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October 15, 2018

Cheryl Nabahe, Director
Minerals and Geology Management
USDA Forest Service
1617 Cole Boulevard, Building 17
Lakewood, CO 80401

RE: Comments on the U.S. Forest Service's Advance Notice of Proposed Rulemaking Revising 36 CFR 228 Part A: Locatable Minerals – Docket Number FS-2018-0052

Dear Ms. Nabahe,

Please accept the following comments from Trout Unlimited (TU) on the potential environmental effects of the proposed changes to the U.S. Forest Service's Advance Notice of Proposed Rulemaking on Locatable Minerals Regulations. With the review of this proposal, our comments will reflect the key issues the U.S. Forest Service (USFS) has identified as they review and authorize current and new issues of concern regarding mineral operations authorized on USFS lands. While the USFS's stated goal is to expedite proposed mineral operations through this regulatory revision process, TU urges the agency to ensure that other objectives – including healthy fish and wildlife habitat, watershed protection and sustainability of ecosystems – are given due consideration and balanced with the goal of expediting mineral operations.

Trout Unlimited supports updating and clarifying regulations for the development of mineral resources on USFS landscapes. We believe it is long overdue and coordination among all the agencies involved in governing all the operations involved in mining operations is a necessary and formidable task. Since the process of conducting mineral exploration involves significant quantities of water and can result in significant, unavoidable impacts to the surface and groundwater resources, we urge the USFS to be judicious in creating a set of new regulations that provide balance and environmental protection, and which minimizes risk to those watersheds integral to aquatic and terrestrial ecosystems, downstream users, and public recreation.

Interested Party Background

Trout Unlimited is a national conservation organization with more than 300,000 members and supporters organized into 400 chapters from Maine to Alaska. Our mission is to conserve, protect and restore North America's coldwater fisheries and their watersheds. In 2017 alone, TU chapters invested 734,824 volunteer hours on their local streams and rivers to restore habitat for trout and salmon,

conducted youth conservation and fly-fishing camps, engaged in veteran's service programs, community events and taking kids fishing events. A significant portion of these activities occurred on USFS lands. In addition, TU conducts extensive restoration work (in partnership with the USFS) on abandoned mines located on national forest lands, spending more than \$13,000,000 over the last 19 years working to repair the damage done from the harmful and long-term effects of hardrock mining. We have a long history of partnering with the USFS to conserve and restore our nation's coldwater fisheries and their watershed and we offer these comments in the same spirit of collaboration.

Comments on the Proposal

The following discussion define our recommendations and the importance of thoughtful, balanced regulatory measures that are informed by public involvement and the best available science.

1. Proposed changes in USFS regulatory actions for permitting mining operations contain major, significant and complex deviations from the current process and have the potential to impact numerous environmental, cultural, historical and human health resources. Because of the significance and intensity of this proposal as a major federal action, we feel that the necessary level analysis is an Environmental Impact Statement (EIS) prior to any regulatory changes. 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.4; 40 C.F.R. § 1508.3.
2. Considering that the USFS is also revising its NEPA regulations¹ the agency should explain to the public how those changes in NEPA procedures will affect other federal actions, including how the USFS proceeds with the Minerals rulemaking actions. Changes to NEPA regulations will likely have an effect on permitting locatable minerals, creating the potential for inconsistencies and invalid assumptions in environmental analysis for the Minerals rulemaking.
3. The USFS and the BLM each manage acreage under the premise of multiple-use and sustained yield for a variety of commodities and attempt to do this without impairing those resources. While there are many similarities between the two agencies, they do have distinct differences and missions² that make them uniquely qualified to manage their respective landscapes—forests for the USFS and rangelands for the BLM. According to the Forest Service, its mission is to sustain the health, productivity, and diversity of the land to meet the needs of present and future generations³. One of the USFS's most important purposes is to ensure sustainable

¹ 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).

² The Forest and Rangelands Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976, also guides the management of the National Forest System. Together, these laws encourage foresight in using the nation's renewable resources and establish long-range strategic-planning processes for Forest Service management.

