

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

October 15, 2018

Re: FS-2018-0052, Forest Service Advance Notice of Proposed Rulemaking 36 C.F.R. Part 228 Subpart A, Locatable Minerals; Request for Comment

To Whom It May Concern:

The undersigned provide this letter to provide information in response to the Forest Service (“USFS”)’s notice as part of its proposed rulemaking for 36 C.F.R. § part 228 Subpart A. 83 Fed.Reg. 46451-46458 (Sept. 13, 2018). Collectively, the undersigned represent organizations 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 comment period by another 60-days and provide public hearings in Washington, D.C., and three more in USFS regions that would be most affected by oil, gas, and mining on Forest Service System lands. *See* attached extension request letter, submitted ***; *see also* attached Senator Bennet extension letter request. Previously submitted letters explained that USFS should provide an extension for both this Advance Notice of Proposed Rulemaking and the Advance Notice of Proposed Rulemaking for Subpart E¹ due to the broad variety of complex technical and legal issues these proposals raise. It is critical that the public have sufficient opportunity to review and provide feedback on USFS’s proposals.

I. USFS Must Fully Comply with the National Environmental Policy Act and Conduct an Environmental Impact Statement.

The National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and its implementing regulations, promulgated by the Council on Environmental Quality (“CEQ”), 40 C.F.R. §§ 1500.1 *et seq.*, is our “basic national charter for the protection of the environment.” 40 C.F.R. § 1500.1. Recognizing that “each person should enjoy a healthful environment,” NEPA ensures that the federal government uses all practicable means to “assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings,”

¹ In short, the proposed Subpart E oil and gas rulemaking seeks to: cutback the USFS’s process for identifying National Forest System lands that the Bureau of Land Management (“BLM”) may offer for oil and gas leasing; change the regulatory provisions concerning lease stipulation waivers, exceptions, and modifications; clarify the review and approval procedures for surface use plan of operations; change the language regarding operator’s responsibility to protect natural resources and the environment; clarify language for inspections and compliance; and address geophysical/seismic operations associated with minerals related matters to mirror that of BLM’s.

and to “attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences,” among other policies. 43 U.S.C. § 4331(b). “NEPA promotes its sweeping commitment to ‘prevent or eliminate damage to the environment and biosphere’ by focusing government and public attention on the environmental effects of proposed agency action.” 42 U.S.C. § 4321.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989). NEPA regulations explain, in 40 C.F.R. § 1500.1(c), that:

Ultimately, of course, it is not better documents but better decisions that count. NEPA’s purpose is not to generate paperwork – even excellent paperwork – but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.

Thus, while “NEPA itself does not mandate particular results, but simply prescribes the necessary process,” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989), agency adherence to NEPA’s action-forcing statutory and regulatory mandates helps federal agencies ensure that they are adhering to NEPA’s noble purpose and policies. See 42 U.S.C. §§ 4321, 4331.

NEPA imposes “action forcing procedures . . . requir[ing] that agencies take a *hard look* at environmental consequences.” Methow Valley, 490 U.S. at 350 (citations omitted) (emphasis added). These “environmental consequences” may be direct, indirect, or cumulative. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8. Direct effects are those that are caused by the action and occur at the same time and place. 40 C.F.R. § 1508.8(a). Indirect effects are those that are caused by the action and are later in time and farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems. 40 C.F.R. § 1508.8(b). A cumulative impact is defined as: the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7.

Federal agencies determine whether direct, indirect, or cumulative impacts are significant by accounting for both the “context” and “intensity” of those impacts. 40 C.F.R. § 1508.27. Context “means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality” and “varies with the setting of the proposed action.” 40 C.F.R. § 1508.27(a). Intensity “refers to the severity of the impact” and is evaluated according to several additional elements, including, for example: unique characteristics of the geographic area such as ecologically critical areas; the degree to which the effects are likely to be highly controversial; the degree to which the possible effects are highly uncertain or involve unique or unknown risks; and whether the action has cumulatively significant impacts. *Id.* §§ 1508.27(b)

An EIS is required when a major federal action “significantly affects the quality of the human environment.” 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.4. A federal action “affects” the environment when it “will or *may* have an effect” on the environment. 40 C.F.R. § 1508.3 (emphasis added); *Airport Neighbors Alliance v. U.S.*, 90 F.3d 426, 429 (10th Cir. 1996) (“If the agency determines that its proposed action *may* ‘significantly affect’ the environment, the agency must prepare a detailed statement on the environmental impact of the proposed action in the form of an EIS.”) (emphasis added).

Based on the scope of the regulations proposed to be revised and the impacts to environmental, cultural, historical, and human health resources resulting from operations authorized under these regulations (as shown by the attached/included documents), the USFS must 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 as the Endangered Species Act (“ESA”) and National Historic Preservation Act (“NHPA”) is also required. It is clear that USFS’s proposed rulemaking for Subpart A is significant.² Although focused on the western public land states, the proposed rulemaking would effect agency lands across the country as it is proposed “to increase the Forest Service’s nationwide consistency in regulating mineral operations.” 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 the 1970s.

The intensity of this proposal is also more than sufficient to require USFS conduct an EIS. As discussed above and demonstrated in the attachments, the proposed locatable minerals rulemaking would have significant environmental, cultural, historical, and human health resources impacts. Hardrock mining has an unfortunate history that by EPA’s own estimates has left 40% of headwaters in western watersheds polluted.³ Each year, the hardrock mining industry leads the nation in toxic releases.⁴ Modern mines have significant impacts on landscapes, often creating permanent scars, such as Bingham Canyon mine southwest of Salt Lake City, which is nearly 4 kilometers deep and wide.⁵ Such mines also produce massive amounts of waste that remain on public lands for eternity.⁶ According to the EPA, uranium mining on the Navajo Nation has left over 500 abandoned mines as well as homes and drinking water sources with elevated uranium to this day.⁷ And disasters associated with mining

² An EIS also must be prepared for the Advanced Noticed of Proposed Rulemaking for Part 228 Subpart E Oil and Gas. Subpart E oil and gas regulations have similarly received only one change since USFS finalized them in 1990, two decades before the peak of the hydraulic fracturing boom. It also would apply nation-wide and involves a number of impacts including but 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 estimated 1,249,161,00 tons of waste rock covering 1,460 acres and leave another 987 acres of mine tailings on national forest lands.

⁷ Cleaning Up Abandoned Uranium Mines EPA *available at* <https://www.epa.gov/navajo-nation-uranium-cleanup/cleaning-abandoned-uranium-mines> (last visited **).

continue to plague tribes, lands, waters, and communities. For example, in 2015 and 2016 there were two catastrophic tailings impoundment failures (Mount Polley tailings dam failure in British Columbia and the Samarco tailings dam failure in Brazil respectively) that released vast amounts of mine waste downstream and recently published research shows that such failures are increasing globally despite modern mining technology.⁸ These impacted communities are still dealing with the environmental and human health fall out as a result of these failures.

NEPA requires “a reasonably thorough discussion of significant aspects of the probable environmental consequences” to “foster both informed decision-making and informed public participation.” *Ctr. for Biological Diversity v. Nat’l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008) (quotations and citations omitted). In this instance, where the proposal is highly technical and significant, and EIS is necessary for the agency to satisfy the mandates of NEPA.

It is also critical that USFS consider the synergistic impact of the concurrent Council of Environmental Quality (“CEQ”)’s proposed rulemaking that seeks to drastically re-write NEPA in its EIS. Update to the Regulations for Implementing the Procedural Provisions of the Nat’l Env’tl. Policy Act, 83 Fed. Reg. 28,591 (June 20, 2018). This rulemaking proposes to, among other things: change public involvement opportunities and mechanisms for engagement; revise NEPA terms such as “Major Federal Action,” “Effects,” “Cumulative Impact,” “Significantly,” and “Scope”; create new definitions for terms such as “Alternatives,” “Purpose and Need,” and “Reasonably Foreseeable”; revise “Notice of Intent” and “Categorical Exclusions”; and change the requirements for analyzing a range of alternatives. *Id.* at 28,591-92.

II. USFS’ Proposals Stemming from Executive Orders to Adopt Measures that Reduce, Minimize, or Eliminate Public Process Should be Rejected.

The undersigned have serious concerns that aspects of USFS’s proposed Subpart A rulemaking are taking direction from Executive Orders 13783, 13807, and 13817. In doing so, these aspects of the proposed rulemaking seek to reduce, minimize, or eliminate public process and other requirements that are necessary to safeguard natural resources, public process, and tribal interests. This effort to increase a single use of locatable minerals (and any specific minerals 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. § 475 (Under the Organic Act, the National Forests were established “to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows”; § 551 (Organic Act authorizes the agency to promulgate rules “to regulate their occupancy and use and to preserve the forests thereon from destruction.”). It is also concerning that USFS would base any aspect of its rulemaking process on these transparently political executive orders. Sound, relevant, and enduring regulations are made when the best available science and information are the guiding operative—not un-vetted executive whims like these

⁸ Mining 101, Earthworks, available at <https://earthworks.org/issues/mining/> (last visited **). Amazingly, despite these failures, industry continues to propose using the same design amounting to planned disasters.

three executive orders.

The Buckhorn Mine in north-central Washington is just one example of the value of NEPA. 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 became a less damaging underground mine, which reduced the overall impact to the land, water, and wildlife. Even still, like so many mines across the west, this now exhausted mine generates water contaminated with heavy metals such as copper, lead, and zinc. The Buckhorn Mine demonstrates that public process can and does reduce harms but that we desperately need mining reform that results in stronger and better protections.

The NEPA process also does not result in undue delay. According to the Government Accountability Office (GAO), the average time it takes BLM, USFS's sister agency, to permit a mine is just two years. This period is competitive with most Western democracies with robust mining industries like Australia, Canada, Chile, and Norway. When a permit takes longer than average, the reason is often the low quality of information operators provided in their mine plans, the agencies' limited resources, or changes in market conditions. Ultimately, NEPA is a source of strength and predictability. It helps lay the foundation for a mining company's social license to operate, which gives domestic mining a distinct competitive advantage.

Executive Order 13783

Executive Order ("EO") 13783, Promoting Energy Independence and Economic Growth, issued March 28, 2017 should not be relevant for shaping locatable minerals regulations, as evidenced by its very title. USFS's attempt to shoehorn this EO into the rulemaking process by rationalizing relevance via uranium and thorium is entirely inappropriate. Tribes and tribal land, communities, and public lands need *more* protection from the harms that are related to uranium mining and milling not less. *Supra* I. and attached documents regarding the toxic legacy uranium mining and milling has left in its wake and continuing problems at existing uranium mines. This misguided EO does not align with USFS's guiding laws and regulations that require the agency to "improve and protect the forest within the reservation [national forest] or for the purpose of securing favorable conditions of water flows" 16 U.S.C. § 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 this rulemaking process, it is incumbent that the USFS analyze the direct, indirect, and cumulative impacts of the actions proposed for uranium and thorium. This necessarily includes analyzing an alternative of regulating these minerals as any other locatable mineral as well as the reasonably 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 also critical that USFS analyze why these minerals should receive, as proposed, more lax regulatory

and public oversight and analyze an alternative of using existing Department of Energy uranium stockpiles.⁹

EO 13807

EO 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, issued August 15, 2017 is similarly misplaced as providing guidance in this proposed rulemaking process.

The notice states that USFS “is seeking to provide a more efficient process for approving exploration activities for the energy producing locatable minerals uranium and thorium where that exploration will cause 5 acres or less of surface disturbance on National Forest System lands for which reclamation has not been completed. This would achieve the result of the Forest Service being a good steward of public funds by avoiding wasteful processes consistent with Section 2e of the Executive Order.” It is anything but clear how excluding exploration activities for these minerals on unreclaimed sites equates to “being a good steward of public funds.” Such unreclaimed sites are often contaminated by radiation and heavy metals. Encouraging exploration that would likely disturb and could spread contamination by excluding it from robust USFS oversight and public review is a dangerous proposition. As explained in greater detail below, there is also no sufficient legal reason that a Plan of Operations should not be submitted for all activities above causal use. And, as also discussed below, these are the very types of activities that scoping and additional public process and agency analysis is needed for to ensure USFS can make an informed decision. Such process is all the more necessary for activities that could further spread contamination on public lands and waters.

EO 13817

USFS cites to EO 13817 (“critical minerals EO”) to rationalize its proposal to “increase exploration for, and mining of, critical minerals (Sec. 3(b)) and to revise permitting processes to expedite exploration for, and production of, critical minerals (Sec. 3(d)) and the revision of 36 CFR part 228, subpart A, in the manner being contemplated and described in this advance notice would help achieve those ends.” The agency continues, stating that “[f]or example, the Forest Service is seeking to provide a more efficient process for approving exploration activities for locatable minerals, including those that also are critical commodities for purposes of Executive Order 13817. This change should enhance operators’ interest in, and willingness

⁹ GAO-12-342SP: Energy: 40. Excess Uranium Inventories *available at* https://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-cycle-technologies/uranium-management-and-policy> (last visited **); Dep’t of Energy: Excess Uranium Transfers, GAO, *available at* <https://www.gao.gov/products/GAO-17-472T> (last visited **); Examining the Dep’t of Energy’s Excess Uranium Mgmt. Plan, *available at* https://archive.org/stream/gov.gpo.fdsys.CHRG-114hhrg94543/CHRG-114hhrg94543_djvu.txt (last visited **).

to, conduct exploratory operations on National Forest System lands and ultimately increase the production of critical minerals, consistent with both of these sections of the Executive Order.”

