

September 6, 2022

Via CARA, U.S. Mail and Email to: SM.FS.TontoPlan@USDA.gov
USDA-Forest Service Southwest Region
ATTN: Objection Reviewing Officer
333 Broadway Blvd SE
Albuquerque, NM 87102

Re: Objection to Tonto National Forest Revised Land Management Plan and Final Environmental Impact Statement (March, 2022)

On behalf of the Pinto Valley Mining Corp. (“PVMC”), we are filing the following objections based on prior submitted formal substantive comments dated March 12, 2020 on the draft Tonto National Forest (“TNF”) Land Management Plan Revision and draft environmental impact statement.¹ Information required pursuant to 36 C.F.R. § 219.54 (c) follows:

I. Objector Contact Information:

Pinto Valley Mining Corp.
P.O. Box 100, 2911 N Forest Service Rd 287
Miami, AZ, 85539
Attn: Tim Ralston, Manager, External & Regulatory Affairs
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II. Subject of Objection: TNF Revised Land Management Plan (March 2022) (“LMP”) and related final environmental impact statement (“FEIS”) and draft record of decision (“DROD”).

III. Name and Title of Responsible Official: Neil Bosworth, TNF Forest Supervisor.

IV. Statement of the Issues and Applicable Parts of Revision to Which the Objection Applies: See relevant content set forth below.

¹ References to prior submitted comments shall hereafter be referred to as PVMC Comments (2020) at the relevant page or attachment number. In addition to the PVMC Comments (2020), PVMC also filed detailed comments on January 12, 2018 to the Preliminary Proposed LMP (hereafter PVMC Comments (2018)).

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V. Statement Explaining Objection, Suggestion for Improvement, Inconsistencies with Law, Regulation or Policy and Links Between Prior Substantive Formal Comments² and/or Issues Arising After Opportunities for Formal Comment: See relevant content set forth below.

1. Objections to Forestwide Plan Direction

A. Mining, Minerals, and Abandoned Mines³

i. Plan Content is Contrary to Law

The Multiple Use Sustained-Yield Act of 1960 (“MUSY”) is one of the foundational pieces of federal legislation relative to the administration of National Forest System (“NFS”) lands in that the statute added consideration of outdoor recreation, range, timber, watershed and wildlife and fish as supplemental management resources.⁴ Importantly, MUSY mandated that “[n]othing herein shall be construed so as to effect the use or administration of the mineral resources of national forest lands or to affect the use or administration of Federal lands not within national forests.”⁵

The principles of MUSY were again integrated into Section 6(e) of the National Forest Management Act of 1976 (“NFMA”) which states, in relevant part, with respect to forest plan revision, that plans shall “*provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the [MUSY] . . .*”⁶ These Congressional mandates manifest themselves in the 2021 Planning Rules at 36 C.F.R. § 219.1 and in other related provisions.⁷

Boiled down, exploration and mining (pursuant to the 1872 Mining Law) and the economic benefits and ecosystem services that flow therefrom must be acknowledged and planned for on NFS land. The fundamental right to explore and develop mineral resources may not be eroded through: (i) the establishment of desired conditions that fail to recognize the inherent capability (and in some cases limitations) of mineralized areas; or (ii) standards and guidelines that restrict mining or subject mine exploration and development to continued plan amendments or impracticable and unreasonable design or mitigation criteria. Prime examples of this include content in the Mining, Minerals, and Abandoned Mines, Roads and Arizona National Scenic Trail⁸

² Said links to prior PVMC comments will be identified in footnotes in the specific subject matter heading of the objection.

³ See prior PVMC Comments (2020) at Attachment 1-1 thru 1-4.

⁴ 16 U.S.C. § 528.

⁵ *Id.*

⁶ 36 C.F.R. § 219.1(b); see also 36 C.F.R. § 219.6(b); 36 C.F.R. § 219.8; 36 C.F.R. § 219.10.

⁷ See also 36 C.F.R. § 219.8(3)(b).

⁸ See FEIS, Ch. 3 at p. 241 (confirming that Alternative B will “lead to greater protection of the trail’s values . . . because the standards and guidelines *restrict non-confirming uses, prohibit the sale and extraction of common variety*”).

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directives sections that preclude or unduly restrict mining or adversely affect the administration and use of NFS lands for development of mineral resources.

In addition to the foregoing, the LMP fails to undertake any meaningful assessment of the economic contributions from mining. Specifically, in Appendix B to the FEIS, there is discussion of the assumptions used for the economic benefits from mining but they are unclear and lacking in accuracy, substance and content. In relevant part, the explanation reads:

“Copper mining is the driving factor behind the economic contribution of the minerals program to the regional economy. Two of the currently operating copper mines are in stages of closure and therefore production will decrease over time. For this analysis the Carlota Copper Mine production is not included as final closure is expected in 2020. *The remaining production is assumed constant.* While mineral production and associated revenues (and therefore actual economic impact) will fluctuate based on global market conditions and the lifecycle of a the mine, this is outside the control of forest management. *No quantitative variation in mineral production across alternatives is modeled. Qualitative discussion of recommended areas removed from mineral entry is included in this analyses.*”⁹

In fact, this explanation confirms that no meaningful effort was undertaken relative to assessing any benefits of mining (notwithstanding the recognition that copper mining is the driving factor behind the regional economy) and the only effort purportedly undertaken was to qualitatively assess areas removed from mineral entry. As described above and herein, the LMP falls short of meeting the requirements of the MUSY, NFMA and the United States Forest Service (“USFS”) planning regulations.

ii. Desired Conditions¹⁰ Are Inconsistent with Applicable Regulations

In its comments on the draft LMP, PVMC pointed out that MMAM-DC-01 and 02 were inconsistent with applicable locatable mineral regulations, but the TNF disregarded PVMC’s concerns on the basis that the law did not “need to be repeated” and claimed that the applicable legal standards were being “emphasized” in MMAM DC-01¹¹ and that MMAM DC-02 was merely an “aspiration” or a “vision” of what the plan area should look like.¹² To the contrary, any adopted

minerals within trail corridors, protect scenic values along trails, and enhance economic values to nearby communities.”)

⁹ FEIS, Appendix B, at pg. 18.

¹⁰ Desired conditions are descriptions of specific, social, economic, and/or other ecological characteristics of the plan area, or a portion of the plan area, toward which management of the land and resources should be directed (36 C.F.R. § 219.7 (e)(1)(i)).

¹¹ FEIS Vol. 3, Appendix A, at pg. 124.

¹² FEIS Vol. 3, Appendix A, at pg. 250.

