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May 27, 2008

Forest Service, USDA
Attn: Director, Minerals and Geology Management (MGM) Staff (2810)
Mail Stop 1126
Washington, DC 20250-1125

Filed via Electronic Mail 36cfr228a@fs.fed.us

Re: Locatable Minerals Operations
Proposed Rule to Amend the 36 CFR 228A Regulations for Locatable Minerals Operations Conducted on National Forest System Lands
73 Fed. Reg. 15694

The Northwest Mining Association (NWMA) is submitting this letter on behalf of its members in response to the request for comments with respect to the above captioned matter. NWMA is a 113 year old, 1700 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 36 states and are actively involved in exploration and mining operations on United States Forest Service (USFS) administered lands, especially in the West. Our diverse membership includes every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. NWMA's broad membership represents a true cross-section of the American mining community from small miners and exploration geologists to both junior and large mining companies. More than 90% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

NWMA's members have extensive first-hand experience with the 36 CFR 228A regulations (228A) and are directly and immediately affected by any changes to these regulations. We believe the 228A regulations have stood the test of time and have proven to be flexible, reasonable, and effective in accomplishing their stated purpose, which is to minimize adverse impacts to National Forest resources to the extent practical and feasible and to require reclamation during and upon termination of locatable mineral activities. Many of our members can personally attest to the success which the 228A regulations have had in promoting environmentally responsible mining, minimizing adverse impact to National Forest System resources to the extent practicable and feasible, and requiring effective reclamation. These regulations have served the public, the USFS, and the mining industry well in assuring that our Nation's mineral resources are discovered, developed and the lands reclaimed in an economically viable and an environmentally sound manner. Revisions to these regulations and how they impact our members exploring and operating on National Forest System lands are very important to NWMA.

General Comments

NWMA supports the proposal to add a Bonded Notice provision in so far as it relates only to exploration on National Forest System lands. As will be explained in more detail below, we believe the Bonded Notice provision should be limited to exploration only, similar to the BLM's 3809 notice-level exploration provision, in order to fully comply and be consistent with the recommendations of the National Research Council 1999 Report, *Hardrock Mining on Federal Lands* (NRC Report). We also support the proposal in so far as it implements the other recommendations of the NRC Report. However, there are sections we strongly oppose, including some of the proposed definitions and the attempt to tie occupancy rights, and whether a Notice of Intent is required, to the length of stay.

We commend the USFS for recognizing that the Mining Law of 1872, the Surface Resources Act of 1955 and the Organic Administration Act of 1897 authorizes prospecting, mining or processing operations and uses reasonably incident thereto on all lands open to mineral entry, on or off of mining claims. We agree that the USFS may not unreasonably restrict the exercise of these rights and encourage the Minerals and Geology Management Staff, with the support of USFS leadership, to take all steps necessary to ensure that all USFS line officers, Forest Supervisors and Regional Offices understand the rights established by these statutes.

While we support efforts to clarify portions of the regulations by incorporating additional definitions for items such as "occupancy," "residence," and "significant disturbance," we believe several of the proposed definitions, especially "occupancy" and "significant disturbance" need additional revision in order to eliminate confusion and potential abuse. NWMA is concerned that there are opportunities for arbitrary decision making and abuse by authorized officers due to the vagueness of proposed definitions or the lack of guidance in the Rule. There are areas where the amount of discretion given to the district ranger is troubling.

There appears to be confusion between the preamble and the proposed revisions to 228.4(a) and (b) with respect to lawful occupation of a mining claim and when a Notice of Intent is required. The preamble implies that any occupancy over the local forest recreational camping limit would require a Notice of Intent. However, 228.4(b)(1) clearly states that a Notice of Intent is not required if there is not a reasonable likelihood of creating a significant surface disturbance. Subsection 228.4(a)(2) adds further confusion. The preamble and 228.4(a)(2) should be corrected to reflect the proposed language in 228.4(b) and comply with a miner's statutory rights.

As explained in more detail below, 30 USC 22 and 30 USC 612 authorize all occupancies of National Forest System lands open to mineral entry, with or without a claim, that are reasonably incident to prospecting, mining or processing operations. The USFS cannot deny those rights nor can it regulate those occupancy rights based solely on the length of stay. Furthermore, there is no rational basis for concluding that occupancy in excess of the recreational camping limit might cause a significant disturbance of surface resources. We believe any attempt to tie the requirement of a Notice of Intent to the length of an occupancy that is reasonably incident to prospecting, mining or processing operations without regard to whether there is a significant disturbance of surface resources is unreasonable, arbitrary and capricious.

We also are concerned with the proposed change in the standard for requiring a modification of a Plan of Operations from operations that are "unnecessarily or unreasonably causing irreparable injury, loss or damage to surface resources…" to a new standard in the proposed rule of simply "causing irreparable loss or damage…." NWMA objects to the removal of the words "reasonable" and "necessary." Mining, by its very nature, might cause irreparable damage in order to mine. For example, an excavation might qualify in the minds of a ranger as "irreparable damage" even though it is necessary and reasonable and is being mitigated. Thus, the reasonable and necessary standard should be re-inserted into the proposed rule to both retain the current standard and reflect miners' statutory rights.

NWMA supports the USFS efforts to clarify its reclamation bonding procedures. However, we believe the requirements in section 228.13 for existing, approved but not bonded operations to comply with the proposed bonding requirements within 180 days after the effective date of the new rules is unreasonable. We believe operations should be allowed 1 year to come into compliance with this provision. Weather conditions in many western states preclude access to mining claims for extended periods of time during winter months and make it impossible to meet the 180 day requirement. Access to the claims is necessary for the operator and Forest Service to conduct a site visit in order to accurately estimate the extent of disturbance, the measures needed to reclaim the site, and the costs of doing so.