The critical minerals EO and related list of 35 minerals that the Department of Interior created after a truncated public process are highly controversial and embattled. For instance, a dozen- more than a third- of the designated minerals are byproducts. Operators sometimes invest considerably in water treatment systems designed to remove these same byproducts, like arsenic, designated as critical minerals. Uranium is a fuel mineral; Sec. 2(b)(i) of the critical minerals EO explicitly excludes fuel minerals from criticality designation. Our country enjoys a surplus of helium and beryllium, yet they too earned the “critical” label. See <https://www.federalregister.gov/documents/2018/05/18/2018-10667/final-list-of-critical-minerals-2018> and attached letter opposing the designation of “critical minerals.” <https://earthworks.org/publications/joint-comments-submitted-to-the-interior-department-on-draft-list-of-critical-minerals/>

At the rulemaking stage, it is no longer good enough to provide conclusory rationale as USFS has done here. The agency is obligated to provide a rational connection between the facts found and the decision that is made. *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). Where, as here, there is an overwhelming amount of information demonstrating that more—not less—regulatory oversight and public process is needed, there is not sufficient evidence to justify reducing, minimizing, or eliminating agency oversight and public process. The agency also cannot, as done here, make conclusions that are divorced from the reality of basic economics: market forces are the actual driver for mineral production—whether its uranium or any other mineral material.

The use of scoping is an important means to identify purpose, need, and reasonable alternatives to mining federal lands, such as storing uranium and other “critical minerals.” For example, mining uranium from federal lands serves no viable purpose or need when viewed in light of a Department of Energy program that costs millions of dollars to maintain federal stockpiles of already mined uranium.¹⁰ The sale of uranium from these stockpiles is limited to provide price supports for a “domestic” mining industry carried out largely by Canadian corporations on federal land. The proposed regulations propose a narrow scope of NEPA analysis that would conceal the effect of mining that would be to further flood the oversupplied global market with more federal minerals while the federal taxpayers are burdened by the expensive-to-maintain federal stockpiles. A robust NEPA scoping process is essential to disclose and address the realities of unnecessary conflicts in federal policies at the proposal stage, and during the comparison of alternatives. The undersigned firmly oppose any efforts to reduce, 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 attached exhibits (Exh. A-L), uranium exploration that has moved forward under the existing Categorical 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 “portable tank” in place of a fluid waste pit at the CP-3 site and several other sites, the company

¹⁰ *Supra* FN 7.

instead, used a tractor trailer to store drilling fluids and other residue at the CP-3. A tractor trailer that is suited for hauling solid material is not a “portable tank” nor is it suited for storing the types of liquid fluid and residue associated with uranium exploration. Uranium drilling waste that was being transported to the trailer through a green hose was leaking on the ground and had spilled over the top of the trailer into a wash. This spill created a white-yellow dried mud flow that extended approximately 20 feet downhill beneath the trailer. And, although USFS had required measures such as netting and fencing to prevent birds and other wildlife from accessing the drilling fluids, no such netting or fencing was deployed to prevent access to the drilling fluids and residue in the tractor trailer or around the spilled waste.

The importance of robust environmental review for uranium mining related activities is also 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 Cultural Property site that has critical religious and cultural importance to several tribes, especially the Havasupai. In 2017, this mine flooded resulting in dissolved uranium at 130 parts per billion in water pumped into the above-ground containment pond. This is 433% greater than the EPA limit for safe drinking water of 30 parts per billion. To prevent the pond from overflowing, the company 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 from heavily used animal trails through fence gaps onto the mining site. Wildlife are drinking and bathing in this contaminated water and it also poses serious bio-accumulation concerns. These are the exact direct, indirect, and cumulative impacts that are so critical for federal agencies to analyze and disclose in order to minimize, mitigate, and avoid harms to water resources and wildlife. This example demonstrates that already under existing law agencies fail to conduct such analysis leaving communities and wildlife in harm’s way. Protecting the health of indigenous people and their lands, as well as Americans and their public lands, requires that Congress strengthen, not weaken, mining laws and regulations.

As further discussed below, compliance with the other mandates of NEPA, such as but not limited to, analyzing a reasonable range of alternatives, direct, indirect, and cumulative impacts, as well as a reasonably complete mitigation effectiveness discussions, are needed to ensure USFS complies with its mandates under the Organic Act, National Forest Management Act (NFMA), the ESA, and other applicable statutes and implementing regulations. Doing so provides the opportunity for the agency to minimize and mitigate impacts to resources. These provisions should not be removed or made inapplicable for any category of minerals.

III. Responses to Questions in the Subpart A Advanced Notice of Proposed Rulemaking and Related Issues that USFS Should Address.

Responses to the questions are in bold following each question or set of questions in the ANPR.

(1) Classification of locatable mineral operations.

a. Currently, the regulations at 36 CFR part 228, subpart A, establish three

classes of locatable mineral operations: those which do not require an operator to provide the Forest Service with notice before operating, those requiring the operator to submit a notice of intent to conduct operations to the Forest Service before operating, and those requiring an operator to submit and obtain Forest Service approval of a proposed plan of operations. The operations which do not require an operator to provide notice before operating are identified by 36 CFR 228.4(a)(1). Those operations include, but are not limited to, using certain existing roads, performing prospecting and sampling which will not cause significant surface resource disturbance, conducting operations which will not cause surface resource disturbance substantially different from that caused by other users of the National Forest System who are not required to obtain another type of written authorization, and conducting operations which do not involve the use of mechanized earthmoving equipment or the cutting of trees unless these operations might otherwise cause a significant disturbance of surface resources. The operations for which an operator must submit a notice of intent to the Forest Service before operating are identified by 36 CFR 228.4(a) as those which might, but are not likely to, cause significant disturbance of surface resources. The operations for which an operator must submit and obtain Forest Service approval of a proposed plan of operations before operating are identified by 36 CFR 228.4(a)(3) - (a)(4) as those which will likely cause, or are actually causing, a significant disturbance of surface resources.

- b. The BLM's surface management regulations at 43 CFR 3809.10 similarly establish three classes of locatable minerals operations: casual use, notice-level operations, and plan-level operations. The operations which constitute casual use are identified by 43 CFR 3809.5 as those which ordinarily result in no or negligible disturbance of the public lands or resources managed by the BLM. Per 43 CFR 3809.10(a) an operator is not required to notify the BLM before beginning operations classified as casual use. Notice-level operations are identified by 43 CFR 3809.21 as exploration causing surface disturbance of 5 acres or less of public lands on which reclamation has not been completed. Generally 43 CFR 3809.10(b) requires an operator proposing to conduct notice-level operations to submit a notice to the BLM. In accordance with 43 CFR 3809.311 and 3809.312(d) an operator may not begin notice-level operations until the BLM determines that the operator's notice is complete and the operator has submitted the required financial guarantee. Typically, 43 CFR 3809.10(a) requires an operator to submit a proposed plan of operations for all other locatable mineral operations and 43 CFR 3809.412 prohibits the operator from beginning those operations until the BLM approves the plan of operations and the operator has submitted the required financial guarantee.
- c. The Forest Service is contemplating amending its regulations at 36 CFR part 228, subpart A, to increase consistency with the BLM's regulations which establish three classes of locatable mineral operations and specify the

requirements an operator must satisfy before commencing operations in each such class, to the extent that the Forest Service's unique statutory authorities allow this. Do you agree with this approach?

The approach used by both the Forest Service (USFS) and BLM, which allows mineral operations to proceed at the Notice-of-Intent (NOI) level without adequate, indeed ANY, public review should not be continued. The Part 228 Subpart A regulations must be revised to require public review of mineral operations on public land, at any level of impact above de-minimis casual use. As detailed herein, and shown by the attached documents, even small-scale mineral operations can have deleterious impacts, especially when conducted within or near streams/riparian areas, sensitive wildlife and/or plant habitats, etc. Impacts to public recreational uses, or Native American cultural/religious uses, are also immediately felt by these operations. The fact that such operations may not result in impacts associated with large open-pit operations does 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 a Plan of Operations (“PoO”) for all operations above casual use. Adopting PoOs for all operations above causal use is consistent with protecting Forest resources and is consistent with USFS’ approach to other extractive uses, such as oil and gas.¹¹ For example, USFS requires holders of oil and gas leases to submit a Surface Use Plan of Operations (“SUPO”) for all applications for permits to drill (“APD”) on the lease – regardless the size or level of impact. “No permit to drill on a Federal oil and gas lease for National Forest System lands may be granted without analysis and approval of a surface use plan of operations covering proposed surface disturbing activities.” 36 C.F.R. § 228.106. Thus the fact that a mining claim may have an arguable right to explore for minerals under the Mining Law does not mean that the claimant should be excused from submitting a proposed PoO for USFS review and approval. Holders of a

¹¹ The undersigned agree that USFS’ regulations for oil and gas should be vastly improved to better protect the public interest as well as Forest and ecosystem health. However, there are aspects of the oil and gas process that are reasonable and compelling to adopt for locatable minerals regulations as well should the agency move forward with revisions to this Subpart.

valid oil and gas lease also have certain property rights in the leasehold as well, yet have long been required to submit a SUPO.

At a minimum, USFS needs to ensure that any revision of the Part 228 Subpart A regulations 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 refuse to adopt such a provision, at a minimum the agency must clarify and require NEPA compliance for any activities above causal use (i.e. Notice and PoO proposals). Such a provision is also consistent with USFS regulations for oil and gas, which require USFS's APD SUPO review to comply with NEPA. In the context of oil and gas, USFS regulations provide that:

The authorized Forest officer shall review a surface use plan of operations as promptly as practicable given the nature and scope of the proposed plan. As part of the review, the authorized Forest officer shall comply with the National Environmental Policy Act of 1969, implementing regulations at 40 C.F.R. parts 1500–1508, and the Forest Service implementing policies and procedures set forth in Forest Service Manual Chapter 1950 and Forest Service Handbook 1909.15.

36 C.F.R. § 228.107.

Although pursuant to Section 390 of the Energy Policy Act of 2005, certain APDs are subject to congressionally-authorized Categorical Exclusions (“CE”) under NEPA, even in these limited instances USFS conducts the required scoping and public review – something that does not occur currently for NOI-level mining. According to the USFS's policy regarding these CEs, scoping and public review “is an integral part” of the agency's responsibilities:

Agency decisions that apply the Section 390 categorical exclusions are subject to agency NEPA procedures. The guidance below clarifies key NEPA requirements.

Scoping - Although the Council on Environmental Quality (CEQ) regulations require scoping only for environmental impact statement (EIS) preparation, the agency has broadened the concept to apply to all proposed actions subject to section 102 of

NEPA.

Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded from further analysis and documentation in an EA or an EIS (§220.6). (36 CFR 220.4(e)(1)).

The process of scoping is an integral part of environmental analysis. Scoping includes clarifying and refining the proposed action, identifying preliminary issues, identifying possible use of a CE, and identifying interested and affected persons. Effective scoping depends on all of the above as well as presenting a coherent proposal. The results of scoping are used to clarify public involvement methods, if any; refine issues; where applicable, select an interdisciplinary team; establish analysis criteria; and explore possible alternatives and their probable environmental effects.

In short, scoping is important to discover information that could point to the need for an 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 is determined by the Responsible Official.

Public Involvement – Agency regulations require that the public be kept informed of agency actions. Scoping initiates public involvement.

See, Energy Policy Act of 2005 Use of Section 390 Categorical Exclusions for Oil and Gas Activities, June 9, 2010 (italics in original).

<https://www.fs.fed.us/emc/nepa/includes/390guidance2.pdf>.¹²

There is no reason why these policies and procedures should not apply to hardrock/locatable mineral operations. Moreover, although as discussed herein the existing CE for short-term mineral exploration should be eliminated, scoping and public 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 its simultaneously proposed Rulemaking for 36 C.F.R. 228 Subpart E—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 far fewer actions than done currently, or in the past. The undersigned strongly oppose the proposal to limit and reduce informed decisionmaking and public process as they pertain to national forests. Both the Subpart A and Subpart E rulemakings 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 and disclose the direct, indirect, and cumulative environmental impact be analyzed. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8.

