Nos. 19-17585 and 19-17586

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, et al.,
Plaintiffs/Appellees,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,
Defendants/Appellants,

and

ROSEMONT COPPER COMPANY,
Intervenor-Defendant/Appellant.

Appeal from the United States District Court for the District of Arizona
Nos. 4:17-cv-00475, 4:17-cv-00576, and 4:18-cv-00189 (Hon. James A. Soto)

FEDERAL APPELLANTS' OPENING BRIEF

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GLOSSARY

APA	Administrative Procedure Act
BLM	Bureau of Land Management
ESA	Endangered Species Act
EIS	Environmental Impact Statement
NEPA	National Environmental Policy Act
ROD	Record of Decision

INTRODUCTION

Regulating mining operations on lands within the National Forest System requires the U.S. Forest Service ("Service") to balance the public interest in promoting the development of mineral resources and the sometimes competing public interest in managing surface resources. Congress has long recognized the importance of fostering the development of mineral resources, and it has authorized miners to explore for minerals and mine on certain federal lands, including National Forest System lands. Congress has also tasked the Service with protecting those lands from destruction and depredation, granting the Service the authority to adopt rules and impose reasonable restrictions on mining operations.

At issue here is the Service's review and approval of Rosemont Mining Company's plan to conduct copper mining operations in the Coronado National Forest and adjoining lands in Arizona. The Service's review of Rosemont's mining plan of operations ("mining plan") correctly recognized that the company's operations were authorized by the Mining Law of 1872 ("the Mining Law"). The Service ultimately approved a modified version of Rosemont's mining plan that included numerous restrictions designed to minimize adverse environmental impacts to the Coronado National Forest. The Service's review of Rosemont's plan adhered to applicable statutes and regulations, and the agency's approval of the plan was reasonable.

The district court's decision to the contrary rested on a fundamental misinterpretation of the Mining Law and the regulatory scheme applicable to the Service's review of mining plans. That decision should be reversed.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that the Service must investigate the validity of Rosemont's mining claims before approving Rosemont's proposed placement of waste rock and tailings on National Forest System lands open to mining under the Mining Law.

2. Whether the district court erred in concluding that the Service should have analyzed parts of Rosemont's mining plan under its Part 251 special use regulations, which expressly exclude mining operations.

3. Whether the district court erred in conducting its own de novo review of the administrative record and concluding that there was no evidence that Rosemont's mining claims contained valuable mineral deposits.

STATEMENT OF JURISDICTION

(a) The district court had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiffs' claims arose under several federal statutes, including the Organic Administration Act of 1897 ("Organic Act"), 16 U.S.C. § 551; the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321 et seq.; and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2). *See* 2 Excerpts of Record ("E.R.") 130–42, 179, 228–34.

(b) The district court's judgment was final because it resolved two of three consolidated cases. 1 E.R. 3, 39–40 & n.16; *see also Hall v. Hall*, 138 S. Ct. 1118, 1131 (2018). This Court has jurisdiction under 28 U.S.C. § 1291.

(c) The judgment was entered on August 2, 2019. 1 E.R. 3. Intervenor-Defendant Rosemont Copper Company timely filed a Rule 59(e) motion to alter or amend the judgment on August 30, 2019. The district court denied that motion on October 28, 2019. 1 E.R. 1–2. The Service filed its notice of appeal on December 23, 2019, or 56 days later. 2 E.R. 41–47. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(B) and (a)(4)(A)(iv). This Court consolidated the Service's appeal with Rosemont's timely filed appeal. DktEntry 21 (Mar. 12, 2020).

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are in the Addendum following this brief.

STATEMENT OF THE CASE

A. Statutory and regulatory background

This case involves the interplay between several statutes and regulations relating to mining and to the management of National Forest System lands.

1. The Mining Law of 1872

"It is hard to understand this dispute about a relatively arcane area of law without reference to history." *United States v. Shumway*, 199 F.3d 1093, 1097 (9th Cir. 1999). "For nearly a century there was practically no legislation on the part of congress for the disposal of mines or mineral lands." *Del Monte Mining & Milling Co. v. Last Chance Mining*

& Milling Co., 171 U.S. 55, 61 (1898). It was well known that explorers searched the public domain for minerals and asserted possessory rights to any deposits they discovered. *Id.* at 62. These miners developed their own rules and customs, which courts "enforced as valid." *Id.*; *accord Shumway*, 199 F.3d at 1097–99. As a result, "vast mining interests [grew] up, employing many millions of capital, and contributing largely to the prosperity and improvement of the whole country" — all "without interference by the national government [and] under its implied sanction." *Sparrow v. Strong*, 70 U.S. (3 Wall.) 97, 104 (1865) (describing "public history" of mineral development).

Congress enacted the first statute addressing mineral extraction in 1866. *Del Monte*, 171 U.S. at 62–63. Rather than adopt a legislative scheme that "might have preserved more government authority or revenue," however, "Congress expressly adopted the 'local customs or rules of miners.'" *Shumway*, 199 F.3d at 1098. The "Lode Law" declared that "the mineral lands of the public domain, both surveyed and unsurveyed," are "free and open to exploration and occupation," subject "to the local customs or rules of miners," as long as they do not "conflict with the laws of the United States." Lode Law of 1866, ch. 262, 14 Stat. 251, 251.