We also believe that 228.13 needs further revision to allow the use of state bonding pools such as pools available at the Nevada Division of Minerals or state agencies in other states and Memoranda of Understanding to meet the financial assurance requirements. In addition, the USFS should accept irrevocable letters of credit, certificates of deposit, collateral trusts and insurance. The USFS should accept the same financial assurance instruments the BLM accepts.

In addition, the Forest Service should include specific provisions allowing phased bonding. The regulations should provide that when an operation will be constructed in phases, the operator may estimate the costs and provide financial assurance only for those phases that will be constructed at the time of bond approval. Subsequent cost estimates and bond approvals would be required before subsequent project phases are constructed. The BLM's 3809 regulations clearly allow for phased bonding and the Forest Service should do the same. *See* 43 CFR § 3809.553.

NWMA believes several changes should be made to the proposed rule in order to comply with Recommendations 2 and 3 of the 1999 National Research Council Report, *Hardrock Mining on Federal Lands* (NRC Report). First, the Bonded Notice provision should be limited to exploration operations that disturb 5 acres or less. Recommendation 2 of the NRC Report states "Plans of operations should be required for mining and milling operations, other than those classified as casual use or exploration activities even if the area disturbed is less than 5 acres." (NRC Report at 95). The proposed rule, in so far as it would allow small mining operations to proceed under a Bonded Notice, is in conflict with this Recommendation.

NWMA recognizes that removing small mining operations from the Bonded Notice category would preserve the *status quo* for small miners and would not address the problems they

currently face in having to wait for two to ten years to have Plans of Operations approved. **NWMA believes this is an unacceptable situation that this rulemaking should address.** We strongly urge the Forest Service to adopt the recommendation offered in the NRC Report to provide for an expedited approval process for small mining operations:

> The Committee recognizes the valuable role that small miners play in the development of the nation's mineral wealth. Because of scale, small mines generally have less potential environmental impact than major mines. **The Committee therefore believes that, with adequate bonding for reclamation, small miners should receive expedited schedules and services in permitting.** For example, regulators should provide small miners with examples of generic permit applications that clearly explain the miner's responsibilities. The Committee believes that certain types of mineral extraction processes should be treated differently than others in terms of the speed with which Plans of Operations are reviewed and approved. Some should have rapid, check-off-the-boxes approaches to permit applications.… In addition, the land management agencies could assist small miners and mill operators by assigning more personnel to help complete permit applications, educate the operators in the permitting process and develop standardized easy-to-understand forms (Emphasis added, NRC Report at 96-97).

In addition, to fully implement the recommendations of the NRC Report, the proposed rule should list small suction dredges with an eight inch hose diameter or less in subsection 228.4(a) as an *operation not requiring prior notice* or as causing no significant disturbance of surface resources. The NRC Report states:

> ...small suction dredges used to recover placer gold from sediment and streams generally are allowed under various state laws to be in the streams only during certain times of the year, preventing disturbance of fish at critical stages in their life cycles. The Committee believes that BLM and the Forest Service are appropriately regulating these small suction dredging operations under current regulations as casual use or as causing no significant impact, respectfully. (NRC Report at 95-96)

NWMA also believes that any excavation performed by hand methods (as opposed to mechanized earth moving equipment), where 10 horsepower or less motors are being used to provide either air or water for the purpose of processing the hand-excavated material should b added to the list of activities in subsection 228.4(a) that do not require prior notice.

NWMA notes with approval that the Forest Service has moved current section 228.8(h) to § 228.2 Scope at 228.2(b) in the proposed rule, which serves to improve the visibility of this important provision. The following provision has been in the 228A regulations since 1974:

> Certification or other approval issued by State agencies or other Federal agencies of compliance with laws and regulations relating to locatable mining operations the authorized officer determines are similar or parallel to requirements of this subpart will be accepted as compliance with the applicable requirements of this subpart.

The intent of this provision seems clear, which is to reduce redundant regulation and permitting of mining operations by state and federal agencies. To our knowledge, Forest Service authorized officers have never used this provision as it was intended, and this lack of use is unfortunate. However, with the Forest Service's current situation of reduced budgets; fewer personnel with expertise in the regulation of mining; the congressional and administration mandates to be more efficient; and the Forest Service's own desire to reduce "analysis paralysis" and redundancies in the regulatory processes, NWMA believes now is an excellent time to emphasize this provision and <u>require</u> authorized officers to implement it. The final rule should include a statement that whenever a District Ranger receives a Notice of Intent or Plan of Operations for mining activities, the Ranger's first obligation is to evaluate whether his or her review of the proposed operation would be a duplication of State or other Federal agency efforts to regulate the activity in a similar or parallel way to the 36 CFR 228A regulations.

If the operation is regulated by another agency, consistent with proposed section 228.2(b), the Ranger would need to only accept that other agency's action as compliance with the 36 CFR 228A regulations. There are many excellent examples where this could be applied, such as the States of California and Oregon regulatory programs for suction dredge operations and the rigorous State regulatory programs for locatable mineral operations in states such as Alaska, Colorado, Idaho, Montana and Nevada. NWMA offers regulatory language to achieve this goal in our specific section-by-section comments that follow.

