Date submitted (UTC-11): 10/14/2018 12:00:00 AM
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Thank you for accepting our comments on the FS-2018-0052 ANPRM. Also, please accept 19 additional exhibits as an appendix to our comments. The additional items for the appendix will be uploaded in a second batch.

The dropbox link below contains all the relevant files.

https://www.dropbox.com/sh/ujqqj0jbx0q5k6y/AADaGegMy5Anq_7BBmPawI0ca?dl=0

USDA-Forest Service
Attn: Director[mdash]MGM Staff1617 Cole Boulevard, Building 17Lakewood, CO 80401October 15, 2018Re: FS-2018-0052, Forest Service Advance Notice of Proposed Rulemaking 36 C.F.R. Part228 Subpart A, Locatable Minerals; Request for CommentTo Whom It May Concern:The undersigned provide this letter to provide information in response to the ForestService ([ldquo]USFS[rdquo])[rsquo]s notice as part of its proposed rulemaking for 36 C.F.R. [sect] part 228 SubpartA. 83 Fed.Reg. 46451-46458 (Sept. 13, 2018). Collectively, the undersigned representorganizations with millions of members who work to protect public lands, water, communities,and species from environmental harm.As an initial matter, this letter requests again that USFS extend the public commentperiod by another 60-days and provide public hearings in Washington, D.C., and three more inUSFS regions that would be most affected by oil, gas, and mining on Forest Service Systemlands. See attached extension request letter, submitted ***; see also attached Senator Bennetextension letter request. Previously submitted letters explained that USFS should provide anextension for both this Advance Notice of Proposed Rulemaking and the Advance Notice ofProposed Rulemaking for Subpart E1 due to the broad variety of complex technical and legalissues these proposals raise. It is critical that the public have sufficient opportunity to reviewand provide feedback on USFS[rsquo]s proposals.I. USFS Must Fully Comply with the National Environmental Policy Act andConduct an Environmental Impact Statement.The National Environmental Policy Act ([ldquo]NEPA[rdquo]), 42 U.S.C. [sect] 4321 et seq., and itsimplementing regulations, promulgated by the Council on Environmental Quality ([ldquo]CEQ[rdquo]), 40C.F.R. [sect][sect] 1500.1 et seq., is our [ldquo]basic national charter for the protection of the environment.[rdquo]40 C.F.R. [sect] 1500.1. Recognizing that [ldquo]each person should enjoy a healthful environment,[rdquo]NEPA ensures that the federal government uses all practicable means to [ldquo]assure for allAmericans safe, healthful, productive, and esthetically and culturally pleasing surroundings,[rdquo]
and to [ldquo]attain the widest range of beneficial uses of the environment without degradation, riskto health or safety, or other undesirable and unintended consequences,[rdquo] among other policies.43 U.S.C. [sect] 4331(b). [ldquo]NEPA promotes its sweeping commitment to [lsquo]prevent or eliminatedamage to the environment and biosphere[rsquo] by focusing government and public attention on theenvironmental effects of proposed agency action.[rsquo] 42 U.S.C. [sect]4321.[rdquo]Marsh v. Oregon NaturalResources Council, 490 U.S. 360, 371 (1989). NEPA regulations explain, in 40 C.F.R. [sect]1500.1(c), that:Ultimately, of course, it is not better documents but better decisions that count. NEPA[rsquo]spurpose is not to generate paperwork [ndash] even excellent paperwork [ndash] but to fosterexcellent action. The NEPA process is intended to help public officials make decisionsthat are based on understanding of environmental consequences, and take actions thatprotect, restore, and enhance the environment._____1 In short, the proposed Subpart E oil and gas rulemaking seeks to: cutback the USFS[rsquo]s processfor identifying National Forest

System lands that the Bureau of Land Management ([ldquo]BLM[rdquo])may offer for oil and gas leasing; change the regulatory provisions concerning lease stipulationwaivers, exceptions, and modifications; clarify the review and approval procedures for surfaceuse plan of operations; change the language regarding operator[rsquo]s responsibility to protectnatural resources and the environment; clarify language for inspections and compliance; andaddress geophysical/seismic operations associated with minerals related matters to mirror thatof BLM[rsquo]s._____Thus, while [ldquo]NEPA itself does not mandate particular results, but simply prescribes thenecessary process,[rdquo] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989),agency adherence to NEPA[rsquo]s action-forcing statutory and regulatory mandates helps federalagencies ensure that they are adhering to NEPA[rsquo]s noble purpose and policies. See 42 U.S.C. [sect][sect]4321, 4331.NEPA imposes [ldquo]action forcing procedures . . . requir[ing] that agencies take a hardlook at environmental consequences.[rdquo] Methow Valley, 490 U.S. at 350 (citations omitted)(emphasis added). These [ldquo]environmental consequences[rdquo] may be direct, indirect, or cumulative.40 C.F.R. [sect][sect] 1502.16, 1508.7, 1508.8. Direct effects are those that are caused by the actionand occur at the same time and place. 40 C.F.R. [sect] 1508.8(a). Indirect effects are those that arecaused by the action and are later in time and farther removed in distance, but are stillreasonably foreseeable. Indirect effects may include growth inducing effects and other effectsrelated to induced changes in the pattern of land use, population density or growth rate, andrelated effects on air and water and other natural systems, including ecosystems. 40 C.F.R. [sect]1508.8(b). A cumulative impact is defined as: the impact on the environment which resultsfrom the incremental impact of the action when added to other past, present, and reasonablyforeseeable future actions regardless of what agency (Federal or non-Federal) or personundertakes such other actions. Cumulative impacts can result from individually minor butcollectively significant actions taking place over a period of time. 40 C.F.R. [sect] 1508.7.Federal agencies determine whether direct, indirect, or cumulative impacts aresignificant by accounting for both the [ldquo]context[rdquo] and [ldquo]intensity[rdquo] of those impacts. 40 C.F.R. [sect]1508.27. Context [ldquo]means that the significance of an action must be analyzed in severalcontexts such as society as a whole (human, national), the affected region, the affectedinterests, and the locality[rdquo] and [ldquo]varies with the setting of the proposed action.[rdquo] 40 C.F.R. [sect]1508.27(a). Intensity [ldquo]refers to the severity of the impact[rdquo] and is evaluated according toseveral additional elements, including, for example: unique characteristics of the geographicarea such as ecologically critical areas; the degree to which the effects are likely to be highlycontroversial; the degree to which the possible effects are highly uncertain or involve unique orunknown risks; and whether the action has cumulatively significant impacts. Id. [sect][sect] 1508.27(b)An EIS is required when a major federal action [ldquo]significantly affects the quality of thehuman environment.[rdquo] 42 U.S.C. [sect] 4332(2)(C); 40 C.F.R. [sect] 1502.4. A federal action [ldquo]affects[rdquo]the environment when it [ldquo]will or may have an effect[rdquo] on the environment. 40 C.F.R. [sect] 1508.3(emphasis added); Airport Neighbors Alliance v. U.S., 90 F.3d 426, 429 (10th Cir. 1996) ([ldquo]Ifthe agency determines that its proposed action may [lsquo]significantly affect[rsquo] the environment, theagency must prepare a detailed statement on the environmental impact of the proposed action inthe form of an EIS.[rdquo]) (emphasis added).Based on the scope of the regulations proposed to be revised and the impacts toenvironmental, cultural, historical, and human health resources resulting from operationsauthorized under these regulations (as shown by the attached/included documents), the USFSmust complete an EIS in full compliance with NEPA prior to codification of any revisions.Full compliance with the procedural and substantive provisions of other applicable laws such asthe Endangered Species Act ([ldquo]ESA[rdquo]) and National Historic Preservation Act ([ldquo]NHPA[rdquo]) is alsorequired. It is clear that USFS[rsquo]s proposed rulemaking for Subpart A is significant.2 Althoughfocused on the western public land states, the proposed rulemaking would effect agency landsacross the country as it is proposed [ldquo]to increase the Forest Service[rsquo]s nationwide consistency inregulating mineral operations.[rdquo] 83 Fed.Reg. at 46451. Except for one clarification in 2005,USFS has not re-visited its regulations for locatable minerals since they were codified in the1970s.The intensity of this proposal is also more than sufficient to require USFS conduct anEIS. As discussed above and demonstrated in the attachments, the proposed locatable mineralsrulemaking would have significant environmental, cultural, historical, and human healthresources impacts. Hardrock mining has an unfortunate history that by EPA[rsquo]s own estimateshas left 40% of headwaters in western watersheds polluted.3 Each year, the hardrock miningindustry leads the nation in toxic releases.4 Modern mines have significant impacts onlandscapes, often creating permanent scars, such as Bingham Canyon mine southwest of SaltLake City, which is nearly 4 kilometers deep and wide.5 Such mines also produce massiveamounts of waste that remain on public lands for eternity.6 According to the EPA, uraniummining on the Navajo Nation has left over 500 abandoned mines as well as homes and drinkingwater sources with elevated uranium to this day.7 And disasters associated with mining
continue to plague tribes, lands, waters, and communities. For example, in 2015 and 2016there were two catastrophic tailings impoundment failures (Mount Polley tailings dam failure inBritish Columbia and the

Samacro tailings dam failure in Brazil respectively) that released vastamounts of mine waste downstream and recently published research shows that such failuresare increasing globally despite modern mining technology.8 These impacted communities arestill dealing with the environmental and human health fall out as a result of these failures._____2 An EIS also must be prepared for the Advanced Noticed of Proposed Rulemaking for Part 228Subpart E Oil and Gas. Subpart E oil and gas regulations have similarly received only onechange since USFS finalized them in 1990, two decades before the peak of the hydraulicfracturing boom. It also would apply nation-wide and involves a number of impacts includingbut not limited to climate change, environmental and human health, and wildlife.3 Mining 101, Earthworks, available at https://earthworks.org/issues/mining/ (last visited **).4 See attached TRI documents.5 Id.6 E.g. Rosemont Mine, which is proposed in southern Arizona would leave an estimated1,249,161,00 tons of waste rock covering 1,460 acres and leave another 987 acres of minetailings on national forest lands.7 Cleaning Up Abandoned Uranium Mines EPA available at https://www.epa.gov/navajonation-uranium-cleanup/cleaning-abandoned-uranium-mines (last visited **)._____NEPA requires [ldquo]a reasonably thorough discussion of significant aspects of the probableenvironmental consequences[rdquo] to [ldquo]foster both informed decision-making and informed publicparticipation.[rdquo] Ctr. for Biological Diversity v. Nat[rsquo]l Hwy. Traffic Safety Admin., 538 F.3d1172, 1194 (9th Cir. 2008) (quotations and citations omitted). In this instance, where theproposal is highly technical and significant, and EIS is necessary for the agency to satisfy themandates of NEPA.It is also critical that USFS consider the synergistic impact of the concurrent Council ofEnvironmental Quality ([ldquo]CEQ[rdquo])[rsquo]s proposed rulemaking that seeks to drastically re-write NEPAin its EIS. Update to the Regulations for Implementing the Procedural Provisions of the Nat[rsquo]lEnvtl. Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018). This rulemaking proposes to, amongother things: change public involvement opportunities and mechanisms for engagement; reviseNEPA terms such as [ldquo]Major Federal Action,[rdquo] [ldquo]Effects,[rdquo] [ldquo]Cumulative Impact,[rdquo] [ldquo]Significantly,[rdquo]and [ldquo]Scope[rdquo]; create new definitions for terms such as [ldquo]Alternatives,[rdquo] [ldquo]Purpose and Need,[rdquo] and[ldquo]Reasonably Foreseeable[rdquo]; revise [ldquo]Notice of Intent[rdquo] and [ldquo]Categorical Exclusions[rdquo]; and changethe requirements for analyzing a range of alternatives. Id. at 28,591-92.II. USFS[rsquo] Proposals Stemming from Executive Orders to Adopt Measures thatReduce, Minimize, or Eliminate Public Process Should be Rejected.The undersigned have serious concerns that aspects of USFS[rsquo]s proposed Subpart Arulemaking are taking direction from Executive Orders13783, 13807, and 13817. In doing so,these aspects of the proposed rulemaking seek to reduce, minimize, or eliminate public processand other requirements that are necessary to safeguard natural resources, public process, andtribal interests. This effort to increase a single use of locatable minerals (and any specificminerals at that) over all other national forest uses and values and weaken public participation,tribal consultation, and/or usurp bedrock environmental laws must be rejected. 16 U.S.C. [sect] 475(Under the Organic Act, the National Forests were established [ldquo]to improve and protect theforest within the boundaries, or for the purpose of securing favorable conditions of waterflows[rdquo]; [sect] 551 (Organic Act authorizes the agency to promulgate rules [ldquo]to regulate theiroccupancy and use and to preserve the forests thereon from destruction.[rdquo]). It is also concerningthat USFS would base any aspect of its rulemaking process on these transparently politicalexecutive orders. Sound, relevant, and enduring regulations are made when the best availablescience and information are the guiding operative [mdash]not un-vetted executive whims like these three executive orders._____8 Mining 101, Earthworks, available at https://earthworks.org/issues/mining/ (last visited **).Amazingly, despite these failures, industry continues to propose using the same designamounting to planned disasters._____The Buckhorn Mine in north-central Washington is just one example of the value ofNEPA. This mine was proposed twenty-five years ago as an open-pit cyanide-leach gold mine.Because the community could engage in the agency analysis process, the eventual mine becamea less damaging underground mine, which reduced the overall impact to the land, water, andwildlife. Even still, like so many mines across the west, this now exhausted mine generateswater contaminated with heavy metals such as copper, lead, and zinc. The Buckhorn Minedemonstrates that public process can and does reduce harms but that we desperately needmining reform that results in stronger and better protections.The NEPA process also does not result in undue delay. According to the GovernmentAccountability Office (GAO), the average time it takes BLM, USFS[rsquo]s sister agency, to permit amine is just two years. This period is competitive with most Western democracies with robustmining industries like Australia, Canada, Chile, and Norway. When a permit takes longer thanaverage, the reason is often the low quality of information operators provided in their mineplans, the agencies[rsquo] limited resources, or changes in market conditions. Ultimately, NEPA is asource of strength and predictability. It helps lay the foundation for a mining company[rsquo]s sociallicense to operate, which gives domestic mining a distinct competitive advantage.Executive Order 13783Executive Order ([ldquo]EO[rdquo]) 13783, Promoting Energy Independence and EconomicGrowth, issued March 28, 2017 should not be relevant for shaping locatable mineralsregulations, as evidenced by its