³ It accomplishes its mission through three major areas. • National Forest System—provides for the protection, management, and utilization of national forests and grasslands for a wide variety of purposes and values. Programs run the spectrum from the preservation of wilderness areas to intensive resource utilization for timber harvest or developed recreation areas. • Forest and Rangeland Research—discovers, develops, and disseminates knowledge and technology to sustain the health, productivity, and diversity of all lands for present and future generations. The Forest Service conducts and sponsors basic and applied scientific research • State and Private Forestry—enhances the health and sustainable management of the nation's urban and rural forests and related economies in partnership with federal, state, and local organizations. The Forest Service's programs provide technical and cost-

ecosystems and the Organic Administration Act (16 U.S.C. 478, 482) states that National Forests were established “to improve and protect the forest within the boundaries, or for the purposed of securing favorable conditions of water flows”; §551. Nothing in the NOI for this rulemaking process discusses the need to protect water flows but we urge the agency to give this important need due consideration in the rulemaking.

4. The NOI identified three Executive Orders (EOs) driving the need to improve regulatory standards for mining resources on forested lands. While TU understands that the rulemaking revisions are, in part, undertaken to comply with the EOs, there is a very real need to proceed deliberately and thoughtfully in developing these new rules.
 - As necessary as many of revisions may be, a thorough, transparent and robust process is necessary for the USFS and the public to effectively evaluate whether proposed regulation changes will be beneficial for the environment and the other multiple uses, not just expediting mineral extraction.
 - In referencing the objectives of all three EOs, the reader is left with the impression that there is a singular focus on increasing mining opportunities on national forest landscapes, potentially at the expense of all other resource consideration. We sincerely hope the USFS gives pause in interpreting the EOs and ensure that new regulations will achieve the necessary revisions while continuing to manage the forests under their primary mission directive.
 - The use of the best available science combined with thoughtful management measures should drive this rulemaking effort and a key objective priority must be protecting the irreplaceable water resources and landscapes of America’s national forests.
 - Lastly, we stress the need to maintain environmental protection measures and to continue the excellent job the USFS has done in encouraging, requesting and providing public comment participation opportunities in all levels of forest actions.
5. Classification of locatable mineral operations. The USFS seeks input on consolidating the classification of locatable mineral operations from their current three classes and proposes to follow the BLM’s three classes of locatable mineral operations. At first glance this may seem a wise step; however, the USFS should consider the differences in landscapes, ecology, water conditions, and impacts to its resources as they pursue this revision. We support the need to strengthen the current USFS permitting for locatable minerals. Too often, even operations not requiring a notice of intent to conduction operations can and do leave a consequential imprint on the landscape.
 - We recommend the USFS strengthen their current regulations, coordinate with the BLM for overlapping regulations were feasible and appropriate to the resource *but* create specific and relevant regulations that take into account the landscapes which will impacted on national forest lands.
 - Trout Unlimited and our many volunteers conduct significant work on national forests on abandoned mine lands and restoration and reclamation of rivers and streams. A key take-away from this work is that regulations for all classes of operators must be adopted. Like

sharing assistance to help ensure the sound stewardship and use of state and private forest lands.
<https://www.gpo.gov/fdsys/pkg/GAOREPORTS-RCED-99-227/pdf/GAOREPORTS-RCED-99-227.pdf>

- any forest user, mine operators have an obligation to be good stewards of the lands, even those who are prospecting, and the USFS has an obligation to establish parameters that provide at least a baseline for stewardship and resources protection. Additionally, enforceable standards provide the industry with consistency and helps remove the occasional “bad apple” who chooses not to conduct operations in a respectful manner to the resource and public. Conflicts with certain suction dredge mining operations on the Nez Perce – Clearwater National Forest is but one example of many that underscores this point.
- Monitoring, oversight, compliance and enforcement language must be included in the new regulations that address best management practices, provide support and address who and where operators can contact for issues, etc.
 - Stronger bonding for all class levels must be included in these regulations. Even at the basic prospecting level, new technology for prospecting creates a need to cover remedial costs of any abandoned mining operations. Updated bonding amounts and financial guarantees must also be included.
 - The USFS must require a Plan of Operations (PoO) for all levels of mining activities, they must be approved prior to any surface disturbance, and all proposed activities must be made available for public comment.
 - As outlined in the NOI, the need for a more efficient and cohesive management process is needed but implementing a speedier process does not always mean greater efficiency. It is apparent based on the research the USFS has on their mining operations, that they are losing money in this process, through staff expense, operator expense, duplication of efforts, etc. Clearly, funding is a shortcoming of the existing process that hinders efficiency; we ask that the rulemaking process consider this in their analyses.
 - The USFS may consider measures similarly used in oil and gas regulations on forest lands. Specifically, holders of oil and gas leases on USFS lands are required to submit a Surface Use Plan of Operations for any and all applications for permits to drill. We recommend the USFS consider adopting similar requirement for locatable minerals and expanding their merits to account for the new and expanding types of mineral activities destined to take place on National Forest lands.
 - Suction dredge mining results in significant impacts to river and riparian resources and in many Western states, state laws (Oregon, Washington) are being passed which limit suction dredge activities and increase permit requirements and environmental regulations. We recommend the USFS include analyses in the environmental review that researches the hazards and evaluates stronger mitigation requirements than that which currently exists.

