October 14, 2018

USDA-Forest Service
Attn: Director—MGM Staff
1617 Cole Boulevard, Building 17
Lakewood, CO 80401

Sent via: *Federal eRulemaking Portal: http://www.regulations.gov.* FS-2018-0052

RE: ADVANCE NOTICE OF PROPOSED RULEMAKING; REQUEST FOR COMMENT.

Dated: August 31, 2018.

Dear Director;

I thank you for this opportunity to submit comments regarding the Advance Notice of Proposed Rulemaking which would, in part, amend 36 CFR 228 regulations regarding *locatable* mineral mining on U.S. Forest Service managed lands of the United States.

I submit these comments on behalf of myself as an individual prospector/miner and claimowner (including claims on both USFS and BLM managed lands) since 1982; and as the President of Oregon's oldest mining district - the Waldo Mining District (WMD) - established on April 1, 1852.[1]

I have nearly 4 years' experience as a MSHA certified Underground Hardrock Miner 1st Class working at depths of 6-8,000 feet. I have also been a individual placer gold miner for the last 30 years and am highly familiar with most small-scale mining methods using non-motorized and motorized methods including every size suction dredge from 2.5" up to 8". I own placer mining claims located on both USNF and BLM managed public lands, and I am familiar with both the USNF and BLM mining regulations (36 & 3809 CFRs).

Unless noted, my comments are aimed at *"Locatable Mineral Mining"* as granted under the Mining Acts of 1866, 1870, and 1872; and my primary interest is in small-scale in-stream placer gold mining & exploration, including the use of a suction dredge.

GENERAL COMMENTS:

1. In general, I object to the proposed rulemaking as it applies to Locatable Mineral Mining, more specifically the proposed changes to 36 CFR 228, subpart A. My main concern is the seeming total disregard or misinterpretation of the Mining Law, and the very real "property rights" granted to miners on the public lands by that law. If the proposed regulations are implemented, they will supposedly "require" a Notice of Intent (NOI) for all but the most trivial and primitive "by hand" methods of mining. Of particular concern is the FS's desire to "require" a NOI for suction dredge mining.

Another concern is the Notice states that at least part of the reason for the proposed action is to more closely match BLM mining regulations. For years, BLM's 3809 regulations did not require an operator to give BLM any form of notice (or plan) for operations that disturbed less than five (5) acres per year. The 3809's were amended during a period over over-zealous environmentalism and now supposedly require all suction dredge miners to notify BLM in advance of operations.

[1] The WMD covers an area of SW Oregon in Josephine County, of which some 70% is federally owned, and is rich in minerals, gold being the most commonly mined. The public domain within the WMD is mostly managed by the Siskiyou National Forest and by the Medford District BLM.

Just because BLM does something does not mean it's a good idea, needed, or lawful. Instead, the changes (by BLM) and now the proposed amendments by the USFS to the 228 regulations are just another step up the ladder of over-regulation which will ultimately lead to no small-scale mining.

2. The Notice mentions amending regulations that cover the mining of Locatable minerals, Saleable minerals, and Leasable minerals. I urge the FS to keep in mind that the mining of Locatable minerals on lands of the United States open to mining under the 1872 Mining Law is performed as a Congressionally granted "right" to not only possession of the minerals but the right to explore for and extract those minerals; whereas mining for Saleable and Leasable minerals is performed as a mere privilege with no "rights" attached as the minerals belong to the United States and permission (possibly including a fee) must be obtained prior to any mining activity. The authority of the USFS over "locatable" mineral mining compared to all other types of mining is the difference between night and day. The one is a granted right that not only can the FS not prohibit – it is also barred from material interference or endangerment, and any regulation or restriction placed on mining must be "reasonable", "necessary", and "feasible".

LOCATABLE MINERALS

30 USC §22 clearly 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 . . ." (emphasis added)

Many of these "valuable mineral deposits" (e.g.; placer gold deposits found in the beds of active streams), can, for all practical purposes only be explored for, let alone mined, by using a suction dredge.[2] Suction dredges are used for prospecting, making a discovery (and thus locating a mining claim), and used for mining – a machine that does it all. Requiring a NOI prior to any amount of suction dredge prospecting destroys the Congressional intent and grant[3] that "all" deposits are "free and open".