It should also be noted that, even under the Energy Policy Act's rebuttable presumption for a CE for certain APDs, even those CEs apply only where some previous NEPA and public review has occurred – which, again, is something that does not currently happen with NOI-level mining. For example, a CE would only apply to an APD if: “site-specific analysis in a document prepared pursuant to NEPA has been previously completed,” or when “Drilling an oil or gas well within a developed field for which an approved land use plan or any environmental document prepared pursuant to NEPA analyzed such drilling as a reasonably foreseeable activity, so long as such plan or document was approved within five (5) years prior to the date of spudding the well.” <https://www.fs.fed.us/emc/nepa/includes/390guidance2.pdf>. Further, regardless of whether a CE applies to an APD: “It is critical to note that use of Section 390 in no way limits or diminishes the Forest Service's substantive authority or responsibility regarding review and approval of a SUPO conducted pursuant to 36 CFR 228.107-108.” Id.

In short, because property rights holders in oil/gas leaseholds are required to submit a SUPO, subject to NEPA and public review – regardless of the level of impact or acreage – persons desiring to conduct hardrock/locatable mineral exploration or development above the level of casual use should be subject to at least the same requirements.

Lastly, in order to be consistent with BLM regulations, the revised USFS Part 228 regulations should expressly state that: “If State laws or regulations conflict with this subpart regarding operations on public lands, you must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart.” 43 C.F.R. § 3809.3. This position was formally expressed by the U.S. Department of Justice, representing BLM and USFS, in its brief to the California Supreme Court in People v. Rinehart, Case No. S222620, where the federal government stated that:

“Regulations promulgated by BLM similarly anticipate and require compliance with state environmental laws. Those regulations state that, in BLM’s view, a state environmental law or regulation must be complied with unless it directly conflicts with federal law. “If State laws or regulations conflict with this subpart regarding

operations on public lands, you must follow the requirements of this subpart. However, there is no conflict if the State law or regulation requires a higher standard of protection for public lands than this subpart.” 43 C.F.R. § 3809.3. The preamble for this regulation explains that “[u]nder the final rule, States may apply their laws to operations on public lands,” and “no conflict exists if the State regulation requires a higher level of environmental protection.” 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 with implementing that law have expressed any intent to fully preempt state regulation of mining activity on federal land. The federal government expects that states may impose restrictions on mining activity that are designed to protect the environment, and federal law requires miners to comply with those restrictions unless they directly conflict with federal law. See Amicus Brief of United States, at 12-13. *See also* Amicus Brief 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 to increase consistency with the BLM’s regulations which establish three classes of locatable mineral operations and specify the requirements which an operator must satisfy before commencing operations in each such class, please identify the classes of locatable mineral operations that you think the Forest Service should adopt. Also please identify all requirements that you think an operator should have to satisfy before commencing the locatable mineral operations 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, whether considered exploration/prospecting or mining/excavation/processing, above casual use. Casual use should be defined to cover only those activities that involve only a de-minimis level of impacts to public lands. For example, applicants proposing any use of motorized or mechanical equipment including but not limited to: backhoes, bulldozers, motorized roadgrading, motorized trenching, motorized processing/separation equipment, motorized suction dredging and/or highbanking, should be required to

submit a PoO.

For example, under the Northwest Forest Plan Minerals Management Standards, a Plan of Operations is required for all operations, regardless of size, that have any facilities, structures, etc., in Riparian Reserves: “MM-1. Require a reclamation plan, approved Plan of Operations, and reclamation bond for all minerals operations that include Riparian Reserves.” Northwest Forest Plan at C-34. Riparian Reserves are defined at C-30-31. www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprd3843203.pdf. At a minimum, due to the importance of riparian areas, this PoO requirement should apply in all national forests. In addition, this requirement should be included (if the agency does not require a PoO for all operations in all areas as noted above), for other valuable forest areas such as habitat for endangered, threatened, sensitive, or indicator species, Native American cultural/religious use sites, municipal watersheds, National Recreation Areas, special management areas, and any area designated in the applicable Forest Plan as warranting such review and protection.

As another example, in many waters in Idaho, the USFS (and BLM) require PoOs for all suction dredging. *See* Nez Perce-Clearwater National Forests Decision Notice/FONSI - Small-Scale Suction Dredging in Orogrande and French Creeks and South Fork Clearwater River (June

2016) https://www.fs.usda.gov/nfs/11558/www/nepa/101540_FSPLT3_3804945.pdf¹³

Nez Perce-Clearwater National Forests - EA - Small-Scale Suction Dredging in Orogrande and French Creeks and South Fork Clearwater River (June

¹³ All federal government documents cited herein are incorporated and included in the administrative record for this rulemaking.

2016) https://www.fs.usda.gov/nfs/11558/www/nepa/101540_FSPLT3_3804944.pdf

BLM - Cottonwood Field Office - Small-Scale Suction Dredging in Orogrande and French Creeks and South Fork Clearwater River (July 2016) [https://eplanning.blm.gov/epl-front-office/projects/nepa/63762/76393/84860/Suction Dredging DR signed 508.pdf](https://eplanning.blm.gov/epl-front-office/projects/nepa/63762/76393/84860/Suction_Dredging_DR_signed_508.pdf)

Clearwater National Forest - Record of Decision - Small-Scale Suction Dredging in Lolo and Moose Creeks (2010) -

https://www.fs.usda.gov/Internet/FSE_DOCUMENTS/fseprd537381.pdf

Upon receipt of a PoO, the USFS should immediately post the PoO and all supporting information online for public review. Any claims by the applicant that portions of the PoO contain confidential business information should be carefully scrutinized, with the overall goal of full public review.

Receipt of the PoO should begin the agency and public review process, including scoping under NEPA, consultation with Indian Tribes under the National Historic Preservation Act (“NHPA”) and related federal Executive Orders and requirements, consultation and compliance with the Endangered Species Act, etc.

Regarding NEPA, USFS should eliminate the current CE for “[s]hort-term (*1 year or less*) mineral, energy, or geophysical investigations and their incidental support activities,” 36 C.F.R. § 220.6(e)(8). Instead, all activities/operations should require review under an Environmental Assessment (“EA”), or Environmental Impact Statement (“EIS”), depending on whether the activities/operation pose a risk of significant impacts.

Categorical exclusions by their definition are not appropriate for mining related activities. Categorical exclusions are defined as “a category of actions which do not individually or cumulatively have a significant effect on the human environment and

which have been found to have no such effect in procedures adopted by a Federal agency . . . and . . . therefore, neither an environmental assessment nor an environmental impact statement is required.” 40 C.F.R. § 1508.4. As shown through various examples in these comments and attachments, environmental and human health risks and harms are unfortunately inherent in mining related activities. This makes it inappropriate for the existing CE to remain on the books, much less for USFS to contemplate adding more as part of this proposed rulemaking. Further, because the promulgation of the CE for short-term mineral 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 a minimum, this CE should be modified so “short-term” is far less than a year and clarify that such activities may have only minimal disturbance, meaning no new roads, no off-road use/drilling, no in-channel or riparian disturbance beyond casual use, etc. Regarding requirements that all applicants should have to satisfy before commencing operations and/or receiving USFS approval, the following requirements should apply, at a minimum, and be contained in the application/PoO:

(1) a list of all unpatented mining (lode/placer) and millsite claims the operations propose to utilize, including up-to-date information that the claim(s) is/are still active;

(2) if the applicant or the agency intends to assert that the applicant has a statutory right to conduct operations on, and/or result in occupancy on, unpatented claims (mining or millsite), evidence proving that the applicable claims are valid and satisfy all requirements of the 1872

Mining Law. For example, beyond initial exploration, for mining claims proposed to be utilized during the operation, the applicant must submit evidence proving that each claim contains the requisite discovery of a valuable mineral deposit (the test for a valid claim under the Mining Law).

“A mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim.” Lara v. Sect. of Interior, 820 F.2d 1535, 1537 (9th Cir. 1987).

“Thus, although a claimant may explore for mineral deposits before perfecting a mining claim, without a discovery, the claimant has no right to the property against the United States or an intervenor. 30 U.S.C. §23 (mining claim perfected when there is a ‘discovery of the vein or lode’).” Freeman v. Dept. of Interior, 37 F.Supp.3d 313, 319-20 (D.D.C. 2014). “[U]npatented claims amount to a potential property interest, since it is the discovery of a valuable mineral deposit and satisfaction of statutory and regulatory requirements that bestows possessory rights.” Id. at 321.

USFS policy recognizes that “rights” to use mining claims on public lands are dependent on whether the lands contain the requisite valuable mineral deposit. “In order to successfully defend rights to occupy and use a claim for prospecting and mining, a claimant must meet the requirements as specified or implied by the mining laws, in addition 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 mineral discovery.” USFS Minerals Manual § 2813.2. “A claim unsupported by a discovery of a valuable mineral deposit is invalid from the time of location, and the only rights the claimant has are those belonging to anyone to enter and prospect on National Forest lands.” Id. § 2811.5.

At a minimum, USFS must ensure that lands covered by mining claims at a proposed project contain the requisite locatable mineral, not “common variety” minerals that are not locatable, and are not covered by any rights under the Mining Law. Lands containing “common varieties” of rock, stone, etc., are not considered minerals subject to the Mining Law. 30 U.S.C. § 611 (“common varieties” of minerals are not locatable/claimable under the Mining Law). “The 1955 Multiple-Use Mining Act . . . provides that common varieties of mineral materials shall not be deemed valuable mineral deposits for purposes of establishing a mining claim.” USFS Manual § 2812.

If satisfactory evidence of both locatability and discovery is not provided for each claim proposed for more than initial exploration, then the USFS must inform the applicant that any operation proposed on such claim(s) are not governed by any statutory rights under the Mining Law and is not authorized under the Mining Law, and the agency’s review and approval on those public lands will be governed by the USFS’s Special Use regulations at 36 C.F.R. Part 251. “Rights to mine under the general mining laws are derivative of a discovery of a valuable mineral deposit and, absent such a discovery, denial of a plan of operations is entirely appropriate.” Great Basin Mine Watch, 146 IBLA 248, 256 (1998), 1998WL1060687, *8. If the operator objects to the agency’s finding of claim validity, it may challenge such finding before the hearings and appeal process of the Interior Department. In the meantime, the USFS will suspend its review of the PoO until the Interior Department (and federal courts if applicable) determines the validity of each claim.

Under federal law, except for initial exploration activities, it is the discovery of a valuable mineral deposit that supports a mining claimant's right to initiate mining operations on

public land. Therefore, the USFS must uphold the legal requirement that a claimant has made a discovery of a valuable mineral deposit in order to satisfy its own obligations to comply with the 1897 Organic Act, National Forest Management Act (NFMA) and other laws governing the USFS.

The question of whether a claim is valid is an integral part of the agency's analysis of a proposed mining project's considerations, because if the USFS approves a mine before ascertaining whether the mining "rights" have any merit, the agency risks unlawfully approving a mining operation under the auspices of the Mining law even though the Mining Law does not grant any rights that do not exist (such as permanent occupation of mining claims not shown to be valid). In addition, because the USFS has the responsibility and the power to maintain and protect public lands, the agency has a duty to ensure that public lands, a resource held by the government in trust for the public, are not used improperly, illegally, or upon alleged rights that do not exist.

Regarding additional information to be included in the PoO, all current submittal requirements found at 36 C.F.R. § 228.4(c) should remain, with the following additional information: (a) An identification of the hazardous materials and any other toxic materials, petroleum products, insecticides, pesticides, and herbicides that will be used during 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 be used 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 be maintained; (d) a complete reclamation and closure plan for all affected resources including, 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 be disturbed 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 or use that is consistent with the applicable Forest Plan¹⁴; (e) the amount of the proposed reclamation bond/financial assurance to cover all potential reclamation and protection of the affected lands, waters, and other resources (including a full reclamation and closure plan, with enough specificity for the agency and public to ascertain whether the proposed bond/financial assurance will be sufficient to cover all reasonably foreseeable/potential impacts; (f) baseline information and data for all potentially affected resources such as surface and ground water, air quality, wildlife, vegetation, etc.; (g) a description of all related operations that are occurring, or may occur, on lands not under the management of 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. This will greatly facilitate the USFS's NEPA review of the operations proposed on USFS lands (since such activities on lands administered by other entities must be analyzed in the USFS's NEPA review for the public-land portion of the operations), as well as public review of the full extent of the operations. On this point, it should be noted that USFS's

¹⁴ The applicable Forest Plan should not be amended to accommodate a proposed PoO. If the operations in a proposed PoO are inconsistent with any aspect of the Forest Plan, it should be denied pursuant to the National Forest Management Act, 36 C.F.R. § 219.15(e)(2). Although not the approach USFS should take, if the agency contemplates an amendment, USFS must comply with the substantive provisions of the planning rule (36 C.F.R. §§ 219.7-11), and all other relevant laws, regulations, and policies, as well as be supported by a full NEPA analysis. 36 C.F.R. § 219.13(b)(3).

authority over operations occurring on USFS lands is not limited to only impacts that occur on USFS lands. Rather, the agency has broad authority under the Property Clause of the U.S. Constitution (article IV) to protect other federal land as resources (such as BLM or National Park Service lands, federal water rights, etc.). The agency also has the duty under the Organic Act to protect “favorable conditions of water flows,” 16 U.S.C. § 475, originating on USFS lands (both surface and groundwater) that may be diminished/affected outside the boundary of USFS lands, as well as authority under the ESA to conserve listed species and their habitat off of USFS lands that may affected by operations conducted/approved by the USFS.

