



October 15, 2018

USDA Forest Service
Attn: Director – MGM Staff
1617 Cole Blvd., Building 17
Lakewood, CO 80401

Bill Harvey
Commission Chair
bharvey@bakerequnty.org

Electronic Submission: <http://www.regulations.gov>
Docket No: FS-2018-0052

Dear Sir,

Baker County appreciates the opportunity to provide comments and guidance for the administration of locatable minerals. Baker County was founded on mining, forests and water that created our rich culture, customs and economic heritage. Today, our ties are still to the land and our social and economic welfare increases, or declines, in direct response to federal laws and land use plans.

The Baker County Board of Commissioners is charged with governing the County in the best interests of its citizens, their health, safety, and welfare, its economic base, and the natural environment. Mining could become, once again, a driving force in the economy. However, the process to get a Plan of Operations through the Forest Service has become an abyss of paperwork and time. It is not uncommon to have miners that have waited on Plan approval for over 20 years. This is an encumbrance on our economy that does not have to be. With this in mind, we provide the comments and guidance below.

We'd like to commend the Forest Service for recognizing that, "the Forest Service may not prohibit locatable mineral operations on lands subject to the Mining Law that otherwise comply with applicable law, nor regulate those operations in a manner which amounts to a prohibition." (Fed Reg. Vol. 83 No. 178) Unfortunately, this has been forgotten or ignored and has led to the Forest Service writing forest plans, aquatic plans, and on-the-ground actions that do, indeed, make mining prohibitive.

Since the passage of Executive Order 13817, miners in Baker County have become enthusiastic as the area is rich in several of the (35) listed critical minerals. It is imperative that the Forest Service provide an efficient process for approving exploration activities for locatable minerals, including those that are critical commodities. Neither the County or America can wait to begin production, especially due to the encumbrance of federal regulations and process.

- (1) c. Baker County agrees that the best means to improve efficiency is to be consistent with the BLM's surface management regulations that allow for three classes of locatable minerals operations: Casual use, notice-level operations, and plan-level operations to the extent that "the Forest Service's unique statutory authorities allow". This would include: Organic Act of 1897; 1955 Surface Use Act; 1976 National Forest Management Act; Multiple Use Sustained Yield Act of 1960. It is unclear how the "unique" statutory authorities would change the way the new proposed regulations would be implemented. This needs clarified.

Baker County would also like to see that exploration notice-level operations not be prohibited from selling gold. This differs from the BLM regulations.

e. There have been issues after the miner made the determination that Forest Service regulations did not require the miner to give notice prior to conducting operations. The most notable is road closures. Some miners have driven out to do assessments only to find their access roads closed. Others, were on their claims doing assessment work, and the Forest Service barricaded their roads so they could not get out. An addition to the regulations would be a requirement that the Forest Service post any road they plan to close one year before they close the road and engage with the County through government to government coordination. This would allow miners working under casual use to have the opportunity to inform the County and the Forest Service that they need to have the road remain open due to the statutory right to access and the RS 2477 rights of way law.

f. Miners have told the County on many occasions that the Forest Service, in almost all cases, would not allow testing to take place where the miner proposed and where minerals were located. The Forest Service decided where testing was to occur. This is not fair to the miner and undermines the process of mineral location.

g. Other environmental concerns or 'special' uses should not be prioritized over the statutory right to mine. Determinations based on T&E species, operations such as suction dredging or special land use status, should never affect the right to mine. Any extenuating 'special' concerns can potentially be mitigated through planning, but the classification of proposed mineral operations should not be based on them.

When the work proposed is for exploration, and less than 5-acres of surface is involved, a Notice, not subject to NEPA, is appropriate. When

exploration has proven out a resource, and the operator wants to begin mining, a mining Plan of Operation should be submitted. Miners who refuse to comply with requirements to resolve a noncompliance, should be required to submit a Plan of Operation, no matter which level of activity (Notice or Plan work) is proposed.

- 2) a. Baker County agrees that increasing the clarity of the plan of operations content requirements in 36 CFR part 228, Subpart A, would result in better proposed plans that would expedite approval. It is important for all stakeholders, including Forest Service personnel, to know, in detail, what is expected to be included on a plan of operation and be consistent throughout the Service. A miner should not take issue with detailing the measures that they intend to take to satisfy the requirements for environmental protection. And the County supports having them do so.
- a. Pre-submittal meetings should be mandatory to make operators, or their representatives, aware of exactly what is expected of them. "Encouraging" Forest Service personnel to engage in pre-submittal meetings will not be successful. The word "discretion" must be removed from the Forest Service regulations. The 228 regulations, as written, are interpreted by one ranger in one manner, and by another ranger in another manner. Make pre-submittal meetings mandatory and part of the process.
- b. Requiring an "appropriate" official to initially review all proposed Plans for completeness, is a concern for the County. Should there be a backlog of Plans, and the appropriate official is not available to review them, months or even years, could go by before the official has time to give his opinion on completeness. There must be a timeframe for completeness review of a submitted Plan (i.e. within 30-days).
- c. Baker County supports providing an opportunity for an operator, or their representative, to meet with the Forest Service pre-proposed plan of operations and requiring a determination of completeness prior to initiating NEPA. This will help expedite approval of proposed plans of operations as everyone will be 'on the same page' as to requirements and have the opportunity to work through any missing, changed, or incorrect data. However, once again, there must be timeframes for pre-proposal meetings and Plan completeness review.
- d. Amend 36 CFR 228, subpart A to:
 - a. Be written in a manner that is easier for the 'everyday' miner to understand,