30 USC § 26[4]: grants:

the *"…exclusive right of possession and enjoyment of all the surface…"* as long as the claim has been properly located and recorded. "Enjoyment" includes the use of… (indeed, 30 USC § 612(b) requires that any use of the surface by the owner of a claim is limited solely to uses

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[2] The nature of in-stream placer gold deposits varies widely. In many areas, not only is a suction dredge the best method (economically and environmentally) to mine, it is the *only* practical or even possible method. The water depth in a stream may be a few inches to many (10+) feet. The miner starts by excavating a hole in the streambed with the goal of reaching the underlying bedrock. In many streams, this material may be 4-8 feet thick (or more). If you started out in 2 feet of water and then had to dig down with a shovel another 4 feet to bedrock you would be standing in 6 feet of water…. You can't shovel in 6 feet of water. The only methods to reach these deposits involve diverting the stream or draining the excavation . . . all way more disruptive; or work underwater with a suction dredge (which has the capability to sink a hole almost straight down to bedrock just to see what's there causing the minimum level of disturbance.

[3] The U.S. Mining Law grants rare and unique "rights" to all citizens (and others) which are not commonly understood by many, including most regulators. (see 30 USC § 26)

[4] 30 USC § 26: "**The locators of all mining locations** made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 **so long as they comply with the laws** of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States **governing their possessory title, *shall have the exclusive right of possession and enjoyment of all the surface*** included within the lines of their locations . . . " (emphasis added)

"reasonable incident" to mining). § 612(b) also forbids the USFS or BLM from material interference or endangerment. § 26 grants the "…exclusive right of… enjoyment of all the surface…". This "right" cannot be "exclusive" if the interests of others can interfere or endanger operations incident to mining . . . especially when there is no real significant disturbance when under the law, "some" level of mining must be allowed.

This is not an argument that miners can do as they please without any restrictions. Here, the problem is that not even the lowest level of mining will be allowed without obtaining some other form of approval (besides that of Congress). You are taking away "*my*" exclusive right of very real "*real property*" without offering compensation, and without any evidence that "*my*" operation might cause a significant disturbance.[5]

3. Requiring a NOI for most suction dredge operations would act against the will of Congress who, in 1872 granted "all" the locatable minerals and the right to search for them and extract them to all citizens (and others). Such a requirement would add prohibitive delays for even prospecting operations – the land is not "free and open" if prior FS permission is required.

A NOI would require fairly site-specific information, and a prospector would never want to disclose the suspected location of unclaimed ground that might contain valuable deposits. Here in SW Oregon, local NGOs have standing FOIA requests for every NOI or POO submitted; often getting them before the District Ranger even sees the document![6] (At one point, the SNF let an NGO bring their own copy machine and go in the records room unsupervised and copy anything they wanted.)

Mining claims are valuable "real property", and highly desirable. Over time, existing claims are abandoned or lost, and become open to relocation by the first person to make a new discovery. TIME is of the essence, and claims normally only come open certain times of the year. Secrecy is essential, similar to the patenting (of inventions) process. You do not tell the world where an unclaimed valuable deposits might exist… at least not until a discovery is made and a claim located. In some cases, the difference between Party 1 owning a new claim vs. Party 2 can come down to mere hours; there is no time to submit a NOI and then wait for some form of authorization . . . (In the case of locating a mining claim, it boils down to whoever makes a discovery first and posts a Notice of Location).

4. The small-scale placer mining community consists of untold tens of 1,000's of individuals, most of whom use mining as a possible supplemental income, usually during the summer months. Some only go mining a few days a year, others work all season. Methods used range from simple gold panning and hand sluicing, to motorized suction dredge mining. The proposed requirement for the prospector/miner to give Notice prior to all but the most trivial operations will act to further cripple (if not drive the final nail) what's left of what was a thriving small-scale mining industry which contributed 100's of $Millions to the economy (and mostly to otherwise poor rural communities).

. . . which by the way, this brings up the purpose of a NOI. NOIs are NOT "approved". The ONLY true purpose for a NOI is so the operator can find out in advance (possibly before investing large sums of money) if a POO is going to be required. Over my 30 years of

[5] Get real! Every year Millions of acres of NFS lands go up in smoke due, in part, by those thinking it better to burn the forests to the ground rather than wise management including a reasonable level of logging – which is by the way what MYSYA is all about. And now the NFS is worried some prospector will go out on a weekend and dredge a few cubic yards of streambed without their oversight? Really?

[6] At one point, the SNF let an NGO bring their own copy machine and go in the records room unsupervised and copy anything they wanted.

prospecting and mining I have submitted both NOIs and POOs; and when I submitted NOIs, the responsive document did not "approve" my operations but rather stated a POO would not be required. POOs, on the other-hand are (eventually, maybe) "approved".

For more than 20 years, the vast majority of suction dredge operations on USNF managed lands did not need an approved POO. Nothing has changed, the dredges are the same, the law is the same, the effects are the same, and no new study has identified anything close to a significant detrimental effect. So why, after over 42 years of FLMPA does the USFS need to tighten the screws of regulation and restriction?