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desired conditions must be consistent with the capability of the planning area, existing law, regulation and policy and recognize the MUSY principles. Management of the land and resources per the LMP cannot be directed or “envisioned” in a manner to the contrary.

iii. Standards MMAM-S-02 and MMAM-S-04 are Inconsistent with Applicable Regulation

Standards are mandatory constraints on project and activity decision-making and deviation requires a plan amendment.¹³ As such, it is particularly important that standards reflect applicable regulatory requirements. PVMC advised the TNF that MMAM-S-02 was contrary to existing locatable minerals regulations, and the TNF rejected PVMC’s comments on the basis that the “standard reflects that the management of this resource is already decided by existing, law, regulation, and policy [but] *[b]ased on experience, it needs to be taken further.*”¹⁴ Without more, the “*need to be taken further*” is not sufficient justification to require reclamation standards that do not comport with existing regulations.

New MMAM-S-04: A new MMAM standard was included in the LMP which is highly objectionable (requiring a Notice of Intent (“NOI”) be submitted for all proposed geophysical investigations). PVMC did not have an opportunity to comment on this standard previously, because it was not included in the draft LMP. Therefore, PVMC lodges its’ objection now based on the fact that new MMAM-S-04 is totally contrary to existing Forest Service regulation and policy.

Specifically, the Forest Service regulations provide a list of when NOIs are not required.¹⁵ For example, NOIs are not needed for:

- “Operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes”;
- “prospecting and sampling which *will not cause* significant surface resource disturbance and will not involve removal of more than a reasonable amount of mineral deposit for analysis and study . . .”; or
- “Operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or back-hoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources.”

Clearly geophysical investigations can be conducted in accord with the regulations above, not causing SSRD, and not requiring NOI submittal. It is not legally permissible for the TNF to

¹³ 36 C.F.R. § 219 (e)(1)(iii).

¹⁴ FEIS Vol. 3, Appendix A, at pgs. 125-26.

¹⁵ 36 C.F.R. § 228.4 (a)(1).

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unilaterally deem all methods of geophysical investigation to require NOI submittal (particularly as a LMP standard without engaging in required rulemaking procedures). Determinations of significant surface resource disturbance (“SSRD”) occur initially on an operator-by-operator, case-by-case basis which is spelled out in existing Forest Service regulation¹⁶ and policy.¹⁷ In fact, the trigger for a NOI is the operator’s reasonable uncertainty as to the significance of the potential effects of the proposed operations. Where there is no question, an operator’s reasonable certainty is the relevant threshold. Where an operator makes a reasoned conclusion that operations will not cause SSRD, no NOI is required. In fact, District Ranger determinations of SSRD only become relevant when there is some question as to whether or not SSRD may result from proposed operations thus requiring plan of operations submittal. The District Ranger authority is mis-cited in the LMP as a justification to require NOIs for all geophysical work and should likewise be removed.¹⁸

Suggestions for improvement: (i) include PVMC’s proposed language changes for MMAM DC-01 and DC-02 and MMAM-S-02 as shown in **Attachment 1**; and (ii) remove MMAM-S-04. With respect to MMAM-S-04, if the Forest Service desires to make all geophysical exploration subject to NOI submittal, it must adopt a rule pursuant to proper notice and comment proceedings and may not do so via the adoption of a forest plan standard that is wholly inconsistent with existing agency regulations and policy.

B. Roads¹⁹

The majority of PVMC’s comments on the draft LMP plan components for roads sought inclusion of, or reference to, concepts or language inherent in provisions of the mining law and/or the locatable mining regulations. Unfortunately, many of PVMC’s comments were rejected by the TNF on the following basis:

The Tonto National Forest recognizes the rights under the Mining Law and applicable regulations for each project proposed with plans of operations (see Mining, Minerals, and Abandoned Mines section in chapter 2 of the forest plan). Per revised plan (chapter 1, under Forest Plan Framework and Organization, Plan Components section), guidelines describe constraints on project and activity decision-making that allow for departure from its terms, so long as *the intent of the guideline is met*. In other words, guidelines are mandatory with *some flexibility on how they are implemented in meeting the intent of the existing guideline*. Most of the guidance for mining is governed by law, regulation, and policy, *which does not*

¹⁶ See 70 Fed. Reg. 32713 (June 6, 2005).

¹⁷ See Forest Service, FSM 2800 (Minerals and Geology), Chapter 2810 (Mining Claims), Section 2817.1 (Notice of Intent to Operate) and **Attachment 2** (USFS Flow Chart on SSRD Determinations).

¹⁸ TNF LMP, at pg. 58 (footnote 38).

¹⁹ See prior PVMC Comments (2020) at Attachment 1-9 thru 1-11.

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need to be repeated within the forest plan. Future projects and activities, of any kind, must be consistent with the forest plan and various laws, agency policy, including direction related to access for exploration or mining operations.²⁰

Per 36 C.F.R. § 219.7(e)(1)(iv), guidelines are *a constraint on project and activity decisionmaking* that allows for departure from its terms, only *so long as the purpose of the guideline is met*. In fact, that same regulation provides that guidelines are established to “*meet applicable legal requirements*.” Moreover, the 2012 planning regulations require that plans “*provide for ecosystem services and multiple uses*” and require the inclusion of “*standards and guidelines, for integrated resource management to provide for ecosystem services and multiple uses in the plan area*.”²¹ Thus, the legal requirements applicable to exploration and mining cannot be ignored in the development of desired conditions, standards and guidelines for roads on the basis provided by the TNF above. Roads are critically necessary for use in mineral exploration and development and for economic exploration of minerals.

PVMC’s concern is not that exploration or mine development will be precluded, but that forest plan amendments will be required for even the smallest departure from the standards and guidelines on the basis that the “*purpose of the guideline*” cannot be met. Further, the purpose of all guidelines is to achieve or maintain a desired condition and, in this LMP, there are no desired conditions in the roads section that recognize multiple use or economic development related to minerals or renewable energy. Instead, all desired conditions are focused on sustainability and minimizing adverse environmental impacts without any recognition of the inherent capability of mineralized areas.

The TNF should, as one of its primary objectives, seek to minimize the number of plan amendments that will be required by building in as much flexibility as possible to the language of adopted desired conditions, standards and guidelines in order to make positive determinations of plan consistency, particularly in areas where locatable minerals are known to exist and likely to be developed in the future (by virtue of technological advancements, fluxions in commodity prices or new discoveries).

Suggestion for improvement: Reconsider the inclusion of PVMC’s proposed language changes for RD-DC-04, RD-G-01, RD-G-02, RD-G-03, RD-G-05 and RD-MA-02 as shown in **Attachment 1**.

²⁰ FEIS Vol. 3, Appendix A, at pg. 257.

²¹ 36 C.F.R. § 219.10 (a).