As stated above, NWMA believes the Bonded Notice provision of the proposed rule must be limited to exploration activities that disturb 5 acres or less in order to comply with the Recommendations of the NRC Report. Recommendation 3 states: “Forest Service regulation should allow exploration disturbing less than 5 acres to be approved or denied expeditiously, similar to notice-level exploration activities on BLM lands.” (NRC Report at 97) NWMA members have experienced significant delays in obtaining permission to conduct small-scale and initial exploration projects on Forest Service lands. Some of our members have reported that the same exploration project conducted on BLM land under notice-level exploration can take up to 2 years to obtain approval on Forest Service lands. This is unconscionable. The ability to conduct exploration in a timely manner is vital to exploration efforts on National Forest System lands.

In discussing Recommendation 3, the NRC Report states:

> Exploration companies informed the Committee that companies typically attempt to limit disturbance to less than 5 acres at a time on BLM lands because of the quick review from BLM for notice-level disturbances. Because such a provision doesn’t exist in Forest Service regulations, there is less incentive to limit disturbance on these lands. In fact, because the review time is so lengthy,

> companies are likely to submit proposals for far larger exploration programs on Forest Service land than on BLM land in order to avoid further delays that would be caused in obtaining additional approvals. (NRC Report at 98)

The NRC Committee further states:

> The objective of this Recommendation is to allow exploration activities to be conducted quickly when minimal degradation is likely to occur. The Committee believes that, with reclamation bonds or other financial assurances in hand for land disturbance (see Recommendation 1) exploration should be able to proceed expeditiously. That is, the current BLM 3809 regulation with a 15-day response time for notice-level exploration activities should be maintained, and the similar procedure should be adopted by the Forest Service. (*Id*.)

Equally important is the Committee's belief that the requirement of financial assurance for exploration activities on less than 5 acres should not result in a federal action that would automatically trigger NEPA.

> The Committee does not intend that the requirement of bonding for exploration activities (Recommendation 1) result in a federal action that would automatically trigger an environmental assessment or an environmental impact statement. BLM does not currently require companies to supply an environmental assessment for notice-level activities. The Committee believes that not requiring environmental assessments for exploration with less than 5 acres of disturbance is appropriate for both BLM and Forest Service lands. (*Id*. at 98)

In revising the Bonded Notice provision of the proposed rule to exclude small mining operations and to apply exclusively to exploration activities on 5 acres or less, the Forest Service should provide for an unlimited number of 2-year extensions, similar to the BLM 43 CFR 3809 rule (*see* 43 CFR § 3809.333) on notice-level exploration activities. We also believe the Forest Service should provide a definition of exploration in the 228A regulations. The BLM 43 CFR 3809 regulations define exploration at 43 CFR § 3809.5. We are aware that there are definitions of exploration in the Forest Service Surface Use Determination handbook and *The Anatomy of a Mine, from Prospect to Production* publication referenced in the preamble on page 15696. We recommend that the Forest Service adopt a definition of exploration similar to the BLM's definition in 43 CFR § 3809.5.

NWMA also supports the proposal to allow assessment work to be conducted on claims located within withdrawn or segregated portions of National Forest lands before the determination of valid existing rights has been completed. However, we do not believe including time limits for determining the existence of valid existing rights is appropriate. In order to avoid the possibility of a taking that requires compensation under the Fifth Amendment of the U.S. Constitution, whatever time is required should be allowed. We also believe there is a serious problem with the section in 228.14 in that it would provide access only to inholdings that are completely

surrounded by Wilderness. The proposed rule ignores other statues which provide reasonable access to inholdings, such as ANILCA.

Specific Comments

§228.1 Purpose

The proposed rule states that its purpose is to ensure that "operations authorized by the United States mining laws must be conducted so as to minimize adverse environmental impacts on National Forest System surface resources." NWMA believes that this sentence should be modified to add the words "to the extent practicable and feasible" to the end of the above quoted sentence.

In addition, the Forest Service also should recognize that another purpose of the 36 CFR 228A Locatable Minerals regulations is to promote the development of minerals that are critical to the Nation. This congressional intent is expressed in Section 2 of the Mining and Minerals Policy Act of 1970 (30 USC 21(a)):

> The Congress declares that it is the continuing policy of the Federal Government in the national interest to foster and encourage private enterprise in (1) the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, (2) the orderly and economic development of domestic mineral resources, reserves, and reclamation of metals and minerals to help assure satisfaction of industrial, security and environmental needs, (3) mining, mineral, and metallurgical research, including the use and recycling of scrap to promote the wise and efficient use of our natural and reclaimable mineral resources, and (4) the study and development of methods for the disposal, control, and reclamation of mineral waste products, and the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment that may result from mining or mineral activities.

NWMA supports the following sentence in the proposed rule:

> The United States mining laws, which confer a statutory right to enter upon certain Federal lands to search for locatable minerals, apply to National Forest System lands reserved from the public domain pursuant to the Creative Act of 1891, Sec. 24, 26 Stat. 1095, 1103 (1891), by virtue of the Organic Administration Act of 1897, 16 U.S.C. 482.

We suggest this sentence be strengthened and clarified to read as follows:

> The United States mining laws, which confer a statutory right to enter upon, ***use and occupy*** certain Federal lands to search for ***and develop*** locatable minerals, apply to National Forest System lands reserved from the public domain pursuant to the Creative Act of 1891, Sec. 24, 26 Stat. 1095, 1103 (1891), by virtue of the Organic Administration Act of 1897, 16 U.S.C. 482.

The suggested additions (shown in bold italics) are necessary to clarify that Section 22 of the Mining Law confers a durable, seamless and continuous right that extends throughout the entire lifecycle of the mineral activities from initial entry and prospecting, through exploration and discovery, to development, mining, and finally reclamation. This right allows citizens to enter, explore, and occupy public land for the express purpose of making a discovery and may be exercised with or without a claim, on land which may or may not be mineral in character. As currently written, the rule could be misconstrued to apply only to prospecting and exploration.