If the purpose of a miner submitting a NOI is to determine if a POO will be required (prior to investing maybe 100's of $1,000s in equipment just to be shut down for years), then submitting a NOI is purely a voluntary act by the miner. As the Action Notice mentions, the 228(A) regulations have only been amended a few times – and although each time added another level of restriction, in general, most (in not all) suction dredge operations did not require an approved POO. If I haven't needed a POO for the last 30+ years I have no reason to believe my operations are suddenly likely to cause a significant surface disturbance, and therefore why do I need an approved POO for the same activities now?

If the proposed amendments are made and suddenly many (1,000s of) small-scale miners will be required to submit NOIs, or possibly POOs, many will quit mining as too much trouble, some will submit NOIs or POOs, and some will ignore your regulations. Currently, and at least since the 1980's, the USFS has had a totally dismal record when it comes to processing mining POOs, with reported delays of 10-14+ YEARS (and growing). For the small-scale miner, the requirement to submit a POO means no mining for probably years while the every branch of the FS "studies" and writes reports and even if a decision is made, it now has to go to Public Comment and more delays . . . and even if approval is finally granted odds are some NGO will step in and appeal the decision possibly tying everything up in court for years and years providing the miner doesn't drop dead first!

As explained below (see Comment #5, Footnote 7), the USNF does not have the funding or manpower to respond to more than a few POOs per year. It certainly does not have the capability of handing potentially 1,000's of POOs. The Ranger Districts containing gold deposits could be buried in an avalanche of paperwork – which under your own regulations require responsive action by the District Ranger within 15 days, and calls for approval of a POO within 30 (with delays of 30 & 60 days allowed… NOT YEARS).

5. As a member of the small-scale mining community for the last 30 years I am very much aware of the continued efforts by so-called environmentalist (some in government employ and some in non-profit orgs.), who for the last 20+ years have made attack after attack against suction dredge mining. In one of those attacks (KARUK TRIBE v USFS), the U.S. 9th Circuit ruled that a decision based on a NOI by the District Ranger that a POO was not required was "approval", and thus triggered NEPA. And under NEPA, months, even years can go by before "approval" (if ever).

With 1,000's of suction dredge miners, certain Ranger Districts, if not whole Forests could be potentially swamped with NOIs, with no budget to handle the increased work load.[7]

[7] Case in point, during the late 1980's and early '90's there was a series of lawsuits brought by local environmental orgs. against the Siskiyou NF for not enforcing Mineral Management I (MM1) of the 1994 NW Forest Plan (SISKIYOU REGIONAL EDUCATION PROJECT v SISKIYOU NATIONAL FOREST), with a decision by the U.S. 9th Circuit that MM1 must be followed. MM1 stated that an approved POO was required for any form of mining within Riparian Reserves (and according to the SNF at the May, 2000 General Meeting of the Waldo Mining District), "any form" included picking gold nuggets out of cracks in exposed bedrock with tweezers). (cont.)

Currently, and for the last 10-20 years, most NFs have minimal Minerals staff, many budgeted to handle (at most) 1-2 POOs at a time or per year. As a submitted POO triggers NEPA, delays of well over ten (10) years are not uncommon.

The USFS is not all-powerful here. I noticed the Action Notice, when citing 30 USC § 612 (b), claimed they could regulate as long as it did not "prohibit" . . . while neglecting to mention the part further limiting USFS authority over mining which states:

> "…Provided, however, That any use of the surface of any such mining claim by the United States, its permittees or licensees, ***shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto…***". (emphasis added)

Other relevant terms the USFS seems to have forgotten or misconstrue include "reasonable", "necessary", "granted right", "real property", "significant", "where feasible"[8], etc..

"Free and open" means just that. The deposits are not "free and open" if a prospector or miner has to obtain permission before even knowing if a deposit worth working even exists. This means that a prospector must be able to, with "reasonable" methods, explore "all" deposits. A demand for NOIs for suction dredge operations destroys the whole exploration process for many deposits. Indeed, in many Valid Existing Rights determinations, USFS Examiners stated when examining placer claims with in-stream deposits that the use of a suction dredge was "… the only practical method to recover the minerals".

Requiring NOIs, or POOs for most suction dredge mining is "material interference" when the USFS demands/requires a NOI or POO knowing they have not the means to handle the work load or expense, and knowing that potentially 100's if not tens of 1,000s will be denied their Congressionally Granted Rights.

Footnote 7 cont.: By August of 2000, over 2,200 POOs were submitted to the various (five) Ranger Districts within the SNF for prospecting on the (unclaimed) public lands within the District using various methods up to and including small suction dredges. And under 36 CFR 228 A, the District Ranger must respond to a submitted NOI or POO within 15 days… (and most Districts or Forests have the budget to handle the massively increased workload and expense).