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C. Watersheds and Water Resources

i. Failure to Coordinate Under the Watershed Condition Framework (“WCF”) Requirements in Classification and Identification of Priority Watersheds²²

The WCF was established pursuant to the 2018 Farm Bill (16 U.S.C. § 6543) and where utilized by the USFS, the agency must follow the mandates of Congress. The Forest planning regulations require plans to “*identify watershed(s) that are a priority for maintenance or restoration.*”²³ Using the WCF to make this identification requires an evaluation and classification of the condition of the watershed;²⁴ then the identification for protection and restoration of up to 5 priority watersheds in each National Forest;²⁵ and then the development of a watershed protection and restoration action plan for each priority watershed.²⁶ In carrying out all of the foregoing, Congress mandated that the Forest Service “*shall* coordinate with interested non-Federal landowners and State, tribal, and local governments within the relevant watershed; and provide for an active and ongoing public engagement process” in carrying out all six of the WCF purposes.²⁷

The TNF has not adhered to these requirements. Instead, the TNF utilized classification and identification analysis undertaken pursuant to a patchwork of dated formal and informal watershed condition framework policies (developed around the timeframe of 2011)²⁸ to satisfy its obligation. This results in the LMP identifying 9 priority watersheds, and classify others as “impaired,” “at risk,” or “functioning properly” without any of the required coordination or engagement in the congressionally adopted WCF.²⁹

In the FEIS, the TNF responded to PVMC’s concern over the failure to coordinate by stating that “Congress did not limit or prohibit the use of the WCF to evaluate long-term conditions of watersheds within our forests.”³⁰ This response misses the point. If the WCF is utilized to identify priority watersheds, it must include the Congressionally mandated coordination at all

²² See prior PVMC Comments (2020) at pgs. 3-5 and Attachment 1-4 thru 1-7.

²³ 36 C.F.R. § 219.7 (f)(1) (the priority watersheds are supposedly found at a web link identified on TNF LMP, pg. 106, however the link is broken not available for review).

²⁴ 16 U.S.C. § 6543(a)(1) (taking into consideration certain baseline factors including water quality and quantity, the presence of roads and trails and soil type and conditions).

²⁵ 16 U.S.C. § 6543(a)(2).

²⁶ 16 U.S.C. § 6543(a)(3).

²⁷ 16 U.S.C. § 6543(b).

²⁸ U.S. Dep’t Agric., Forest Serv., *A Framework for Assessing and Tracking Changes to Watershed Condition* (May 2011) https://www.fs.usda.gov/sites/default/files/Watershed_Condition_Framework.pdf

²⁹ TNF LMP, at pg. 06.

³⁰ FEIS Vol. 3, Appendix A, pgs. 308, 320, 321.

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stages of the process (e.g., evaluation, identification of priority watersheds, developing protection and restoration action plans for priority watersheds and implementation of action plans).

In addition, the TNF states in the FEIS:

The revised plan is a programmatic document that provides the framework to accomplish exactly what the commentor refers to by collaborating with our State, Tribal, other Federal agencies, and interest groups when identifying priority watersheds. The revised plan has been modified to clarify *Watershed and Water Resources Management Approach 01* to: “Work with forest leadership and partners to identify priority watersheds, develop watershed restoration action plans as well as other restoration activities to leverage resources, and to implement and monitor projects that improve vegetative composition, reduce erosion, and/or otherwise improve watershed function.”³¹

This aspirational “Management Approach” is a plain admission that the TNF has yet to meet the required Congressional obligations to coordinate in conjunction with classification and identification of priority watersheds. The TNF cannot use decades old data to classify watersheds, then identify priority watersheds and commit to coordinate “after the fact.” Further, the inclusion this commitment as a mere “Management Approach” which does not offer plan direction, but describes an approach or strategy to manage the unit to achieve a desired condition,³² but may be used to identify partnership opportunities and coordination activities³³ is not sufficient to demonstrate compliance with a mandate from Congress. The classification of watersheds and the identification of priority watersheds in the LMP must include coordination with interested non-federal landowners and State, Tribal and local government within the relevant watershed, and provide for an active and ongoing public engagement process.

Suggestions for improvement: (i) the TNF should engage in the required coordination efforts to re-evaluate the watershed conditions and identify priority watersheds and then prepare a supplemental EIS to allow for further public input; (ii) WAT-MA-01 should be moved to a standard (new WAT-S-05) as it is Congressionally required as a function of the Farm Bill legislation and Section 6 of NFMA; and (iii) reconsider the inclusion of PVMC’s proposed language changes for WAT-DC-01, WAT-DC-02 and WAT-DC-03 as shown in **Attachment 1**.

ii. Implementation of a Region 3 Policy as WAT-S-02

With respect to WAT-S-02, PVMC expressed concerns regarding implementation the Region 3 Forest Service Manual, Chapter 2540 Water Uses and Development (“Region 3 Policy”)

³¹ FEIS Vol. 3, Appendix A, at pg. 307.

³² TNF LMP, at pg. 14.

³³ *Id.*

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in the LMP. The Region 3 Policy pertains only to groundwater management and applies only to special use authorizations, but WAT-S-02 broadens the Region 3 Policy and makes it applicable to “*all new authorizations for wells and pipelines and to impacts on surface flows.*”

In the FEIS, the TNF rejected PVMC’s concern on the basis that the Region 3 Policy requires the TNF to look at groundwater and surface water as hydrologically connected.³⁴ We see no corresponding requirement in the Region 3 Policy. In fact, the TNF acknowledged in its response to PVMC’s comment that the policy is limited to special use authorizations as set forth below:

Within the Region 3 Forest Service Manual, Chapter 2540, Section 2541.35, it states “Upon completion of the analysis, *special use authorizations* for water developments on National Forest System lands should be approved using the appropriate decision document only when the long-term protection of National Forest System streams, springs, seeps, and associated riparian and aquatic ecosystems can be assured.” Other water developments classified as range improvements are authorized and managed through the administration of term grazing permits.³⁵

PVMC’s concern remains that the Region 3 Policy is legally unsupported and that there is no basis for an expansion of the Region 3 Policy (particularly as a standard) in the LMP. The TNF must acknowledge the foundational principle of Arizona water law in that groundwater and surface water are administered in a bifurcated manner. Further, groundwater withdrawal outside of Active Management Areas is regulated under the reasonable use doctrine and not arbitrary caveats in the Region 3 Policy. Reasonable use allows the extraction of groundwater for a beneficial use even if the withdrawals adversely affect nearby wells.³⁶

Suggestion for improvement: Revise WAT-S-02 as follows so that it is consistent with the fundamental state water law principles and only to special use authorizations as covered by the Region 3 Policy:

“New authorizations for special use authorizations for wells and pipelines on National Forest system lands shall ~~only~~ be considered consistent with applicable provisions of state water law and proponents should strive where to demonstrate that water removed and/or transported by these facilities will ensure the long-term protection of ~~would not adversely impact~~ springs, wetlands, riparian areas, surface

³⁴ FEIS Vol. 3, Appendix A, at pgs. 318-20.

³⁵ FEIS Vol. 3, Appendix A, at pg. 320.