§228.3 Definitions.

(b) *Day* –The proposed definition excludes weekends and holidays from the calculation of the various time periods set forth in the proposed rule. Thus, the 15-day period for the Forest Service to respond to Notices of Intent and Bonded Notices is actually longer than 15 calendar days. This is inconsistent with the BLM 3809 regulations, and may create confusion for operators. We recommend that all time periods in the proposed rule refer to calendar days, including weekends and holidays.

(c) *Minimize* – The current 228A regulations and the proposed rule repeatedly require that operations must be conducted to minimize adverse environmental impacts to surface resources. This *minimize* requirement is the overriding standard that governs operations throughout the 228A regulations and proposed rule. The definition of *minimize* incorporates the concept that impacts must be prevented or reduced when "practical." There is no definition of "practical." It would be helpful to get some clarification that the term "practical" requires consideration of economic practicality. Note that in Section 228.12, the proposed rule specifically refers to actions that are "economically and technically practical," which begs the question of what the term "practical" means when used without qualification in the definition of "minimize."

(d) *Mining claim* –Tunnel site should be added to the definition of mining claim so that it would read "Any unpatented mining claim, unpatented mill site or unpatented tunnel site authorized by the United States Mining Laws." This addition will make it clear that all four types of entry (placer, lode, mill site, and tunnel site) are included in this definition.

(e) *Occupancy* – NWMA objects to defining occupancy based on whether or not camping on a mining claim "will exceed any stay limit applicable to the National Forest System lands on which such temporary structure or temporary shelter is situated." This definition ignores the fact that 30 USC 22 and 30 USC 612 give mining claimants the absolute right to occupy their mining claim for prospecting, mining or processing operations and uses reasonably incident thereto. 30 USC 612 specifically defines this right to "prospecting, mining or processing operations and uses reasonably incident thereto and prohibits any non-mining uses of unpatented mining claims. The duration of occupancy is irrelevant – so long as the occupancy is for "prospecting, mining or processing operations and uses reasonably incident thereto." NWMA recognizes that the Forest Service has the right to minimize adverse environmental impacts on National Forest System surface resources to the extent practicable and feasible. However, there is no rational basis for utilizing an arbitrary time limit such as the recreational stay limit applicable to National Forest

System lands to distinguish or determine a mining claimant's occupancy rights or whether a Notice of Intent is required.

We also are concerned with defining occupancy to include the "[r]egular use of any area…." (§ 228.3(e)(2)). What is meant by "regular use?" Again, this is an arbitrary standard for determining an "occupancy" that requires a Notice of Intent because it is not based on the degree of surface disturbance. The same is true for § 228.3(e)(5). The mere fact that a miner is using a road the Forest Service has closed does not automatically mean there is a likelihood of creating a significant disturbance of surface resources. The proposed rule must eliminate these arbitrary standards and focus on the degree of surface disturbance for determining whether a Notice of Intent or Plan of Operations is required.

(f) *Operations* -- NWMA supports the definition of operations and the explicit recognition that these regulations pertain to all prospecting, mining or processing operations and uses reasonably incident apply whether on or off of claims.

(j) *Reasonably incident* – NWMA objects to the Forest Service using new, undefined terms in its definition of *reasonably incident*. Examples are the terms "realistically calculated" and "warranted." Rather than warranted, the definition should use the term "reasonably necessary." The term "reasonably calculated" is a new term that has not been defined by past practice or case law. The introduction of this term could lead to confusion and unnecessary delay in the permitting process. The Forest Service should stick to terms that have been utilized in previous regulations, or have well known and understood meanings from common use or case law.

(n) *Significant disturbance of surface resources* - NWMA believes the definition of significant disturbance of surface resources needs substantial revision. We believe the definition is excessive and subject to broad and conflicting interpretations that would needlessly re-categorize a large number of presently exempt activities as now requiring Notices of Intent or Plans of Operations. For example, the proposed rule states:

> Significant disturbance of surface resources also generally occurs when operations… preclude or restrict other uses of National Forest System surface resources; prevent or obstruct free passage or transit over National Forest System lands;…or necessitate closing National Forest System lands or facilities to users other than an operator; or exempting an operator from closure of National Forest System lands or facilities to other users.

The above-quoted activities the proposed rule attempts to define as causing a significant disturbance of surface resources presently occur at existing operations in order to protect the public from mining operations and should not be defined as "significant disturbance of surface resources."

Also, NWMA is concerned that the above quoted statement suggests the Forest Service may be attempting to place the responsibility entirely on operators to mitigate interference with other users. NWMA cites the following quote from 30 USC 612 (b) to remind the Forest Service that

the 1955 Surface Resources Act placed responsibility on the Forest Service and those other users to avoid interference with reasonably necessary mining operations:

> Provided however that any use of the surface of any such mining claim by the United States, its permittees and licensees shall be such as to not endanger or materially interfere with prospecting, mining, or prospecting operations or uses reasonably incident thereto....

The proposed definition of significant disturbance of surface resources also is overbroad. For example, protection of all "scientifically important paleontologic remains" is too vague and all encompassing, and will be subject to varying and arbitrary interpretations by District Rangers as well as by operators. As geologists know, most sedimentary rocks contain paleontologic remains of some kind. Who will determine which paleontologic resources are "scientifically important"? NWMA understands that there is only broad scientific consensus that most vertebrate fossils are scientifically important. Furthermore, NWMA would like the Forest Service to explain where it was given statutory authority to invoke such an expansive protection of all "scientifically important" fossils. NWMA is not aware of any such Forest Service authority and regardless believes it is highly misplaced to include such a category in the definition of significant disturbance of surface resources. At the very least, this rule should be limited to protecting "significant vertebrate fossils."