I have FOIA documents (emails) from the fall of 2000 between the SNF Supervisor and MGM-WO discussing the problem, and that it would be easier to withdraw the whole Forest rather than process the 1,000's of POOs . . . and two days before Sec. Interior Babbitt left office, he segregated the whole 1.2M acre SNF and about 700K acres of nearby BLM lands pending a permanent withdrawal. This was followed by a letter from the Forest Supervisor to all that had submitted POOs to prospect on unclaimed public lands were now denied as the segregation closed all the unclaimed lands to location and entry.

The miners challenged the segregation and pending withdrawal as during every step of the way in the process of applying for the withdrawal, the Federal Regulations (on withdrawals) were not followed. Whole pages of the Application to BLM (such as "List all overlapping existing withdrawn lands") were blank. There was a time problem with BLM where the deadline for processing and publishing was exceeded by more than 100 days, etc., besides the fact that when describing the lands covered, they missed some 70,000 acres of the SNF that was not segregated… and then denied to process the POOs covering those areas – the very same POOs the SNF had demanded. (Eventually the new Sec. Interior Gale Norton canceled the withdrawal and lifted the segregation(s)). It should also be noted that the SNF Supervisor lost his federal employ and the Regional Forester was transferred for their part in all this.

[8] *Granite Rock*'s holding was also based, in part, on certain Forest Service regulations requiring, "where feasible", compliance with state air and water quality "standards". *Granite Rock*, 480 U.S. at 583.

6. SCIENCE & SIGNIFICANT DISTURBANCE

The effects of suction dredge mining have been studied for over 30 years, by such agencies as the USEPA, USACE, USGS, BLM, USFS, along with various State agencies and Universities. Millions have been spent looking for a significant harmful effect (very few studies even considered possible beneficial effects – and there are some), and yet to date, there is not one dead fish. Suction dredge mining is being regulated/restricted under the guise of "potential for harm".

In the mid 1990's, the SNF, in preparation of a DEIS to approve certain level suction dredge operations forest-wide contracted Oregon State University (OSU) to perform a Cumulative Effects Analysis of the effects of suction dredge mining.[9] It should be noted that the study was done on the Illinois River sub-basin as it has the highest concentration of suction dredge mining operations probably anywhere in Oregon, let alone in the SNF. The results of that study concluded:

> "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.** (emphasis added)
>
> The reader is reminded of the effect of scale. Localized, short-term effects of suction dredge mining have been documented in a qualitative sense. However, on the scales occupied by fish populations such local disturbances would need a strong cumulative intensity of many operations to have a measureable effect.
>
> 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. (emphasis added)

To date, the only proven, measured, and remotely significant detrimental effects from suction dredge mining is the risk of disturbing fish redds by excavation or burying them. This issue has been solved years ago by states only allowing in-water work certain times of the year (when fish eggs are not present).

In 1994, the U.S. Army Corps of Engs. declared that the effects from four inch and small dredges were "de minimus".

So where is the "significant surface disturbance" requiring further restriction in the 228 (A) regulations? What new study justifies any further restriction of Congressionally granted rights?

36 CFR 228 (A) mentions POOS required for the use of "…mechanized earthmoving equipment…" such as "…bull dozers and backhoes". Suction dredges are nowhere near the scale of bull dozers or back hoes; nor is there any mechanized earthmoving. The typical 4 inch suction dredge fits in the back of a SUV or pickup truck and is powered by the same size engine found on most lawn mowers. The typical bull dozer or backhoe would crush most SUVs or pickups. And, the typical 4" dredge moves about the same amount of material that a person could shovel in the same amount of time, except that the dredge can reach material too deeply submerged to be shoveled.

Under our Constitution, we are all to be presumed innocent until PROVEN guilty.

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[9] Response of fish to cumulative effects of suction dredge and hydraulic mining in the Illinois subbasin, Siskiyou National Forest, Oregon, dated April, 2003 by Peter B. Bayley, Dept. Fisheries & Wildlife, Oregon State University, Corvallis, OR.

Further direction to the USFS found in other FS documents (which I do not have time to look up & cite) speak to preventing "unnecessary" degradation. Congress knows that most all mining will involve a certain amount of surface disturbance, i.e.; the miner has to move dirt to dig a hole . . . which means that moving dirt/rock/etc., and processing it in order to recover the valuable mineral(s) is "necessary", as long as the methods are "reasonable". The courts have ruled that using explosives to blast holes in placer deposits for testing is "unnecessary" and "unreasonable"… but excavation using a backhoe or excavator was "necessary and reasonable".