very title. USFS[rsquo]s attempt to shoehorn this EO into therulemaking process by rationalizing relevance via uranium and thorium is entirelyinappropriate. Tribes and tribal land, communities, and public lands need more protection fromthe harms that are related to uranium mining and milling not less. Supra I. and attacheddocuments regarding the toxic legacy uranium mining and milling has left in its wake andcontinuing problems at existing uranium mines. This misguided EO does not align withUSFS[rsquo]s guiding laws and regulations that require the agency to [ldquo]improve and protect the forestwithin the reservation [national forest] or for the purpose of securing favorable conditions ofwater flows[rdquo] 16 U.S.C. [sect] 475. USFS is bound to comply with these duties first and foremost;these duties cannot be overridden with a cursory EO.Should USFS inappropriately continue to impose this and the other EOs on thisrulemaking process, it is incumbent that the USFS analyze the direct, indirect, and cumulativeimpacts of the actions proposed for uranium and thorium. This necessarily includes analyzingan alternative of regulating these minerals as any other locatable mineral as well as thereasonably foreseeable full life-cycle indirect and cumulative impacts of these materials(mining, milling, use, and what would be done with the materials once they are waste, i.e.where would they be deposited, as well as transport impacts for each and every stage). It is alsocritical that USFS analyze why these minerals should receive, as proposed, more lax regulatoryand public oversight and analyze an alternative of using existing Department of Energyuranium stockpiles.9EO 13807EO 13807, Establishing Discipline and Accountability in the Environmental Reviewand Permitting Process for Infrastructure Projects, issued August 15, 2017 is similarlymisplaced as providing guidance in this proposed rulemaking process.The notice states that USFS [ldquo]is seeking to provide a more efficient process forapproving exploration activities for the energy producing locatable minerals uranium andthorium where that exploration will cause 5 acres or less of surface disturbance on NationalForest System lands for which reclamation has not been completed. This would achieve theresult of the Forest Service being a good steward of public funds by avoiding wastefulprocesses consistent with Section 2e of the Executive Order.[rdquo] It is anything but clear howexcluding exploration activities for these minerals on unreclaimed sites equates to [ldquo]being agood steward of public funds.[rdquo] Such unreclaimed sites are often contaminated by radiation andheavy metals. Encouraging exploration that would likely disturb and could spreadcontamination by excluding it from robust USFS oversight and public review is a dangerousproposition. As explained in greater detail below, there is also no sufficient legal reason that aPlan of Operations should not be submitted for all activities above causal use. And, as alsodiscussed below, these are the very types of activities that scoping and additional public processand agency analysis is needed for to ensure USFS can make an informed decision. Suchprocess is all the more necessary for activities that could further spread contamination on publiclands and waters.EO 13817USFS cites to EO 13817 ([ldquo]critical minerals EO[rdquo]) to rationalize its proposal to [ldquo]increaseexploration for, and mining of, critical minerals (Sec. 3(b)) and to revise permitting processesto expedite exploration for, and production of, critical minerals (Sec. 3(d)) and the revision of36 CFR part 228, subpart A, in the manner being contemplated and described in this advancenotice would help achieve those ends.[rdquo] The agency continues, stating that [ldquo][f]or example, theForest Service is seeking to provide a more efficient process for approving explorationactivities for locatable minerals, including those that also are critical commodities for purposesof Executive Order 13817. This change should enhance operators[rsquo] interest in, and willingness
to, conduct exploratory operations on National Forest System lands and ultimately increase theproduction of critical minerals, consistent with both of these sections of the Executive Order.[rdquo]_____9 GAO-12-342SP: Energy: 40. Excess Uranium Inventories available athttps://www.gao.gov/modules/ereport/handler.php?1=1&m=1&path=/ereport/GAO-12-342SP/data_center_savings/Energy/40._Excess_Uranium_Inventories (last visited **);Uranium Mgmt. and Policy, DOE, available at https://www.energy.gov/ne/fuel-cycletechnologies/uranium-management-and-policy (last visited **); Dep[rsquo]t of Energy: ExcessUranium Transfers, GAO, available at https://www.gao.gov/products/GAO-17-472T (lastvisited **); Examining the Dep[rsquo]t of Energy[rsquo]s Excess Uranium Mgmt. Plan, available athttps://archive.org/stream/gov.gpo.fdsys.CHRG-114hhrg94543/CHRG-114hhrg94543_djvu.txt(last visited **)._____The critical minerals EO and related list of 35 minerals that the Department of Interiorcreated after a truncated public process are highly controversial and embattled. For instance, adozen- more than a third- of the designated minerals are byproducts. Operators sometimesinvest considerably in water treatment systems designed to remove these same byproducts, likearsenic, designated as critical minerals. Uranium is a fuel mineral; Sec. 2(b)(i) of the criticalminerals EO explicitly excludes fuel minerals from criticality designation. Our country enjoys asurplus of helium and beryllium, yet they too earned the [ldquo]critical[rdquo] label. Seehttps://www.federalregister.gov/documents/2018/05/18/2018-10667/final-list-of-criticalminerals-2018 and attached letter opposing the designation of [ldquo]critical minerals.[rdquo]https://earthworks.org/publications/joint-comments-submitted-to-the-interior-department-ondraft-list-of-critical-minerals/At the rulemaking stage, it is no longer good enough to provide conclusory

rationale asUSFS has done here. The agency is obligated to provide a rational connection between thefacts found and the decision that is made. Or. Natural Res. Council Fund v. Brong, 492 F.3d1120, 1125 (9th Cir. 2007). Where, as here, there is an overwhelming amount of informationdemonstrating that more[mdash]not less[mdash]regulatory oversight and public process is needed, there isnot sufficient evidence to justify reducing, minimizing, or eliminating agency oversight andpublic process. The agency also cannot, as done here, make conclusions that are divorced fromthe reality of basic economics: market forces are the actual driver for mineral production[mdash]whether its uranium or any other mineral material.The use of scoping is an important means to identify purpose, need, and reasonablealternatives to mining federal lands, such as storing uranium and other [ldquo]critical minerals.[rdquo] Forexample, mining uranium from federal lands serves no viable purpose or need when viewed inlight of a Department of Energy program that costs millions of dollars to maintain federalstockpiles of already mined uranium.10 The sale of uranium from these stockpiles is limited toprovide price supports for a [ldquo]domestic[rdquo] mining industry carried out largely by Canadiancorporations on federal land. The proposed regulations propose a narrow scope of NEPAanalysis that would conceal the effect of mining that would be to further flood the oversuppliedglobal market with more federal minerals while the federal taxpayers are burdened by theexpensive-to-maintain federal stockpiles. A robust NEPA scoping process is essential todisclose and address the realities of unnecessary conflicts in federal policies at the proposalstage, and during the comparison of alternatives. The undersigned firmly oppose any efforts toreduce, minimize, or eliminate scoping and/or any other aspect of full analysis (EA and EIS).As shown in the attached Second Declaration of Taylor McKinnon and the attachedexhibits (Exh. A-L), uranium exploration that has moved forward under the existingCategorical Exclusion has been problematic. Although USFS had required in the December 20,2007 Decision Memo and February 6, 2008 Amendment that the operator, Vane Minerals, use a[ldquo]portable tank[rdquo] in place of a fluid waste pit at the CP-3 site and several other sites, the company
instead, used a tractor trailer to store drilling fluids and other residue at the CP-3. A tractortrailer that is suited for hauling solid material is not a [ldquo]portable tank[rdquo] nor is it suited for storingthe types of liquid fluid and residue associated with uranium exploration. Uranium drillingwaste that was being transported to the trailer through a green hose was leaking on the groundand had spilled over the top of the trailer into a wash. This spill created a white-yellow driedmud flow that extended approximately 20 feet downhill beneath the trailer. And, althoughUSFS had required measures such as netting and fencing to prevent birds and other wildlifefrom accessing the drilling fluids, no such netting or fencing was deployed to prevent access tothe drilling fluids and residue in the tractor trailer or around the spilled waste._____10 Supra FN 7._____The importance of robust environmental review for uranium mining related activities isalso highlighted by the Canyon Mine, an existing uranium mine just outside the Grand Canyon.This Mine is located entirely within the boundaries of the Red Butte Traditional CulturalProperty site that has critical religious and cultural importance to several tribes, especially theHavasupai. In 2017, this mine flooded resulting in dissolved uranium at 130 parts per billion inwater pumped into the above-ground containment pond. This is 433% greater than the EPAlimit for safe drinking water of 30 parts per billion. To prevent the pond from overflowing, thecompany sprayed this water into the air, dispersing it on adjacent Forest Service land. In 2018,due to the severe drought in the southwest, this same pond is the only surface water for miles.It is being used by birds and other wildlife, as bystanders have witnessed and is evident fromheavily used animal trails through fence gaps onto the mining site. Wildlife are drinking andbathing in this contaminated water and it also poses serious bio-accumulation concerns. Theseare the exact direct, indirect, and cumulative impacts that are so critical for federal agencies toanalyze and disclose in order to minimize, mitigate, and avoid harms to water resources andwildlife. This example demonstrates that already under existing law agencies fail to conductsuch analysis leaving communities and wildlife in harm[rsquo]s way. Protecting the health ofindigenous people and their lands, as well as Americans and their public lands, requires thatCongress strengthen, not weaken, mining laws and regulations.As further discussed below, compliance with the other mandates of NEPA, such as butnot limited to, analyzing a reasonable range of alternatives, direct, indirect, and cumulativeimpacts, as well as a reasonably complete mitigation effectiveness discussions, are needed toensure USFS complies with its mandates under the Organic Act, National Forest ManagementAct (NFMA), the ESA, and other applicable statutes and implementing regulations. Doing soprovides the opportunity for the agency to minimize and mitigate impacts to resources. Theseprovisions should not be removed or made inapplicable for any category of minerals.III. Responses to Questions in the Subpart A Advanced Notice of ProposedRulemaking and Related Issues that USFS Should Address.Responses to the questions are in bold following each question or set of questions in theANPR.(1) Classification of locatable mineral operations.a. Currently, the regulations at 36 CFR part 228, subpart A, establish threeclasses of locatable mineral operations: those which do not require anoperator to provide the Forest Service with notice before operating, thoserequiring the operator to submit a notice of intent to conduct operations tothe Forest Service before operating, and those requiring an operator tosubmit and obtain Forest Service approval of a proposed plan ofoperations. The operations which do not

require an operator to providenotice before operating are identified by 36 CFR 228.4(a)(1). Thoseoperations include, but are not limited to, using certain existing roads,performing prospecting and sampling which will not cause significantsurface resource disturbance, conducting operations which will not causesurface resource disturbance substantially different from that caused byother users of the National Forest System who are not required to obtainanother type of written authorization, and conducting operations which donot involve the use of mechanized earthmoving equipment or the cutting oftrees unless these operations might otherwise cause a significantdisturbance of surface resources. The operations for which an operatormust submit a notice of intent to the Forest Service before operating areidentified by 36 CFR 228.4(a) as those which might, but are not likely to,cause significant disturbance of surface resources. The operations forwhich an operator must submit and obtain Forest Service approval of aproposed plan of operations before operating are identified by 36 CFR228.4(a)(3) - (a)(4) as those which will likely cause, or are actuallycausing, a significant disturbance of surface resources.b. The BLM's surface management regulations at 43 CFR 3809.10 similarlyestablish three classes of locatable minerals operations: casual use, noticeleveloperations, and plan-level operations. The operations which constitutecasual use are identified by 43 CFR 3809.5 as those which ordinarily result inno or negligible disturbance of the public lands or resources managed by theBLM. Per 43 CFR 3809.10(a) an operator is not required to notify the BLMbefore beginning operations classified as casual use. Notice-level operationsare identified by 43 CFR 3809.21 as exploration causing surface disturbanceof 5 acres or less of public lands on which reclamation has not beencompleted. Generally 43 CFR 3809.10(b) requires an operator proposing toconduct notice-level operations to submit a notice to the BLM. In accordancewith 43 CFR 3809.311 and 3809.312(d) an operator may not begin noticeleveloperations until the BLM determines that the operator's notice iscomplete and the operator has submitted the required financial guarantee.Typically, 43 CFR 3809.10(a) requires an operator to submit a proposed planof operations for all other locatable mineral operations and 43 CFR 3809.412prohibits the operator from beginning those operations until the BLMapproves the plan of operations and the operator has submitted the requiredfinancial guarantee.c. The Forest Service is contemplating amending its regulations at 36 CFR part228, subpart A, to increase consistency with the BLM[rsquo]s regulations whichestablish three classes of locatable mineral operations and specify therequirements an operator must satisfy before commencing operations in eachsuch class, to the extent that the Forest Service's unique statutory authoritiesallow this. Do you agree with this approach?The approach used by both the Forest Service (USFS) and BLM, which allows mineraloperations to proceed at the Notice-of-Intent (NOI) level without adequate, indeedANY, public review should not be continued. The Part 228 Subpart A regulationsmust be revised to require public review of mineral operations on public land, at anylevel of impact above de-minimis casual use. As detailed herein, and shown by theattached documents, even small-scale mineral operations can have deleterious impacts,especially when conducted within or near streams/riparian areas, sensitive wildlifeand/or plant habitats, etc. Impacts to public recreational uses, or Native Americancultural/religious uses, are also immediately felt by these operations. The fact thatsuch operations may not result in impacts associated with large open-pit operationsdoes not mean that public review of smaller operations should be precluded.There is no legal reason why USFS cannot and should not require the submittal of aPlan of Operations ([ldquo]PoO[rdquo]) for all operations above casual use. Adopting PoOs for alloperations above causal use is consistent with protecting Forest resources and isconsistent with USFS[rsquo] approach to other extractive uses, such as oil and gas.11 Forexample, USFS requires holders of oil and gas leases to submit a Surface Use Plan ofOperations ([ldquo]SUPO[rdquo]) for all applications for permits to drill ([ldquo]APD[rdquo]) on the lease [ndash]regardless the size or level of impact. [ldquo]No permit to drill on a Federal oil and gas leasefor National Forest System lands may be granted without analysis and approval of asurface use plan of operations covering proposed surface disturbing activities.[rdquo] 36C.F.R. [sect] 228.106. Thus the fact that a mining claim may have an arguable right toexplore for minerals under the Mining Law does not mean that the claimant should beexcused from submitting a proposed PoO for USFS review and approval. Holders of a valid oil and gas lease also have certain property rights in the leasehold as well, yethave long been required to submit a SUPO._____11 The undersigned agree that USFS[rsquo] regulations for oil and gas should be vastly improved to better protectthe public interest as well as Forest and ecosystem health. However, there are aspects of the oil and gasprocess that are reasonable and compelling to adopt for locatable minerals regulations as well should theagency move forward with revisions to this Subpart._____At a minimum, USFS needs to ensure that any revision of the Part 228 Subpart Aregulations makes it clear that the agency must comply with NEPA. As stated above,USFS should require a PoO for all activities above causal use, however, should it refuseto adopt such a provision, at a minimum the agency must clarify and require NEPAcompliance for any activities above causal use (i.e. Notice and PoO proposals). Such aprovision is also consistent with USFS regulations for oil and gas, which requireUSFS[rsquo]s APD SUPO review to comply with NEPA. In the context of oil and gas, USFSregulations provide that:The authorized Forest officer shall review a surface use plan ofoperations as promptly as practicable given the nature and scopeof the proposed plan. As part of the review, the authorized