NWMA recommends that the Forest Service refer to its rulemaking in June 2005 and use the definition set forth in the Federal Register Vol. 70, No. 107, at p. 32724:

> 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 to NFS lands and resources which more probably than not need to be avoided or ameliorated by means such as reclamation, bonding, timing restrictions, and other mitigation measures to minimize adverse environmental impacts on NFS resources.

While not perfect, the 2005 definition at least states a number of objective criteria to judge when and whether an operation will likely cause a significant disturbance of surface resources. This definition is better than the one offered in the proposed rule because it might help ensure that the District Ranger goes through a scientific analysis, documents it, and publicly discloses the scientific information he considered in determining the likelihood of significant surface disturbance so that operators and the general public can be assured the Ranger's decision on "significant disturbance" was not arbitrary and/or capricious.

NWMA also objects to the use of the term "influencing materially" in regard to Forest Service administration. Again, the Forest Service appears to be attempting to transfer to the operator the restriction placed on the Forest Service by 30 USC 612 (b) quoted-above. When applied to Forest Service administration, this term is extremely vague. How can an operator be expected to judge what might "influence" Forest Service administration, let along "materially influence" it?

We are concerned that some District Rangers might determine that the possibility of any operator or any mining activity being on his district might somehow "materially influence" his administration. Based on Forest Service statutory authority in its Organic Act and the Surface Resources Act of 1955, NWMA believes the emphasis should be placed on minimizing adverse environmental impacts to surface resources, not on easing Forest Service administration. In summary, "influencing materially" is a very low and arbitrary standard that can be easily misconstrued and misapplied. NWMA strongly urges the Forest Service to delete it from these regulations.

NWMA also is concerned about the accuracy of the Forest Service's assumption that significant surface disturbance generally results from all operations that are "...occurring within areas of National Forest System lands or waters known to contain Federally listed threatened or endangered species or their designated critical habitats;…."

The Forest Service is required under the Endangered Species Act to conduct biological assessments (BA's) to determine what effect mining activities or other uses will have on threatened or endangered species. We are well aware of these BA's and that there are a great number of circumstances in threatened or endangered species habitat where Forest Service BA's have found mining activities to have "no effect" on listed species. Absent a Forest Service determination that an activity "may affect" or is "likely to adversely affect" a listed species, we believe the Forest Service has no grounds for its assumption in the proposed rule that operations in an area known to contain listed species or in their designated habitats generally result in a significant surface disturbance.

Just as we've explained previously in regard to the occupancy and access issues, the Forest Service should rely upon case-by-case scientific analyses to support its findings instead of these broad, arbitrary, and inaccurate categories inserted in the "significant surface disturbance" definition.

§228.4 Submission of notices of intent to operate, bonded notices and plans of operations

This section is very confusing and does not promote certainty. There are so many subjective requirements in this section that the result will be confusion, uncertainty, and delays. The regulations constantly refer the reader back and forth to multiple sections in the regulations. (See a typical example of this in the last sentence in the proposed section 228.4(a)(2)(i)). These sections should at least summarize the points they are trying to make in the logical place in the regulations, instead of sending the reader on a scavenger hunt through the text.

The use of the word "Beginning" in front of 228.4(a)(1)(i),(ii),(iv),(v) and (vi) is superfluous and confusing. The insertion of this word into each exemption implies that a mining claimant can begin the operations listed and be exempt, but leaves open the question of what happens next. That is, once an operation has commenced and is no longer in the "beginning" stage, does the Forest Service intend for it to no longer be exempt? The following wording for all of the exemptions as written in existing section 228.4(a)(1) should be retained. We include the following example for your information:

> A notice of intent to operate is not required for:
>
> (i) Operations which will be limited to the use of vehicles on existing public roads or roads used and maintained for National Forest System purposes.....

In 228.4(a)(2)(iii) the word "compliance" is misspelled.

Section 228.4(a)(1)(ii) should be expanded to include any suction dredging operations regulated by state law and any excavation performed by hand methods (as opposed to mechanized earth moving equipment), where 10 horsepower or less motors are being used to provide either air or water for the purpose of processing the hand-excavated material in the type of activities that do not require a Notice of Intent. These recommendations are consistent with the NRC Report's discussion of activities which do not require a Notice. *See* NRC Report at 20, 94-96.

NWMA finds the Forest Service's proposed definition and application of section 228.4 to occupancy in general are highly confusing, apt to be contentious, inconsistent in their application by the agency, and nearly impossible for the average miner to understand. Aside from their confusing nature, we conclude that the proposed rule, particularly at section 228.4(b), intends to require a Notice of Intent from a miner if he/she stays on his/her claim longer than the typical 14 day time limit the Forest Service imposes on recreational users of National Forests. We believe these regulations err in adopting such an unsupported standard. It is clearly arbitrary and capricious in that it is unsupported by any environmental analysis or evidence.

Without any foundation or legal authority, the proposed rule assumes that when a miner stays one day or more over whatever the approved stay limit is for recreational users, the miner's use might constitute a significant surface disturbance, which would then require the miner to file a Notice of Intent. The preamble offers no evidence, argument or authority to support this major policy change from the current regulations. NWMA is unaware of any Forest Service, state or other federal agency environmental study on the impacts of stays of 14 days, versus 15 days or longer, that supports this proposed policy.