6. Submitting/Approving Plans of Operations. We believe that there is much room to improve the process for reviewing and approving PoOs. Increasing the clarity of the PoO content may help, but TU suggests revamping the entire PoO document structure and requirements to update the process and provide information that addresses modern mining activities and their impacts.
 - This “facelift” should include definitions of what a PoO constitutes and defining the various levels of use, equipment management requirements and compliance, clear and unambiguous definitions regarding what the operator must do to meet the criteria for all levels of mineral activity, identification of environmental resource protection measures, how amendments or modifications to a PoO can be addressed, reporting and compliance

measures, monitoring requirements and the requirement for notifications of activities for public comment.

- The PoOs should also include timelines and inspection requirements, provide contact information which clearly identifies operator contacts and agency contacts for reporting and emergencies.
- We support the amendment concept proposed which increases operator and Forest Service staff communication and meetings. Increased coordination, cooperative exchanges and information sharing can only be helpful for all parties involved.
- We also support confirming the presence of a complete PoO prior to NEPA action as entirely appropriate as it seems intuitive that it would reduce costs, confusion, and wasteful staff and operator time.
- Finally, in answer to the numerous questions whether we support the NRC's 1999 report "Hard Rock Mining on Federal Lands", TU does approve of the recommendations offered in the report as it applies to improving the communication, enforcement, compliance, correct harm from resulting mining problems, etc. It is our sincere hope that through the improvement of the PoO document, additional consistency and stronger procedures implementation, these issues raised in the report will be remedied.

7. Enforcement tools for noncompliance and enforcement. Adoption of several BLM judicial remedies for violations and noncompliance issues may help strengthen the USFS's mining operations responsibility and oversight, as well as their financial outlook and improve efficiencies across agency lines. While we support consistency of these regulatory measures between USFS and BLM, the burden of actually engaging in governing of these operations must clearly be described and identified.

- Given that \$5,000 is the current fine for violations, adopting the stronger BLM language and fining structure may provide a stronger deterrent to operators who wish to conduct mining operations on national forests.
- Current judicial remedies need to be re-evaluated, fine assessments need to be assessed based on market economic costs of remediation and restoration (costs of a polluted/contaminated watershed and subsequent remediation to fish and wildlife and habitat should be updated), and an assortment of enforcement tools need to be reviewed. Enforcement actions can clearly be defined in regulatory efforts and in approval documents for the PoOs and discussed during the proposed agency-operator meetings.
- Violations definitions and monitoring requirements need to be addressed; the operator must understand their responsibilities and it is incumbent upon the agency to relay those requirements, including the ability of the USFS to revoke and suspend operations when damages and injury is occurring on national forest landscapes. Improving definitions for violations and consequential monitoring and compliance efforts means a commitment from USFS staff to undertake such actions, as well as fairness for operators by eliminating ambiguity.
- In order to adopt the proposed rulemaking language regarding enforcement and violations, the USFS needs to have the requisite staffing in order to make this work effectively. An increase in staff who are knowledgeably educated and adequately trained to assist or complete compliance, monitoring and enforcement is integral to the success of this

rulemaking process. While the budget and appropriations process are outside the scope of this rulemaking, we encourage the agency to consider how new regulations can support and justify future budget requests.