Forestofficer shall comply with the National Environmental Policy Actof 1969, implementing regulations at 40 C.F.R. parts 1500[ndash]1508,and the Forest Service implementing policies and procedures setforth in Forest Service Manual Chapter 1950 and Forest ServiceHandbook 1909.15.36 C.F.R. [sect] 228.107.Although pursuant to Section 390 of the Energy Policy Act of 2005, certain APDs aresubject to congressionally-authorized Categorical Exclusions ([ldquo]CE[rdquo]) under NEPA,even in these limited instances USFS conducts the required scoping and public review [ndash]something that does not occur currently for NOI-level mining. According to theUSFS[rsquo]s policy regarding these CEs, scoping and public review [ldquo]is an integral part[rdquo] ofthe agency[rsquo]s responsibilities:Agency decisions that apply the Section 390 categorical exclusionsare subject to agency NEPA procedures. The guidance belowclarifies key NEPA requirements.Scoping - Although the Council on Environmental Quality (CEQ)regulations require scoping only for environmental impactstatement (EIS) preparation, the agency has broadened theconcept to apply to all proposed actions subject to section 102 ofNEPA.Scoping is required for all Forest Service proposed actions,including those that would appear to be categorically excluded fromfurther analysis and documentation in an EA or an EIS ([sect]220.6).(36 CFR 220.4(e)(1)).The process of scoping is an integral part of environmental analysis. Scoping includesclarifying and refining the proposed action, identifying preliminary issues, identifyingpossible use of a CE, and identifying interested and affected persons. Effective scopingdepends on all of the above as well as presenting a coherent proposal. The results ofscoping are used to clarify public involvement methods, if any; refine issues; whereapplicable, select an interdisciplinary team; establish analysis criteria; and explorepossible alternatives and their probable environmental effects.In short, scoping is important to discover information that could point to the need foran EA or EIS versus a CE (FSH 1909.15, Chapter 11.6) as well as to inform the public.Scoping complexity should be commensurate with project complexity, which isdetermined by the Responsible Official.Public Involvement [ndash] Agency regulations require that the publicbe kept informed of agency actions. Scoping initiates publicinvolvement.See, Energy Policy Act of 2005 Use of Section 390 CategoricalExclusions for Oil and Gas Activities, June 9, 2010 (italics inoriginal).https://www.fs.fed.us/emc/nepa/includes/390guidance2.pdf.12There is no reason why these policies and procedures should not apply tohardrock/locatable mineral operations. Moreover, although as discussed herein theexisting CE for short-term mineral exploration should be eliminated, scoping andpublic review is required when USFS applies this CE (which is similar to the APD CE)._____12 The undersigned are aware that USFS has proposed limiting to eliminating these requirements in itssimultaneously proposed Rulemaking for 36 C.F.R. 228 Subpart E[mdash]Oil and Gas Resources. 83 Fed. Reg. 46458(Sept. 13, 2018). In the Advanced Notice of Proposed Rulemaking for Subpart E, USFS has proposed to scope farfewer actions than done currently, or in the past. The undersigned strongly oppose the proposal to limit and reduceinformed decisionmaking and public process as they pertain to national forests. Both the Subpart A and Subpart Erulemakings are related and have strong overtones of weighing the process (in some instances even heavily)towards a project proponent. For both proposed Rulemakings it is imperative that the agencies analyze anddisclose the direct, indirect, and cumulative environmental impact be analyzed. 40 C.F.R. [sect][sect] 1502.16, 1508.7,1508.8._____It should also be noted that, even under the Energy Policy Act[rsquo]s rebuttablepresumption for a CE for certain APDs, even those CEs apply only where someprevious NEPA and public review has occurred [ndash] which, again, is something that doesnot currently happen with NOI-level mining. For example, a CE would only apply toan APD if: [ldquo]site-specific analysis in a document prepared pursuant to NEPA has beenpreviously completed,[rdquo] or when [ldquo]Drilling an oil or gas well within a developed field forwhich an approved land use plan or any environmental document prepared pursuantto NEPA analyzed such drilling as a reasonably foreseeable activity, so long as suchplan or document was approved within five (5) years prior to the date of spudding thewell.[rdquo] https://www.fs.fed.us/emc/nepa/includes/390guidance2.pdf. Further, regardlessof whether a CE applies to an APD: [ldquo]It is critical to note that use of Section 390 in noway limits or diminishes the Forest Service's substantive authority or responsibilityregarding review and approval of a SUPO conducted pursuant to 36 CFR 228.107-108.[rdquo] Id.In short, because property rights holders in oil/gas leaseholds are required tosubmit a SUPO, subject to NEPA and public review [ndash] regardless of the level of impactor acreage [ndash] persons desiring to conduct hardrock/locatable mineral exploration ordevelopment above the level of casual use should be subject to at least the samerequirements.Lastly, in order to be consistent with BLM regulations, the revised USFS Part 228regulations should expressly state that: [ldquo]If State laws or regulations conflict with thissubpart regarding operations on public lands, you must follow the requirements of thissubpart. However, there is no conflict if the State law or regulation requires a higherstandard of protection for public lands than this subpart.[rdquo] 43 C.F.R. [sect] 3809.3. Thisposition was formally expressed by the U.S. Department of Justice, representing BLMand USFS, in its brief to the California Supreme Court in People v. Rinehart, Case No.S222620, where the federal government stated that:[ldquo]Regulations promulgated by BLM similarly anticipate and require compliancewith state environmental laws. Those regulations state that, in BLM[rsquo]s

view, a stateenvironmental law or regulation must be complied with unless it directly conflictswith federal law. [ldquo]If State laws or regulations conflict with this subpart regardingoperations on public lands, you must follow the requirements of this subpart.However, there is no conflict if the State law or regulation requires a higherstandard of protection for public lands than this subpart.[rdquo] 43 C.F.R. [sect] 3809.3. Thepreamble for this regulation explains that [ldquo][u]nder the final rule, States may applytheir laws to operations on public lands,[rdquo] and [ldquo]no conflict exists if the Stateregulation requires a higher level of environmental protection.[rdquo] Final Rule,Mining Claims Under the General Mining Laws; Surface Management, 65 Fed.Reg. 69,998, 70,008 (Nov. 21, 2000).Thus, neither Congress in the Mining Law nor the federal agencies charged withimplementing that law have expressed any intent to fully preempt state regulation ofmining activity on federal land. The federal government expects that states may imposerestrictions on mining activity that are designed to protect the environment, andfederal law requires miners to comply with those restrictions unless they directlyconflict with federal law. See Amicus Brief of United States, at 12-13. See also AmicusBrief of United States before the Ninth Circuit Court of Appeals in Bohmker v.Oregon, No. 16-35262, at pp. 6-7 (same). Both U.S. briefs are attached.d. If you do not agree that 36 CFR part 228, subpart A, should be amended toincrease consistency with the BLM[rsquo]s regulations which establish three classesof locatable mineral operations and specify the requirements which anoperator must satisfy before commencing operations in each such class, pleaseidentify the classes of locatable mineral operations that you think the ForestService should adopt. Also please identify all requirements that you think anoperator should have to satisfy before commencing the locatable mineraloperations that would fall in each such class.The part 228 regulations should be amended to eliminate the NOI-level process.Instead, applicants should be required to submit a PoO for all activities, whetherconsidered exploration/prospecting or mining/excavation/processing, above casual use.Casual use should be defined to cover only those activities that involve only a de-minimislevel of impacts to public lands. For example, applicants proposing any use ofmotorized or mechanical equipment including but not limited to: backhoes, bulldozers,motorized roadgrading, motorized trenching, motorized processing/separationequipment, motorized suction dredging and/or highbanking, should be required tosubmit a PoO.For example, under the Northwest Forest Plan Minerals Management Standards, a Planof Operations is required for all operations, regardless of size, that have any facilities,structures, etc., in Riparian Reserves: [ldquo]MM-1. Require a reclamation plan, approvedPlan of Operations, and reclamation bond for all minerals operations that includeRiparian Reserves.[rdquo] Northwest Forest Plan at C-34. Riparian Reserves are defined atC-30-31. www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3843203.pdf. At aminimum, due to the importance of riparian areas, this PoO requirement should applyin all national forests. In addition, this requirement should be included (if the agencydoes not require a PoO for all operations in all areas as noted above), for other valuableforest areas such as habitat for endangered, threatened, sensitive, or indicator species,Native American cultural/religious use sites, municipal watersheds, National RecreationAreas, special management areas, and any area designated in the applicable Forest Planas warranting such review and protection.As another example, in many waters in Idaho, the USFS (and BLM) require PoOs for allsuction dredging. See Nez Perce-Clearwater National Forests Decision Notice/FONSI -Small-Scale Suction Dredging in Orogrande and French Creeks and South ForkClearwater River (June2016) https://www.fs.usda.gov/nfs/11558/www/nepa/101540_FSPLT3_3804945.pdf13Nez Perce-Clearwater National Forests - EA - Small-Scale Suction Dredging inOrogrande and French Creeks and South Fork Clearwater River (June 2016) https://www.fs.usda.gov/nfs/11558/www/nepa/101540_FSPLT3_3804944.pdfBLM - Cottonwood Field Office - Small-Scale Suction Dredging in Orogrande and FrenchCreeks and South Fork Clearwater River (July 2016) https://eplanning.blm.gov/eplfront-office/projects/nepa/63762/76393/84860/Suction_Dredging_DR_signed_508.pdfClearwater National Forest - Record of Decision - Small-Scale Suction Dredging in Loloand Moose Creeks (2010) - https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd537381.pdf_____13 All federal government documents cited herein are incorporated and included in theadministrative record for this rulemaking._____Upon receipt of a PoO, the USFS should immediately post the PoO and all supportinginformation online for public review. Any claims by the applicant that portions of thePoO contain confidential business information should be carefully scrutinized, with theoverall goal of full public review.Receipt of the PoO should begin the agency and public review process, including scopingunder NEPA, consultation with Indian Tribes under the National Historic PreservationAct ([ldquo]NHPA[rdquo]) and related federal Executive Orders and requirements, consultation andcompliance with the Endangered Species Act, etc.Regarding NEPA, USFS should eliminate the current CE for [ldquo][s]hort-term (1 year or less)mineral, energy, or geophysical investigations and their incidental support activities,[rdquo] 36C.F.R. [sect] 220.6(e)(8). Instead, all activities/operations should require review under anEnvironmental Assessment ([ldquo]EA[rdquo]), or Environmental Impact Statement ([ldquo]EIS[rdquo]),depending on whether the activities/operation pose a risk of significant impacts.Categorical exclusions by their definition are not appropriate for mining relatedactivities. Categorical exclusions are defined as [ldquo]a category of actions which do notindividually or

cumulatively have a significant effect on the human environment andwhich have been found to have no such effect in procedures adopted by a Federal agency .. . and . . . therefore, neither an environmental assessment nor an environmental impactstatement is required.[rdquo] 40 C.F.R. [sect] 1508.4. As shown through various examples in thesecomments and attachments, environmental and human health risks and harms areunfortunately inherent in mining related activities. This makes it inappropriate for theexisting CE to remain on the books, much less for USFS to contemplate adding more aspart of this proposed rulemaking. Further, because the promulgation of the CE for shorttermmineral exploration never underwent the required cumulative impacts review,which (if this CE is not eliminated) must be conducted in order to comply with NEPA.If the agency proceeds to keep this CE (which as noted herein it should not do), at aminimum, this CE should be modified so [ldquo]short-term[rdquo] is far less than a year and clarifythat such activities may have only minimal disturbance, meaning no new roads, no offroaduse/drilling, no in-channel or riparian disturbance beyond casual use, etc.Regarding requirements that all applicants should have to satisfy before commencingoperations and/or receiving USFS approval, the following requirements should apply, ata minimum, and be contained in the application/PoO:(1) a list of all unpatented mining (lode/placer) and millsiteclaims the operations propose to utilize, including up-to-date informationthat the claim(s) is/are still active;(2) if the applicant or the agency intends to assert that theapplicant has a statutory right to conduct operations on, and/or result inoccupancy on, unpatented claims (mining or millsite), evidence proving thatthe applicable claims are valid and satisfy all requirements of the 1872Mining Law. For example, beyond initial exploration, for mining claimsproposed to be utilized during the operation, the applicant must submitevidence proving that each claim contains the requisite discovery of avaluable mineral deposit (the test for a valid claim under the Mining Law).[ldquo]A mining claimant has the right to possession of a claim only if he has made a mineraldiscovery on the claim.[rdquo] Lara v. Sect. of Interior, 820 F.2d 1535, 1537 (9th Cir. 1987).[ldquo]Thus, although a claimant may explore for mineral deposits before perfecting a miningclaim, without a discovery, the claimant has no right to the property against the UnitedStates or an intervenor. 30 U.S.C. [sect]23 (mining claim perfected when there is a [lsquo]discoveryof the vein or lode[rsquo]).[rdquo] Freeman v. Dept. of Interior, 37 F.Supp.3d 313, 319-20 (D.D.C.2014). [ldquo][U]npatented claims amount to a potential property interest, since it is thediscovery of a valuable mineral deposit and satisfaction of statutory and regulatoryrequirements that bestows possessory rights.[rdquo] Id. at 321.USFS policy recognizes that [ldquo]rights[rdquo] to use mining claims on public lands are dependenton whether the lands contain the requisite valuable mineral deposit. [ldquo]In order tosuccessfully defend rights to occupy and use a claim for prospecting and mining, aclaimant must meet the requirements as specified or implied by the mining laws, inaddition to the rules and regulations of the USFS. These require a claimant to: . . . 2.Discover a valuable mineral deposit. . . .(and) 7. Be prepared to show evidence of mineraldiscovery.[rdquo] USFS Minerals Manual [sect] 2813.2. [ldquo]A claim unsupported by a discovery of avaluable mineral deposit is invalid from the time of location, and the only rights theclaimant has are those belonging to anyone to enter and prospect on National Forestlands.[rdquo] Id. [sect] 2811.5.At a minimum, USFS must ensure that lands covered by mining claims at a proposedproject contain the requisite locatable mineral, not [ldquo]common variety[rdquo][rsquo] minerals that arenot locatable, and are not covered by any rights under the Mining Law. Lands containing[ldquo]common varieties[rdquo] of rock, stone, etc., are not considered minerals subject to the MiningLaw. 30 U.S.C. [sect] 611 ([ldquo]common varieties[rdquo] of minerals are not locatable/claimable underthe Mining Law). [ldquo]The 1955 Multiple-Use Mining Act . . . provides that common varietiesof mineral materials shall not be deemed valuable mineral deposits for purposes ofestablishing a mining claim.[rdquo] USFS Manual [sect] 2812.If satisfactory evidence of both locatabilty and discovery is not provided for each claimproposed for more than initial exploration, then the USFS must inform the applicant thatany operation proposed on such claim(s) are not governed by any statutory rights underthe Mining Law and is not authorized under the Mining Law, and the agency[rsquo]s reviewand approval on those public lands will be governed by the USFS[rsquo]s Special Useregulations at 36 C.F.R. Part 251. [ldquo]Rights to mine under the general mining laws arederivative of a discovery of a valuable mineral deposit and, absent such a discovery,denial of a plan of operations is entirely appropriate.[rdquo] Great Basin Mine Watch, 146IBLA 248, 256 (1998), 1998WL1060687, *8. If the operator objects to the agency[rsquo]sfinding of claim validity, it may challenge such finding before the hearings and appealprocess of the Interior Department. In the meantime, the USFS will suspend its review ofthe PoO until the Interior Department (and federal courts if applicable) determines thevalidity of each claim.Under federal law, except for initial exploration activities, it is the discovery of a valuablemineral deposit that supports a mining claimant's right to initiate mining operations onpublic land. Therefore, the USFS must uphold the legal requirement that a claimant hasmade a discovery of a valuable mineral deposit in order to satisfy its own obligations tocomply with the 1897 Organic Act, National Forest Management Act (NFMA) and otherlaws governing the USFS.The question of whether a claim is valid is an integral part of the agency[rsquo]s analysis of aproposed mining project[rsquo]s considerations, because if the USFS approves a mine beforeascertaining whether the mining [ldquo]rights[rdquo] have any merit, the agency risks unlawfullyapproving a mining operation under the auspices of the Mining law even though