We strongly encourage the Forest Service to drop this ill-conceived and arbitrary approach to regulating occupancy from the proposed rule. Instead of relying upon an exceedance of an arbitrary recreation stay limit, the Forest Service needs to review and heed the Forest Service and USDA's Response to Comments in the Forest Service's 2005 rulemaking regarding Notices of Intent and Plans of Operations. In that rulemaking, the Forest Service and USDA made definitive, (and we believe correct), statements that are binding on the Forest Service regarding the trigger for a Notice of Intent. *See* Fed. Reg. Vol. 70, No. 107, June 6, 2005, at p. 32728:

> Further, this record demonstrates that the intended trigger for a notice of intent to operate is reasonable uncertainty on the part of the operator as to the significance of the potential effects of the proposed operations.
>
> Given the intended function of a notice of intent to operate, there can be no definitive answer to the question of what level of activity requires the submission

> of a notice of intent to conduct operations. As previously mentioned in the discussion on § 228.4(a), that given the variability of the lands within the NFS subject to the United States mining laws, identical operations could have vastly different effects depending upon the condition of the lands and other surface resources which would be affected by those mining operations. Thus, while it is possible to identify some categories of operations which will never require the prior submission of a notice of intent to operate, in many cases the need for the submission of a notice of intent to operate must be determined based upon a case-by-case evaluation of the proposed operations and the kinds of lands and other surface resources involved.

As the above quotes clearly demonstrate, the Forest Service is off-base in its proposed rule and should return to the standard in the current 228A regulations in regard to triggers for a Notice of Intent. The current regulations adequately and reasonably provide for a case-by-case evaluation by the operator and the authorized officer of proposed operations to determine whether they might cause a significant disturbance of surface resources and thus require a Notice of Intent. Furthermore, attempting to regulate "occupancy" based solely on the length of stay conflicts with the free and open access rights granted in 30 USC 22:

> Except as otherwise provided, all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, shall be **free and open to exploration** and purchase, **and the lands in which they are found to occupation** and purchase….(emphasis added)

NWMA believes the preceding citations from the 2005 rulemaking and 30 USC 22 also demonstrate why the Forest Service should delete from the proposed rule at section 228.4(b)(ii)(A) the requirement that in all circumstances use of a closed road or "other access facility" would require a Notice of Intent. Again, this proposed standard is an arbitrary standard not clearly based in documented resource impacts and it ignores the case-by-case evaluation the USDA cited with approval in its own 2005 rule making. The Forest Service should retain the current 228A regulatory standard regarding access for purposes reasonably incident to prospecting, mining or processing operations, and determine whether Notices of Intent or Plans of Operation are needed based on a determination of whether the use might or is likely to cause a significant disturbance of surface resources.

In summary, NWMA believes 228.4(a)(2) and 228.4(b)(ii)(A) are arbitrary and capricious and must be revised. There is no rational basis for assuming that occupancy of a mining claim that exceeds the recreational camping stay limit applicable to the National Forest System lands where the mining claim is located or the use of a closed road "might cause a significant disturbance of surface resources." Whether or not a Notice of Intent or a Plan of Operations is required with respect to occupancy as defined in the proposed rule or use of a closed road must be tied to the degree of disturbance, not to the mere fact of occupancy, the length of time one is occupying their mining claim or the use of a closed road.

As set forth above in these comments, 30 USC 22 and 30 USC 612 provide an absolute right of occupancy for prospecting, mining, or processing operations and uses reasonably incident thereto. Thus, the decision of whether an occupancy is allowed must be tied to a determination of whether the occupancy is reasonably incident to prospecting, mining or processing operations (including the protection of the claim from claim jumpers), not to the duration of the occupancy. If the occupancy is reasonably incident to prospecting, mining or processing operations, then the degree of surface disturbance, not the duration of the occupancy, determines whether a Notice of Intent or Plan of Operations is required.

Another confusing part of proposed 228.4 is that the preamble and the definition of occupancy at 228.3(e) are in conflict with 228.4(b)(1) and (2). NWMA submits that 228.4(b)(2)(iii) is the correct standard for determining whether or not a Notice of Intent is required with respect to all prospecting, mining, or processing operations and uses reasonably incident thereto, including occupancy, i.e., “the proposed operations are not likely to cause significant disturbance of National Forest System surface resources.”

228.4(b) Operations requiring a notice of intent to operate

As NWMA pointed out earlier in these comments, § 228.2 Scope at subparagraph (b) provides that when an operation is being regulated by another agency with similar or parallel requirements, a Ranger would need to only accept that other agency's action as compliance with these Forest Service regulations. We mentioned several excellent examples where this could be applied such as the States of California and Oregon regulatory programs for suction dredge operations, or in states such as Alaska, Colorado, Idaho, Montana and Nevada, which have rigorous State regulatory programs for locatable mineral operations.

To ensure that all of the intended public benefits from section 228.2 (b) are realized (especially the elimination of regulatory redundancy), and that authorized officers implement it, NWMA suggests the addition of the following paragraph to 228.4(b):

> Consistent with 228.2(b) of this Subpart, within 15 days of receipt of a notice of intent or plan of operations, the authorized officer will determine whether certification or other approval of compliance with laws and regulations relating to locatable mining operations are issued by State agencies or other Federal agencies, and whether they are similar or parallel to the requirements of this Subpart. Upon making such a determination, the authorized officer will accept the other agency's certification or approval as compliance with the applicable requirements of this subpart. Memoranda of Understanding between the Forest Service and the pertinent State or Federal agency will be considered to facilitate implementation of this section.

Subsections 228.4(b)(4), (5) and (6) should be revised to clearly indicate that transmitting or delivering the notice of intent to the office of the District Ranger is what is required, not personally transmitting or delivering the notice to the District Ranger. Also,” receipt by the District Ranger” should be clarified to read receipt by the office of the District Ranger.