7. 30 USC § 21a: "The Congress declares that ***it is the continuing policy of the Federal Government in the national interest to <u>foster and encourage</u> private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, . . ."*** (emphasis added)

Nothing in the proposed Action "foster[s]" or "encourage[s]", but instead would act to discourage by adding more and more regulation and restriction, unreasonable delays, and violates the very rights granted by Congress. The practice of small-scale mining (usually by individuals), involves nearly endless exploration, testing and sampling. Many move to a new location almost daily unless a deposit worth working is located. This holds especially true for the suction dredge miner. In-stream placer deposits vary every way imaginable… there can be good gold "here", and 3 feet away and for the next 20 feet nothing. Or, there can be a paystreak extending for 100's of feet. Or the whole bed might be worth working… or none at all… and the ONLY way to find out is to get in the water and sink a hole.

Most dredgers can tell if the area is good or bad within hours or days, and if not good enough they will pack up and move, sometimes a few or 100's of feet up or down the stream – or to a totally different stream. Most dredgers have a regular job, and only find time on weekends or vacations to go mining, and might not know when or where they will go next until the day they go. Unless your NOI is Forestwide (or at least District wide) with 1,000's of suction dredge miners the whole idea of NOIs for dredging is unreasonable, unnecessary, unwarranted, material interference, unlawful, and totally ridiculous & unworkable. (BTW: As the proposed Action stands to destroy the whole small-scale mining industry involving the loss of Millions of dollars to small businesses (each miner is considered a "small business" by the SBA), is the USFS planning to notify and report to the SBA of the proposed Action?)

The goal for most suction dredge miners is to reach and clean the bedrock, as typically, that's where the most gold is concentrated. A suction dredge is nothing more than an underwater vacuum cleaner and is the best tool for the job as one cannot recover fine (small) gold particles on bedrock with a shovel underwater (which does a better job cleaning your carpet at home: A) a broom (or shovel), or B) a vacuum cleaner?).

8. OCCUPANCY

The FS seems to have a problem with prospectors and miners occupying the land or their claims, and wants to require a NOI (or POO) for anyone wanting to occupy more than the standard 14-Day camping limit available to all. This isn't a mining issue but instead it's just that some people are slobs, and others are not. Some leave a huge mess (even without camping), and most others leave hardly a sign they were there.

30 USC §22 (see Comment 2) clearly states that the grant of "free and open" is extended to include the land being free and open to occupation: "…***and the lands*** in which they are found ***to occupation****…"*.

Unlike the general public who generally have no actual "right" to go upon the lands of the United States for non-mining related purposes (who are ultimately "allowed" entry as a mere privilege – which can be denied); citizens exercising the granted rights of the Mining Law actually do have a Congressionally granted statutory right to free and open access to the mineral deposits and the right to occupy the lands they are found in.

For many small-scale miners, how long they stay at one location depends on what they find. If the area turns out poor, they might move. If it is rich, they might stay the whole summer (even though they might have originally planned to stay only a week or two). The point is, many do not know how long they might stay until they get there, and even then that can change daily. The Mining Law says they are free to come and go, and stay. Indeed, the courts have ruled that miners are and have the rights of "settlers".

Since long before the California Gold Rush individual prospectors and miners combed the planet for mineral deposits. Since the mid 1800's millions have wandered the western United States looking for gold and other minerals… and the vast majority (more than 99%) "camped out", usually near the operations. Even those with a horse stuck close to the operations as a means of practicality, safety, and least expensive (i.e.; a trip anywhere can cost needed funds). Many traveled (and still do) 100's if not 1,000's of miles just to get to the gold areas, and most of those that were successful want to stay/live on their claims. Small scale mining is (usually) a hit & miss operation, the miner never really knowing what's there until it is mined… and unless or until the mining really pays, the last thing the miner needs is unnecessary expenses. Yes, he might have a house in town… 30 miles away, but why waste 10 gallons of gas, a couple hours of daylight, and risk having your equipment stolen while gone when the Mining Law says you have the right to occupancy.

The amended Mining Law also says all use of the surface by the miner must be "reasonably incident to mining", generally meaning that as long as everything the miner does is reasonably incident to mining then the miner generally has a "right" to do it (subject to a host of other laws, rules and regulations). More recently, agencies have decided that in order to justify occupancy the miner must be mining at least a normal 40-hour week, and year-round occupancy is almost unheard of. This is, bluntly, ridiculous and a twist of what the law says. Nowhere does the Mining Law say how hard or how long a miner has to work in order to justify occupancy. However, 30 USC §612(b) does limit all use of a claim to uses reasonably incident to mining. . . in other words, "non-mining" uses are not allowed. This means the opposite is true: As long as everything the miner does is reasonably incident to mining, then it is allowed; and just "living" is incident to mining.