³⁶ See *Bristor v. Cheatham*, 255 P.2d 173 (Ariz. 1953).

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flows, and other groundwater dependent ecosystems on National Forest System Lands.”

iii. WAT Guidelines³⁷

Several of PVMC’s comments on the draft LMP pertained to guidelines imposing restrictions on activities (e.g., within source water protections areas, road construction near water resource features, etc.). TNF responded that guidelines describe constraints on project and decision-making but are flexible and allow for departure so long as the intent of the guideline is met.³⁸ While the TNF’s response correctly reflects the definition of a “guideline”, more is required.³⁹ In fact, the regulations related to the development of guidelines, require that they are established to “*meet applicable legal requirements.*” Moreover, the 2012 planning regulations require that plans “*provide for ecosystem services and multiple uses*” and require the inclusion of “*standards and guidelines, for integrated resource management to provide for ecosystem services and multiple uses in the plan area.*”⁴⁰ Thus, the legal requirements applicable to state water law, exploration and mineral development cannot be ignored in the development of guidelines.

For example, WAT-G-05 (requiring activities that could impact groundwater or surface water be located outside “Source Water Protection Areas”) does not meet applicable legal requirements and should be removed from the LMP. In the FEIS, the TNF responded that this guideline will not necessarily preclude or prohibit an activity in a Source Water Protection Area because there is some flexibility in administration.⁴¹ Notably, there is only flexibility if the “*intent of the guideline is met*” and where prohibitions on activities are established, it is very difficult to envision how flexibility in administration might prevail. Moreover, WAT-G-05 is totally inconsistent with existing regulations addressing management of watersheds that supply Municipal Watersheds and appears to be an end run around established regulation (i.e., 36 C.F.R. § 251.19). Further WAT-G-05 fails to provide for any flexibility to consider integrated resource management and multiple use prescriptions (as required in developing guidelines).

Suggestions for improvement: Reconsider the inclusion of PVMC’s proposed language changes to WAT-G-01, WAT-G-03, WAT-G-04, WAT-G-06 and WAT-MA-07 as shown in **Attachment 1**. Remove WAT-G-05 and WAT-G-14.⁴²

³⁷ See prior PVMC Comments (2020) at Attachment 1-5 thru 1-7.

³⁸ FEIS Vol. 3, Appendix A, at pgs. 319, 322.

³⁹ 36 C.F.R. § 219.7(e)(1)(iv).

⁴⁰ 36 C.F.R. § 219.10 (a).

⁴¹ FEIS Vol. 3, Appendix A, at pg. 322.

⁴² WAT-G-14 (manage groundwater and surface water on NFS lands as one hydrologically connected system) is a prime example of how state water law provisions are being ignored. “Guidelines” must “meet applicable regulatory requirements” and this one fails to do so and should be removed.

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iv. Transcription Errors

TNF responded to several of PVMC's comments by stating TNF would incorporate the comment and provided new LMP plan component language. However, the final LMP fails to include the language from the responses to comments in two instances.

For instance, TNF responded to PVMC's comment on WAT-G-13 by stating:

The guideline will be revised as such; "Where Forest Service management contributes to designation of a water body as an impaired water body, recommendations in Total Maximum Daily Load (TMDL) assessments should be implemented to enable the Tonto to assist with meeting or exceeding water quality standards for the water body. Best management practices, watershed condition improvement treatments, or other identified water quality improvement practices should be utilized to improve water quality in impaired or non-attaining streams and water bodies without completed TMDL assessments where feasible."⁴³

However, WAT-G-13 in the LMP provides:

Where Forest Service management contributes to designation of a water body as impaired, the Forest Service should implement recommendations in Total Maximum Daily Load (TMDL) assessments and, where feasible, complete watershed improvement projects in impaired or non-attaining water bodies without completed TMDL assessments.⁴⁴

The same issue arises regarding incorporating mining as an example of multiple uses into WAT-DC-01. TNF responded to PVMC's comment by agreeing to incorporate mining.⁴⁵ However, in the final LMP, WAT-DC-01 reads:

Watersheds support multiple uses (e.g., timber, recreation, grazing, cultural) with no long-term decline in ecological conditions as measured by the Watershed Condition Framework or an equivalent method and provide high-quality water for downstream communities dependent on them.⁴⁶

Suggestions for improvement: Update the LMP to include the language from TNF's response to PVMC's comments regarding WAT-G-13 and WAT-DC-01 as committed by the TNF.

⁴³ FEIS Vol. 3, Appendix A, at pgs. 320-21.

⁴⁴ TNF LMP, at pg. 109.

⁴⁵ FEIS Vol. 3, Appendix A, at 321.

⁴⁶ TNF LMP, at pg. 107.

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D. Riparian Areas, Seeps, Springs, Wetlands and Riparian Management Zones⁴⁷

The plan components addressing riparian areas, and riparian management zones do not meet the criteria set forth in the applicable 2012 planning regulations.⁴⁸ The LMP must include an identification of riparian areas and riparian management zones (“RMZs”) with established width(s) and it does not. Further, RMZ management prescriptions must be limited to certain established widths around “lakes, perennial and intermittent streams, and open water wetlands.”⁴⁹ In the LMP, the RMZ plan components have been expanded to include not only undefined RMZs with no established widths, but “*all riparian areas, streams, springs, seeps and wetlands.*”⁵⁰ And, unbelievably, the LMP provides that RMZs can even be expanded to incorporate *ephemeral channels*.⁵¹

In short, the LMP takes the following approach to the development of riparian and RMZ plan components:

(i) First, the LMP repeats the regulatory definition of “riparian areas” (which is incredibly broad), describes healthy riparian systems and potential disturbances, discusses general characteristics of springs, seeps and wetlands and then repeats the regulatory definition of RMZs.⁵²

(ii) Then, with respect to RMZs, the LMP provides a purported framework for how one might determine an RMZ beginning with the existence of USFS Region 3 mapped riparian ecological response units (“Riparian ERUs”)⁵³ of which there are seven types on the TNF. The LMP goes on to state that RMZs will be further modified through “*site-specific delineations during project-level planning and implementation*” and then declares that RMZs can be vastly expanded to

⁴⁷ See prior PVMC Comments (2020) at pg. 5 and Attachment 1-8 thru 1-9.

⁴⁸ 36 C.F.R. 219.8 (a)(3) (requiring the identification of riparian areas and RMZs in the plan, along with separate plan components for riparian areas and RMZs).

⁴⁹ 36 C.F.R. § 219.8 (a)(3)(ii).

⁵⁰ TNF LMP, at pg. 113.

⁵¹ *Id.* (the inclusion of ephemeral channels is wholly contrary to the definition of an RMZ at 36 C.F.R. § 219.19 and the requirement for the plan to established defined width(s) for RMZs only around lakes, perennial and intermittent streams, and open water wetlands as set forth at 36 C.F.R. § 219.8 (a)(3)(ii)).