<u>228.4(c) Operations requiring a proposed bonded notice</u>

This section must be rewritten to apply to exploration only in order to be consistent with the recommendations of the 1999 NRC Report *Hardrock Mining on Federal Lands*. As discussed above, Recommendation 2 of the NRC report recommends that all mining operations require a Plan of Operations, even those disturbing less than 5 acres. NWMA recommends that the Forest Service revise the proposed rule to apply the Bonded Notice provision to exploration activities only, and that it follow BLM's 43 CFR 3809 notice-level rule for exploration and an unlimited number of 2-year extensions be allowed for Bonded Notice operations in good standing (*see* 43 CFR § 3809.333).

Exploration is an iterative process. Exploration progresses from one place to another depending on the results of previous drilling and analysis. A Bonded Notice provision for exploration only similar to BLM's 3809 notice-level exploration provisions at 43 CFR §§ 3809.300 – 336 is consistent with the iterative nature of exploration. Moreover, as discussed in the NRC Report, the notice provision on BLM-administered lands encourages companies to limit disturbance to less than 5 acres at a time because of the quick review process afforded by a Bonded Notice. A similar outcome is likely to result from a Bonded Notice for exploration activities on National Forest System lands.

In discussing Recommendation 3 (that the Forest Service regulations allow exploration disturbing less than 5 acres to be approved or denied expeditiously similar to those activities on BLM lands), the NRC Report states:

> The objective of this recommendation is to allow exploration activities to be conducted quickly when minimal degradation is likely to occur. The Committee believes that, with reclamation bonds or other financial assurances in hand for land disturbance, exploration should be able to proceed expeditiously. That is, the current BLM 3809 regulation with a 15-day response time for notice-level exploration activities should be maintained, and a similar procedure should be adopted by the Forest Service. (NRC Report at 98.)

Section 228.4(d) will need to be rewritten to provide consistency with a Bonded Notice that will be limited to exploration activities disturbing 5 acres or less. Subsection 228.4(d)(i) will need to be modified to require Plans of Operations for all mining activities not exempted in 228.4(a)(1)(ii) and for all exploration activities disturbing more than 5 acres of National Forest System lands at any point in time.

In order to be consistent with the recommendations in the NRC Report, the Forest Service needs to limit the Bonded Notice to exploration activities and require a Plan of Operations for all mining operations – including small mining operations. However, NWMA wishes to emphasize that the Forest Service should use this rulemaking to eliminate the untenable delays that small miners currently experience in securing approval for Plans of Operation for small mines. In order to remedy this problem, NWMA strongly urges the Forest Service to maintain consistency with

the NRC Report by adopting the recommendation in the NRC Report to provide for an expedited approval process for small mining operations:

> The Committee recognizes the valuable role that small miners play in the development of the nation's mineral wealth. Because of scale, small mines generally have less potential environmental impact than major mines. **The Committee therefore believes that, with adequate bonding for reclamation, small miners should receive expedited schedules and services in permitting**…. The Committee believes that certain types of mineral extraction processes should be treated differently than others in terms of the speed with which plans of operations are reviewed and approved. Some could have rapid, check-off-the-boxes approaches to permit applications…. In addition, **the land management agencies could assist small miners and mill operators by assigning more personnel to help complete permit applications, educate the operators in the permitting process, and develop standardized, easy-to-understand forms.** (Emphasis added, NRC Report at 96-97)

<u>§228.5 Bonded notice – completeness review</u>

NWMA believes additional guidance should be given for what is meant by the term "properly estimates" in 228.5(a)(4).

Also, NWMA is very concerned with section 228.5(a)(5). "Pattern of non compliance" is a new concept and truly opens Pandora's Box as to what is meant. This proposed subsection invites agency regulatory abuse and the use of arbitrary standards in the Ranger's "findings" of what constitutes a "pattern of noncompliance". By definition, exploration activities covered by a Bonded Notice ensure that there will be sufficient monies available to reclaim any disturbance. Moreover, any operator with a poor record of reclaiming reclamation disturbances likely won't be bondable and therefore won't be able to participate in the Bonded Notice program. This concept is absolutely unnecessary and 228.5(a)(5) should be deleted in its entirety.

At minimum, the proposed rule needs more clarification on what constitutes a pattern of non-compliance that would justify a Ranger in requiring a Plan of Operations to ensure that this authority will not be misused. Many questions must be answered. What is a pattern? One incident? Two? Three? More? And how serious an instance of non-compliance is required? How does an operator get off of the non-compliance "black list"? Regardless, the Forest Service should consider whether this provision is even necessary. NWMA believes the Forest Service regulations are sufficiently protective of the environment that this provision is unnecessary. In addition, as mentioned above, any operator with a history of noncompliance and not reclaiming reclamation disturbances likely won't be bondable and therefore won't be able to participate in the bonded notice program. Moreover, such unscrupulous operators are unlikely to qualify for the bond that would be necessary to operate under a Plan of Operations.

§228.6 Plan of operations – approval

Section 228.6(h)(4)(ii) introduces new, undefined term "causing irreparable injury…" This is a change from the current standard of requiring a modification to a plan of operation that is "unnecessarily or unreasonably causing irreparable injury, loss or damage to surface resources…." (emphasis added) to a new standard in the proposed rule of simply "causing irreparable loss or damage…." There is no rational basis for removing the "reasonable and necessary" standard. The current standard is consistent with the standard stated in 30 USC 612 which affirms an operator's right to conduct operations reasonably incident to prospecting, mining or processing operations but prohibits unnecessary and unreasonable activities. Just as BLM's "undue or unnecessary degradation" standard recognizes that some mining operations, by their nature, might cause "irreparable" damage that is necessary and reasonable and being mitigated, the Forest Service should do the same and retain its current standard.