Bottomline is that those operating under the Mining Law have a right to occupy the lands. And the USFS has the authority to, upon inspection, inform an operator that they are, or about to create a significant disturbance, explain what the disturbance is, and give the miner an opportunity to alter the operations so that the disturbance does not happen, or stop and submit a POO. If the FS comes by and some miner has been there a week or so and the place is a mess, I would expect the FS to do or say something (like clean it up). If however the FS comes by some miner's camp of 2 months and the place is reasonably neat and clean there's no reason to require a POO.

In order for the prospecting/exploration part of the Mining Law to work, the prospector MUST be free to search and explore for deposits. Once a likely (and unclaimed) spot has been picked, the prospector can try to make a valid discovery and locate a mining claim. It might take days of back-breaking labor before a discovery is made, and up until a discovery is made and a Notice of Location posted on the claim, the ONLY thing protecting the prospector's days and days of labor and expense from others coming in and making a discovery is by staying on-sight 24/7. It's called *"pedis possessio"* … and it means that the work of the prospector prior to locating a claim is protected from others only as long as the prospector is diligently searching for a discovery and is physically there.

So here we have the Mining Law saying the prospector **must** stay on sight 24/7 to protect pre-discovery work, and the FS saying the miner can only camp 14 days. The prospector has no idea of how many days it will take to make a discovery, making it nearly impossible to submit a NOI ahead of time that would do any good… and certainly isn't going to sit by and wait potentially years for a POO to be approved.

9. Executive Order 13817: Which calls for the reduction of unnecessary regulations. So what does the USFS propose? "Less" regulation? Nooo -- they want to add more regulations. President Trump says "less", so the FS wants "more". The 228 regulations say a POO is needed if there "might" be a significant disturbance – rather open ended, vague. Anything "might" happen. I believe in the past the word used was "likely", not "might".

And what is a "significant" disturbance? Compared to what? (How about compared to burning Millions of acres of forest every summer). In the past, before we had page after page of near endless regulations we also had a thriving mineral industry. Now, all that's left are a few very large-scale operations and the micro-scale miners trying desperately to stay below the threshold of endless red-tape and delays. There are very mid-sized operations, such as simple back-hoe/trommel operations employing a few people, not because there is no gold left but instead because of needed approvals and permits.

So now the UDFS is not happy with helping to destroy most of this nation's mineral industry, and is working to destroy the individual prospector/miner with more regulations, restrictions, paperwork, and delays.

10. **Use of National Forest System Lands – Is Minerals Part of the Mix?**[10]

In this highly enlightening document, the authors (both USDA FS employees), detail where mining fits in with other forest planning; and concludes with:

> "In short, mineral resources are to be managed on an equal – if not priority – basis with other resources."

NOTE: I am unable to find this document on the internet (anymore), it seems to have been removed years ago. However, I have included a full copy of the text at the send of these comments.

SPECIFIC COMMENTS:

Comments Requested

(1) Classification of locatable mineral operations.
a. Currently, the regulations at 36 CFR part 228, subpart A, establish three classes of locatable mineral operations: Those which do not require an operator to provide the Forest Service with notice before operating, *those requiring the operator to submit a notice of intent* …

COMMENT 11: I have a problem with the phrase: "…those requiring the operator to submit a notice of intent…". It is my understanding that no agency of the federal government can officially request/require information from citizens without first obtaining a OMB Number as specified in the Right to Privacy Act. I am aware that the USFS obtains

[10] By Barry Burkhardt, USDA Forest Service Intermountain Region & Melody R. Holm, USDA Forest Service Rocky Mountain Region; March 10, 2003

OMB numbers for Plans of Operation (POO), but as far as I know, the USFS does not have an OMB number for a Notice of Intent (NOI) – and thus cannot "require" a Notice even if the regulations say so.

And, as far as I know there is no USFS "form" for a NOI, unlike the packet of forms with an OMB Number for a POO.

The submittal of a NOI is purely a voluntary act by an operator that is uncertain whether a POO will be required, providing the operations in their entirety do not trigger one of the requirements of needing a POO. It is initially left up to the operator to decide if the operations "might" cause a "significant disturbance of surface resources", and if the operator believes there will be no "significant disturbance of surface resources", there is no need for the operator to obtain further approval.

The USFS is of course free to come by and inspect, and, if upon inspection the USFS believes there is, or is likely to be a significant disturbance, they can notify the operator, in writing of the significant disturbance and that they need to stop and submit a POO or at least modify the operations so that a significant disturbance is not likely.

IN CLOSING: Time has run out and I haven't gotten to any specific comments other than I am more than unhappy with the method used to electronically submit these comments. I it is now 11:14pm Oct. 13, and I am finishing these comments and am hoping that when I go to town tomorrow where there is a wifi connection I can paste these comments into whatever box your website contains. It would have been a whole lot easier and safer had you just provided a regular email address – especially if you requested everything as a PDF document.