theMining Law does not grant any rights that do not exist (such as permanent occupation ofmining claims not shown to be valid). In addition, because the USFS has theresponsibility and the power to maintain and protect public lands, the agency has a dutyto ensure that public lands, a resource held by the government in trust for the public, arenot used improperly, illegally, or upon alleged rights that do not exist.Regarding additional information to be included in the PoO, all current submittalrequirements found at 36 C.F.R. [sect] 228.4(c) should remain, with the following additionalinformation: (a) An identification of the hazardous materials and any other toxicmaterials, petroleum products, insecticides, pesticides, and herbicides that will be usedduring the mineral operation, and the proposed means for disposing of such substances;(b) An identification of the character and composition of the mineral wastes that will beused or generated and a proposed method or strategy for their placement, control,isolation, or removal; (c) An identification of how public health and safety are to bemaintained; (d) a complete reclamation and closure plan for all affected resourcesincluding, but not limited to, the following: (1) Reduction and/or control of erosion,landslides, and water runoff; (2) Rehabilitation of wildlife and fisheries habitat to bedisturbed by the proposed mineral operation; (3) Protection of water quality, and (4)Demonstration of how the area of surface disturbance will be reclaimed to a condition oruse that is consistent with the applicable Forest Plan14; (e) the amount of the proposedreclamation bond/financial assurance to cover all potential reclamation and protection ofthe affected lands, waters, and other resources (including a full reclamation and closureplan, with enough specificity for the agency and public to ascertain whether the proposedbond/financial assurance will be sufficient to cover all reasonably foreseeable/potentialimpacts; (f) baseline information and data for all potentially affected resources such assurface and ground water, air quality, wildlife, vegetation, etc.; (g) a description of allrelated operations that are occurring, or may occur, on lands not under the managementof the USFS, such as private lands, BLM lands, etc.For example, if use of USFS lands is associated with mining conducted on private lands,then the operations occurring/proposed on these lands should be described in detail. Thiswill greatly facilitate the USFS[rsquo]s NEPA review of the operations proposed on USFS lands(since such activities on lands administered by other entities must be analyzed in theUSFS[rsquo]s NEPA review for the public-land portion of the operations), as well as publicreview of the full extent of the operations. On this point, it should be noted that USFS[rsquo]s authority over operations occurring on USFS lands is not limited to only impacts thatoccur on USFS lands. Rather, the agency has broad authority under the Property Clauseof the U.S. Constitution (article IV) to protect other federal land as resources (such asBLM or National Park Service lands, federal water rights, etc.). The agency also has theduty under the Organic Act to protect [ldquo]favorable conditions of water flows,[rdquo] 16 U.S.C. [sect]475, originating on USFS lands (both surface and groundwater) that may bediminished/affected outside the boundary of USFS lands, as well as authority under theESA to conserve listed species and their habitat off of USFS lands that may affected byoperations conducted/approved by the USFS._____14 The applicable Forest Plan should not be amended to accommodate a proposed PoO. Ifthe operations in a proposed PoO are inconsistent with any aspect of the Forest Plan, itshould be denied pursuant to the National Forest Management Act, 36 C.F.R. [sect]219.15(e)(2). Although not the approach USFS should take, if the agency contemplates anamendment, USFS must comply with the substantive provisions of the planning rule (36C.F.R. [sect][sect] 219.7-11), and all other relevant laws, regulations, and policies, as well as besupported by a full NEPA analysis. 36 C.F.R. [sect] 219.13(b)(3)._____The Northwest Forest Plan, noted above, also mandates additional assurances andinformation as part of the PoO submittal and approval requirements. For example, thatPlan (at C-35/35) requires that:MM-2. Locate structures, support facilities, and roads outside Riparian Reserves.Where no alternative to siting facilities in Riparian Reserves exists, locate them ina way compatible with Aquatic Conservation Strategy objectives. Roadconstruction will be kept to the minimum necessary for the approved mineralactivity. Such roads will be constructed and maintained to meet roadsmanagement standards and to minimize damage to resources in the RiparianReserve. When a road is no longer required for mineral or land managementactivities, it will be closed, obliterated, and stabilized.MM-3. Prohibit solid and sanitary waste facilities in Riparian Reserves. If noalternative to locating mine waste (waste rock, spent ore, tailings) facilities inRiparian Reserves exists, and releases can be prevented, and stability can beensured, then:a. analyze the waste material using the best conventional sampling methodsand analytic techniques to determine its chemical and physical stabilitycharacteristics.b. locate and design the waste facilities using best conventional techniquesto ensure mass stability and prevent the release of acid or toxic materials. If thebest conventional technology is not sufficient to prevent such releases and ensurestability over the long term, prohibit such facilities in Riparian Reserves.c. monitor waste and waste facilities after operations to ensure chemicaland physical stability and to meet Aquatic Conservation Strategy objectives.d. reclaim waste facilities after operations to ensure chemical and physicalstability and to meet Aquatic Conservation Strategy objectives.e. require reclamation bonds adequate to ensure long-term chemical andphysical stability of mine waste facilities.Such requirements should apply nationwide to all Riparian Reserves, as well as othervaluable forest areas such as habitat for endangered, threatened, sensitive, or indicatorspecies, Native American

cultural/religious use sites, municipal watersheds, NationalRecreation Areas, special management areas, and any area designated in the applicableForest Plan as warranting such submittals and requirements.Another set of requirements, taken from the Interior Department[rsquo]s policy for coal mines,should be adopted by the USFS in order to meet its environmental protection mandatesunder the Organic Act, NFMA, and other applicable laws.Objective 1Only approve permits where the operation is designed to prevent offsitematerial damage to the hydrologic balance and minimize both onandoff- site disturbances to the hydrologic balance. In no case shoulda permit be approved if the determination of probable hydrologicconsequences or other reliable hydrologic analysis predicts theformation of a postmining pollutional discharge that would requirecontinuing long-term treatment without a defined endpoint.Strategy 1.1 - Predictive techniques should be used to identify andcharacterize the site-specific acid- or toxic-forming conditions posing arisk of AMD formation.Strategy 1.2 - Each mining and reclamation plan should specificallyaddress identified acid- and toxic- forming conditions and demonstratehow off-site material damage will be prevented and on- and off-sitedisturbances minimized without the use of techniques that requirelong- term discharge treatment without a defined endpoint.Strategy 1.3 - Each permit should include adequate measures, such asprevention and mitigation technologies, to control and manageidentified acid- or toxic-forming AMD conditions and to protect thequality and quantity of surface and ground water systems duringmining and reclamation.See Interior Department, HYDROLOGIC BALANCE PROTECTION, POLICY GOALSAND OBJECTIVES on CORRECTING, PREVENTING AND CONTROLLINGACID/TOXIC MINE DRAINAGE, March 31, 1997, at 5. (italics original)https://www.osmre.gov/lrg/docs/amdpolicy033197.pdfLastly, the revised regulations should require that applicants should reimburse theagency for all costs associated with processing the application and reviewing theapplication to ensure compliance with all federal laws. This includes not only reimbursalof all costs for conducting NEPA compliance (preparation of EAs/EISs), but also for allcosts associated with processing the PoO or other approvals/requirements such as ESAconsultation, as well as any mineral validity reviews, Surface Use Determinations,etc. The agency has broad authority to recover these costs pursuant to the 1952Independent Offices Appropriation Act (IOAA), as amended, 31 U.S.C. [sect] 9701 (originallycodified at 31 U.S.C. [sect] 483a), which provides for cost recovery by federal agencies. TheIOAA expresses the intent that services provided by agencies should be "self-sustaining tothe extent possible," 31 U.S.C. [sect] 9701(a), and authorizes agency heads to "prescriberegulations establishing the charge for a service or thing of value provided by theagency." 31 U.S.C. [sect] 9701(b). See also, 1996 Interior Department Solicitor[rsquo]s Opinion,which although discussing in part that agency[rsquo]s authorities to recover costs underFLPMA, details the extensive authority of federal agencies to recover costs under theIOAA.https://doi.opengov.ibmcloud.com/sites/doi.opengov.ibmcloud.com/files/uploads/M-36987.pdfe. If you previously concluded that 36 CFR part 228, subpart A, did not requireyou to give the Forest Service prior notice before you began conductinglocatable mineral operations on National Forest System lands, what issues orchallenges did you encounter once you began operating?As noted, except for de-minimis non-motorized casual use, the revised part 228regulations should eliminate NOI-level operations, as all operations/activities abovecasual use should require the submittal of a PoO.f. If you previously concluded that 36 CFR part 228, subpart A, only requiredyou to submit a notice of intent before you began conducting locatablemineral operations on National Forest System lands, what issues or challengesdid you encounter after submitting your notice of intent or after you beganoperating?As noted, except for de-minimis non-motorized casual use, the revised part 228regulations should eliminate NOI-level operations, as all operations/activities abovecasual use should require the submittal of a PoO.g. Should certain environmental concerns, such as threatened or endangeredspecies, certain mineral operations, such as suction dredging, or certain landstatuses, such as national recreation areas, be determinative of the classificationof proposed locatable mineral operations? If so, please identify allcircumstances which you think should require an operator to submit a noticebefore operating, and all circumstances which you think should require anoperator to submit and obtain Forest Service approval of a proposed plan ofoperations?As noted, except for de-minimis non-motorized casual use, the revised part 228regulations should eliminate NOI-level operations, as all operations/activities abovecasual use should require the submittal of a PoO. At a minimum, PoOs must be requiredfor any operation that may affect Riparian Reserves (as defined by the Northwest ForestPlan and applied nationwide), as well as other valuable forest areas such as habitat forendangered, threatened, sensitive, or indicator species, Native Americancultural/religious use sites, municipal watersheds, National Recreation Areas, specialmanagement areas, and any area designated in the applicable Forest Plan as warrantingsuch submittals and requirements.(2) Submitting, Receiving, Reviewing, Analyzing, and Approving Plans ofOperations.a. Today, 36 CFR 228.4(a)(3) and (4) requires an operator to submit, andobtain approval of, a proposed plan of operations before conductinglocatable mineral operations which will likely cause, or are actuallycausing, a significant disturbance of National Forest System surfaceresources. Unfortunately, as the GAO's 2016 report entitled [ldquo]HardrockMining: BLM and Forest Service Have Taken Some Action To Expeditethe Mine Plan Review Process but Could Do More[rdquo] concludes, the qualityof the information operators include in such plans is

frequently low,resulting in substantially delayed approval of these insufficient proposedplans. The Forest Service thinks that increasing the clarity of the plan ofoperations content requirements in 36 CFR part 228, subpart A, wouldresult in better proposed plans of operations. The Forest Service alsothinks that clarifying 36 CFR part 228, subpart A, to emphasize thatproposed plans of operation must specify in detail the measures thatoperators intend to take to satisfy the requirements for environmentalprotection set out in 36 CFR 228.8 would result in better proposed plans ofoperation.The undersigned agree that [ldquo]proposed plans of operation must specify in detail themeasures that operators intend to take to satisfy the requirements for environmentalprotection set out in 36 CFR 228.8 would result in better proposed plans ofoperation.[rdquo]b. Nonetheless, the Forest Service has observed that the best proposed plans ofoperations often are submitted by operators who met with agency officials todiscuss the formulation of their proposed plans. Thus, the Forest Servicecontemplates amending 36 CFR part 228, subpart A, to make operators awarethat the Forest Service encourages them to meet with the appropriate localForest Service official when the operator begins formulating a proposed planto ensure that the operator knows and understands precisely what informationa proposed plan of operations must contain for the agency to find it complete.The Forest Service thinks that routinely having such meetings would improvethe quality of proposed plans of operation and consequently speed the approvalof such plans.The undersigned agree that [ldquo]routinely having such meetings would improve the qualityof proposed plans of operation and consequently speed the approval of such plans.[rdquo] Theregulations should also encourage prospective applicants and USFS to reach out to theaffected public before a PoO is submitted as it is an opportunity to resolve potentialconflicts early on, which would save the project proponent and USFS time and funds.c. The Forest Service also is considering amending 36 CFR part 228, subpart A,to require that the appropriate agency official ensures that an operator'sproposed plan of operations is complete before the agency begins the NationalEnvironmental Policy Act (NEPA)-related process of analyzing that plan andensuring that the measures an operator intends to take to satisfy therequirements for environmental protection set out in 36 CFR 228.8 areappropriate. As the GAO's 2016 report finds, when analysis of a proposed planof operations begins before the Forest Service has determined that the plan iscomplete, the consequence is likely to be that this analysis must be repeated oraugmented due to subsequently identified gaps in the proposed plan. TheGAO's 2016 report observes, and the Forest Service agrees, that the ultimateconsequence of beginning to analyze an incomplete proposed plan ofoperations is delay in the plan's approval. Premature analysis of a proposedplan of operations also usually results in unnecessary expenditures on the partof the Forest Service, and sometimes the operator. Therefore, the ForestService is considering amending 36 CFR part 228, subpart A, to require anappropriate Forest Service official to initially review all proposed plans ofoperation for completeness. If that official finds a proposed plan incomplete,the agency would notify the operator, identify the additional information theoperator must submit, and advise the operator that the Forest Service will notbegin analyzing that plan until it is complete.The undersigned agree [ldquo]to require an appropriate Forest Service official to initiallyreview all proposed plans of operation for completeness. If that official finds a proposedplan incomplete, the agency would notify the operator, identify the additionalinformation the operator must submit, and advise the operator that the Forest Servicewill not begin analyzing that plan until it is complete.[rdquo] To guard against a prematuredetermination that a PoO is complete (and the premature commencement of the NEPAprocess), USFS[rsquo]s regulations should provide an opportunity for the public to comment onwhether the proposed PoO is complete and satisfies all of the submittal requirements inpart 228. The undersigned also agree with the USFS[rsquo]s and GAO[rsquo]s determination thatincomplete information provided by the permit applicant is the primary reason forpermitting delays.d. Do you think that amending 36 CFR part 228, subpart A, to provide anopportunity for an operator to meet with the Forest Service before submitting aproposed plan of operations, or to require the Forest Service to determine that aproposed plan is complete before initiating its NEPA-related analysis of theplan will expedite approval of proposed plans of operations? Are thereadditional or alternate measures that you would recommend to expediteapproval of proposed plans of operation submitted to the Forest Service under36 CFR part 228, subpart A?The undersigned agree that [ldquo]an operator [should] meet with the Forest Service beforesubmitting a proposed plan of operations, [and] to require the Forest Service todetermine that a proposed plan is complete before initiating its NEPA-related analysis ofthe plan will expedite approval of proposed plans of operations.[rdquo] In addition, theaffected public should be allowed to comment upon whether the proposed PoO iscomplete and satisfies all of the submittal requirements in part 228. This process will beexpedited by the posting of the PoO and all supporting documents on the USFS websitefor the area (e.g., Ranger District and Forest) and at least 30 days before initiatingscoping providing notice to the public that the information is posted.e. How should 36 CFR part 228, subpart A, be amended so that therequirements for submitting a proposed plan of operations and the processthe Forest Service uses in receiving, reviewing, analyzing, and approvingthat plan are clear?One way would be to develop a plain-language guidance document posted online. Itmust be stressed, however, that all claimholders and potential PoO applicants areobligated to know and comply with all applicable policies, regulations, and laws.f. What issues or challenges have you encountered with respect to preparing