- b. Mandate that the federal agencies coordinate with local governments.
 - c. Improve coordination with other federal and state agencies; have timeframes attached and prevent unnecessary administrative delay while managing public lands during mining and exploration as directed by Memorandums of Agreement.
 - d. Mandate that the federal agencies conduct pre-proposal meetings with the miner and other federal, state, and local agencies and stakeholders.
 - e. Mandate timeframes to dictate when the federal agencies must get their part of the process completed. Existing regulations give 90-days to approve a plan of operation, but they cannot comply with this timeframe because NEPA takes a lot longer than 90-days to complete. Therefore, the stated timeframe is irrelevant to the actual process. The regulations must be specific concerning timeframes for authorizations/approvals of notices and plans.
 - f. BLM occupancy regulations are clearly laid out and Baker County agrees that the Forest Service's regulations should be the same. Once again, consistency between the regulations is important so miners know what to expect.
- e. Miners in Baker County have experienced, and are currently experiencing, their plans of operations being held-up through a change in protocol at the US Forest Service. Plans are now grouped together, and held, until a large number in a single watershed can go through the process at the same time. This has caused a backlog of plans that have kept miners from mining their claims for many years. Compounded with the 'collection' of proposed plans, is the fact that it takes so long for the Forest Service to complete their part of the process. It would expedite the process to address each plan separately, and include a cumulative-effects section in each of the Plans which addresses all other mining activity, (also grazing, timber sales, and recreation) in the subwatershed, but make the decision about each mining operation on a site specific basis.
- f. See 'f' above. This is truly a significant problem that affects, not only the miner's economic viability, but also impacts potential income to the local, state, and federal governments.

In addition to the above, at the discretion of the local Forest Service officials, the hired mining consultant may, or may not, be a part of the process. This is causing a huge delay as the information needed gets to the consultant second hand. The regulations need to clarify and mandate who

may be allowed to participate in the plan of operation process. Once again, "discretion" needs to be eliminated.

- 3) Baker County recommends the Forest Service to adopt the BLM's process for modifying approved plans of operations.

However, one addition to this section, would be for the Forest Service to adopt the BLM regulations which pertain to transferring plans of operation. BLM requires that both the previous operator and the new operator sign a transfer form. The new operator must take responsibility for all outstanding reclamation and post his own reclamation bond. At that time, the prior operator's bond is returned. Currently, on the Forest, if a miner buys a claim with an approved plan of operation, the new miner must start over in gaining operating plan approval. In one instance that the County is aware of, both the former operator and the new operator have bonds posted. Double bonding must be prohibited. Too, there must be a timeframe for returning reclamation bonds (i.e. 30-days).

- 4) BLM's regulations are as "reasonable" as enforcement regulations can be. The agency's actions are based on whether the non-compliance is a significant violation (one that causes environmental harm or danger). This standard should also apply to the Forest Service regulations.

Baker County agrees that this section on enforcement will work, as it has been working for the BLM for nearly 20 years. The key is that the other parts of the regulations must also be changed, as all parts must fit together. Enforcement must be of reasonable regulations.

- 5) BLM occupancy regulations are clearly laid out and Baker County agrees that the Forest Service's regulations should be the same. However, there is a concern by hand operators that they will not be able to camp longer than 14 days. The regulations need to be clear that if occupancy is reasonably incident to the mining taking place, even casual use operator will be authorized to camp on site.

- 6) The change in verbiage, "bonds" to "financial guarantees" is not the important issue. However, it is important for the Forest Service to accept the same bonding spreadsheet, bond forms, and procedures that the BLM uses. Miners on the Forest will benefit by having the opportunity to submit third party bond riders, such as the BLM allow.

Reclamation bonds should be reviewed every five years or when a plan of operation is modified.

7) Baker County does not believe that segregations, special uses, or withdrawals should ever close lands to mining or any other multiple use. The statutory right to mine (1872 Mining Laws) were in effect long before the federal land agencies came into existence and began taking land for non-productive purposes. Miners have substantial rights to public mineral lands that are "dominate and primary" (legislative history for the 30 USC 612(a) and (b) statute). Any use of the surface or other surfaces resources by Federal agencies must yield to mining (*Shoemaker*, 110 IBLA 39, 53 (1989)).

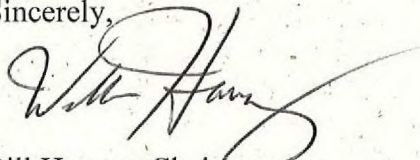
Baker County policies on special use designations can be found in the Baker County Natural Resources Plan (2016).

8) Once again, consistency should be prioritized. Steps need to be taken to direct the Forest Service and the BLM to align wherever possible. If this means that amendments need to be added to direct the interaction, then do so.

Baker County applauds the effort to make regulations regarding Locatable Minerals consistent between the Forest Service and the BLM, while ensuring that regulations in 36 CFR Part 228 work towards clarifying and expediting the process. However, it is also just as important to increase the accountability of federal personnel in implementing the regulations.

Government to government coordination is vitally important to the process and should be mandated instead of 'encouraged'. The Law of Coordination states the agencies "shall" coordinate, it's not an option. Local knowledge, history, culture, customs, and economic viability of the community must be taken into account when determining impact of mining operations and all multiple land uses. There is a balance between the environment and the social needs of natural resource use; the federal agencies must acknowledge and promote this.

Sincerely,

A handwritten signature in black ink, appearing to read "Bill Harvey", with a stylized flourish extending from the end.

Bill Harvey, Chairman
Baker County Commission