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Use of National Forest System Lands – Is Minerals Part of the Mix?

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Natural resources are fundamental to a strong economy and peaceful society. The United States is rich in resources, including mineral resources. As the country developed politically, socially, and economically, the federal government recognized the need to develop and use the nation's mineral resources in a variety of ways that would benefit society as a whole.

Relationship between federal government and private enterprise in development of mineral resources

The U.S. Government, founded on principles of free enterprise, relies on the private sector to develop both private and federal mineral resources to meet public needs and provide for a strong national economy. A growing society's need and demand for minerals – oil, gas, coal, gold, silver, copper, sand, gravel, and more – drive private industry to seek development rights for federal minerals. And, for over 130 years, the government's *stated policy* has been to enable such development of the nation's mineral resources.

Federal Government's Mineral Policy

Since 1872, an evolving body of legislation and policy has acknowledged, addressed, and directed mineral development on federal lands. The Federal Government's policy for minerals resource management is most succinctly expressed in the Mining and Minerals Policy Act of 1970 [1] :

Forest Service Mission to Manage Mineral Resources

> *"The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs... For the purpose of this Act 'minerals' shall include all minerals and mineral fuels including oil, gas, coal, oil shale and uranium."*

The Forest Service bases its mission to administer mineral resources on that policy. As expressed in the Forest Service Manual, *"The availability of mineral and energy resources within the National Forests and Grasslands significantly affects the development, economic growth, and defense of the Nation. The mission of the Forest Service in relation to minerals management is to encourage, facilitate, and administer the orderly exploration, development, and production of mineral and energy resources on National Forest System lands to help meet the present and future needs of the Nation."* [2]

The Forest Service has both a responsibility and an obligation to manage mineral resources in ways that meet the intent and direction of specific mineral laws and a multitude of other laws affecting management of the Nation's forests and grasslands. However, Forest Service managers and staff often exhibit attitudes that indicate a belief that exploration and development of mineral resources are impacts to be avoided. In fact, mineral resource development is a valid management responsibility as directed by law and policy, and is crucial to meeting the needs of the Nation and supporting a strong economy.

Statutory direction for management of resources, including minerals

Key legislation, including the National Forest Management Act of 1976 (NFMA), acknowledges and reinforces the principle of minerals as an important part of the mix of resources the Forest Service is mandated to manage.

National Forest Management Act of 1976 – P.L. 94-588, 90 Stat. 2949, as amended, and the Forest and Rangeland Renewable Resources Planning Act of 1974 – P.L. 93-378, 88 Stat. 476, as amended

NFMA, which amended the Forest and Rangeland Renewable Resources Planning Act (RPA) of 1974, is the primary statute governing the development of forest plans that guide all resource management activities on national forests. NFMA requires the Secretary of Agriculture to assess forest lands, develop a management program based on *multiple-use, sustained-yield principles,* and implement a resource management plan for each unit of the National Forest System (NFS).

Section 2 "Findings" of RPA as amended by NFMA states,

> *"The Congress finds that…*
>
> *(3) to serve the national interest, the renewable resource program must be based on a comprehensive assessment of present and anticipated uses, demand for, and supply of renewable resources from the Nation's public and private forests and rangelands, through analysis of environmental and economic impacts,* ***coordination of multiple use and sustained yield opportunities as provided in the Multiple-Use Sustained-Yield Act of 1960*** *(74 Stat. 215; 16 U.S.C. 528-531), and public participation in the development of the program;"* (emphasis added).

Section 6 "National Forest System Resource Planning" of RPA, as amended by NFMA, states,

> *(e) In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans --*
>
> > *(1) provide for* ***multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of***

1960, *and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and*

(g) As soon as practicable, but no later than two years after enactment of this subsection, the Secretary shall in accordance with the provisions set forth in section 553 of title 5, United States Code, promulgate regulations, ***under the principles of the Multiple-Use Sustained-Yield Act of 1960,*** *that set out the process for the development and revision of the land management plans, and the guidelines and standards prescribed by this subsection.*

Multiple-Use Sustained-Yield Act of 1960 – Codified at 16 U.S.C. 528 et. seq.

The Multiple-Use Sustained-Yield Act established the multiple use principles on which NFMA is based, and NFMA repeatedly references MUSYA. MUSYA specifically addresses the role of minerals in the management of the National Forests.

MUSYA Sec. 1 states:

It is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes. The purposes of this Act are declared to be supplemental to, but not in derogation of, the purposes for which the national forests were established as set forth in the Act of June 4, 1897 (16 U.S.C.475). Nothing herein shall be construed as affecting the jurisdiction or responsibilities of the several states with respect to wildlife and fish on the national forests. ***Nothing herein shall be construed so as to affect the use or administration of the mineral resources on national forest lands…*** (emphasis added).