aproposed plan of operations or submitting that plan to the Forest Servicepursuant to 36 CFR 228.4(c) and (d) or 36 CFR 228.4(a)(3) and (4),respectively?One of the major challenges for the affected public is that the agency[rsquo]s initial review ofa proposed PoO is not subject to public review, and is often withheld by the USFS evenin response to FOIA requests. To correct this, as noted herein, the proposed PoO andall supporting information should be required to be submitted in electronic format soUSFS can immediately post it online. The public should then be allowed to commentupon whether the proposed PoO is complete and meets all of the submittalrequirements. The PALS system for projects would work well for posting the PoO andassociated documents. The federal register should be used to notice the availability ofthe documents and establish a timeframe.g. What issues or challenges have you encountered with respect to the ForestService's receipt, review, analysis, or approval of a proposed plan ofoperations that you submitted under 36 CFR part 228 subpart A?Although this question is roughly aimed at current operators, it highlights the overallissue of whether the USFS[rsquo]s review and approval of PoOs adequately protects publicresources and meets the agencies duties under the Organic Act, Clean Water and AirActs, Endangered Species Act, NFMA, and other applicable laws, regulations, andpolicies. The attached documents detail how the agency[rsquo]s current Part 228 reviewand approval process fails to protect public land and resources, as shown by thesignificant adverse impacts to public resources occurring from hardrock/locatablemineral operations. They also detail the toxic legacy that communities as well aslands and waters have been left to bear in the wake of mining.(3) Modifying Approved Plans of Operations.a. After a plan of operations has been approved by the Forest Service under36 CFR part 228 subpart A, either the operator or the Forest Service maysee reason why that plan should be modified. However, 36 CFR part 228,subpart A, does not explicitly recognize that an operator may requestmodification of an approved plan or provide procedures for such amodification. Insofar as the Forest Service is concerned, 36 CFR part 228,subpart A, permits a Forest Service official to ask an operator to submit aproposed modification of the approved plan for the purpose of minimizingunforeseen significant disturbance of surface resources. However, 36 CFRpart 228, subpart A, provides that the Forest Service official cannot requirethe operator to submit such a proposed modification unless the official'simmediate supervisor makes three findings. One of the necessary findingsis that the Forest Service took all reasonable measures to predict theenvironmental impacts of the proposed operations prior to approving theplan of operations.b. The NRC's 1999 report entitled [ldquo]Hard Rock Mining on Federal Lands[rdquo] isstrongly critical of these current 36 CFR part 228, subpart A, limitations uponthe Forest Service's ability to require an operator to obtain approval of amodified plan of operations. The NRC's 1999 report finds that [ldquo][hellip]argumentsover what should have been [lsquo]foreseen[rsquo] or whether a ... Forest Service officertook [lsquo]all reasonable measures[rsquo] in approving the original plan makes themodification process dependent on looking backward. Instead, the processshould focus on what may be needed in the future to correct problems that haveresulted in harm or threatened harm. [hellip]Modification procedures should lookforward, rather than backward, and reflect advances in predictivecapacity, technical capacity, and mining technology.[rdquo]c. Do you agree that 36 CFR part 228, subpart A, should be amended toexplicitly permit an operator to request Forest Service approval for amodification of an existing plan of operations?The undersigned agree that an operator should be able to request a modificationof an existing PoO. However, such modification request must be submitted via arevised PoO and be subject to full review, analysis, and public comment underNEPA and all applicable laws just the same as the original PoO application.d. Do you agree with the 1999 NRC report's conclusion that the plan of operationsmodification provisions in 36 CFR part 228, subpart A, should be amended topermit the Forest Service to require modification of an approved plan in order1) to correct problems that have resulted in harm or threatened harm to NationalForest System surface resources and 2) to reflect advances in predictivecapacity, technical capacity, and mining technology? If you do not agree withthe 1999 NRC report's conclusion that 36 CFR part 228, subpart A, should beamended to allow the Forest Service to require an operator to modify anapproved plan of operations to achieve these two ends, please identify anycircumstances in addition to those in the current regulations which you thinkshould permit the Forest Service to require modification of an approved plan ofoperations.The undersigned agree that the USFS should be able to require a current operator tosubmit a modification of an existing PoO in order to correct problems that have resultedin harm or threatened harm to National Forest System resources (includinggroundwater), as well as to off-site areas that may be impacted (e.g., BLM lands, privateand state lands), and to reflect advances in predictive capacity, technical capacity, andmining technology.In addition, the requirement to submit a revised PoO should be mandatory and triggeredwhen there is any impact to any resource, whether on USFS land or not (e.g., off-siteimpacts), that was not fully reviewed (i.e. an impact beyond what was anticipated andanalyzed) and expressly approved in the approval of the original/current PoO. TheCanyon Mine flooding incident discussed above supra II is just one example where unreviewedimpacts occurred to lands with cultural significance as well as lands that areunder national forest management.As noted above, the amended PoO must be subject to full review, analysis, and publiccomment under NEPA and all applicable laws just the same as the original PoOapplication.e. Do you think that the regulations at 36 CFR part 228, subpart A, should beamended to set out the procedures which

govern submission, receipt, review,analysis, and approval of a proposed modification of an existing plan ofoperations? If so, please describe the procedures that you think should be addedto 36 CFR part 228, subpart A, to govern modification of existing plans ofoperations, including any differing requirements that should be adopted if themodification is being sought by the operator rather than the Forest Service.The submittal requirements for information and data for a proposedmodification/amendment of a PoO should be the same as noted above, regardless ofwhether the modification/amendment is submitted by the operator or the agency. Inaddition, the application for the modification/amendment should detail all of thecircumstances that warrant the modification/amendment (e.g., any problems that arosesince the approval of the original PoO, new changed conditions or relevant environmentalinformation, etc.).(4) Noncompliance and Enforcement.a. Currently the noncompliance provisions in 36 CFR part 228, subpart A, simplyrequire the Forest Service to serve a notice of noncompliance upon an operatorwhen the operator is not in compliance with 36 CFR part 228, subpart A, or anapproved plan of operations and this noncompliance is unnecessarily orunreasonably causing injury, loss or damage to surface resources. The notice ofnoncompliance must describe the noncompliance, specify the actions that theoperator must take to come into compliance, and specify the date by whichsuch compliance is required. The regulations at 36 CFR part 228, subpart A, donot specify what further administrative actions the Forest Service may take ifthe operator does not meet the requirements set out in the notice ofnoncompliance.b. There also are judicial remedies that the federal government may pursue whenan operator fails to comply with 36 CFR part 228, subpart A, or an approvedplan of operations. A United States Attorney may bring a civil action in federalcourt 1) seeking an injunction requiring an operator to cease acting in a mannerwhich violates 36 CFR part 228, subpart A, or the approved plan, or2) seeking an order requiring the operator to take action required by 36 CFRpart 228, subpart A, or the approved plan of operations and to compensate theUnited States for any damages that resulted from the operator's unlawful act.Federal criminal prosecution of an operator also is possible for violations of theForest Service's regulations at 36 CFR part 261, subpart A, which bar users ofthe National Forest System, including locatable mineral operators, from actingin a manner prohibited by that Subpart. An operator charged with violating 36CFR part 261, subpart A, which is a misdemeanor, may be prosecuted infederal court. If the operator is found guilty of violating such a prohibition, thecourt can order the operator to pay a fine of not more than$5,000, to be imprisoned for not more than 6 months, or both. Some operatorshave challenged these criminal prosecutions when the Forest Service has notfirst served them a notice of noncompliance. Although these challenges havefailed, their pursuit nonetheless indicates that increasing the clarity of the ForestService[rsquo]s regulations pertaining to the enforcement of 36 CFR part 228, subpartA, and approved plans of operations is desirable. The BLM has moreadministrative enforcement tools it can employ when an operator does notcomply with the agency's surface management regulations at 43 CFR part 3800,subpart 3809, a notice, or an approved plan of operations. However, the actionthat the BLM takes is dependent upon whether a violation is significant. Underthe BLM[rsquo]s regulations, a significant violation is one that causes or may result inenvironmental or other harm or danger, or one that substantially deviates from anotice or an approved plan of operations. When the BLM determines that anoperator[rsquo]s noncompliance is significant, the agency may issue the operator animmediate temporary suspension order. If the operator takes the requiredcorrective action in accordance with an immediate temporary suspension order,the BLM will lift the suspension. But if the operator fails to take the requiredcorrective action, then once the BLM completes a specified process the agencymay nullify the operator[rsquo]s notice or revoke the operator[rsquo]s approved plan ofoperations.c. When the BLM determines that an operator[rsquo]s noncompliance is not significant,the agency may issue the operator a noncompliance order which describes thenoncompliance, specifies the actions the operator must take to come intocompliance, and specifies the date by which such compliance is required. If theoperator takes the required corrective action, the BLM will lift thenoncompliance order. However, if the operator fails to take the requiredcorrective action, the BLM again assesses the violation[rsquo]s significance. If theBLM determines that the noncompliance is still not significant, the agency mayrequire the operator to obtain approval of a plan of operations for current orfuture notice-level activity. But, if the BLM determines that the operator[rsquo]snoncompliance has become significant, then once the agency completes aspecified process the BLM may issue the operator a suspension order. Whenthe BLM issues a suspension order, the agency follows the same processapplicable to an immediate temporary suspension order. Thus, the operator[rsquo]sfailure to take comply with a suspension order may result in the agencynullifying the operator[rsquo]s notice or revoking the operator[rsquo]s approved plan ofoperations.d. There are judicial remedies that the federal government may pursue if anoperator fails to comply with any of the BLM[rsquo]s enforcement orders. The civilremedies that a United States Attorney can seek are the same as the onesavailable when the noncompliance involves lands managed by the ForestService. But if an operator knowingly and willfully violates the BLM'sregulations at 43 CFR subpart 3809, the consequences of the operator'scriminal prosecution may be far more severe than those operative when anoperator violates 36 CFR part 261, subpart A. An individual operator convictedof violating the BLM[rsquo]s regulations is subject to a fine

of not more than$100,000, imprisonment for not more than 12 months, or both, for eachoffense. An organization or corporation convicted of violating the BLM[rsquo]sregulations is subject to a fine of not more than $200,000.e. As the NRC's 1999 report entitled [ldquo]Hard Rock Mining on Federal Lands[rdquo] finds,the Forest Service's inability to issue a notice of noncompliance unless theoperator fails to comply with 36 CFR part 228, subpart A, and thatnoncompliance is unnecessarily or unreasonably causing injury, loss or damageto National Forest System surface resources [ldquo]has led to concern about theefficacy of the notice of noncompliance in preventing harm to [those]resources....[rdquo] The fact that 36 CFR part 228, subpart A, does not expresslypermit the Forest Service to suspend or revoke noncompliant plans ofoperations also poses an unnecessary risk that the agency would be challengedif it took these actions in order to prevent harm to National Forest Systemsurface resources.f. The Forest Service is contemplating amending 36 CFR part 228, subpart A, toincrease consistency with the BLM[rsquo]s regulations governing the enforcement oflocatable mineral operations conducted upon public lands that the BLMmanages, to the extent that the Forest Service's unique statutory authoritiesallow this. Do you agree with this approach?The undersigned agree that the USFS needs to strengthen its enforcement of operationsthat do not comply with an approved PoO or NOI (for those still existing). The revisedpart 228 regulations should match, at a minimum, the BLM[rsquo]s enforcement authority.This includes being able to order the immediate suspension/halt of any activities not instrict accordance with the original/current PoO/NOI, including deviation from the termsof the PoO/NOI, or the discovery that the information submitted by the applicant for thePoO/NOI was not accurate.Fines and penalties should be commensurate with the extent of the violation and at aminimum ensure that the operator did not obtain any financial advantage from theviolation. For example, for a large operation, the BLM cap of $200,000 may besubstantially smaller than the revenues produced by the operation during the violation(e.g., un-remediated water quality problems) and provides little financial incentive toavoid similar problems in the future. In all cases, the fines/penalties should not becapped and should reflect not only a deterrent effect, but full compensation for all agencycosts to investigate and remediate the problem. Damage to other public and privateresources (water quality and quantity impacts, recreation/tourism losses, agriculturallosses) must also be fully compensated by the violating operator.g. If you do not agree that 36 CFR part 228, subpart A, should be amended toincrease consistency with the BLM's regulations governing the enforcement oflocatable mineral operations conducted upon public lands that the BLMmanages, please describe the enforcement procedures that you think the ForestService should adopt to prevent noncompliance with the agency's requirementsgoverning locatable mineral operations from harming National Forest Systemsurface resources.h. Please describe the processes that the Forest Service should be mandated tofollow if 36 CFR part 228, subpart A, is amended to permit the ForestService to take the following enforcement actions: ordering the suspensionof noncompliant operations, in whole or in part, requiring noncompliantoperators to obtain approval of a plan of operations for current or futurenotice-level operations, and nullifying a noncompliant operator's notice orrevoking a noncompliant operator's approved plan of operations.USFS enforcement procedures should be at least similar to BLM[rsquo]s. At a minimum,the agency must have the authority to order the immediate suspension/stay of anyand all activities/operations not in strict compliance with the terms of an approvedPoO/NOI, and the applicant/operator[rsquo]s statements and assurances made to theagency and the public during the PoO/NOI review and approval process.This is especially true for any environmental risk that develops after the approval ofthe PoO/NOI. For example, if a risk of an environmental hazard or conditiondevelops after the original approval (e.g., development of water pollution/acid minedrainage, leaks from containment facilities or structures such as liners), all operatorand agency resources should be devoted to immediately fixing the problem orpotential problem. The operator should not be allowed to continuemining/processing/exploring until all potential risks are eliminated. In such ascenario, immediate suspension/stay of all operations not specifically aimed at fixingthe problem is warranted.It should be noted that an immediate suspension/stay order does not raise any dueprocess issues for the operator, as the operator is on notice that it is only authorizedto conduct operations, and is only authorized to adversely impact the environment, asallowed in the approved PoO/NOI. Towards this end, the agency rules shouldrequire that the agency expressly notify all potential PoO/NOI operators that it willbe subject to immediate suspension/stay if the PoO/NOI is strictly adhered to, or ifenvironmental impacts arise which were not reviewed and approved in the PoO/NOI.Of course, an operator may seek judicial review of the agency[rsquo]s violation andsuspension decision, but such decisions should not be stayed (i.e., the stay ofoperations remains in force) unless a court issues an injunction against such decisionand stay.(5) Reasonably Incident Use and Occupancy.a. The Surface Resources Act of 1955, 30 U.S.C. 612(a), applies to NationalForest System lands and prohibits the use of mining claims for any purposeother than prospecting, mining, or processing operations and uses reasonablyincident thereto. But federal courts had held that the mining laws only entitlepersons conducting locatable mineral operations to use surface resources forprospecting, exploration, development, mining, and processing purposes, andfor reasonably incident uses long before 1955. Usually, two categories of usesthat may be reasonably incident to prospecting, exploration, development,mining, and processing operations uses