The Northwest Forest Plan, noted above, also mandates additional assurances and information as part of the PoO submittal and approval requirements. For example, that Plan (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 in a way compatible with Aquatic Conservation Strategy objectives. Road construction will be kept to the minimum necessary for the approved mineral activity. Such roads will be constructed and maintained to meet roads management standards and to minimize damage to resources in the Riparian Reserve. When a road is no longer required for mineral or land management activities, it will be closed, obliterated, and stabilized.

MM-3. Prohibit solid and sanitary waste facilities in Riparian Reserves. If no alternative to locating mine waste (waste rock, spent ore, tailings) facilities in

Riparian Reserves exists, and releases can be prevented, and stability can be ensured, then:

a. analyze the waste material using the best conventional sampling methods and analytic techniques to determine its chemical and physical stability characteristics.

b. locate and design the waste facilities using best conventional techniques to ensure mass stability and prevent the release of acid or toxic materials. If the best conventional technology is not sufficient to prevent such releases and ensure stability over the long term, prohibit such facilities in Riparian Reserves.

c. monitor waste and waste facilities after operations to ensure chemical and physical stability and to meet Aquatic Conservation Strategy objectives.

d. reclaim waste facilities after operations to ensure chemical and physical stability and to meet Aquatic Conservation Strategy objectives.

e. require reclamation bonds adequate to ensure long-term chemical and physical stability of mine waste facilities.

Such requirements should apply nationwide to all Riparian Reserves, as well as other valuable forest areas such as habitat for endangered, threatened, sensitive, or indicator species, Native American cultural/religious use sites, municipal watersheds, National Recreation Areas, special management areas, and any area designated in the applicable Forest Plan as warranting such submittals and requirements.

Another set of requirements, taken from the Interior Department's policy for coal mines, should be adopted by the USFS in order to meet its environmental protection mandates under the Organic Act, NFMA, and other applicable laws.

Objective 1

Only approve permits where the operation is designed to prevent off-site material damage to the hydrologic balance and minimize both on- and off- site disturbances to the hydrologic balance. In no case should a permit be approved if the determination of probable hydrologic consequences or other reliable hydrologic analysis predicts the formation of a postmining polluttional discharge that would require continuing long-term treatment without a defined endpoint.

Strategy 1.1 - Predictive techniques should be used to identify and characterize the site-specific acid- or toxic-forming conditions posing a risk of AMD formation.

Strategy 1.2 - Each mining and reclamation plan should specifically address identified acid- and toxic- forming conditions and demonstrate how off-site material damage will be prevented and on- and off-site disturbances minimized without the use of techniques that require long- term discharge treatment without a defined endpoint.

Strategy 1.3 - Each permit should include adequate measures, such as prevention and mitigation technologies, to control and manage identified acid- or toxic-forming AMD conditions and to protect the quality and quantity of surface and ground water systems during mining and reclamation.

See Interior Department, HYDROLOGIC BALANCE PROTECTION, POLICY GOALS AND OBJECTIVES on CORRECTING, PREVENTING AND CONTROLLING ACID/TOXIC MINE DRAINAGE, March 31, 1997, at 5. (italics original)

<https://www.osmre.gov/lrg/docs/amdpolicy033197.pdf>

Lastly, the revised regulations should require that applicants should reimburse the agency for all costs associated with processing the application and reviewing the application to ensure compliance with all federal laws. This includes not only reimbursal of all costs for conducting NEPA compliance (preparation of EAs/EISs), but also for all costs associated with processing the PoO or other approvals/requirements such as ESA consultation, as well as any mineral validity reviews, Surface Use Determinations, etc. The agency has broad authority to recover these costs pursuant to the 1952

Independent Offices Appropriation Act (IOAA), as amended, 31 U.S.C. § 9701 (originally

codified at 31 U.S.C. § 483a), which provides for cost recovery by federal agencies. The IOAA expresses the intent that services provided by agencies should be "self-sustaining to the extent possible," 31 U.S.C. § 9701(a), and authorizes agency heads to "prescribe regulations establishing the charge for a service or thing of value provided by the agency." 31 U.S.C. § 9701(b). See also, 1996 Interior Department Solicitor's Opinion, which although discussing in part that agency's authorities to recover costs under FLPMA, details the extensive authority of federal agencies to recover costs under the IOAA.

<https://doi.opengov.ibmcloud.com/sites/doi.opengov.ibmcloud.com/files/uploads/M-36987.pdf>

- e. If you previously concluded that 36 CFR part 228, subpart A, did not require you to give the Forest Service prior notice before you began conducting locatable mineral operations on National Forest System lands, what issues or challenges did you encounter once you began operating?

As noted, except for de-minimis non-motorized casual use, the revised part 228 regulations should eliminate NOI-level operations, as all operations/activities above casual use should require the submittal of a PoO.

- f. If you previously concluded that 36 CFR part 228, subpart A, only required you to submit a notice of intent before you began conducting locatable mineral operations on National Forest System lands, what issues or challenges did you encounter after submitting your notice of intent or after you began operating?

As noted, except for de-minimis non-motorized casual use, the revised part 228 regulations should eliminate NOI-level operations, as all operations/activities above casual use should require the submittal of a PoO.

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

As noted, except for de-minimis non-motorized casual use, the revised part 228 regulations should eliminate NOI-level operations, as all operations/activities above casual use should require the submittal of a PoO. At a minimum, PoOs must be required for any operation that may affect Riparian Reserves (as defined by the Northwest Forest Plan and applied nationwide), as well as other valuable forest areas such as habitat for endangered, threatened, sensitive, or indicator species, Native American cultural/religious use sites, municipal watersheds, National Recreation Areas, special management areas, and any area designated in the applicable Forest Plan as warranting such submittals and requirements.

- (2) Submitting, Receiving, Reviewing, Analyzing, and Approving Plans of Operations.
 - a. Today, 36 CFR 228.4(a)(3) and (4) requires an operator to submit, and obtain approval of, a proposed plan of operations before conducting locatable mineral operations which will likely cause, or are actually causing, a significant disturbance of National Forest System surface resources. Unfortunately, as the GAO's 2016 report entitled "Hardrock Mining: BLM and Forest Service Have Taken Some Action To Expedite the Mine Plan Review Process but Could Do More" concludes, the quality of the information operators include in such plans is frequently low, resulting in substantially delayed approval of these insufficient proposed plans. The Forest Service thinks that increasing the clarity of the plan of operations content requirements in 36 CFR part 228, subpart A, would result in better proposed plans of operations. The Forest Service also thinks that clarifying 36 CFR part 228, subpart A, to emphasize that proposed plans of operation must specify in detail the measures that operators intend to take to satisfy the requirements for environmental protection set out in 36 CFR 228.8 would result in better proposed plans of operation.

The undersigned agree that “proposed plans of operation must specify in detail the measures that operators intend to take to satisfy the requirements for environmental protection set out in 36 CFR 228.8 would result in better proposed plans of operation.”

- b. Nonetheless, the Forest Service has observed that the best proposed plans of operations often are submitted by operators who met with agency officials to discuss the formulation of their proposed plans. Thus, the Forest Service contemplates amending 36 CFR part 228, subpart A, to make operators aware that the Forest Service encourages them to meet with the appropriate local Forest Service official when the operator begins formulating a proposed plan to ensure that the operator knows and understands precisely what information a proposed plan of operations must contain for the agency to find it complete. The Forest Service thinks that routinely having such meetings would improve the quality of proposed plans of operation and consequently speed the approval of such plans.

The undersigned agree that “routinely having such meetings would improve the quality of proposed plans of operation and consequently speed the approval of such plans.” The regulations should also encourage prospective applicants and USFS to reach out to the affected public before a PoO is submitted as it is an opportunity to resolve potential conflicts 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's proposed plan of operations is complete before the agency begins the National Environmental Policy Act (NEPA)-related process of analyzing that plan and ensuring that the measures an operator intends to take to satisfy the requirements for environmental protection set out in 36 CFR 228.8 are appropriate. As the GAO's 2016 report finds, when analysis of a proposed plan of operations begins before the Forest Service has determined that the plan is complete, the consequence is likely to be that this analysis must be repeated or augmented due to subsequently identified gaps in the proposed plan. The GAO's 2016 report observes, and the Forest Service agrees, that the ultimate consequence of beginning to analyze an incomplete proposed plan of operations is delay in the plan's approval. Premature analysis of a proposed plan of operations also usually results in unnecessary expenditures on the part

of the Forest Service, and sometimes the operator. Therefore, the Forest Service is considering amending 36 CFR part 228, subpart A, to require an appropriate Forest Service official to initially review all proposed plans of operation for completeness. If that official finds a proposed plan incomplete, the agency would notify the operator, identify the additional information the operator must submit, and advise the operator that the Forest Service will not begin analyzing that plan until it is complete.

The undersigned agree “to require an appropriate Forest Service official to initially review all proposed plans of operation for completeness. If that official finds a proposed plan incomplete, the agency would notify the operator, identify the additional information the operator must submit, and advise the operator that the Forest Service will not begin analyzing that plan until it is complete.” To guard against a premature determination that a PoO is complete (and the premature commencement of the NEPA process), USFS’s regulations should provide an opportunity for the public to comment on whether the proposed PoO is complete and satisfies all of the submittal requirements in part 228. The undersigned also agree with the USFS’s and GAO’s determination that incomplete information provided by the permit applicant is the primary reason for permitting delays.

- d. Do you think that amending 36 CFR part 228, subpart A, to provide an opportunity for an operator to meet with the Forest Service before submitting a proposed plan of operations, or to require the Forest Service to determine that a proposed plan is complete before initiating its NEPA-related analysis of the plan will expedite approval of proposed plans of operations? Are there additional or alternate measures that you would recommend to expedite approval of proposed plans of operation submitted to the Forest Service under 36 CFR part 228, subpart A?

The undersigned agree that “an operator [should] meet with the Forest Service before submitting a proposed plan of operations, [and] to require the Forest Service to determine that a proposed plan is complete before initiating its NEPA-related analysis of

the plan will expedite approval of proposed plans of operations.” In addition, the affected public should be allowed to comment upon whether the proposed PoO is complete and satisfies all of the submittal requirements in part 228. This process will be expedited by the posting of the PoO and all supporting documents on the USFS website for the area (e.g., Ranger District and Forest) and at least 30 days before initiating scoping providing notice to the public that the information is posted.

- e. How should 36 CFR part 228, subpart A, be amended so that the requirements for submitting a proposed plan of operations and the process the Forest Service uses in receiving, reviewing, analyzing, and approving that plan are clear?

One way would be to develop a plain-language guidance document posted online. It must be stressed, however, that all claimholders and potential PoO applicants are obligated to know and comply with all applicable policies, regulations, and laws.

- f. What issues or challenges have you encountered with respect to preparing a proposed plan of operations or submitting that plan to the Forest Service pursuant 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’s initial review of a proposed PoO is not subject to public review, and is often withheld by the USFS even in response to FOIA requests. To correct this, as noted herein, the proposed PoO and all supporting information should be required to be submitted in electronic format so USFS can immediately post it online. The public should then be allowed to comment upon whether the proposed PoO is complete and meets all of the submittal requirements. The PALS system for projects would work well for posting the PoO and associated documents. The federal register should be used to notice the availability of

the documents and establish a timeframe.

- g. What issues or challenges have you encountered with respect to the Forest Service's receipt, review, analysis, or approval of a proposed plan of operations that you submitted under 36 CFR part 228 subpart A?

Although this question is roughly aimed at current operators, it highlights the overall issue of whether the USFS's review and approval of PoOs adequately protects public resources and meets the agencies duties under the Organic Act, Clean Water and Air Acts, Endangered Species Act, NFMA, and other applicable laws, regulations, and policies. The attached documents detail how the agency's current Part 228 review and approval process fails to protect public land and resources, as shown by the significant adverse impacts to public resources occurring from hardrock/locatable mineral operations. They also detail the toxic legacy that communities as well as lands 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 under 36 CFR part 228 subpart A, either the operator or the Forest Service may see reason why that plan should be modified. However, 36 CFR part 228, subpart A, does not explicitly recognize that an operator may request modification of an approved plan or provide procedures for such a modification. Insofar as the Forest Service is concerned, 36 CFR part 228, subpart A, permits a Forest Service official to ask an operator to submit a proposed modification of the approved plan for the purpose of minimizing unforeseen significant disturbance of surface resources. However, 36 CFR part 228, subpart A, provides that the Forest Service official cannot require the operator to submit such a proposed modification unless the official's immediate supervisor makes three findings. One of the necessary findings is that the Forest Service took all reasonable measures to predict the environmental impacts of the proposed operations prior to approving the plan of operations.
- b. The NRC's 1999 report entitled "Hard Rock Mining on Federal Lands" is strongly critical of these current 36 CFR part 228, subpart A, limitations upon the Forest Service's ability to require an operator to obtain approval of a

modified plan of operations. The NRC's 1999 report finds that "...arguments over what should have been 'foreseen' or whether a ... Forest Service officer took 'all reasonable measures' in approving the original plan makes the modification process dependent on looking backward. Instead, the process should focus on what may be needed in the future to correct problems that have resulted in harm or threatened harm. ...Modification procedures should look forward, rather than backward, and reflect advances in predictive capacity, technical capacity, and mining technology."