⁵² TNF LMP, at pg. 112 (RMZs are defined at 36 C.F.R. § 219.19).

⁵³ TNF LMP, at pg. 99 (apparently developed from a USFS Region 3, Riparian Mapping Project (Triepke et al.)(2014), which report is not provided as part of any LMP appendix and was not referenced in the draft LMP).

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*“incorporate ephemeral channels with minimal or no riparian vegetation that support riparian vegetation downstream due to subsurface flow.”*⁵⁴

(iii) Next, the LMP states that the RMZ plan components apply not only to RMZs but to *“all riparian areas, streams, springs, seeps and wetlands”*⁵⁵ without ever having identified any specific riparian areas or established widths of RMZs.

The plan components in the RMZ section are completely contrary to the applicable planning regulations and will result in proposed activities in vast areas of watersheds having to establish their own RMZs, then demonstrate plan consistency and overcome the standard and guidelines which improperly preclude many types of activities (e.g., RMZ-S-02 and 03, RMZ-G-05).⁵⁶ The TNF does not have the legal authority to expand the regulatory definitions of “riparian areas” or “RMZs” or to apply the same plan components applicable to RMZs to *all riparian areas, streams, springs, seeps and wetlands* and/or possibly *ephemeral channels*.

Suggestion for improvement: The TNF should publish a supplemental EIS to: (i) identify proposed riparian areas on maps attached thereto; (ii) establish widths for proposed RMZs for *lakes, perennial and intermittent streams, and open water wetlands* only; and (iii) develop separate plan components for riparian areas and RMZs using the criteria in 36 C.F.R. § 219.8(a)(3). It is contrary to the planning regulations for the TNF to attempt to defer this exercise to site-specific project-level decision making.⁵⁷ Further, so doing is a recipe for arbitrary application of the provided establishment criteria⁵⁸ and is certain to result in unwarranted determinations that projects are within riparian areas or RMZs thus resulting in rejection of a proposed action or determinations of plan inconsistency.

In the alternative, and at a minimum, the TNF must remove the language that expands RMZ plan components to *“all riparian areas, streams, springs, seeps and wetlands”* and/or possibly *“ephemeral channels with little or no riparian vegetation.”* In addition, TNF should remove RMZ-S-02, RMZ-S-03 and RMZ-G-05 as they are improper restrictions that do not meet the regulatory criteria set forth in 36 C.F.R. § 219(a)(3)(ii)(B).

⁵⁴ TNF LMP, at pg. 113. Note that the inclusion of “ephemeral channels with minimal or no riparian vegetation” is in stark contrast to the definition of an RMZ at 36 C.F.R. § 219.19 which is “portions of a watershed where riparian-dependent resources receive primary emphasis.”

⁵⁵ *Id.*

⁵⁶ In fact, restrictions are only warranted in RMZs for management actions when the specific criteria of 36 C.F.R. § 219(a)(3)(ii)(B) are met.

⁵⁷ See 36 C.F.R. § 219.8 (a)(3)(ii)(A) (confirming that RMZs must be established in the plan, but allowing them to be refined by later site-specified delineation).

⁵⁸ TNF LMP, at pg. 112-13.

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2. **Objection to Management Areas Plan Direction**

A. National trails – Arizona National Scenic Trail⁵⁹

Because a comprehensive plan for the management of the Arizona National Scenic Trail (“ANST”) has yet to be developed, the TNF LMP cannot define the ANST as “*approximately .5 miles from the centerline of the trail*” thereby establishing a trail corridor within which standards and guidelines prohibit certain activities.⁶⁰ In fact, all decisions relevant to the acquisition, management, development and use of the trail must be established in a comprehensive National Scenic Trail Plan, not via the LMP.⁶¹ The LMP cannot supplant applicable federal law.

In order to determine any trail right-of-way, the National Trails System Act requires a collaborative process which includes the creation and participation of a trail advisory council. In fact, 16 U.S.C. § 1244(e) requires:

“the responsible Secretary *shall*, after full consultation with affected Federal Land managing agencies, the Governors of the affected States, the relevant *advisory council established pursuant to subsection (d)* . . . submit to the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate, *a comprehensive plan for acquisition, management, development, and use of the trail.* . . .”

A trail advisory council, according to statute, must include one or more members appointed to represent private organizations including corporate and individual landowners, and land users that have an established and recognized interest in the trail. Further, under 16 U.S.C. § 1244(d), “the appropriate Secretary *shall consult with [the Advisory] council* . . . with respect to matters relating to the trail, *including the selection of the rights-of-way.* . . .” (emphasis added).

In addition to the coordination obligations set forth in the National Trails System Act, Section 6 of NFMA requires land management planning to be “coordinated with the land and resource management planning processes of State and local governments and other Federal agencies” (16 U.S.C. 1604 (a)). Further, insofar as it pertains to the requirement to coordinate Forest Service management with State and local governments, the 2012 Planning Rule requires:

Coordination with other public planning efforts. (1) The responsible official shall coordinate land management planning with the equivalent and related planning

⁵⁹ See prior PVMC Comments (2020) at pg. 9 and Attachment 1-13 thru 1-15.

⁶⁰ TNF LMP, at pg. 152.

⁶¹ 16 U.S.C. § 1244(e).

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efforts of federally recognized Indian Tribes, Alaska Native Corporations, other Federal agencies, and State and local governments.⁶²

We note the absence of coordination efforts as to the objectionable ANST management prescriptions, particularly as to consideration of the impacts on future development of intervening state land administered by the Arizona State Land Department and as to the effect on Gila County economic and energy development objectives.⁶³

In addition, the LMP description of the ANST corridor should be changed and the desired conditions adopted as NTMA-DC-06 and NTMA-DC-07 should be removed until a comprehensive plan is adopted and impacts on existing and future mining districts can be properly considered. “*Expansive views of natural-appearing landscapes*” and conserving “*significant scenic and natural resources*” within trail segments traversing historic mining districts or areas of planned mine expansion is simply not ever going to be achievable.

Further, the standard adopted as NTMA-S-03 and the guidelines adopted as NTMA-G-10 and NTMA-G-12 are inconsistent with federal law and could not be implemented to preclude (or otherwise require relocation of ancillary mine facilities. Finally, it is not sufficient to leave any objectionable guidelines in place simply because there is “some potential for flexibility” in the future as indicated by the TNF in its response to comments.⁶⁴

Suggestions for improvement: (i) remove NTMA-DC-06, NTMA-DC-07, NTMA-S-03, NTMA-G-10 and NTMA-G-12; (ii) relocate NTMA-MA-07 (following the trail comprehensive plan once adopted) from a management approach to a standard; and (iii) remove NTMA-G-03 as it is contrary to the mining law and regulations to prevent road crossings over national trails if such is needed for mining.⁶⁵

3. Rejection of a Minerals Management Area

PVMC encouraged the TNF to develop a Minerals Management Area in the Globe-Miami mining district in plan workshops and in written correspondence.⁶⁶ Legal support for so doing exists in the applicable planning regulations and policies.⁶⁷ Unfortunately, the TNF summarily rejected that proposal on the basis that Alternative D already considered “fewer restrictions on

⁶² 36 C.F.R. § 219(4)(b).