are recognized. One is called[ldquo]occupancy,[rdquo] or sometimes [ldquo]residency,[rdquo] and means full or part-time residenceon federal lands subject to the mining laws along with activities or things thatpromote such residence such as the construction or maintenance of structuresfor residential purposes and of barriers to access. The term [ldquo]use[rdquo] generallyrefers to all other activities or things that promote prospecting, exploration,development, mining, and processing, such as the maintenance of equipmentand the construction or maintenance of access facilities.This discussion erroneously interprets applicable federal law governing the review andapproval of mineral operations on USFS lands, including the 1955 Surface Resources Act.The agency is under the mistaken view that the 1955 Act requires it to approve operationson mining claims under assumed statutory rights under the Mining Law itself or the 1955Act regardless of whether the claimant has shown that it is entitled to such rights (e.g.,discovery of valuable mineral deposit on mining claims for all operations beyond initialexploration), or even whether there are mining claims at all (See current Part 228definition of [ldquo]operations[rdquo]). Under this erroneous view of especially the 1955 Act, theagency believes that as along as any activity is [ldquo]reasonably related[rdquo] to mineral operations,the applicant has a statutory right to conduct such operations, and the agency cannot[ldquo]materially interfere[rdquo] with the applicant[rsquo]s desired economic returns.That is wrong. The USFS[rsquo]s recent FEIS and Record of Decision (ROD) for the RosemontCopper Project in Arizona highlights this erroneous legal position.https://www.rosemonteis.us/files/final-eis/rosemont-feis-final-rod.pdf;https://www.rosemonteis.us/final-eis. [ldquo]Rosemont Copper is entitled to conduct operations thatare reasonably incidental to exploration and development of mineral deposits on its miningclaims pursuant to applicable U.S. laws and regulations and is asserting its right under theGeneral Mining Law to mine and remove the mineral deposit subject to regulatory laws.[rdquo]FEIS ix (emphasis added). [ldquo]Federal law provides the right for a proponent to develop themineral resources it owns and to use the surface of its unpatented mining claims for miningand processing operations and reasonably incidental uses (see 30 U.S.C.612).[rdquo] ROD 14.The Mine would also violate the current Forest Plan for the Coronado National Forest, butdue to the agency[rsquo]s erroneous belief that Rosemont has a statutory right to conduct itsoperations, it amended the Plan to remove protections for wildlife, environmental, andcultural resources. ROD 31-32. [ldquo]I determined that modifying the proposed project tocomply with the current Coronado forest plan would materially interfere with mineraloperations, which is beyond my legal authority.[rdquo] ROD 32. The FEIS listed the dozens ofstandards and guidelines in the Plan that would be violated by the Mine. FEIS 115, 117.USFS wrongly believes that it cannot [ldquo]materially interfere[rdquo] with Rosemont[rsquo]s desiredeconomic interests in the Mine. [ldquo]The Coronado . . . cannot materially interfere withreasonably necessary activities under the General Mining Law.[rdquo] FEIS 94, ROD 31. [ldquo]TheForest Service is not authorized by these Acts and regulations to . . . impose . . . mitigationmeasures or operational limitations that would render the project infeasible from aneconomic standpoint.[rdquo] USFS Response to Objections (available on file with USFS).Contrary to the agency[rsquo]s position, [ldquo]rights[rdquo] under the Mining Law are not absolute. Thereis thus no legal or factual basis for USFS[rsquo]s assertion that applicants have an absolute rightunder the Mining Law to permanently occupy the public lands overlying its mining claims.Such a right does not exist in the Mining Law:[T]he Mining Law gives citizens three primary rights: (1) the right toexplore for valuable mineral deposits, 30 U.S.C. [sect]22; (2) the right topossess, occupy, and extract minerals from the lands in whichvaluable mineral deposits are found, 30 U.S.C. [sect]26; and (3) the rightto patent lands in which valuable mineral deposits are found, 30U.S.C. [sect]29.Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 47 (D.D.C. 2003). Thus, while givinga limited right to initially explore for minerals, the Mining Law specifically restricts theright of long-term occupation and development of mining claims to public lands to onlywhere there has been a discovery of a [ldquo]valuable mineral deposit.[rdquo] 30 U.S.C. [sect][sect]22, 26. [ldquo]Allvaluable mineral deposits in lands belonging to the United States . . . shall be free and opento exploration and purchase, and the lands in which they are found to occupation andpurchase.[rdquo] 30 U.S.C. [sect] 22 (emphasis added).Mining claims are [ldquo]valid against the United States if there has been a discovery of [avaluable] mineral within the limits of the claim.[rdquo] Best v. Humboldt Placer Mining Co., 371U.S. 334, 336 (1963). Importantly, mining claim location (claim staking) does not indicate adiscovery or provide any rights. [ldquo][L]ocation is the act or series of acts whereby theboundaries of the claim are marked, etc., but it confers no right in the absence of discovery,both being essential to a valid claim.[rdquo] Cole v. Ralph, 252 U.S. 286, 296 (1920).[ldquo]A mining claimant has the right to possession of a claim only if he has made a mineraldiscovery on the claim.[rdquo] Lara v. Sect. of Interior, 820 F.2d 1535, 1537 (9th Cir. 1987).[ldquo]Thus, although a claimant may explore for mineral deposits before perfecting a miningclaim, without a discovery, the claimant has no right to the property against the UnitedStates or an intervenor. 30 U.S.C. [sect]23 (mining claim perfected when there is a [lsquo]discovery ofthe vein or lode[rsquo]).[rdquo] Freeman v. Dept. of Interior, 37 F.Supp.3d 313, 319-20 (D.D.C. 2014).[ldquo][U]npatented claims amount to a potential property interest, since it is the discovery of avaluable mineral deposit and satisfaction of statutory and regulatory requirements thatbestows possessory rights.[rdquo] Id. at 321.USFS policy recognizes that [ldquo]rights[rdquo] to use public lands are dependent on whether thelands contain the

requisite valuable mineral deposit. [ldquo]In order to successfully defend rightsto occupy and use a claim for prospecting and mining, a claimant must meet therequirements as specified or implied by the mining laws, in addition to the rules andregulations of the USFS. These require a claimant to: . . . 2. Discover a valuable mineraldeposit. . . . (and) 7. Be prepared to show evidence of mineral discovery.[rdquo] USFS MineralsManual [sect] 2813.2. [ldquo]A claim unsupported by a discovery of a valuable mineral deposit isinvalid from the time of location, and the only rights the claimant has are those belonging toanyone to enter and prospect on National Forest lands.[rdquo] Id. [sect] 2811.5.Accordingly, permanent use and occupancy of mining claims on lands not containing therequisite valuable mineral deposit, like all other uses of public land, are not governed bythe Mining Law. Rather, these uses are governed by the full range of public land statutes.[ldquo]Before an operator perfects her claim, because there are no rights under the Mining Lawthat must be respected, BLM has wide discretion in deciding whether to approve ordisapprove of a miner[rsquo]s proposed plan of operations.[rdquo] MPC, 292 F. Supp. 2d at 48.[ldquo]Rights to mine under the general mining laws are derivative of a discovery of a valuablemineral deposit and, absent such a discovery, denial of a plan of operations is entirelyappropriate.[rdquo] Great Basin Mine Watch, 146 IBLA 248, 256 (1998), 1998WL1060687, *8.USFS erroneously equates the right to explore for minerals with a right to permanently usepublic land for mine facilities when there is no evidence that these lands contain the requisitevaluable minerals or otherwise comply with all requirements of the Mining Law. This is clearlegal error, as the right to occupy a mining claim, unlike the right to initially explore, dependson the discovery of a valuable mineral deposit, a prerequisite which the USFS ignores.USFS erroneously believes that an applicant[rsquo]s [ldquo]rights[rdquo] to permanently occupy public landdo not depend on whether there are mining claims at all, let alone valuable minerals oneach claim. See Rosemont FEIS 148 ([ldquo]Mining claim location and demonstration of mineraldiscovery are not required for approval of a locatable minerals operations subject to ForestService regulation.[rdquo]). See also 36 C.F.R. [sect] 228.2 (defining [ldquo]operations[rdquo] authorized by theMining Law to include any mining-related activity [ldquo]regardless of whether said operationstake place on or off mining claims.[rdquo]). Thus, according to USFS, the mere fact thatproposed operations are mining-related automatically translates into permanent possessoryrights under the Mining Law.That is wrong. Such a regulation cannot override the plain language of the statutorycommand limiting rights to permanently [ldquo]use and occupy[rdquo] mining claims to only thoselands containing valuable mineral deposits. 30 U.S.C. [sect]22. See United States v. Larionoff,431 U.S. 864, 873 (1977) (to be valid, regulations must be [ldquo]consistent with the statute underwhich they are promulgated[rdquo]). Here, [sect] 22 of the Mining Law only [ldquo]authorizes[rdquo] permanentuse and occupancy of mining claims on lands containing the requisite valuable mineraldeposit. The Mining Law limits the [ldquo]right of possession and enjoyment of all the surface[rdquo]to only [ldquo]the locators of all mining locations made on any mineral vein, lode or ledge.[rdquo] 30U.S.C. [sect] 26. The regulation must be consistent with this statutory requirement. It thuscannot be the case, contrary to USFS[rsquo]s regulatory interpretation, that rights topermanently possess/use apply to lands without mining claims, or even without minerals.This is also true to off-site use of public lands for infrastructure such as pipelines, electricaltransmission lines, etc. Applications for these uses are not governed by the Mining Lawand instead must be reviewed and approved/disapproved pursuant the Title V of theFederal Land Policy and Management Act of 1976 (FLPMA) and USFS regulations at 36CFR Part 251. Water pipelines, transmission lines, and other conveyances cannot beauthorized by the plan of operations approval process, which only involve [ldquo]operationsauthorized by the United States mining laws.[rdquo] 36 C.F.R. [sect] 228.1. Approval of water andelectrical transmission lines is not governed by any right under the Mining Law:BLM apparently contends that a mining claimant does not need aright-of-way to convey water from land outside the claim for use onthe claim. It asserts that such use is encompassed in the impliedrights of access which a mining claimant possesses under themining laws. Such an assertion cannot be credited. . . .There is simply no authority for the assertion that miningclaimants need not obtain a right-of-way under Title V forconveyance of water from lands outside the claim onto the claim.Desert Survivors, 96 IBLA 193, 196 (1987), 1987WL110528, *3 (citations omitted). Seealso Far West Exploration, 100 IBLA 306, 309, n. 4 (1988), 1988WL110726, *3 ([ldquo]a rightof-way must be obtained prior to transportation of water across Federal lands formining.[rdquo]). Although these Interior Department cases dealt with BLM lands, they applyequally to USFS lands, as FLPMA Title V governs both agencies. 43 U.S.C. [sect] 1761. Therevised regulations should reflect this proper legal position to state that suchinfrastructure facilities are not considered [ldquo]operations authorized by the Mining Law.[rdquo]Regarding what is [ldquo]authorized by the Mining Law,[rdquo] the USFS also mistakenly believes thatroad access and infrastructure facilities crossing public land to facilitate mining operationson private or state lands is also governed by the purported [ldquo]rights[rdquo] under the Mining Law.Yet the Mining Law only applies to public land. 30 U.S.C. [sect] 22 (right to valuable mineralsonly on [ldquo]lands belonging to the United States[rdquo]).BLM, on the other hand, correctly recognizes that such access/use across public land isgoverned by the Right-of-Way (ROW) provisions of FLPMA Title V, not the Mining Law.For example, in one recent case, BLM required the submittal of a FLPMA ROW from anapplicant desiring to cross public land to

access private lands for mining. See, e.g.,Environmental Assessment, Zephyr Road Right-of-Way, DOI-BLM-CO-F020-2018-0043-EA, August 2018 ([ldquo]The purpose of this action is for the BLM to consider an application foran access road right-of-way from Zephyr across public land in Fremont County, Colorado.The need for the action is established by the BLM[rsquo]s responsibility under Title V of theFederal Land Policy and Management Act of October 21, 1976, as amended (FLPMA), 43U.S.C. 1716, to respond to requests for rights-of-way.[rdquo]). https://eplanning.blm.gov/eplfront-office/projects/nepa/108344/155337/190106/DOI-BLM-CO-F020-2018-0043-EA_DRAFT.pdf. See also BLM, Environmental Assessment, Golden Asset Mine, DOIMT-B070-2013-0023-EA, Case File MTM-106022 ([ldquo]The Golden Asset Mine is located onprivate inholdings within BLM public lands. Therefore, the applicant would needauthorization to haul ore from the mine across public land at greater than a casual userate. The BLM[rsquo]s need for the action is established by the BLM[rsquo]s responsibility under theFederal Land Policy and Management Act of 1976 (FLPMA Title V, Section 501) torespond to requests for right-of-way grants and whether a ROW shall be approved asrequested, approved with conditions, or denied.[rdquo]).http://www.jeffersoncountycourier.com/Monitor/Entries/2013/10/8_Proposed_mine_project_near_Jeff_City_slowed_by_government_shutdown_files/Golden%20Asset%20Mine%20ROW%20EA%20and%20FONSI%20copy.pdfIn interpreting the Organic Act, the agency further asserts that it lacks discretion orsignificant regulatory authority over mining. The Organic Act authorizes the agency topromulgate rules [ldquo]to regulate their occupancy and use and to preserve the forests thereonfrom destruction.[rdquo] 16 U.S.C. [sect] 551. [ldquo][P]ersons entering the national forests for thepurpose of exploiting mineral resources [lsquo]must comply with the rules and regulationscovering such national forests.[rsquo] 16 U.S.C. [sect] 478.[rdquo] Clouser v. Espy, 42 F.3d 1522, 1529 (9thCir. 1994). Section 478 of the Act states: [ldquo]Nothing in section . . . 551 of this title shall beconstrued as prohibiting . . . any person from entering upon such national forests for allproper and lawful purposes, including that of prospecting, locating, and developing themineral resources thereof. Such persons must comply with the rules and regulationscovering such national forests.[rdquo] 16 U.S.C. [sect] 478. The agency interprets this to mean that[ldquo]16 U.S.C. 478 bars the Forest Service from prohibiting locatable mineral operations onlands subject to the U.S. mining laws either directly or by regulation amounting to aprohibition.[rdquo] Rosemont ROD 82.Yet, Section 478 does not limit USFS[rsquo]s authority under Section 551 [ldquo]to regulate theiroccupancy and use and to preserve the forests thereon from destruction.[rdquo] Rather, thatprovision was added in the debate over the Act to ensure that the newly-created NationalForests were not [ldquo]withdrawn[rdquo] or [ldquo]reserved[rdquo] from the filing of mining claims. As theleading treatise on the creation of the National Forests explains:Initially, mining was not permitted in the forest reserves, which werecreated by presidential proclamation and withdrawn from mineraland other forms of entry. From 1891 until 1897, western and easternlawmakers battled over this locking up of mineral lands. After sixyears of heated controversy, the western representatives prevailed.Eastern conservationists realized that if forest reserves were notopened to mining, they would be abolished altogether . . .. Thus, the1897 Organic Act permitted . . . mining in the forest reserves.Wilkinson and Anderson, [ldquo]Land and Resource Planning in the National Forests,[rdquo] 64OREGON L. REV. 246-47 (1985)(citations omitted). [ldquo]This provision to open the reserves tomining was later supplemented to require miners to [lsquo]comply with the rules and regulationscovering such forest reservations.[rsquo] 30 Cong. Rec. 900 (1897).[rdquo] Id. 50, n. 248. Thus, [sect] 478does not override the Act[rsquo]s regulatory purpose [ldquo]to preserve the forests from destruction.[rdquo]In the ANPR and in the Rosemont ROD/FEIS, the agency relies on the Surface ResourcesAct/Multiple-Use Mining Act of 1955, 30 U.S.C. [sect] 612, enacted to restrict the unauthorizeduse of mining claims, to argue that it cannot [ldquo]materially interfere[rdquo] with any activity[ldquo]reasonably related to mineral exploration, extraction, or processing. [ldquo]The Multiple-UseMining Act of 1955 reaffirms the right to conduct mining activities on public lands,including mine processing facilities and the placement of mining tailings and waste rock.[rdquo]ROD 13-14.That law, however, does not stand for the proposition that miners have a [ldquo]right[rdquo] topermanently use/occupy mining claims divorced from the fundamental prerequisite of thediscovery of valuable mineral deposits. [ldquo]One of the purposes of the Act was to eliminatesome of the abuses that had occurred under the mining laws. . . . But Congress did notintend to change the basic principles of the mining laws.[rdquo] Converse v. Udall, 399 F.2d 616,617 (9th Cir. 1968). The 1955 Act had two purposes: (1) eliminating unauthorized use ofmining claims by allowing only [ldquo]prospecting, mining or processing operations and usesreasonably incident thereto,[rdquo] and (2) allowing USFS/BLM to permit non-mining uses onmining claims, by eliminating the mining claimant[rsquo]s exclusive right to use/possess claimedlands. U.S. v. Curtis-Nevada Mines, Inc. 611 F.2d 1277, 1281-1283 (9th Cir. 1980)(discussing congressional history and intent of Act). Thus, the Act was a restriction onmining, not an expansion of mining rights that somehow eliminated the requirement thatrights to permanent use/occupancy of mining claims be based on the discovery of valuableminerals.The [ldquo]material interference[rdquo] language relied on by USFS comes from the provisionremoving the claimant[rsquo]s exclusive possession by allowing non-mining uses of these lands.30 U.S.C. [sect] 612(b). However, contrary to USFS[rsquo]s view, this provision