- c. Do you agree that 36 CFR part 228, subpart A, should be amended to explicitly permit an operator to request Forest Service approval for a modification of an existing plan of operations?

The undersigned agree that an operator should be able to request a modification of an existing PoO. However, such modification request must be submitted via a revised PoO and be subject to full review, analysis, and public comment under NEPA 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 operations modification provisions in 36 CFR part 228, subpart A, should be amended to permit the Forest Service to require modification of an approved plan in order 1) to correct problems that have resulted in harm or threatened harm to National Forest System surface resources and 2) to reflect advances in predictive capacity, technical capacity, and mining technology? If you do not agree with the 1999 NRC report's conclusion that 36 CFR part 228, subpart A, should be amended to allow the Forest Service to require an operator to modify an approved plan of operations to achieve these two ends, please identify any circumstances in addition to those in the current regulations which you think should permit the Forest Service to require modification of an approved plan of operations.

The undersigned agree that the USFS should be able to require a current operator to submit a modification of an existing PoO in order to correct problems that have resulted in harm or threatened harm to National Forest System resources (including groundwater), as well as to off-site areas that may be impacted (e.g., BLM lands, private and state lands), and to reflect advances in predictive capacity, technical capacity, and

mining technology.

In addition, the requirement to submit a revised PoO should be mandatory and triggered when there is any impact to any resource, whether on USFS land or not (e.g., off-site impacts), that was not fully reviewed (i.e. an impact beyond what was anticipated and analyzed) and expressly approved in the approval of the original/current PoO. The Canyon Mine flooding incident discussed above *supra* II is just one example where un-reviewed impacts occurred to lands with cultural significance as well as lands that are under national forest management.

As noted above, the amended PoO must be subject to full review, analysis, and public comment under NEPA and all applicable laws just the same as the original PoO application.

- e. Do you think that the regulations at 36 CFR part 228, subpart A, should be amended to set out the procedures which govern submission, receipt, review, analysis, and approval of a proposed modification of an existing plan of operations? If so, please describe the procedures that you think should be added to 36 CFR part 228, subpart A, to govern modification of existing plans of operations, including any differing requirements that should be adopted if the modification is being sought by the operator rather than the Forest Service.

The submittal requirements for information and data for a proposed modification/amendment of a PoO should be the same as noted above, regardless of whether the modification/amendment is submitted by the operator or the agency. In addition, the application for the modification/amendment should detail all of the circumstances that warrant the modification/amendment (e.g., any problems that arose since the approval of the original PoO, new changed conditions or relevant environmental information, etc.).

(4) Noncompliance and Enforcement.

- a. Currently the noncompliance provisions in 36 CFR part 228, subpart A, simply require the Forest Service to serve a notice of noncompliance upon an operator when the operator is not in compliance with 36 CFR part 228, subpart A, or an approved plan of operations and this noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources. The notice of noncompliance must describe the noncompliance, specify the actions that the operator must take to come into compliance, and specify the date by which such compliance is required. The regulations at 36 CFR part 228, subpart A, do not specify what further administrative actions the Forest Service may take if the operator does not meet the requirements set out in the notice of noncompliance.
- b. There also are judicial remedies that the federal government may pursue when an operator fails to comply with 36 CFR part 228, subpart A, or an approved plan of operations. A United States Attorney may bring a civil action in federal court 1) seeking an injunction requiring an operator to cease acting in a manner which violates 36 CFR part 228, subpart A, or the approved plan, or 2) seeking an order requiring the operator to take action required by 36 CFR part 228, subpart A, or the approved plan of operations and to compensate the United States for any damages that resulted from the operator's unlawful act. Federal criminal prosecution of an operator also is possible for violations of the Forest Service's regulations at 36 CFR part 261, subpart A, which bar users of the National Forest System, including locatable mineral operators, from acting in a manner prohibited by that Subpart. An operator charged with violating 36 CFR part 261, subpart A, which is a misdemeanor, may be prosecuted in federal court. If the operator is found guilty of violating such a prohibition, the court 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 operators have challenged these criminal prosecutions when the Forest Service has not first served them a notice of noncompliance. Although these challenges have failed, their pursuit nonetheless indicates that increasing the clarity of the Forest Service's regulations pertaining to the enforcement of 36 CFR part 228, subpart A, and approved plans of operations is desirable. The BLM has more administrative enforcement tools it can employ when an operator does not comply with the agency's surface management regulations at 43 CFR part 3800, subpart 3809, a notice, or an approved plan of operations. However, the action that the BLM takes is dependent upon whether a violation is significant. Under the BLM's regulations, a significant violation is one that causes or may result in environmental or other harm or danger, or one that substantially deviates from a notice or an approved plan of operations. When the BLM determines that an operator's noncompliance is significant, the agency may issue the operator an immediate temporary suspension order. If the operator takes the required corrective action in accordance with an immediate temporary suspension order, the BLM will lift the suspension. But if the operator fails to take the required corrective action, then once the BLM completes a specified process the agency may nullify the operator's notice or revoke the operator's approved plan of

operations.

- c. When the BLM determines that an operator's noncompliance is not significant, the agency may issue the operator a noncompliance order which describes the noncompliance, specifies the actions the operator must take to come into compliance, and specifies the date by which such compliance is required. If the operator takes the required corrective action, the BLM will lift the noncompliance order. However, if the operator fails to take the required corrective action, the BLM again assesses the violation's significance. If the BLM determines that the noncompliance is still not significant, the agency may require the operator to obtain approval of a plan of operations for current or future notice-level activity. But, if the BLM determines that the operator's noncompliance has become significant, then once the agency completes a specified process the BLM may issue the operator a suspension order. When the BLM issues a suspension order, the agency follows the same process applicable to an immediate temporary suspension order. Thus, the operator's failure to take comply with a suspension order may result in the agency nullifying the operator's notice or revoking the operator's approved plan of operations.
- d. There are judicial remedies that the federal government may pursue if an operator fails to comply with any of the BLM's enforcement orders. The civil remedies that a United States Attorney can seek are the same as the ones available when the noncompliance involves lands managed by the Forest Service. But if an operator knowingly and willfully violates the BLM's regulations at 43 CFR subpart 3809, the consequences of the operator's criminal prosecution may be far more severe than those operative when an operator violates 36 CFR part 261, subpart A. An individual operator convicted of violating the BLM's regulations is subject to a fine of not more than \$100,000, imprisonment for not more than 12 months, or both, for each offense. An organization or corporation convicted of violating the BLM's regulations is subject to a fine of not more than \$200,000.
- e. As the NRC's 1999 report entitled "Hard Rock Mining on Federal Lands" finds, the Forest Service's inability to issue a notice of noncompliance unless the operator fails to comply with 36 CFR part 228, subpart A, and that noncompliance is unnecessarily or unreasonably causing injury, loss or damage to National Forest System surface resources "has led to concern about the efficacy of the notice of noncompliance in preventing harm to [those] resources...." The fact that 36 CFR part 228, subpart A, does not expressly permit the Forest Service to suspend or revoke noncompliant plans of operations also poses an unnecessary risk that the agency would be challenged if it took these actions in order to prevent harm to National Forest System surface resources.
- f. The Forest Service is contemplating amending 36 CFR part 228, subpart A, to increase consistency with the BLM's regulations governing the enforcement of locatable mineral operations conducted upon public lands that the BLM manages, to the extent that the Forest Service's unique statutory authorities allow this. Do you agree with this approach?

The undersigned agree that the USFS needs to strengthen its enforcement of operations that do not comply with an approved PoO or NOI (for those still existing). The revised part 228 regulations should match, at a minimum, the BLM's enforcement authority. This includes being able to order the immediate suspension/halt of any activities not in strict accordance with the original/current PoO/NOI, including deviation from the terms of the PoO/NOI, or the discovery that the information submitted by the applicant for the PoO/NOI was not accurate.

Fines and penalties should be commensurate with the extent of the violation and at a minimum ensure that the operator did not obtain any financial advantage from the violation. For example, for a large operation, the BLM cap of \$200,000 may be substantially smaller than the revenues produced by the operation during the violation (e.g., un-remediated water quality problems) and provides little financial incentive to avoid similar problems in the future. In all cases, the fines/penalties should not be capped and should reflect not only a deterrent effect, but full compensation for all agency costs to investigate and remediate the problem. Damage to other public and private resources (water quality and quantity impacts, recreation/tourism losses, agricultural losses) 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 to increase consistency with the BLM's regulations governing the enforcement of locatable mineral operations conducted upon public lands that the BLM manages, please describe the enforcement procedures that you think the Forest Service should adopt to prevent noncompliance with the agency's requirements governing locatable mineral operations from harming National Forest System surface resources.**
- h. Please describe the processes that the Forest Service should be mandated to follow if 36 CFR part 228, subpart A, is amended to permit the Forest**

Service to take the following enforcement actions: ordering the suspension of noncompliant operations, in whole or in part, requiring noncompliant operators to obtain approval of a plan of operations for current or future notice-level operations, and nullifying a noncompliant operator's notice or revoking a noncompliant operator's approved plan of operations.

USFS enforcement procedures should be at least similar to BLM's. At a minimum, the agency must have the authority to order the immediate suspension/stay of any and all activities/operations not in strict compliance with the terms of an approved PoO/NOI, and the applicant/operator's statements and assurances made to the agency and the public during the PoO/NOI review and approval process.

This is especially true for any environmental risk that develops after the approval of the PoO/NOI. For example, if a risk of an environmental hazard or condition develops after the original approval (e.g., development of water pollution/acid mine drainage, leaks from containment facilities or structures such as liners), all operator and agency resources should be devoted to immediately fixing the problem or potential problem. The operator should not be allowed to continue mining/processing/exploring until all potential risks are eliminated. In such a scenario, immediate suspension/stay of all operations not specifically aimed at fixing the problem is warranted.

It should be noted that an immediate suspension/stay order does not raise any due process issues for the operator, as the operator is on notice that it is only authorized to conduct operations, and is only authorized to adversely impact the environment, as allowed in the approved PoO/NOI. Towards this end, the agency rules should require that the agency expressly notify all potential PoO/NOI operators that it will

be subject to immediate suspension/stay if the PoO/NOI is strictly adhered to, or if environmental impacts arise which were not reviewed and approved in the PoO/NOI.

Of course, an operator may seek judicial review of the agency’s violation and suspension decision, but such decisions should not be stayed (i.e., the stay of operations remains in force) unless a court issues an injunction against such decision and stay.

(5) Reasonably Incident Use and Occupancy.

- a. The Surface Resources Act of 1955, 30 U.S.C. 612(a), applies to National Forest System lands and prohibits the use of mining claims for any purpose other than prospecting, mining, or processing operations and uses reasonably incident thereto. But federal courts had held that the mining laws only entitle persons conducting locatable mineral operations to use surface resources for prospecting, exploration, development, mining, and processing purposes, and for reasonably incident uses long before 1955. Usually, two categories of uses that may be reasonably incident to prospecting, exploration, development, mining, and processing operations uses are recognized. One is called “occupancy,” or sometimes “residency,” and means full or part-time residence on federal lands subject to the mining laws along with activities or things that promote such residence such as the construction or maintenance of structures for residential purposes and of barriers to access. The term “use” generally refers to all other activities or things that promote prospecting, exploration, development, mining, and processing, such as the maintenance of equipment and the construction or maintenance of access facilities.

This discussion erroneously interprets applicable federal law governing the review and approval 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 operations on mining claims under assumed statutory rights under the Mining Law itself or the 1955 Act 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 initial exploration), or even whether there are mining claims at all (*See* current Part 228

definition of “operations”). Under this erroneous view of especially the 1955 Act, the agency believes that as long as any activity is “reasonably related” to mineral operations, the applicant has a statutory right to conduct such operations, and the agency cannot “materially interfere” with the applicant’s desired economic returns.

That is wrong. The USFS’s recent FEIS and Record of Decision (ROD) for the Rosemont Copper 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>. “Rosemont Copper is *entitled* to conduct operations that are reasonably incidental to exploration and development of mineral deposits on its mining claims pursuant to applicable U.S. laws and regulations and is asserting its *right* under the General Mining Law to mine and remove the mineral deposit subject to regulatory laws.”