⁶³ We acknowledge the TNF’s coordination efforts set forth in the FEIS, Vol. 4-Appendix C subject to the exceptions identified above.

⁶⁴ See FEIS, Vol. 3, Appendix A, at pg. 150.

⁶⁵ See 36 C.F.R. § 219.7(e)(1)(iii) (a standard is a mandatory constraint on project and activity decisionmaking, established to help achieve or maintain the desired condition or conditions, to avoid or mitigate undesirable effects, or to meet applicable legal requirements).

⁶⁶ PVMC Comments (2018) at pgs. 10-12.

⁶⁷ See 36 C.F.R. § 219.7 (c)(2)(vii), 36 C.F.R. § 219.7 (d) and FSH 1909.12, ch. 10, sec. 14, pg. 66.

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land uses, including mining and minerals” and that “minerals might be discovered outside any defined area.”⁶⁸

A review of the TNF’s justification evidences the failure of the TNF to give proper consideration to this proposal. First, the TNF acknowledged in the FEIS that most of the direction that effects locatable mineral activities comes from existing law, regulation and policy and that fact “was unchanged across all alternatives considered.”⁶⁹ In addition, with respect to locatable minerals, the TNF acknowledged that most of the potential for, and interest in, locatable mineral deposits exists in the Globe-Miami and Superior mining districts and that future development proposals are probable in that area.⁷⁰ Further, the TNF stated that the effects of the plan components to locatable and saleable minerals were essentially ‘common to all alternatives’ and admitted that the only difference in Alternative D relative to other alternatives was to make saleable (common variety) minerals more available.⁷¹ This is not sufficient justification to disregard the need for a Minerals Management Area (particularly needed for the Globe-Miami and Superior mining districts at a minimum). The planning regulations require the TNF to recognize the inherent capabilities of certain areas and the economic and social benefits of mining and a Minerals Management Area should have been developed to avoid constant plan amendments when otherwise uniform desired conditions, standards and guidelines cannot be met in areas where historic mining has occurred for decades or known mine development or expansion will otherwise take place.

Suggestion for improvement: Revise the LMP to adopt a Minerals Management Area in keeping with the planning regulations and policy that wholly authorize so doing and to ensure economic and social sustainability plan content is included as required by 36 C.F.R. § 219.10. It is notable that there are 11 separate management areas in the LMP and not one of them is focused on economic sustainability or non-conservation oriented multiple uses.

4. Objection to Plan Implementation and Project Consistency Determination⁷²

The forest planning regulations at 36 C.F.R. § 219.15(a) state as follows:

“Every decision document approving a plan, plan amendment, or plan revision *must state whether authorizations of occupancy and use made before the decision document may proceed unchanged*. If a plan decision document does not expressly allow such occupancy and use, the permit,

⁶⁸ Vol. 3, App. A, at pg. 120.

⁶⁹ FEIS at pg. 249.

⁷⁰ FEIS at pg. 248.

⁷¹ FEIS at pg. 251.

⁷² DROD at pgs. 46-47.

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contract, and other authorizing instrument for the use and occupancy must be made consistent with the plan, plan amendment or plan revision as soon as practicable ...” (emphasis added).

The LMP and DROD fail to precisely recite this very important finding to allow prior authorizations to proceed unchanged.

Suggestion for improvement: Add the following sentence “*Authorizations of occupancy and use made before this forest plan revision ROD may proceed unchanged.*” to the last sentence of the first paragraph under the DROD heading **Plan Implementation** and as the first sentence under the heading **Project Consistency** for clarity and consistency with regulatory requirements. Incorporate the same sentence into the LMP at pages 17 and 19.

In closing, PVMC appreciates the opportunity to have participated in the planning workshops and to have provided comment on the draft LMP. It is unfortunate that many of PVMC’s comments were disregarded and we hope that focused re-consideration through the objection process will be undertaken. The objective of developing an LMP consistent with federal law and in a manner that provides inherent flexibility, withstanding the need for constant plan amendments, should be paramount along with the obligation for the TNF to administer NFS lands for exploration and mining purposes in a manner that does not result in unreasonable regulation.

Sincerely,



Dawn Meidinger

cc: Timothy Ralston, Manager, Land, Permitting, Environmental & Regulatory Affairs

ATTACHMENT 1

Mining, Minerals, and Abandoned Mines (MMAM)	
Minerals – Desired Conditions MMAM-DC-01	<p>Proposed Changes: Mining and Mineral Activities comply with law, regulation, and policy in the development of minerals. Minimize adverse environmental impacts, <u>where feasible</u>, to surface and groundwater resources <u>which includes air quality, water quality, watershed and forest ecosystem health, fisherieswildlife</u> and wildlife habitat, scenic <u>values character, roads, solid wastes</u> and <u>reclamation</u>. other desired conditions applicable to the area.</p> <p>Why: This will make MMAM-DC-01 consistent with 36 C.F.R. § 228.8. Under 36 C.F.R. § 228.8, “[a]ll operations shall be conducted so as, <i>where feasible</i>, to minimize adverse environmental impacts on National Forest <i>surface resources</i>.” (emphasis added). The listed <i>surface resources</i> in § 228.8 include air quality, water quality, solid wastes, scenic values, fisheries and wildlife habitat, roads, and reclamation.</p>
MMAM-DC-02	<p>Proposed Changes: Reclaimed mining and mineral sites provides for public safety and the protection <u>prevention or control of damage to</u> of forest <u>surface</u> resources. They possess a resilient forest ecosystem suitable to permanent post mining landform.</p> <p>Why: This will make MMAM-DC-02 consistent with 36 C.F.R. § 228.8(g). There is no statutory or regulatory mandate requiring reclaimed sites to “possess a resilient forest ecosystem suitable to permanent post mining landform.”</p> <p>In fact, 36 C.F.R. § 228.8 requires “[u]pon exhaustion of the mineral deposit or at the earliest practicable time during operations, or within 1 year of the conclusion of operations, unless a longer time is allowed by the authorized officer, operator shall, where practicable, reclaim the surface disturbed in operations by taking such measures as will prevent or control onsite and off-site damage to the environment and forest surface resources including: (1) control of erosion and landslides; (2) control of water runoff; (3) isolation, removal or control of toxic materials; (4) reshaping and revegetation of disturbed areas, where reasonably practicable; and (5) rehabilitation of fisheries and wildlife habitat.”</p>
Minerals - Standards MMAM-S 02	<p>Proposed Changes: Required reclamation activities, <u>where practicable</u>, shall be designed to <u>prevent or control onsite or off-site damage to the environment and forest surface resource</u>. establish resilient post-mining ecosystems consistent with the pre-disturbance ecological response unit or to an ecological response unit identified as achievable to the post-mining landscape condition.</p>