8. References in the NOI identify agency officials responsible for evaluating proposed plans and the numerous conflicts that occur in doing so. We recommend part of the analyses for this rulemaking effort include a review of the staffing within the USFS, ensuring that adequate staff with mining experience for reviewing the technical and scientific aspects of mining, water impacts and waste production be in place. The USFS has a highly respected and vital forest and rangeland research program nationwide, which the BLM does not. We recommend the incorporation of this program in providing input on the science of and watershed issues which occur with mining rather than turning this over to the BLM.
9. Surface Resources Act. Due to the high level of continued disputes, unlawful use, challenges enforcing actions and improper occupancy on national forest lands with respect to mining activities (as described in the NOI), TU supports the amendment to 36 CFR part 228 Subpart A which seeks to increase consistency with the BLM's regulations governing use and occupancy under the mining laws. However, we caution against an approach that may lead to the BLM assuming responsibility in conducting current and future governing of how mining operations are conducted for the USFS. Rather, any new regulation should identify source of responsibility, procedures for enacting these new responsibilities and notification processes for identifying such violations. In addition, such actions should be agency-coordinated and notification to the public should be made.
10. Financial Guarantees. We agree that the USFS has limited resources when it comes to adequately attaching financial assurance guarantees for the costs of reclamation and sufficient costs of plans by operators. In the 2004 report by the USFS on reclamation bond estimation, a list of reasons for bond inadequacy were large and solutions were small.⁴
 - Of note is the significant lack of consideration in understanding the entire operation activities of a mining action and complexity. In a 2009 and a 2012 study on the costs of reclamation, the authors discuss the weaknesses of bonding requirements and provide a more accountable method that fully accounts for the cost of reclamation.⁵ Reclamation costs are significant, and many western states are stuck with millions of dollars' worth of remediating abandoned or under-bonded projects, whether it is for hardrock mining or oil and gas operations.

⁴ USFS "Training Guide for Reclamation Bond Estimation and Administration: For Mineral Plans of Operation authorized and administered under 36 CFR 228A. USDA Forest Service. April 2004.

⁵ Anderson, Matt, et al. "Reclamation Costs and Regulation of Oil and Gas Development with Application to Wyoming." Presented at the Western Economics Forum, Spring 2009. <https://wyofile.com/wp-content/uploads/2012/06/Economic-Issues-and-Policies-Affecting-Reclamation-in-Wyomings-Oil-and-Gas-Industry-Final-Revision-1.pdf>.

- The type of mining activities dictates the types of reclamation costs and the USFS should provide thorough reviews on the differences in reclamation from one type of mining to another, such as those posed by uranium mining.⁶
- Limitations to bonding mean that all too often cleanup costs have been borne by federal and state agencies (and NGOs) when operators have defaulted on their obligations. We agree that an overhaul is needed in how the USFS reviews the adequacy of its bonding and the cost of reclamation. In addition, the USFS must understand that attaching financial assurances is not limited to certain activities of mining operations.
- Considerable literature now exists for estimating true and future costs, based on market economics, of reclamation bonding. We recommend the USFS thoroughly research and adopt stronger measures that provide more than adequate and reasonable financial guarantees from operators who chose to mine on national forest lands.

11. Operations on Withdrawn or Segregated Lands. We absolutely agree with the USFS's desire to conduct scoping notices of intent to conduct operations or proposed plans of operations that embrace segregated or withdrawn lands. The public should be made aware and be able to comment on any activity that is proposed, based on NEPA procedures and requirements, on federal lands, including national forest lands.

- We support the design of explicit regulations governing locatable mineral operations on segregated or withdrawn national forest lands. Adopting some of the language used in BLM's procedures is recommended; however, the USFS must be able to develop regulations that are specific for adoption on National Forest lands.
- We believe the USFS should not have to request permission from the BLM to initiate contest proceedings for the validity of mining claims. However, if there is not a process which allows the USFS to conduct this proceeding on its own then amending the regulation to direct the USFS to ask the BLM to initiate the proceedings should be considered with the caveat that the USFS has the final responsibility once the research has been conducted.

Summary

Because of the significance and complexity that presents itself in terms of potential environmental harm from the entire mining review, regulatory and approval process, TU requests that the USFS analyze the rulemaking proposal through an Environmental Impact Statement (EIS). There is a long history of critical impacts to habitat and watersheds on national forest lands across North America from the impacts of mining. Despite the continued efforts from the USFS in analyzing these impacts, we understand the current regulatory provisions provide inadequate protection measures, agency challenges and inefficiencies in management and policies of mining operations. It is complicated and technical; the mining laws are more lenient in many ways than other extractive uses on public lands, yet these activities have the potential for significant long-term environmental impacts. Therefore, the goal of the rulemaking process should not be to expedite permitting for mineral activities (as stated in the NOI), but rather to improve permitting efficiency while ensuring ecosystem sustainability. This should also include the continued engagement with and for the public. To that end, we hope that our comments are constructive and look forward to continued engagement in a robust public process for this rulemaking.

⁶ https://www.energy.gov/sites/prod/files/2017/07/f35/S10859_Cost.pdf

We appreciate the opportunity to participate in the long-awaited and important regulatory process.

Sincerely,

A handwritten signature in black ink, appearing to read 'Corey Fisher', with a stylized flourish at the end.

Corey Fisher
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