The initial implementing regulations of NFMA (1982-2000) reflected the multiple use principles of MUSYA. Requirements in the first iterations of NFMA regulations at 36 CFR 219.22 (a-f) were intended to facilitate the consideration and recognition of effects of renewable resource management practices on mineral development, and to ensure that the Deciding Officer would make decisions that comply with MUSYA principles (highlighted above) and various mineral laws. Direction at 36 CFR 219.22 (f) specifically addressed minerals in forest plans:

The following shall be recognized to the extent practicable in forest planning:

(f) The probable effect of renewable resource prescriptions and management direction on mineral resources and activities, including exploration and development.

The direction to recognize the "…effect of renewable resource…on mineral resources" has, in some cases, been misconstrued as "effect of minerals activities on other resources". Such interpretation illustrates the attitude that mineral development activity often is considered solely as an impact rather than valid and necessary resource management established in law and policy.

The fact that the initial NFMA regulations were changed in 2000, with elimination of references to specific resources suggests a diminishing recognition of minerals being an important part of the mix of resources designated for multiple use on national forests and grasslands. This is most

certainly not the case. Now, more than ever, it is important to our Nation's security and economy that we be particularly attentive to direction in law and policy for management of mineral development.

Energy Security Act of 1980 – Codified at 42 U.S.C. 8854 et seq.

The Energy Security Act of 1980 reinforced the MUSYA principles related to mineral development in relation to management plans. Sec. 262, states:

> *"It is the intent of the Congress that the Secretary of Agriculture shall process applications for leases on National Forest System lands and for permits to explore, drill, and develop resources on land leased from the Forest Service, notwithstanding the current status of any plan being prepared under section 6 of the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1604)."*

In other words, leasing actions are not to be delayed pending completion of a forest plan because a forest plan is "not to affect the use or administration of the mineral resources on national forest lands", as stated in MUSYA.

Consideration of other parts of the "mix"

As the body of laws specifically addressing mineral management on NFS lands evolved, Congress also passed laws addressing management of other resources. Some of those laws provide for protecting specific components of the environment (i.e., Endangered Species Act [3] , Clean Water Act [4] , etc.). Others, specifically the National Environmental Policy Act (NEPA) [5] , provide a framework for a process in which certain types of decisions are made with consideration of environmental effects on a variety of resources. NEPA also requires making environmental information available to the public before certain types of federal actions are taken. Environmental protection becomes a important component of mineral development under these laws. Ongoing mineral development on some NFS lands are clear examples of the ability of the Forest Service and its mineral industry partners to comply with the legal mandate and policy to "foster and encourage" mineral development while following direction to protect other uses and environmental values.

Conclusion: Minerals is part of the mix.

A history of statutory direction for mineral resource management on NFS lands attests to mineral resources being a significant component of the resources that the Forest Service manages. References to mineral resource management in key laws cited herein indicate that in most cases, minerals need to be a primary consideration in multiple use management of NFS lands and should not be unduly constrained by management prescriptions for other resources. The legal mandates for forest planning provide for limited discretion in managing mineral resource development. **In short, mineral resources are to be managed on an equal – if not priority – basis with other resources.** (emphasis added)

1872 Mining Law, as amended:

Provides for non-discretionary locatable minerals management.

1920 & 1947 Mineral Leasing Acts, as amended:

Provides limited discretion for leasable mineral management. management

1970 Mining & Minerals Policy Act:

"Foster and encourage" mineral development.

Mineral Resource Management 1980 Energy Security Act:

Process leases & permits.

1960 Multiple-Use Sustained-Yield Act:

"Nothing…to affect the use or administration of the mineral resources on national forest lands..."

1976 National Forest Management Act, amending 1976 Forest and Rangeland Renewable Resources Planning Act:

Apply principles of MUSYA

1947 Mineral Materials Act:

Provides for disposal of mineral materials.

1970 National Environmental Policy Act
1973 Endangered Species Act
1948 Clean Water Act, as amended
1955 Clean Air Act, as amended

Illustration of principle laws addressing management of mineral resources on National Forest System lands. (Not all-inclusive of all applicable laws.)

[1] Mining and Minerals Policy Act of 1970, P.L. 91-631, 84 Stat. 1876
[2] Forest Service Manual 2800 Zero Code
[3] Endangered Species Act of 1973, P.L. 93-205, 87 Stat. 884
[4] Clean Water Act of 1948, as amended, P.L. 80-845, 62 Stat. 1155
[5] National Enviromental Policy Act of 1970, P.L. 91-190, 83 Stat. 852