FEIS ix (emphasis added). “Federal law provides the right for a proponent to develop the mineral resources it owns and to use the surface of its unpatented mining claims for mining and processing operations and reasonably incidental uses (see 30 U.S.C.612).” ROD 14.

The Mine would also violate the current Forest Plan for the Coronado National Forest, but due to the agency’s erroneous belief that Rosemont has a statutory right to conduct its operations, it amended the Plan to remove protections for wildlife, environmental, and cultural resources. ROD 31-32. “I determined that modifying the proposed project to comply with the current Coronado forest plan would materially interfere with mineral operations, which is beyond my legal authority.” ROD 32. The FEIS listed the dozens of standards and guidelines in the Plan that would be violated by the Mine. FEIS 115, 117.

USFS wrongly believes that it cannot “materially interfere” with Rosemont’s desired economic interests in the Mine. “The Coronado . . . cannot materially interfere with

reasonably necessary activities under the General Mining Law.” FEIS 94, ROD 31. “The Forest Service is not authorized by these Acts and regulations to . . . impose . . . mitigation measures or operational limitations that would render the project infeasible from an economic standpoint.” USFS Response to Objections (available on file with USFS).

Contrary to the agency’s position, “rights” under the Mining Law are not absolute. There is thus no legal or factual basis for USFS’s assertion that applicants have an absolute right under 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 to explore for valuable mineral deposits, 30 U.S.C. §22; (2) the right to possess, occupy, and extract minerals from the lands in which valuable mineral deposits are found, 30 U.S.C. §26; and (3) the right to patent lands in which valuable mineral deposits are found, 30 U.S.C. §29.

Mineral Policy Center v. Norton, 292 F. Supp. 2d 30, 47 (D.D.C. 2003). Thus, while giving a limited right to initially explore for minerals, the Mining Law specifically restricts the right of long-term occupation and development of mining claims to public lands to only where there has been a discovery of a “valuable mineral deposit.” 30 U.S.C. §§22, 26. “All *valuable mineral deposits* in lands belonging to the United States . . . shall be free and open to exploration and purchase, *and the lands in which they are found to occupation and purchase.*” 30 U.S.C. § 22 (emphasis added).

Mining claims are “valid against the United States if there has been a discovery of [a valuable] mineral within the limits of the claim.” Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963). Importantly, mining claim location (claim staking) does not indicate a discovery or provide any rights. “[L]ocation is the act or series of acts whereby the boundaries of the claim are marked, etc., but it confers no right in the absence of discovery, both being essential to a valid claim.” Cole v. Ralph, 252 U.S. 286, 296 (1920).

“A mining claimant has the right to possession of a claim only if he has made a mineral discovery on the claim.” Lara v. Sect. of Interior, 820 F.2d 1535, 1537 (9th Cir. 1987).

“Thus, although a claimant may explore for mineral deposits before perfecting a mining claim, without a discovery, the claimant has no right to the property against the United States or an intervenor. 30 U.S.C. §23 (mining claim perfected when there is a ‘discovery of the vein or lode’).” Freeman v. Dept. of Interior, 37 F.Supp.3d 313, 319-20 (D.D.C. 2014).

“[U]npatented claims amount to a potential property interest, since it is the discovery of a valuable mineral deposit and satisfaction of statutory and regulatory requirements that bestows possessory rights.” Id. at 321.

USFS policy recognizes that “rights” to use public lands are dependent on whether the lands contain the requisite valuable mineral deposit. “In order to successfully defend rights to occupy and use a claim for prospecting and mining, a claimant must meet the requirements as specified or implied by the mining laws, in addition 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 mineral discovery.” USFS Minerals Manual § 2813.2. “A claim unsupported by a discovery of a valuable mineral deposit is invalid from the time of location, and the only rights the claimant has are those belonging to anyone to enter and prospect on National Forest lands.” Id. § 2811.5.

Accordingly, permanent use and occupancy of mining claims on lands not containing the requisite valuable mineral deposit, like all other uses of public land, are not governed by the Mining Law. Rather, these uses are governed by the full range of public land statutes. “Before an operator perfects her claim, because there are no rights under the Mining Law that must be respected, BLM has wide discretion in deciding whether to approve or

disapprove of a miner's proposed plan of operations." MPC, 292 F. Supp. 2d at 48.

"Rights to mine under the general mining laws are derivative of a discovery of a valuable mineral deposit and, absent such a discovery, denial of a plan of operations is entirely appropriate." 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 use public land for mine facilities when there is no evidence that these lands contain the requisite valuable minerals or otherwise comply with all requirements of the Mining Law. This is clear legal error, as the right to occupy a mining claim, unlike the right to initially explore, depends on the discovery of a valuable mineral deposit, a prerequisite which the USFS ignores.

USFS erroneously believes that an applicant's "rights" to permanently occupy public land do not depend on whether there are mining claims at all, let alone valuable minerals on each claim. *See* Rosemont FEIS 148 ("Mining claim location and demonstration of mineral discovery are not required for approval of a locatable minerals operations subject to Forest Service regulation."). *See also* 36 C.F.R. § 228.2 (defining "operations" authorized by the Mining Law to include any mining-related activity "regardless of whether said operations take place on or off mining claims."). Thus, according to USFS, the mere fact that proposed operations are mining-related automatically translates into permanent possessory rights under the Mining Law.

That is wrong. Such a regulation cannot override the plain language of the statutory command limiting rights to permanently "use and occupy" mining claims to only those lands containing valuable mineral deposits. 30 U.S.C. §22. *See United States v. Larionoff*, 431 U.S. 864, 873 (1977) (to be valid, regulations must be "consistent with the statute under which they are promulgated"). Here, § 22 of the Mining Law only "authorizes" permanent

use and occupancy of mining claims on lands containing the requisite valuable mineral deposit. The Mining Law limits the “right of possession and enjoyment of all the surface” to only “the locators of all mining locations made on any mineral vein, lode or ledge.” 30 U.S.C. § 26. The regulation must be consistent with this statutory requirement. It thus cannot be the case, contrary to USFS’s regulatory interpretation, that rights to permanently 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, electrical transmission lines, etc. Applications for these uses are not governed by the Mining Law and instead must be reviewed and approved/disapproved pursuant the Title V of the Federal Land Policy and Management Act of 1976 (FLPMA) and USFS regulations at 36 CFR Part 251. Water pipelines, transmission lines, and other conveyances cannot be authorized by the plan of operations approval process, which only involve “operations authorized by the United States mining laws.” 36 C.F.R. § 228.1. Approval of water and electrical transmission lines is not governed by any right under the Mining Law:

BLM apparently contends that a mining claimant does not need a right-of-way to convey water from land outside the claim for use on the claim. It asserts that such use is encompassed in the implied rights of access which a mining claimant possesses under the mining laws. Such an assertion cannot be credited. . . .

There is simply no authority for the assertion that mining claimants need not obtain a right-of-way under Title V for conveyance of water from lands outside the claim onto the claim.

Desert Survivors, 96 IBLA 193, 196 (1987), 1987WL110528, *3 (citations omitted). *See also* Far West Exploration, 100 IBLA 306, 309, n. 4 (1988), 1988WL110726, *3 (“a right-of-way must be obtained prior to transportation of water across Federal lands for mining.”). Although these Interior Department cases dealt with BLM lands, they apply

equally to USFS lands, as FLPMA Title V governs both agencies. 43 U.S.C. § 1761. The revised regulations should reflect this proper legal position to state that such infrastructure facilities are not considered “operations authorized by the Mining Law.” Regarding what is “authorized by the Mining Law,” the USFS also mistakenly believes that road access and infrastructure facilities crossing public land to facilitate mining operations on private or state lands is also governed by the purported “rights” under the Mining Law. Yet the Mining Law only applies to public land. 30 U.S.C. § 22 (right to valuable minerals only on “lands belonging to the United States”).

BLM, on the other hand, correctly recognizes that such access/use across public land is governed 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 an applicant 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 (“The purpose of this action is for the BLM to consider an application for an access road right-of-way from Zephyr across public land in Fremont County, Colorado. The need for the action is established by the BLM’s responsibility under Title V of the Federal Land Policy and Management Act of October 21, 1976, as amended (FLPMA), 43 U.S.C. 1716, to respond to requests for rights-of-way.”). https://eplanning.blm.gov/epl-front-office/projects/nepa/108344/155337/190106/DOI-BLM-CO-F020-2018-0043-EA_DRAFT.pdf. *See also* BLM, Environmental Assessment, Golden Asset Mine, DOI-MT-B070-2013-0023-EA, Case File MTM-106022 (“The Golden Asset Mine is located on private inholdings within BLM public lands. Therefore, the applicant would need authorization to haul ore from the mine across public land at greater than a casual use

rate. The BLM's need for the action is established by the BLM's responsibility under the Federal Land Policy and Management Act of 1976 (FLPMA Title V, Section 501) to respond to requests for right-of-way grants and whether a ROW shall be approved as requested, approved with conditions, or denied.”).

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.pdf

In interpreting the Organic Act, the agency further asserts that it lacks discretion or significant regulatory authority over mining. The Organic Act authorizes the agency to promulgate rules “to regulate their occupancy and use and to preserve the forests thereon from destruction.” 16 U.S.C. § 551. “[P]ersons entering the national forests for the purpose of exploiting mineral resources ‘must comply with the rules and regulations covering such national forests.’ 16 U.S.C. § 478.” Clouser v. Espy, 42 F.3d 1522, 1529 (9th Cir. 1994). Section 478 of the Act states: “Nothing in section . . . 551 of this title shall be construed as prohibiting . . . any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.” 16 U.S.C. § 478. The agency interprets this to mean that “16 U.S.C. 478 bars the Forest Service from prohibiting locatable mineral operations on lands subject to the U.S. mining laws either directly or by regulation amounting to a prohibition.” Rosemont ROD 82.

Yet, Section 478 does not limit USFS's authority under Section 551 “to regulate their occupancy and use and to preserve the forests thereon from destruction.” Rather, that

provision was added in the debate over the Act to ensure that the newly-created National Forests were not “withdrawn” or “reserved” from the filing of mining claims. As the leading treatise on the creation of the National Forests explains:

Initially, mining was not permitted in the forest reserves, which were created by presidential proclamation and withdrawn from mineral and other forms of entry. From 1891 until 1897, western and eastern lawmakers battled over this locking up of mineral lands. After six years of heated controversy, the western representatives prevailed. Eastern conservationists realized that if forest reserves were not opened to mining, they would be abolished altogether . . . Thus, the 1897 Organic Act permitted . . . mining in the forest reserves.

Wilkinson and Anderson, “Land and Resource Planning in the National Forests,” 64 OREGON L. REV. 246-47 (1985)(citations omitted). “This provision to open the reserves to mining was later supplemented to require miners to ‘comply with the rules and regulations covering such forest reservations.’ 30 Cong. Rec. 900 (1897).” *Id.* 50, n. 248. Thus, § 478 does not override the Act’s regulatory purpose “to preserve the forests from destruction.” In the ANPR and in the Rosemont ROD/FEIS, the agency relies on the Surface Resources Act/Multiple-Use Mining Act of 1955, 30 U.S.C. § 612, enacted to restrict the unauthorized use of mining claims, to argue that it cannot “materially interfere” with any activity “reasonably related to mineral exploration, extraction, or processing. “The Multiple-Use Mining 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.” ROD 13-14.

That law, however, does not stand for the proposition that miners have a “right” to permanently use/occupy mining claims divorced from the fundamental prerequisite of the discovery of valuable mineral deposits. “One of the purposes of the Act was to eliminate some of the abuses that had occurred under the mining laws. . . . But Congress did not

intend to change the basic principles of the mining laws.” Converse v. Udall, 399 F.2d 616, 617 (9th Cir. 1968). The 1955 Act had two purposes: (1) eliminating unauthorized use of mining claims by allowing only “prospecting, mining or processing operations and uses reasonably incident thereto,” and (2) allowing USFS/BLM to permit non-mining uses on mining claims, by eliminating the mining claimant’s exclusive right to use/possess claimed lands. 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* on mining, not an *expansion* of mining rights that somehow eliminated the requirement that rights to permanent use/occupancy of mining claims be based on the discovery of valuable minerals.

The “material interference” language relied on by USFS comes from the provision removing the claimant’s exclusive possession by allowing non-mining uses of these lands. 30 U.S.C. § 612(b). However, contrary to USFS’s view, this provision does not limit the agency’s authority to regulate mining operations. Rather, this limitation applies to the agency’s direct use of the lands covered by mining claims, or to the issuance of “permits and licenses” for *other* uses of mining claims. “[A]ny use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto.” Id. Nothing in this law limits USFS authority to regulate mining operations to just those measures that do not “materially interfere” with mining.