	<p>Why: The use of the term “restore” is inconsistent with 36 C.F.R. § 228.8(g) which states “[u]pon exhaustion of the mineral deposit or at the earliest practicable time during operations, or within 1 year of the conclusion of operations, unless a longer time is allowed by the authorized officer, operator shall, <i>where practicable, reclaim the surface disturbed in operations by taking such measures as will prevent or control onsite and off-site damage to the environment and forest surface resources.</i>” Standards should be made to align with existing regulations.</p> <p>Focus should be on best management practices that control onsite or offsite environmental damage.</p> <p>The impossibility of historic mining districts to meet the standard as drafted could result in required plan amendments for all project-level decisions if not modified.</p>
Watersheds and Water Resources (WAT)	
<p>Watersheds and Water Resources</p> <p>Desired Conditions (WAT-DC)</p> <p>02</p>	<p>Proposed Changes: Surface water and groundwater quality, while in consideration of inherent capability of the area, meets or exceeds applicable state water quality standards, fully supports designated beneficial uses, maintains or moves ecological conditions to low departure from reference conditions and meets the needs of downstream water users.</p> <p>Why: Consistency with planning regulations and recognition of background soil conditions. Due to the background mineralization of soils in Arizona, some areas will never meet state water quality or fully support designated beneficial uses. 36 C.F.R. § 219.8 requires when considering the sustainability “[a] plan developed or revised under this part must provide for social, economic, and ecological sustainability within Forest Service authority and consistent with the <i>inherent capability of the plan area.</i>” Resources that fall under this section include air, soil and water (36 C.F.R. § 219.8(a)(2)).</p>
03	<p>Proposed Changes: Based on their inherent capability, Watersheds are functioning properly (based on criteria provided in the Watershed Condition Framework or similar current protocol) and they exhibit high geomorphic, hydrologic, and biotic integrity relative to their potential condition. They support the magnitude, frequency, timing and duration of runoff within a natural range of variability and the movement of water and sediment from the surrounding uplands through the channel system sustains the health and function of the channel and riparian corridors as measured by the Watershed Condition Framework National</p>

	Riparian Core Protocol (Merritt et al. 2017) or another equivalent method.
	Why: TNF must recognize that all watersheds are not created equal and that certain geographic areas have unique considerations (e.g., background arsenic, mineralization, etc.).
Watersheds and Water Resources Guidelines (WAT-G) 01	<p>Proposed Changes: When existing groundwater wells on National Forest System lands are proposed for improvement, adverse impacts to groundwater dependent ecosystems (e.g., wetlands, riparian areas, springs, streams, and fens) should be evaluated, and measures to eliminate, mitigate, or reduce impacts should be implemented <u>when a scientific determination of actual causal effect can be made.</u></p> <p>Why: Mitigation measures should be tied to determinations of actual impact and not to anticipated impacts all too often determined by inherently imprecise modeling efforts.</p>
03	<p>Proposed Changes: New wells on National Forest System lands and new pipelines across National Forest System lands should avoid adversely impacting nearby wells on adjoining private lands.</p> <p>Why: Groundwater withdrawal outside of Active Management Areas is regulated under the reasonable use doctrine. Reasonable use allows the extraction of groundwater for a beneficial purpose even if withdrawals adversely affect nearby wells. <i>See Bristor v. Cheatham</i>, 255 P.2d 173 (Ariz. 1953). No liability is incurred to an adjoining land owner for adverse impacts. <i>Id.</i> at 180. Groundwater users are legally allowed to impact neighboring wells.</p>
04	<p>Proposed Changes: New water supply needs for Forest Service uses (e.g., livestock watering and recreation uses) should be met, <u>where practicable and feasible,</u> with groundwater supplies, provided that this development does not adversely impact groundwater dependent ecosystems or surface water resources.</p> <p>Why: If adopted as proposed, this guideline could have an extremely harmful effect on mineral resource development in the TNF and result in perpetual requirement for costly project redesign or plan amendments. Groundwater extractions outside of Active Management Areas are regulated under the reasonable use doctrine. Reasonable use allows the extraction of groundwater for a beneficial purpose. <i>See Bristor v. Cheatham</i>, 255 P.2d 173 (Ariz.1953).</p>
	Proposed Changes: New or reconstructed roads and motorized routes, infrastructure, recreation sites, or similar constructed facilities should not be located within floodplains or within 300 feet of water resource

06	<p>features (e.g., perennial and intermittent streams, springs, wetlands, and riparian areas), except where necessary for stream crossings or otherwise authorized for exploration and mining operations to provide for resource protection to avoid the long-term adverse impacts associated with the occupancy and modification of floodplains and water resource features.</p> <p>Why: The stated guidelines if adopted could have an extremely harmful effect on mineral resource development in the TNF and result in perpetual requirement for costly project redesign or plan amendments. The TNF does not have the authority to relocate existing roads authorized by prior approved decisions or prohibit activities requiring road construction that do not meet stated distance prohibitions which seems arbitrary and impracticable in light of the common occurrence of intermittent washes.</p>
14	<p>Proposed Changes: Groundwater and surface water on National Forest System lands should be managed as one hydrologically connected system.</p> <p>Why: This guideline is wholly inconsistent with state law and “guidelines” are required to be established to meet “applicable legal requirements” and this does not.</p>
Roads (RD)	
<p>Roads</p> <p>Desired Conditions (RD-DC)</p> <p>04</p>	<p>Proposed Changes: Roads have minimal adverse environmental impacts to Forest surface resources soil, riparian areas, watercourses, native vegetation, and at-risk species, unless otherwise reasonably necessary for exploration or mining operations.</p> <p>Why: This language is inconsistent with the Forest’s surface use regulations for exploration and mining operations (36 C.F.R. § 228.12) which entitles operators to have access in connection with operations. Further, the Mining Law of 1872 (30 U.S.C. § 22) deems federal land “free and open to exploration and purchase.” This allows road building to patented lands and unpatented claims without prohibition of impact on natural resources.</p>
<p>Roads – Guidelines (RD-G)</p> <p>01</p>	<p>Proposed Changes: New motorized routes or areas should not be constructed in areas designed as primitive in the recreation opportunity spectrum (ROS), or current protocol except those authorized pursuant to the Forest’s surface use regulations.</p> <p>Why: TNF should clarify this does not apply to roads used or required for exploration or mining operations. Those holding valid unpatented claims have a right to access to those claims unimpeded by forest</p>