does not limit theagency[rsquo]s authority to regulate mining operations. Rather, this limitation applies to theagency[rsquo]s direct use of the lands covered by mining claims, or to the issuance of [ldquo]permitsand licenses[rdquo] for other uses of mining claims. [ldquo][A]ny use of the surface of any suchmining claim by the United States, its permittees or licensees, shall be such as not toendanger or materially interfere with prospecting, mining or processing operations oruses reasonably incident thereto.[rdquo] Id. Nothing in this law limits USFS authority toregulate mining operations to just those measures that do not [ldquo]materially interfere[rdquo] withmining.The Ninth Circuit has recognized that this [ldquo]no material interference[rdquo] provision appliesnot to USFS[rsquo]s regulation of mining to protect public resources, but to the other usesallowed by USFS on claims. [ldquo][T]he other uses by the general public cannot materiallyinterfere with the prospecting and mining operation.[rdquo] Curtis-Nevada, 611 F.2d at 1285.Previous cases that have affirmed USFS[rsquo]s authority to regulate mining have pointed tothis [ldquo]interference[rdquo] language, albeit only related to [ldquo]rights conferred by the mininglaws.[rdquo] See U.S. v. Weiss, 642 F.2d 296, 297 (9th Cir. 1981).The Ninth Circuit has confirmed that USFS regulation of mining to protect forestresources is not strictly limited by economic considerations. In Clouser, the courtaffirmed the ability of the agency to restrict mining even to the point that the projectwould no longer be economically viable. [ldquo]Virtually all forms of Forest Service regulationof mining claims[mdash]for instance, limiting the permissible methods of mining andprospecting in order to reduce incidental environmental damage[mdash]will result inincreased operating costs, and thereby will affect claim validity.[rdquo] 42 F.3d at 1530(limiting claimant to pack-mule access). Under the Mining Law, [ldquo]If the costs ofcompliance [with environmental protections] render the mineral development of a claimuneconomic, the claim, itself, is invalid and any plan of operations therefor is properlyrejected.[rdquo] Great Basin Mine Watch, 1998WL1060687, *8.Thus, the revised part 228 regulations should reflect these proper legal requirements.b. Unfortunately, the mining laws have long been widely abused by individualsand entities in an attempt to justify unlawful use and occupancy of federallands. As the 1990 United States General Accounting Office report [ldquo]FederalLand Management: Unauthorized Activities Occurring on Hardrock MiningClaims:[rdquo] (United States General Accounting Office. 1990. Report to theChairman, Subcommittee on Mining and Natural Resources, Committee onInterior and Insular Affairs, House of Representatives. Federal LandManagement: Unauthorized Activities Occurring on Hardrock Mining Claims.GAO/RCED 90-111. Washington, DC: U.S. General Accounting Office.https://www.gao.gov/assets/220/212954.pdf) finds, some holders of miningclaims were using them for unauthorized residences, non-mining commercialoperations, illegal activities, or speculative activities not related to legitimatemining. The GAO's 1990 report also determines that these unauthorizedactivities result in a variety of problems, including blocked access to publicland by fences and gates; safety hazards including threats of violence;environmental contamination caused by the unsafe storage of hazardouswastes; investment scams that defraud the public; and increased costs toreclaim damaged land or otherwise acquire land from claim holders intent onprofiting from holding out for monetary compensation from parties wishing touse the land for other purposes. Accordingly, the GAO[rsquo]s 1990 report urges theForest Service and the BLM to revise their regulations to limit use oroccupancy under the mining laws to that which is reasonably incident.c. Issues regarding the propriety of use and occupancy under the SurfaceResources Act's reasonably incident standard have generated, and continue togenerate, frequent and protracted disputes between persons who are conductinglocatable mineral operations and Forest Service personnel responsible forpreventing unlawful use and occupancy of National Forest System lands.Moreover, a significant percentage of the judicial enforcement actions thefederal government commences with regard to locatable mineral operations onNational Forest System lands involve use and occupancy of the lands that isquestionable or improper under 30 U.S.C. 612(a). Presently, 36 CFR part 228,subpart A, lacks express standards or procedures for determining whetherproposed or existing use and occupancy is reasonably incident, regulating useand occupancy per se, and terminating use and occupancy which is notreasonably incident.d. The BLM[rsquo]s regulations at 43 CFR part 3710, subpart 3715, are designed toprevent or eliminate uses and occupancies of public lands which are notreasonably incident to locatable mineral prospecting, exploration,development, mining, or processing. These regulations establish a frameworkfor distinguishing between bona fide uses and occupancies and those thatrepresent abuse of the mining laws for non-mining pursuits. Specifically, theBLM's regulations establish procedures for beginning occupancy, inspectionand enforcement, and managing existing uses and occupancies as well asstandards for evaluating whether use or occupancy is reasonably incident.e. The Forest Service is contemplating amending 36 CFR part 228 subpart A,which governs all operations conducted on National Forest System landsunder the mining laws, to increase consistency with the BLM[rsquo]s regulationsgoverning use and occupancy under the mining laws. Do you agree withthis approach?The undersigned agree that USFS regulations should be consistent with BLMregulations regarding occupancy and use of public lands. As detailed above, however,the revised regulations should make clear that mining claimants have no rights, aboveinitial exploration, to the use and occupancy of mining claims without providingdetailed evidence that each and every claim satisfies the requirements of the MiningLaw so as to be

governed by the Mining Law (i.e., discovery of a valuable deposit of alocatable mineral for mining claims, and all requirements for use and occupancy ofmillsite claims under 30 U.S.C. [sect] 42).f. If you do not agree that 36 CFR part 228, subpart A, should be amended toincrease consistency with the BLM's regulations governing use and occupancyunder the mining laws, please describe the requirements, standards, andprocedures that you think the Forest Service should adopt to prevent unlawfuluse and occupancy of National Forest System surface resources that is notreasonably incident to prospecting, exploration, development, mining, orprocessing operations under the mining laws.See above.(6) Financial Guarantees.a. Current regulations at 36 CFR part 228, subpart A, include a sectionentitled [ldquo]bonds[rdquo] but there are many alternate kinds of financial assurancewhich the regulations recognize as being acceptable substitutes.Therefore, the Forest Service contemplates changing the title of this sectionto the broader terminology [ldquo]Financial Guarantees.[rdquo] The currentregulations provide for the Forest Service authorized officer to review theadequacy of the estimated cost of reclamation and of the financialguarantee[rsquo]s terms in connection with the approval of an initial plan ofoperations. But the regulations do not specifically provide that theauthorized officer will subsequently review the cost estimate and thefinancial guarantee to ensure that they remain sufficient for finalreclamation. The Forest Service is considering amending 36 CFR part 228,subpart A, to provide for such a subsequent review. An issue that theagency will consider is whether 36 CFR part 228, subpart A, shouldspecifically provide that the review will occur at a fixed interval. TheForest Service also is considering whether to amend 36 CFR part 228,subpart A, to specifically provide for the establishment of a fundingmechanism which will provide for post-closure obligations such as longtermwater treatment and maintaining long-term infrastructure such astailings impoundments. Another concern is what forms of financialguarantee should an operator be allowed to furnish to assure these longtermpost-closure obligations.The undersigned agree that the part 228 regulations should require the mandatorysubmittal of a funding mechanism for operation, reclamation, and closure as a conditionof the USFS[rsquo]s review and approval of a PoO (or NOI, although as noted above the use ofNOI-level approvals should be discontinued). The current part 228 subpart Aregulations could be interpreted to mean that the USFS is not required to obtain suchfinancial guarantee ([ldquo]FG[rdquo])/bond as a condition of approval. See 36 C.F.R. [sect] 228.13(FG/bond submitted [ldquo]when required by the authorized officer[rdquo]). BLM[rsquo]s 43 C.F.R. Part3809 regulations make such FG/bond submittals and approval mandatory, 43 C.F.R. [sect]3809.500, as USFS should also require.Regarding long-term impacts to public resources, the USFS should not approve anyoperations that will require long-term or perpetual treatment (e.g., water qualitytreatment). Allowing an operation to begin that will admittedly never be fullyreclaimed due to its unending need for perpetual treatment violates the agency[rsquo]s dutiesto ensure the protection of public resources under the Organic Act, Minerals Policy Actof 1970, and other applicable laws. See, e.g., Interior Department, HYDROLOGICBALANCE PROTECTION, POLICY GOALS AND OBJECTIVES onCORRECTING, PREVENTING AND CONTROLLING ACID/TOXIC MINEDRAINAGE, March 31, 1997, at 5.https://www.osmre.gov/lrg/docs/amdpolicy033197.pdf ([ldquo]In no case should a permit beapproved if the determination of probable hydrologic consequences or other reliablehydrologic analysis predicts the formation of a postmining pollutional discharge thatwould require continuing long-term treatment without a defined endpoint.[rdquo]). Althoughwritten for coal mines, there is no reason why the USFS cannot adopt this requirementfor hardrock mines.Regarding facilities that are not anticipated/predicted to need perpetual treatment, butcould if circumstances change (e.g., tailings or leach facility predicted to be [ldquo]zerodischarge[rdquo] due to liner systems but are discovered to actually leak/discharge), theFG/bond should include funds for ongoing monitoring to ensure the predictions aremet, as well as contingency funds to handle situations if the predictions are not met.Regarding the actual FG/bond instrument or mechanism, an operator should not beallowed to [ldquo]self-bond[rdquo] through corporate guarantees or similar mechanisms. Norshould an operator be allowed to submit blanket state or region wide FG/bonds. Eachoperation/project must be independently supported by a FG/bond for that specific site.Although the USFS should be able to coordinate the FG/bond mechanism with theapplicable state mine permitting agency, the USFS must maintain independentauthority to ascertain the proper FG/bond amount as it is the USFS[mdash]not stateagencies[mdash] that must protect public resources pursuant to the Organic Act, MineralsPolicy Act of 1970, and other applicable laws. If the state agency requires a higherFG/bond amount than proposed/reviewed by the USFS, the higher FG/bond amountshould control, but at no time should a lower FG/bond recommended by the statecontrol over a higher USFS-imposed FG/bond.Overall, the review and approval of an adequate reclamation/closure FG/bond is acritical part of the USFS[rsquo]s oversight of mineral operations.b. What circumstances should permit the authorized officer to review thecost estimate and financial guarantee[rsquo]s adequacy and require the operatorto furnish an updated financial guarantee for reclamation or post-closuremanagement?The USFS should require the submittal of the FG/bond mechanism/instrument for anyapplication seeking to use USFS lands. This should be required to be submitted with theapplicant[rsquo]s initial application (i.e. PoO or any other application), and re-submitted forany alternative that might be proposed or reviewed by the applicant or the USFS duringthe NEPA process. Similarly, re-submission should be

triggered when a PoO/NOI issubstantially modified as well. Unlike current USFS policy, the agency should includethe initial FG/bond amount for public review during the NEPA process, as well as theFG/bond amount for any reasonable alternatives considered in the EA or EIS. And,where re-submission is triggered due to a modification to the PoO/NOI. The FG/bondamount and mechanism must also contain sufficient detail for the USFS and the publicto judge its adequacy.c. How frequently should the authorized officer be allowed to initiate thisreview and update of the financial guarantees for reclamation or postclosuremanagement?The adequacy of the FG/bond amount and mechanism should be reviewed yearly, ormore frequently if any conditions have changed which may warrant a higher amount.All agency review of the FG/bond amount, details, and mechanism should be subjectto public review during the USFS[rsquo]s consideration of the initial, or any revisedFG/bond. Any release of the FG/bond based upon an applicant[rsquo]s assertion that allreclamation obligations have been completed should be subject to public review andcomment prior to the agency[rsquo]s release of any portion of the FG/bond.(7) Operations on Withdrawn or Segregated Lands.a. Segregations and withdrawals close lands to the operation of the mining laws,subject to valid existing rights. Generally the purpose of segregation andwithdrawal is environmental resource protection, but sometimes they are usedin advance of a realty action to prevent the location of mining claims whichmight pose an obstacle to the contemplated realty action. The Forest Service'sregulations at 36 CFR part 228, subpart A, do not contain provisions governingproposed or existing notices of intent to conduct operations and proposed orapproved plans of operations for lands subject to mining claims that embracesegregated or withdrawn lands. As a matter of policy, the Forest Serviceemploys the same procedures applicable to operations on segregated orwithdrawn lands that are set forth in the BLM's regulations at 43 CFR3809.100. However, the absence of explicit Forest Service regulationsgoverning locatable mineral operations on segregated or withdrawn NationalForest System lands has given rise to legal challenges concerning the proprietyof this Forest Service policy.b. Under 43 CFR 3809.100, the BLM will not approve a plan of operations orallow notice-level operations to proceed on lands withdrawn fromappropriation under the mining laws until the agency has prepared a mineralexamination report to determine whether each of the mining claims on whichthe operations would be conducted was valid before the withdrawal andremains valid. Where lands have been segregated from appropriation underthe mining laws, the BLM may, but is not required to, prepare such a mineralexamination report before the agency approves a plan of operations or allowsnotice-level operations to proceed.c. If a BLM mineral examination report concludes that one or more of the miningclaims in question are invalid, 43 CFR 3809.100 prohibits the agency fromapproving a plan of operations or allowing notice-level operations to occur onall such mining claims. Instead, the regulation requires the BLM to promptlyinitiate contest proceedings with respect to those mining claims. There is oneexception to this process: prior to the completion of a required mineralexamination report and any contest proceedings, 43 CFR 3809.100 permits theBLM to approve a plan of operations solely for the purposes of sampling tocorroborate discovery points or complying with assessment work requirements.If the U.S. Department of the Interior's final decision with respect to a mineralcontest declares any of the mining claims to be null and void, the operator mustcomplete required reclamation but must cease all other operations on the landsformerly subject to all such mining claims.d. The Forest Service is contemplating amending 36 CFR part 228, subpart A, toincrease consistency with the BLM[rsquo]s regulations governing operations onsegregated or withdrawn lands. However, since the authority to determine thevalidity of mining claims lies with the Department of the Interior, theamendments would need to direct the Forest Service to ask the BLM to initiatecontest proceedings with respect to mining claims whose validity is questionedby the Forest Service [ndash] a process consistent with an existing agreementbetween the Department of the Interior and the Department of Agriculture. Doyou agree with this approach? Also, please specify whether you think that suchamendments to 36 CFR part 228, subpart A, should treat locatable mineraloperations conducted on segregated and withdrawn lands identically ordifferently, and the reasons for your belief.e. If you do not agree that 36 CFR part 228, subpart A, should be amended toincrease consistency with the BLM's regulations governing operations onsegregated and withdrawn lands, please describe the requirements andprocedures that you think the Forest Service should adopt to govern locatablemineral operations on National Forest System lands segregated or withdrawnfrom appropriation under the mining laws?For both questions, the undersigned agree that USFS regulations, like BLM[rsquo]s rules,should provide that the agency will not approve a PoO or allow NOI level operations(however, see above for the elimination of NOI-level operations) to proceed on landswithdrawn from appropriation under the mining laws until the agency has prepared amineral examination report to determine whether each of the mining claims on whichthe operations would be conducted was valid before the withdrawal and remains valid.The undersigned disagree, however, that BLM[rsquo]s policy that where lands have beensegregated from appropriation under the mining laws, the BLM (or USFS) may, but arenot required to, prepare such a mineral examination report before the agency approvesoperations complies with federal law. Under the Mining Law and public land law, thesegregation acts the same as a withdrawal[mdash]closing off entry under the Mining Law,absent a finding of the existence of a valid existing right on each claim on the date of thesegregation and/or withdrawal. Thus, for the purposes of USFS review of