The Ninth Circuit has recognized that this “no material interference” provision applies *not* to USFS’s regulation of mining to protect public resources, but to the *other* uses

allowed by USFS on claims. “[T]he other uses by the general public cannot materially interfere with the prospecting and mining operation.” Curtis-Nevada, 611 F.2d at 1285. Previous cases that have affirmed USFS’s authority to regulate mining have pointed to this “interference” language, albeit only related to “rights conferred by the mining laws.” 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 forest resources is not strictly limited by economic considerations. In Clouser, the court affirmed the ability of the agency to restrict mining even to the point that the project would no longer be economically viable. “Virtually all forms of Forest Service regulation of mining claims—for instance, limiting the permissible methods of mining and prospecting in order to reduce incidental environmental damage—will result in increased operating costs, and thereby will affect claim validity.” 42 F.3d at 1530 (limiting claimant to pack-mule access). Under the Mining Law, “If the costs of compliance [with environmental protections] render the mineral development of a claim uneconomic, the claim, itself, is invalid and any plan of operations therefor is properly rejected.” 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 individuals and entities in an attempt to justify unlawful use and occupancy of federal lands. As the 1990 United States General Accounting Office report “Federal Land Management: Unauthorized Activities Occurring on Hardrock Mining Claims:” (United States General Accounting Office. 1990. Report to the Chairman, Subcommittee on Mining and Natural Resources, Committee on Interior and Insular Affairs, House of Representatives. Federal Land Management: 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 mining claims were using them for unauthorized residences, non-mining commercial operations, illegal activities, or speculative activities not related to legitimate

mining. The GAO's 1990 report also determines that these unauthorized activities result in a variety of problems, including blocked access to public land by fences and gates; safety hazards including threats of violence; environmental contamination caused by the unsafe storage of hazardous wastes; investment scams that defraud the public; and increased costs to reclaim damaged land or otherwise acquire land from claim holders intent on profiting from holding out for monetary compensation from parties wishing to use the land for other purposes. Accordingly, the GAO's 1990 report urges the Forest Service and the BLM to revise their regulations to limit use or occupancy under the mining laws to that which is reasonably incident.

- c. Issues regarding the propriety of use and occupancy under the Surface Resources Act's reasonably incident standard have generated, and continue to generate, frequent and protracted disputes between persons who are conducting locatable mineral operations and Forest Service personnel responsible for preventing unlawful use and occupancy of National Forest System lands. Moreover, a significant percentage of the judicial enforcement actions the federal government commences with regard to locatable mineral operations on National Forest System lands involve use and occupancy of the lands that is questionable or improper under 30 U.S.C. 612(a). Presently, 36 CFR part 228, subpart A, lacks express standards or procedures for determining whether proposed or existing use and occupancy is reasonably incident, regulating use and occupancy per se, and terminating use and occupancy which is not reasonably incident.
- d. The BLM's regulations at 43 CFR part 3710, subpart 3715, are designed to prevent or eliminate uses and occupancies of public lands which are not reasonably incident to locatable mineral prospecting, exploration, development, mining, or processing. These regulations establish a framework for distinguishing between bona fide uses and occupancies and those that represent abuse of the mining laws for non-mining pursuits. Specifically, the BLM's regulations establish procedures for beginning occupancy, inspection and enforcement, and managing existing uses and occupancies as well as standards 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 lands under the mining laws, to increase consistency with the BLM's regulations governing use and occupancy under the mining laws. Do you agree with this approach?

The undersigned agree that USFS regulations should be consistent with BLM

regulations regarding occupancy and use of public lands. As detailed above, however,

the revised regulations should make clear that mining claimants have no rights, above

initial exploration, to the use and occupancy of mining claims without providing detailed evidence that each and every claim satisfies the requirements of the Mining Law so as to be governed by the Mining Law (i.e., discovery of a valuable deposit of a locatable mineral for mining claims, and all requirements for use and occupancy of millsite claims under 30 U.S.C. § 42).

- f. If you do not agree that 36 CFR part 228, subpart A, should be amended to increase consistency with the BLM's regulations governing use and occupancy under the mining laws, please describe the requirements, standards, and procedures that you think the Forest Service should adopt to prevent unlawful use and occupancy of National Forest System surface resources that is not reasonably incident to prospecting, exploration, development, mining, or processing operations under the mining laws.

See above.

(6) Financial Guarantees.

- a. Current regulations at 36 CFR part 228, subpart A, include a section entitled “bonds” but there are many alternate kinds of financial assurance which the regulations recognize as being acceptable substitutes. Therefore, the Forest Service contemplates changing the title of this section to the broader terminology “Financial Guarantees.” The current regulations provide for the Forest Service authorized officer to review the adequacy of the estimated cost of reclamation and of the financial guarantee’s terms in connection with the approval of an initial plan of operations. But the regulations do not specifically provide that the authorized officer will subsequently review the cost estimate and the financial guarantee to ensure that they remain sufficient for final reclamation. The Forest Service is considering amending 36 CFR part 228, subpart A, to provide for such a subsequent review. An issue that the agency will consider is whether 36 CFR part 228, subpart A, should specifically provide that the review will occur at a fixed interval. The Forest Service also is considering whether to amend 36 CFR part 228, subpart A, to specifically provide for the establishment of a funding mechanism which will provide for post-closure obligations such as long-term water treatment and maintaining long-term infrastructure such as tailings impoundments. Another concern is what forms of financial guarantee should an operator be allowed to furnish to assure these long-term post-closure obligations.

The undersigned agree that the part 228 regulations should require the mandatory submittal of a funding mechanism for operation, reclamation, and closure as a condition of the USFS's review and approval of a PoO (or NOI, although as noted above the use of NOI-level approvals should be discontinued). The current part 228 subpart A regulations could be interpreted to mean that the USFS is not required to obtain such financial guarantee ("FG")/bond as a condition of approval. *See* 36 C.F.R. § 228.13 (FG/bond submitted "when required by the authorized officer"). BLM's 43 C.F.R. Part 3809 regulations make such FG/bond submittals and approval mandatory, 43 C.F.R. § 3809.500, as USFS should also require.

Regarding long-term impacts to public resources, the USFS should not approve any operations that will require long-term or perpetual treatment (e.g., water quality treatment). Allowing an operation to begin that will admittedly never be fully reclaimed due to its unending need for perpetual treatment violates the agency's duties to ensure the protection of public resources under the Organic Act, Minerals Policy Act of 1970, and other applicable laws. *See, e.g.,* Interior Department, HYDROLOGIC BALANCE PROTECTION, POLICY GOALS AND OBJECTIVES on CORRECTING, PREVENTING AND CONTROLLING ACID/TOXIC MINE DRAINAGE, March 31, 1997, at 5.

<https://www.osmre.gov/lrg/docs/amdpolicy033197.pdf> (*"In no case should a permit be approved if the determination of probable hydrologic consequences or other reliable hydrologic analysis predicts the formation of a postmining pollutional discharge that would require continuing long-term treatment without a defined endpoint."*). Although

written for coal mines, there is no reason why the USFS cannot adopt this requirement for hardrock mines.

Regarding facilities that are not anticipated/predicted to need perpetual treatment, but could if circumstances change (e.g., tailings or leach facility predicted to be “zero discharge” due to liner systems but are discovered to actually leak/discharge), the FG/bond should include funds for ongoing monitoring to ensure the predictions are met, 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 be allowed to “self-bond” through corporate guarantees or similar mechanisms. Nor should an operator be allowed to submit blanket state or region wide FG/bonds. Each operation/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 the applicable state mine permitting agency, the USFS must maintain independent authority to ascertain the proper FG/bond amount as it is the USFS—not state agencies— that must protect public resources pursuant to the Organic Act, Minerals Policy Act of 1970, and other applicable laws. If the state agency requires a higher FG/bond amount than proposed/reviewed by the USFS, the higher FG/bond amount should control, but at no time should a lower FG/bond recommended by the state control over a higher USFS-imposed FG/bond.

Overall, the review and approval of an adequate reclamation/closure FG/bond is a critical part of the USFS’s oversight of mineral operations.

- b. What circumstances should permit the authorized officer to review the cost estimate and financial guarantee’s adequacy and require the operator to furnish an updated financial guarantee for reclamation or post-closure management?

The USFS should require the submittal of the FG/bond mechanism/instrument for any application seeking to use USFS lands. This should be required to be submitted with the applicant's initial application (i.e. PoO or any other application), and re-submitted for any alternative that might be proposed or reviewed by the applicant or the USFS during the NEPA process. Similarly, re-submission should be triggered when a PoO/NOI is substantially modified as well. Unlike current USFS policy, the agency should include the initial FG/bond amount for public review during the NEPA process, as well as the FG/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/bond amount and mechanism must also contain sufficient detail for the USFS and the public to judge its adequacy.

- c. How frequently should the authorized officer be allowed to initiate this review and update of the financial guarantees for reclamation or post-closure management?

The adequacy of the FG/bond amount and mechanism should be reviewed yearly, or more 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 subject to public review during the USFS's consideration of the initial, or any revised FG/bond. Any release of the FG/bond based upon an applicant's assertion that all reclamation obligations have been completed should be subject to public review and comment prior to the agency'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 and

withdrawal is environmental resource protection, but sometimes they are used in advance of a realty action to prevent the location of mining claims which might pose an obstacle to the contemplated realty action. The Forest Service's regulations at 36 CFR part 228, subpart A, do not contain provisions governing proposed or existing notices of intent to conduct operations and proposed or approved plans of operations for lands subject to mining claims that embrace segregated or withdrawn lands. As a matter of policy, the Forest Service employs the same procedures applicable to operations on segregated or withdrawn lands that are set forth in the BLM's regulations at 43 CFR 3809.100. However, the absence of explicit Forest Service regulations governing locatable mineral operations on segregated or withdrawn National Forest System lands has given rise to legal challenges concerning the propriety of this Forest Service policy.

- b. Under 43 CFR 3809.100, the BLM will not approve a plan of operations or allow notice-level operations to proceed on lands withdrawn from appropriation under the mining laws until the agency has prepared a mineral examination report to determine whether each of the mining claims on which the operations would be conducted was valid before the withdrawal and remains valid. Where lands have been segregated from appropriation under the mining laws, the BLM may, but is not required to, prepare such a mineral examination report before the agency approves a plan of operations or allows notice-level operations to proceed.
- c. If a BLM mineral examination report concludes that one or more of the mining claims in question are invalid, 43 CFR 3809.100 prohibits the agency from approving a plan of operations or allowing notice-level operations to occur on all such mining claims. Instead, the regulation requires the BLM to promptly initiate contest proceedings with respect to those mining claims. There is one exception to this process: prior to the completion of a required mineral examination report and any contest proceedings, 43 CFR 3809.100 permits the BLM to approve a plan of operations solely for the purposes of sampling to corroborate discovery points or complying with assessment work requirements. If the U.S. Department of the Interior's final decision with respect to a mineral contest declares any of the mining claims to be null and void, the operator must complete required reclamation but must cease all other operations on the lands formerly subject to all such mining claims.
- d. The Forest Service is contemplating amending 36 CFR part 228, subpart A, to increase consistency with the BLM's regulations governing operations on segregated or withdrawn lands. However, since the authority to determine the validity of mining claims lies with the Department of the Interior, the amendments would need to direct the Forest Service to ask the BLM to initiate contest proceedings with respect to mining claims whose validity is questioned by the Forest Service – a process consistent with an existing agreement between the Department of the Interior and the Department of Agriculture. Do you agree with this approach? Also, please specify whether you think that such amendments to 36 CFR part 228, subpart A, should treat locatable mineral operations conducted on segregated and withdrawn lands identically or

differently, and the reasons for your belief.

- e. If you do not agree that 36 CFR part 228, subpart A, should be amended to increase consistency with the BLM's regulations governing operations on segregated and withdrawn lands, please describe the requirements and procedures that you think the Forest Service should adopt to govern locatable mineral operations on National Forest System lands segregated or withdrawn from appropriation under the mining laws?

For both questions, the undersigned agree that USFS regulations, like BLM'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 lands withdrawn from appropriation under the mining laws until the agency has prepared a mineral examination report to determine whether each of the mining claims on which the operations would be conducted was valid before the withdrawal and remains valid.

The undersigned disagree, however, that BLM's policy that where lands have been segregated from appropriation under the mining laws, the BLM (or USFS) may, but are not required to, prepare such a mineral examination report before the agency approves operations complies with federal law. Under the Mining Law and public land law, the segregation acts the same as a withdrawal—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 the segregation and/or withdrawal. Thus, for the purposes of USFS review of a proposed PoO (again, NOI-level proposals should be eliminated and all operations above casual use must submit a PoO), the agency will not approve a PoO to proceed on lands withdrawn or segregated from appropriation under the mining laws until the agency has prepared a mineral examination report to determine whether each of the mining claims on which the operations would be conducted was valid before the

segregation/withdrawal and remains valid.