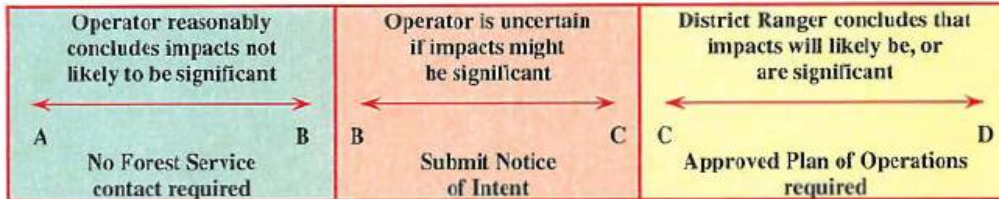
	<p>planning prohibitions (36 C.F.R. § 228.12). Further, the Mining Law of 1872 (30 U.S.C. § 22) declares that “all valuable mineral deposits in land belonging to the United States,” as well as “the lands in which they are found,” are “free and open” to “exploration, occupation and purchase.”</p>
02	<p>Proposed Changes: Construction of temporary roads in areas designated as semiprimitive nonmotorized recreation opportunity spectrum (ROS) should be avoided unless required for mining operations or by a valid permitted activity or management activity. If authorized, roads should be constructed and maintained at the lowest maintenance level needed for the intended use, then rehabilitated.</p> <p>Why: Those holding valid unpatented claims have a right to access to those claims unimpeded (36 C.F.R. § 228.12). Further, the Mining Law of 1872 declares that “all valuable mineral deposits in land belonging to the United States,” as well as “the lands in which they are found,” are “free and open” to exploration, occupation and purchase. It created a system that is self-initiated, i.e. no federal permit or approval is necessary to enter federal land and to locate and occupy a mining claim and necessary road improvements can be undertaken in conjunction with notice level operations and/or approved mine plans of operation.</p>
03	<p>Proposed Changes: Unless needed to support exploration or mineral development, Decommissioned roads should be returned to their natural condition.</p> <p>Why: C.F.R. § 212.5(b)(2) provides, as to the identification of unneeded roads: “[r]esponsible officials must review the road system on each National Forest and Grassland and identify the roads on lands under Forest Service jurisdiction that are no longer needed to meet forest resource management objectives.” However, it is outside the jurisdiction of the Forest Service to declare roads constructed pursuant to Mining Law of 1872 or the Forest Service’s surface use regulations as “unneeded.”</p>
05	<p>Proposed Changes: New or reconstructed roads should be located outside of the riparian management zone, or other important water resources (e.g., meadows, wetlands, seeps, and springs), where practicable, in order to prevent resource damage. If road construction in riparian areas is unavoidable, it should be constructed and maintained so as to assure adequate drainage and to minimize or, where practicable, eliminate damage to soil, water, and other resource values. designed and implemented to minimize effects to natural waterflow, aquatic species, channel morphology, water quality, and native riparian vegetation. The number of stream crossings should be minimized to reduce negative impacts to natural resources.</p>

	<p>Why: The proposed guideline is inconsistent with 36 C.F.R. § 228.8 which states “[o]perator shall construct and maintain all roads so as to assure adequate drainage and to minimize or, where practicable, eliminate damage to soil, water, and other resource values.” Altering the guideline allows it to be consistent with the C.F.R. Adding the “where practicable” qualifier allows flexibility in road management.</p>
Management Approaches for Roads RD-MA 02	<p>Proposed Changes: <u>Recognizing the potential need for road access for exploration and mining in applicable areas,</u> Pprioritize decommissioning of roads that impact flow regimes, are redundant routes, cause mass movement of soils and sediment, are built within the riparian management zone, or have substantial negative impacts to at-risk species.</p> <p>Why: Without modification, the content does not recognize the need for roads associated with exploration and mining activities. Further, the proposed guideline is inconsistent with 36 C.F.R. § 228.8 which states the “[o]perator shall construct and maintain all roads so as to assure adequate drainage and to minimize or, where practicable, eliminate damage to soil, water, and other resource values.” Mine operators are allowed to construct roads that may impact drainages, water and other resources as long as efforts are taken to minimize the damage.</p>

ATTACHMENT 2

U.S. Forest Service Mining Regulations – 36 CFR 228, Subpart A

Summary of regulations at 228.4(a): The District Ranger's authority to regulate mining activities is triggered by the degree of surface disturbance associated with proposed or ongoing mineral activities.



A/B – activities not likely to cause a significant disturbance of surface resource. The following types of activities are excluded from the operator having to submit a Notice of Intent (228.4(a)(1)):

- Operations that are limited to use of vehicles on existing National Forest System (NFS) roads;
- Prospecting and sampling activities such as taking small mineral samples, gold panning, metal detecting (for mineral deposits, not cultural artifacts), non-motorized hand sluicing, battery operated dry washers, and collecting mineral specimens using hand tools;
- Marking and monumenting mining claims;
- Underground operations which will not cause significant disturbance of surface resources;
- Operations, which in their totality, will not cause surface disturbance which is substantially different than that caused by other users of the NFS who are not required to obtain FS authorizations;
- Operations which will not involve the use of mechanized earthmoving equipment, such as bulldozers or backhoes, or the cutting of trees, unless those operations otherwise might cause a significant disturbance of surface resources.

B/C – activities that might cause significant disturbance of surface resources (228.4(a)):

- Except for use of mechanized earthmoving equipment or the cutting of trees, no specific or general types of activities are listed to help trigger Notice of Intent (NOI) submission;
- NOI submission to the District Ranger (DR) is triggered by the operator's reasonable uncertainty as to the significance of the potential disturbance on surface resources;⁸⁰
- When a NOI is submitted to the DR, the DR will acknowledge receipt and inform the proponent whether or not a Plan of Operations is required;
- NOI acknowledgement is not a regulatory instrument⁸⁰ so it is not a Federal action that triggers the National Environmental Policy Act (NEPA) and other requirements.

C/D – activities that will likely cause or are causing significant disturbance of surface resources requires the submission of a proposed plan of operations (228.4(a)(3) and (4)):

- The regulation does not list activities which would automatically fall into this category;
- Whether or not the operator submits a NOI, the DR has final authority to require a plan of operations if the DR concludes that activities will likely cause or are causing significant resource disturbances; **
- If the DR determines that operations will likely cause or are causing significant disturbance of surface resources, the operator must submit a proposed plan of operations for approval and operations cannot be conducted until a plan of operations is approved by the DR.
- A proposed plan of operations triggers NEPA and other requirements.

The phrase "will likely cause significant disturbance of surface resources" means that, based on past experience, direct evidence, or sound scientific projection, the District Ranger reasonably expects that the proposed operations would result in impacts which more probably than not need to be avoided or ameliorated by means such as reclamation, bonding, timing restrictions, and other measures to minimize adverse environmental impacts to NFS resources. ⁴⁹

*** Federal Register, Vol. 70, No. 107, June 6, 2005

April 5, 2007