a proposedPoO (again, NOI-level proposals should be eliminated and all operations above casualuse must submit a PoO), the agency will not approve a PoO to proceed on landswithdrawn or segregated from appropriation under the mining laws until the agency hasprepared a mineral examination report to determine whether each of the mining claimson which the operations would be conducted was valid before thesegregation/withdrawal and remains valid.The undersigned also disagree with BLM[rsquo]s policy of not completing validityexaminations for operations that had an approved PoO before a segregation orwithdrawal was made. Forest Service regulations should instead require that validityexaminations are completed for operations that have been approved prior to asubsequent segregation or withdrawal (i.e., in order to ensure that operators have a validexisting right to proceed with operations, validity confirmation should be required forpreviously-approved operations upon enactment of segregation or withdrawal).The following process, found in other USFS regulations (36 C.F.R. [sect] 292.64) should befollowed:[U]pon receipt of a plan of operations [or for previously-approvedoperations upon enactment of the segregation/withdrawal], theauthorized officer shall review the information related to validexisting rights and notify the operator in writing within 60 days ofone of the following situations: (1) That sufficient information onvalid existing rights has been provided and the anticipated date bywhich the valid existing rights determination will be completed,which shall not be more than 2 years after the date of notification;unless the authorized officer, upon finding of good cause withwritten notice and explanation to the operator, extends the timeperiod for completion of the valid existing rights determination. (2)That the operator has failed to provide sufficient information toreview a claim of valid existing rights and, therefore, the authorizedofficer has no obligation to evaluate whether the operator has validexisting rights or to process the operator[rsquo]s proposed plan ofoperations. (b)(1) If the authorized officer concludes that there isnot sufficient evidence of valid existing rights, the officer shall sonotify the operator in writing of the reasons for the determination,inform the operator that the proposed mineral operation cannot beconducted, advise the operator that the Forest Service willpromptly notify the Bureau of Land Management of thedetermination and request the initiation of a mineral contest actionagainst the pertinent mining claim, and advise the operator thatfurther consideration of the proposed plan of operations issuspended pending final action by the Department of the Interioron the operator[rsquo]s claim of valid existing rights and any finaljudicial review thereof. (2) If the authorized officer concludes thatthere is not sufficient evidence of valid existing rights, theauthorized officer also shall notify promptly the Bureau of LandManagement of the determination and request the initiation of amineral contest action against the pertinent mining claims. (c) Anauthorized officer[rsquo]s decision pursuant to paragraph (b) of thissection that there is not sufficient evidence of valid existing rights isnot subject to further agency or Department of Agriculture reviewor administrative appeal. (d) The authorized officer shall notify theoperator in writing that the review of the remainder of theproposed plan will proceed if: (1) The authorized officer concludesthat there is sufficient evidence of valid existing rights; (2) Finalagency action by the Department of the Interior determines thatthe applicable mining claim constitutes a valid existing right; or (3)Final judicial review of final agency action by the Department ofthe Interior finds that the applicable mining claim constitutes avalid existing right. (e) Upon completion of the review of the plan ofoperations, the authorized officer shall ensure that the minimuminformation required by [sect] 292.63(c) of this subpart has beenaddressed and, pursuant to [sect] 228.5(a) of this chapter, notify theoperator in writing whether or not the plan of operations isapproved. (f) If the plan of operations is not approved, theauthorized officer shall explain in writing why the plan ofoperations cannot be approved. (g) If the plan of operations isapproved, the authorized officer shall establish a time period forthe proposed operations which shall be for the minimum amount oftime reasonably necessary for a prudent operator to complete themineral development activities covered by the approved plan ofoperations.A similar approach was recently taken by the USFS regarding proposed [ldquo]confirmationdrilling[rdquo] operations on existing claims in a withdrawn area in Oregon, where the USFSnotified the claimant of the following requirements:(A) The Forest will send a letter to the claimant that a valid existingrights determination is required and identify the lead CME assignedto the case. The following information will be requested:[bull] Information concerning the subject mining claims (i.e. BLM claimnumbers, location dates, maps) as well as data and/ordocumentation showing that a physical exposure/discovery of avaluable mineral deposit existed as of the date of segregation andcontinues to exist on each claim.[bull] Physical exposures include but are not limited to rock outcrops,trenches, pits, adits, shafts, and drill holes that displaymineralization that separates it from the surrounding rock.[bull] Evidence of the degree of mineralization may be one of a variety ofindustry standard methods including, but not limited to, assays,chemical analysis, x-ray fluorescence, neutron activation, or onsiteconcentration and processing.[bull] The examiner will also request any geological, mineral resource, orother technical information that the claimant may have concerningthe subject claims including, but not limited to, private orconfidential mineral reports; identification of discovery points oneach claim; physical exposure/sample location maps;assay/analytical results; sampling methodologies; sampledescriptions; exploration results or resource/reserveestimates/calculations[bull] The results of metallurgical testing; likely mining, milling, andreclamation methods and cost estimates; and mineral recovery datafor proposed milling processes.(B) For

any activities in the proposed Plan of Operations that [theproponent]contends are meant to obtain samples to confirm orcorroborate mineral exposures that were physically accessible onthe mining claim claims before the segregation date, the claimantwill need to provide a description of how their proposed activitiesrelate to and serve to confirm or corroborate those pre-existingmineral exposures for consideration by the mineral examiner.[bull] The examiner will assess and evaluate whether those activitiesconstitute exploration or serve to confirm or corroborate preexistingphysical exposures/discovery points and provide theirjustification, rationale, and recommendations to the AuthorizedOfficer in the form of a Surface Use Determination Report.[bull] If any additional activities are deemed appropriate and/orapproved, the Forest Service will request that the claimant enterinto a joint sampling agreement with the agency so that the resultscan be used to support the ongoing VER determination andassociated mineral examination report.Approval of any activities determined to serve to confirm or corroborate pre-existingphysical exposures/discovery points on the subject mining claims would still be subject toNational Environmental Policy Act (NEPA) analysis and an associated decision.Approval of any allowable activities would still require resolution of any outstandingenvironmental analysis issues in the existing NEPA analysis completed to date.Attachment to August 7, 2018 letter from Forest Supervisor of the RogueRiver-Siskiyou NF to Red Flat Nickel Corp. and associates (on file withUSFS).In addition to the NEPA requirements noted in that letter, due to the importantresources in segregated/withdrawn area (the basis for segregations/withdrawals), anyproposal to conduct any confirmation or corroboration drilling or related operations ina segregated/withdrawn area should be reviewed in an EIS.(8) Procedures for Minerals or Materials that May Be Salable Mineral Materials,Not Locatable Mineralsa. Effective July 24, 1955 in accordance with 30 U.S.C. 601, 611, mineralmaterials, including but not limited to common varieties of sand, stone,gravel, pumice, pumicite, cinders, and clay found on National ForestSystem lands reserved from the public domain ceased being locatable underthe mining laws. Instead, the Forest Service normally is required to sellthese substances, which are collectively referred to as mineral materials, tothe highest qualified bidder after formal advertising pursuant to 30 U.S.C.602 and Forest Service regulations at 36 CFR part 228, subpart C (49 FR29784, July 24, 1984, as amended at 55 FR 51706, Dec. 17, 1990).However, uncommon varieties of sand, stone, gravel, pumice, pumicite,cinders, and clay found on National Forest System lands reserved from thepublic domain continue to be locatable under the mining laws, 30 U.S.C.611.b. When there is a question as to whether one of these minerals or materials isa common variety of that substance which is salable under the MaterialsAct of 1947, 30 U.S.C. 601-04, or an uncommon variety of that substancewhich is subject to appropriation under the mining laws, 30 U.S.C. 611,Forest Service policy calls for preparation of a mineral examination reportto evaluate this issue. Pending resolution of the question as to whether themineral or material is subject to appropriation under the mining laws, theForest Service encourages an operator seeking to remove it in accordancewith 36 CFR part 228, subpart A, to establish an escrow account anddeposit the appraised value of the substance in that account. But if theoperator refuses to establish and make payments to an escrow account, 36CFR part 228, subpart A, does not expressly permit the Forest Service todelay the substance's removal while the Forest Service considers whetherthe substance is a mineral material rather than a locatable mineral.c. The BLM[rsquo]s regulations at 43 CFR 3809.101 establish special proceduresapplicable to substances that may be salable mineral materials rather thanlocatable minerals. That section generally prohibits anyone from initiatingoperations for the substance until the BLM has prepared a mineralexamination report evaluating this question. Prior to completion of thereport and any resulting contest proceedings, the BLM will allow noticeleveloperations or approve a plan of operations when 1) the operations'purpose is either sampling to confirm or corroborate existing mineralexposures physically disclosed on the mining claim or complying withassessment work requirements, or 2) the operator establishes anacceptable escrow account and deposits the appraised value of thesubstance in that account under a payment schedule approved by theagency. If the mineral examination report concludes that the substance issalable rather than locatable, the BLM will initiate contest proceedingswith respect to all mining claims on which locatable mineral operationsare proposed unless the mining claimant elects to relinquish those miningclaims. Upon the relinquishment of all such mining claims or the U.S.Department of the Interior's issuance of a final decision declaring thosemining claims to be null and void, the operator must complete requiredreclamation but must cease all other operations on the lands formerlysubject to those mining claims.d. The Forest Service is contemplating amending 36 CFR part 228, subpart A,to increase consistency with the BLM[rsquo]s regulations governing substancesthat may be salable mineral materials rather than locatable minerals.However, since the authority to determine the validity of mining claims lieswith the Department of the Interior, the amendments would need to directthe Forest Service to ask the BLM to initiate contest proceedings withrespect to mining claims which the Forest Service thinks are based upon animproper attempt to appropriate salable mineral materials under the mininglaws [ndash] a process consistent with an existing agreement between theDepartment of the Interior and the Department of Agriculture. Do you agreewith this approach?The undersigned agree that BLM and USFS procedures should be more consistent.However, the undersigned disagree that applicants/operators should be allowed toconduct operations or remove any minerals from public lands pending the

agency[rsquo]sdetermination as to whether the subject minerals are locatable or common variety.Under federal mining laws (1872 Mining Law, 1955 Common Variety and SurfaceResources Act), lands that do not contain locatable minerals are not subject to mineralentry. Relatedly, any adverse impacts to public land from activities associated with nonlocatableminerals are not allowed, unless a mineral materials sales contract (with fullpublic review) has been done.Thus, a person should not be allowed to conduct operations without establishing that theminerals to be explored/removed are indeed locatable, and the agency should not approveany ground disturbance until the locatability issues have been finally resolved in theaffirmative for each claim.Allowing the applicant to establish an [ldquo]escrow account[rdquo] that would purportedly providethe future payments pursuant to an eventual minerals sale contract ignores thefundamental reality of possibly irreparable on-the-ground damage to public land thatwould occur in the meantime. The fact that the applicant would eventually pay theescrowed funds if the minerals were determined to be non-locatable does nothing toeliminate the damage caused in the meantime [ndash] damage that could easily have beenavoided.Further, approval of mineral material (i.e., non-locatable) operations are regulated undera very different regime than the current part 228 regulations governing locatableminerals. For example: [ldquo]Mineral materials may be disposed of only if the authorizedofficer determines that the disposal is not detrimental to the public interest.[rdquo] 36 C.F.R. [sect]228.43.The agency should thus not allow operations to proceed if there is any question that thelands covered by the proposed operation may not be verified locatable minerals, underthe guise that the lands contain locatable minerals. This question must be made beforeallowing any ground disturbance at the site, except for very limited sampling to assist theagency in making the determination of whether the deposit is locatable or a commonvariety. As noted herein, any proposal to conduct such sampling should be fully subjectto public review under NEPA, and should require the submittal of a PoO. And, to theextent a validity examination determines the deposit is an uncommon common variety,that examination must be released to the public.e. If you do not agree that 36 CFR part 228, subpart A, should be amendedto increase consistency with the BLM[rsquo]s regulations governing substancesthat may be salable mineral materials rather than locatable minerals, pleasedescribe the requirements and procedures that you think the Forest Serviceshould adopt to help ensure that the public interest and the Federal treasuryare protected by preventing mineral materials from being given away forfree contrary to 30 U.S.C. 602 which requires payment of their fair marketvalue.f. If you submitted a proposed plan of operations under 36 CFR part 228,subpart A, for what you thought was an uncommon variety of sand, stone,gravel, pumice, pumicite, cinders, and clay, what issues or challenges didyou encounter in obtaining, or attempting to obtain, Forest Serviceapproval of that plan?See above.IV. ConclusionThe undersigned appreciate the opportunity to comment and look forward to remainingengaged in this process if it moves forward. Again, we ask that USFS extend the publiccomment period by 60-days and conduct an EIS pursuant to NEPA for this proposed rulemaking.This is an opportunity for USFS to adopt and revise regulations so they are more consistent andprotective of USFS[rsquo]s resources like water and public lands. It is critical that USFS increasetransparency and public involvement and engagement to ensure the twin aims of NEPA would bebetter satisfied in the context of site-specific proposals. To the extent USFS is contemplatingadopting regulations to the contrary, this must be rejected.Sincerely,Friends of the KalmiopsisCentral Colorado Wilderness CoalitionBasin and Range WatchSave Our Sky Blue WatersSave Lake Superior AssociationKlamath Forest AllianceEnvironmental Protection Information Center (EPIC)Voyageurs National Park AssociationThe Wilderness SocietyQuiet Use CoalitionUranium WatchFriends of the InyoKentucky HeartwoodFriends of the BitterrootCalifornia Native Plant SocietySouthern Environmental Law CenterWaterLegacyUpper Peninsula Environmental CenterConservation CongressRESTORE: The North WoodsSequoia ForestKeeperUpper Gila Watershed AllianceMorongo Basin Conservation AssociationShawnee Forest SentinelsSouthern Illinois Against Fracturing Our EnvironmentGlobal Justice Ecology ProjectSan Juan Citizens AllianceKalmiopsis Audubon SocietyEarthworksEarthjusticeSierra ClubCenter for Biological DiversityWestern Environmental Law CenterGila Conservation CoalitionGila Resources Information ProjectPacific Coast Federation of Fishermen[rsquo]s Associations (PCFFA)Institute for Fisheries ResourcesNortheastern Minnesotans for WildernessCalifornians for Western WildernessShawnee Chapter, Illinois Audubon SocietyCalifornia Nevada Desert Committee, Sierra ClubArizona Mining Reform CoalitionMount Graham CoalitionFriends of the ClearwaterIdaho Conservation LeagueBlack Hills Clean Water AllianceInformation Network for Responsible Mining (INFORM)Rock Creek AllianceSave Our CabinetsGreat Old Broads for Wilderness, Boise, Idaho ChapterGreat Old Broads for WildernessUranium WatchMulticultural Alliance for a Safe EnvironmentCopper Country AllianceBrooks Range CouncilAmerican Bird ConservancyConservatives for Responsible StewardshipFriends of the Bell Smith SpringsHigh Country Conservation AdvocatesGrand Canyon TrustDefenders of WildlifeLeague of Conservation VotersNational Parks Conservation AssociationFriends of Del Norte