The undersigned also disagree with BLM's policy of not completing validity examinations for operations that had an approved PoO before a segregation or withdrawal was made. Forest Service regulations should instead require that validity examinations are completed for operations that have been approved prior to a subsequent segregation or withdrawal (i.e., in order to ensure that operators have a valid existing right to proceed with operations, validity confirmation should be required for previously-approved operations upon enactment of segregation or withdrawal).

The following process, found in other USFS regulations (36 C.F.R. § 292.64) should be followed:

[U]pon receipt of a plan of operations [or for previously-approved operations upon enactment of the segregation/withdrawal], the authorized officer shall review the information related to valid existing rights and notify the operator in writing within 60 days of one of the following situations: (1) That sufficient information on valid existing rights has been provided and the anticipated date by which 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 with written notice and explanation to the operator, extends the time period for completion of the valid existing rights determination. (2) That the operator has failed to provide sufficient information to review a claim of valid existing rights and, therefore, the authorized

officer has no obligation to evaluate whether the operator has valid existing rights or to process the operator's proposed plan of operations. (b)(1) If the authorized officer concludes that there is not sufficient evidence of valid existing rights, the officer shall so notify the operator in writing of the reasons for the determination, inform the operator that the proposed mineral operation cannot be conducted, advise the operator that the Forest Service will promptly notify the Bureau of Land Management of the determination and request the initiation of a mineral contest action against the pertinent mining claim, and advise the operator that further consideration of the proposed plan of operations is suspended pending final action by the Department of the Interior on the operator's claim of valid existing rights and any final judicial review thereof. (2) If the authorized officer concludes that there is not sufficient evidence of valid existing rights, the authorized officer also shall notify promptly the Bureau of Land Management of the determination and request the initiation of a mineral contest action against the pertinent mining claims. (c) An authorized officer's decision pursuant to paragraph (b) of this section that there is not sufficient evidence of valid existing rights is not subject to further agency or Department of Agriculture review or administrative appeal. (d) The authorized officer shall notify the operator in writing that the review of the remainder of the

proposed plan will proceed if: (1) The authorized officer concludes that there is sufficient evidence of valid existing rights; (2) Final agency action by the Department of the Interior determines that the applicable mining claim constitutes a valid existing right; or (3) Final judicial review of final agency action by the Department of the Interior finds that the applicable mining claim constitutes a valid existing right. (e) Upon completion of the review of the plan of operations, the authorized officer shall ensure that the minimum information required by § 292.63(c) of this subpart has been addressed and, pursuant to § 228.5(a) of this chapter, notify the operator in writing whether or not the plan of operations is approved. (f) If the plan of operations is not approved, the authorized officer shall explain in writing why the plan of operations cannot be approved. (g) If the plan of operations is approved, the authorized officer shall establish a time period for the proposed operations which shall be for the minimum amount of time reasonably necessary for a prudent operator to complete the mineral development activities covered by the approved plan of operations.

A similar approach was recently taken by the USFS regarding proposed “confirmation drilling” operations on existing claims in a withdrawn area in Oregon, where the USFS notified the claimant of the following requirements:

- (A) The Forest will send a letter to the claimant that a valid existing rights determination is required and identify the lead CME assigned**

to the case. The following information will be requested:

- Information concerning the subject mining claims (i.e. BLM claim numbers, location dates, maps) as well as data and/or documentation showing that a physical exposure/discovery of a valuable mineral deposit existed as of the date of segregation and continues to exist on each claim.
- Physical exposures include but are not limited to rock outcrops, trenches, pits, adits, shafts, and drill holes that display mineralization that separates it from the surrounding rock.
- Evidence of the degree of mineralization may be one of a variety of industry standard methods including, but not limited to, assays, chemical analysis, x-ray fluorescence, neutron activation, or onsite concentration and processing.
- The examiner will also request any geological, mineral resource, or other technical information that the claimant may have concerning the subject claims including, but not limited to, private or confidential mineral reports; identification of discovery points on each claim; physical exposure/sample location maps; assay/analytical results; sampling methodologies; sample descriptions; exploration results or resource/reserve estimates/calculations
- The results of metallurgical testing; likely mining, milling, and reclamation methods and cost estimates; and mineral recovery data for proposed milling processes.

(B) For any activities in the proposed Plan of Operations that [the proponent] contends are meant to obtain samples to confirm or corroborate mineral exposures that were physically accessible on the mining claim claims before the segregation date, the claimant will need to provide a description of how their proposed activities relate to and serve to confirm or corroborate those pre-existing mineral exposures for consideration by the mineral examiner.

- The examiner will assess and evaluate whether those activities constitute exploration or serve to confirm or corroborate pre-existing physical exposures/discovery points and provide their justification, rationale, and recommendations to the Authorized Officer in the form of a Surface Use Determination Report.
- If any additional activities are deemed appropriate and/or approved, the Forest Service will request that the claimant enter into a joint sampling agreement with the agency so that the results can be used to support the ongoing VER determination and associated mineral examination report.

Approval of any activities determined to serve to confirm or corroborate pre-existing

physical exposures/discovery points on the subject mining claims would still be subject to National Environmental Policy Act (NEPA) analysis and an associated decision.

Approval of any allowable activities would still require resolution of any outstanding environmental analysis issues in the existing NEPA analysis completed to date.

Attachment to August 7, 2018 letter from Forest Supervisor of the Rogue River-Siskiyou NF to Red Flat Nickel Corp. and associates (on file with USFS).

In addition to the NEPA requirements noted in that letter, due to the important resources in segregated/withdrawn area (the basis for segregations/withdrawals), any proposal to conduct any confirmation or corroboration drilling or related operations in a segregated/withdrawn area should be reviewed in an EIS.

(8) Procedures for Minerals or Materials that May Be Salable Mineral Materials,

Not Locatable Minerals

- a. Effective July 24, 1955 in accordance with 30 U.S.C. 601, 611, mineral materials, including but not limited to common varieties of sand, stone, gravel, pumice, pumicite, cinders, and clay found on National Forest System lands reserved from the public domain ceased being locatable under the mining laws. Instead, the Forest Service normally is required to sell these substances, which are collectively referred to as mineral materials, to the 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 FR 29784, 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 the public 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 is a common variety of that substance which is salable under the Materials Act of 1947, 30 U.S.C. 601-04, or an uncommon variety of that substance which is subject to appropriation under the mining laws, 30 U.S.C. 611, Forest Service policy calls for preparation of a mineral examination report to evaluate this issue. Pending resolution of the question as to whether the mineral or material is subject to appropriation under the mining laws, the Forest Service encourages an operator seeking to remove it in accordance

with 36 CFR part 228, subpart A, to establish an escrow account and deposit the appraised value of the substance in that account. But if the operator refuses to establish and make payments to an escrow account, 36 CFR part 228, subpart A, does not expressly permit the Forest Service to delay the substance's removal while the Forest Service considers whether the substance is a mineral material rather than a locatable mineral.

- c. The BLM's regulations at 43 CFR 3809.101 establish special procedures applicable to substances that may be salable mineral materials rather than locatable minerals. That section generally prohibits anyone from initiating operations for the substance until the BLM has prepared a mineral examination report evaluating this question. Prior to completion of the report and any resulting contest proceedings, the BLM will allow notice-level operations or approve a plan of operations when 1) the operations' purpose is either sampling to confirm or corroborate existing mineral exposures physically disclosed on the mining claim or complying with assessment work requirements, or 2) the operator establishes an acceptable escrow account and deposits the appraised value of the substance in that account under a payment schedule approved by the agency. If the mineral examination report concludes that the substance is salable rather than locatable, the BLM will initiate contest proceedings with respect to all mining claims on which locatable mineral operations are proposed unless the mining claimant elects to relinquish those mining claims. Upon the relinquishment of all such mining claims or the U.S. Department of the Interior's issuance of a final decision declaring those mining claims to be null and void, the operator must complete required reclamation but must cease all other operations on the lands formerly subject to those mining claims.
- d. The Forest Service is contemplating amending 36 CFR part 228, subpart A, to increase consistency with the BLM's regulations governing substances that may be salable mineral materials rather than locatable minerals. However, since the authority to determine the validity of mining claims lies with the Department of the Interior, the amendments would need to direct the Forest Service to ask the BLM to initiate contest proceedings with respect to mining claims which the Forest Service thinks are based upon an improper attempt to appropriate salable mineral materials under the mining laws – a process consistent with an existing agreement between the Department of the Interior and the Department of Agriculture. Do you agree with this approach?

The undersigned agree that BLM and USFS procedures should be more consistent. However, the undersigned disagree that applicants/operators should be allowed to conduct operations or remove any minerals from public lands pending the agency's determination as to whether the subject minerals are locatable or common variety.

Under federal mining laws (1872 Mining Law, 1955 Common Variety and Surface Resources Act), lands that do not contain locatable minerals are not subject to mineral entry. Relatedly, any adverse impacts to public land from activities associated with non-locatable minerals are not allowed, unless a mineral materials sales contract (with full public review) has been done.

Thus, a person should not be allowed to conduct operations without establishing that the minerals to be explored/removed are indeed locatable, and the agency should not approve any ground disturbance until the locatability issues have been finally resolved in the affirmative for each claim.

Allowing the applicant to establish an “escrow account” that would purportedly provide the future payments pursuant to an eventual minerals sale contract ignores the fundamental reality of possibly irreparable on-the-ground damage to public land that would occur in the meantime. The fact that the applicant would eventually pay the escrowed funds if the minerals were determined to be non-locatable does nothing to eliminate the damage caused in the meantime – damage that could easily have been avoided.

Further, approval of mineral material (i.e., non-locatable) operations are regulated under a very different regime than the current part 228 regulations governing locatable minerals. For example: “Mineral materials may be disposed of only if the authorized officer determines that the disposal is not detrimental to the public interest.” 36 C.F.R. § 228.43.

The agency should thus not allow operations to proceed if there is any question that the lands covered by the proposed operation may not be verified locatable minerals, under the guise that the lands contain locatable minerals. This question must be made before allowing any ground disturbance at the site, except for very limited sampling to assist the

agency in making the determination of whether the deposit is locatable or a common variety. As noted herein, any proposal to conduct such sampling should be fully subject to public review under NEPA, and should require the submittal of a PoO. And, to the extent 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 amended to increase consistency with the BLM's regulations governing substances that may be salable mineral materials rather than locatable minerals, please describe the requirements and procedures that you think the Forest Service should adopt to help ensure that the public interest and the Federal treasury are protected by preventing mineral materials from being given away for free contrary to 30 U.S.C. 602 which requires payment of their fair market value.
- 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 did you encounter in obtaining, or attempting to obtain, Forest Service approval of that plan?

See above.

IV. Conclusion

The undersigned appreciate the opportunity to comment and look forward to remaining engaged in this process if it moves forward. Again, we ask that USFS extend the public comment 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 and protective of USFS's resources like water and public lands. It is critical that USFS increase transparency and public involvement and engagement to ensure the twin aims of NEPA would be better satisfied in the context of site-specific proposals. To the extent USFS is contemplating adopting regulations to the contrary, this must be rejected.

Sincerely,

Friends of the Kalmiopsis
Central Colorado Wilderness Coalition

Basin and Range Watch
Save Our Sky Blue Waters
Save Lake Superior Association
Klamath Forest Alliance
Environmental Protection Information Center (EPIC)
Voyageurs National Park Association
The Wilderness Society
Quiet Use Coalition
Uranium Watch
Friends of the Inyo
Kentucky Heartwood
Friends of the Bitterroot
California Native Plant Society
Southern Environmental Law Center
WaterLegacy
Upper Peninsula Environmental Center
Conservation Congress
RESTORE: The North Woods
Sequoia ForestKeeper
Upper Gila Watershed Alliance
Morongo Basin Conservation Association
Shawnee Forest Sentinels
Southern Illinois Against Fracturing Our Environment
Global Justice Ecology Project
San Juan Citizens Alliance
Kalmiopsis Audubon Society
Earthworks
Earthjustice
Sierra Club
Center for Biological Diversity
Western Environmental Law Center
Gila Conservation Coalition
Gila Resources Information Project
Pacific Coast Federation of Fishermen's Associations (PCFFA)
Institute for Fisheries Resources
Northeastern Minnesotans for Wilderness
Californians for Western Wilderness
Shawnee Chapter, Illinois Audubon Society
California Nevada Desert Committee, Sierra Club
Arizona Mining Reform Coalition
Mount Graham Coalition
Friends of the Clearwater
Idaho Conservation League
Black Hills Clean Water Alliance
Information Network for Responsible Mining (INFORM)
Rock Creek Alliance

Save Our Cabinets
Great Old Broads for Wilderness, Boise, Idaho Chapter
Great Old Broads for Wilderness
Uranium Watch
Multicultural Alliance for a Safe Environment
Copper Country Alliance
Brooks Range Council
American Bird Conservancy
Conservatives for Responsible Stewardship
Friends of the Bell Smith Springs
High Country Conservation Advocates
Grand Canyon Trust
Defenders of Wildlife
League of Conservation Voters
National Parks Conservation Association
Friends of Del Norte