§228.9 Environmental protection requirements

NWMA believes 228.9(g) and (k) need modification. Section 228.9(g) should have the words "Except as otherwise provided by an approved Plan of Operation" inserted after the word "must" so that the section would read:

> The operator must construct and maintain all roads so as to ensure adequate drainage and, where practicable, to prevent or otherwise minimize damage to soil, water, and other resource values. Unless otherwise provided in an approved plan of operations or otherwise approved by the authorized officer, when a road is no longer required for the operations, the operator must.…

Subsection 228.9(k) Reclamation (3)(iv) should be modified to read "reshape as practical and needed to revegetate disturbed areas;" Reshaping may not be necessary depending on the future use of the area, and might even cause greater disturbance of surface resources depending on the site-specific conditions. Furthermore, reshaping often isn't practical for open-pit mines. Flexibility should be retained to make wise decisions without undue restrictions in these regulations.

§228.10 Reasonably incident uses

Subsection 228.10(b)(2) should be modified to recognize that mining claimants operating in remote areas of Alaska and other western states often have a small garden to supplement their diet due to the difficulty and high costs associated with transporting food to the site. Thus, the words "unless they have been specifically approved in a plan of operation" should be inserted as a modifier to this section. In addition, cultivating crops for produce should be prohibited only if said cultivation is "for sale."

§228.12 Access for operations

Subsection 228.12(d)(3) requires the operator to "specify the design standard for all roads, trails, etc…." This is not a reasonable requirement for small scale miners and would be difficult to

fulfill due to a lack of expertise. Rather, the Forest Service should ask the miner to describe the roads, trails, etc. in sufficient detail, depending on the local site conditions so that the Forest Service can then evaluate the proposed access.

§228.13 Reclamation bonds for bonded notices and plans of operations

Subsection 228.13(c)(3) provides that the operator's estimate must be acceptable to the Forest Service. Guidelines should be developed and provided to help prevent arbitrary disapprovals and promote consistency in bond amounts across National Forests and with existing Memoranda of Understanding with BLM and State agencies. Many Forest Service line officers lack expertise to evaluate such estimates and guidelines are necessary.

Subsection 228.13(g)(1)(iv) deals with the Forest Service believing it needs to step in. This authority should be exercised only if the operator fails to act. NWMA suggests that this subsection be rewritten to state "The authorized officer determines reclamation is necessary to prevent environmental damage resulting from the operator's cessation of operations and the operator fails to act."

§228.14 Operations on withdrawn or segregated National Forest System lands including National Forest System Wilderness

The proposed subsection 228.14(b)(2) would only allow access through wilderness lands "...providing the mining claim is wholly within the Wilderness". This standard would disallow access across Wilderness to a mining claim or claim group just partially surrounded by Wilderness, even if that route were the only reasonable means of access. This paragraph fails to recognize that there are other statutes like the Alaska Native Interests Land Claims Act (ANILCA) which provide for reasonable access to inholdings, even if they are only partially surrounded by Wilderness. Requiring a mining claim within a Wilderness area to be wholly surrounded by Wilderness is an inappropriate standard unsupported by law.

As stated in ANILCA at 16 USC 3210(a):

> (a) Reasonable use and enjoyment of land within boundaries of National Forest System. Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System.

In addition, the Forest Service has established regulations at 36 CFR 251.114 based in part on ANILCA. Those regulations make it clear that this reasonable access provision quoted above applies to all National Forest System lands including congressionally designated Wilderness areas. The Forest Service's proposed rule at § 228.14 must be consistent with ANILCA and the

regulations at 36 CFR 251.114, and allow reasonable access to private inholdings and claims even only partly surrounded.

§228.15 Administrative appeals

The current regulation at 36 CFR 228.14 is a straightforward declaratory sentence that reads as follows:

> Any operator aggrieved by a decision of the authorized officer in connection with the regulations in this part may file an appeal under the provisions of 36 CFR part 251, subpart C

Thus under the above current regulation, an operator "may" (at his discretion) appeal any decision of the authorized officer and should file that appeal under 36 CFR 251 Subpart C. In the proposed rule, the Forest Service would change this simple declaratory statement of appeal rights into a passive voice rewording of those appeal rights:

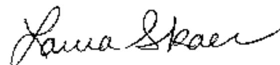
> Decisions made by Forest Service officers pursuant to part 228, subpart A may be subject to appeal by the operator in accordance with part 251, subpart C, of this chapter.

This rewording indicates decisions under 228 A "...may be subject to appeal...", and thus seem to reduce the scope of a miner's right to appeal all decisions made under 228A. That is, the new location of the word "may" in this reworded section suggests appeals "may" be filed not at the discretion of the miner, but rather at the discretion of the Forest Service. Or the new wording could even be taken to imply that there will be some circumstances where miners will not be allowed to appeal certain decisions based in 228A.

The Forest Service needs to be more upfront on what its intentions are by rewording this important paragraph. NWMA believes this section requires modification to indicate that an operator may choose to appeal any adverse decision. We suggest the Forest Service either replace "may" with "will" in its draft regulation, or simply retain the current statement of appeal rights. Considering the investment in time and money, as well as the extent of statutory rights involved in mining operations, mining claimants or operators must always have the maximum opportunity to appeal adverse decisions.

Thank you for the opportunity to comment on these proposed revisions.

Sincerely,



Laura Skaer
Executive Director

cc: USDA Under Secretary Mark Rey