Congress further cemented this system of self-initiated rights in the Mining Law of 1872, 30 U.S.C. §§ 22–54. Like the Lode Law, the Mining Law contains "an express invitation to all qualified persons to explore the lands of the United States for valuable mineral deposits." *Union Oil Co. v. Smith*, 249 U.S. 337, 346 (1919); *accord Andrus v. Shell Oil Co.*, 446 U.S. 657, 658 (1980) (the Mining Law "provides that citizens may enter and

explore the public domain, and search for minerals"); *Cole v. Ralph*, 252 U.S. 286, 294 (1920) (similar). It embraces "the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." 30 U.S.C. § 22. The Mining Law recognizes two types of self-initiated rights — (1) free access to federal land and (2) the right to establish property rights to that land.

First, § 22 provides that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase," subject to applicable regulations and laws. In short, the Mining Law invites and authorizes U.S. citizens (and those who have declared their intention to become citizens) to enter and occupy "free and open" lands for mining purposes "under regulations prescribed by law." *Id.*[1]

Second, the Mining Law grants miners the option to establish and protect a property right to lands explored and occupied by staking or "locating" mining claims. *Id.* §§ 23, 26, 35, 36; *see also Shumway*, 199 F.3d at 1095 (noting that mining claims are "vested possessory rights" and recognized interests in real property). Miners locate a mining claim by following certain procedures, including posting notice, marking claim boundaries, recording with the county, and meeting other statutory or regulatory

[1] As discussed below (pp. 23–24), the government may withdraw lands from the operation of the Mining Law. In this brief, "open lands" refer to lands subject to the Mining Law that have not been withdrawn.

requirements. *Shumway*, 199 F.3d at 1099 (describing "location"). The staking of a mining claim protects the claimant against competing miners. *See, e.g.*, *Belk v. Meagher*, 104 U.S. 279, 283–84 (1881).

To secure enforceable property rights, however, the mining claimant must do all of the above *and* make a "discovery" of a valuable mineral deposit. 30 U.S.C. § 23; *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963). A discovery is the identification of a mineral deposit valuable enough that a prudent person would justifiably expend more labor and money to develop it. *See Coleman v. United States*, 390 U.S. 599, 600–03 (1968). Courts have refined this to require a mineral deposit that can be extracted and marketed at a profit. *Id.*; *Chrisman v. Miller*, 197 U.S. 313, 320–22 (1905).

The Secretary of the Interior has primary jurisdiction to determine the validity of a mining claim, *Cameron v. United States*, 252 U.S. 450, 460 (1920), even when miners locate claims on National Forest System lands, *see Clouser v. Espy*, 42 F.3d 1522, 1525 (9th Cir. 1994). A validity determination is an administrative process that begins with a mineral examination, including an on-the-ground examination to sample and test for the presence of a valuable mineral deposit. *See Freeman v. U.S. Department of Interior*, 83 F. Supp. 3d 173, 178–80 (D.D.C. 2015) (describing administrative process), *aff'd*, 650 Fed. Appx. 6 (D.C. Cir. 2016).

Although Interior has the authority to determine a mining claim's validity at any time (and the Service may ask it to do so), *Best*, 371 U.S. at 339–40, the agency rarely conducts validity exams unless required. The two most common circumstances in

which validity exams are required are (1) when the government has withdrawn lands from the Mining Law and a miner claims to have rights preexisting the withdrawal, *see, e.g.*, *National Mining Ass'n v. Zinke*, 877 F.3d 845, 858 (9th Cir. 2017); and (2) before the United States "patents" a claim (i.e., conveys full fee title to the land), *see McMaster v. United States*, 731 F.3d 881, 884 (9th Cir. 2013).

The Mining Law also grants citizens the opportunity to establish property rights in "mill sites." 30 U.S.C. § 42. This type of mining claim covers up to five acres of non-mineral lands used for "mining or milling" purposes — that is, for operational facilities. *Id.*; 43 C.F.R. §§ 3832.32, 3832.34(a); *Swanson v. Babbitt*, 3 F.3d 1348, 1350 (9th Cir. 1993) ("A mill site is a tract of land, not to exceed five acres, on which can be placed processing facilities and other structures used to support the extraction of minerals from the claim."). Mining claimants may stake as many mill sites as they reasonably need for mining operations. 43 C.F.R. § 3832.32.

Owners of mining claims and mill sites may decide to "patent the claim, thereby purchasing from the Federal Government the land and minerals and obtaining ultimate title to them." *United States v. Locke*, 471 U.S. 84, 86 (1985). But a mining claimant need not apply for or obtain a patent, and many miners complete mining operations on federal lands without patenting any mining claims. *Id.*; *cf.* Consolidated Appropriations Act, 2019, Pub. L. No. 116-6, § 404(a), 133 Stat. 13, 258 (generally prohibiting the use of appropriated funds to accept or process mining patent applications).

2. Surface Resources Act of 1955[2]

In 1955, Congress enacted the Surface Resources and Multiple Use Act, 30 U.S.C. §§ 611–615, which made clear that a claimant may not use his unpatented mining claims "for any purpose other than prospecting, mining or processing operations and uses reasonably incident thereto," *id.* § 612(a).

The Act also confirmed that the Service may permit and manage non-mining uses on the surfaces of mining claims located on National Forest System lands. *Id.* § 612(b). Although the Mining Law originally granted miners "exclusive" use of their claims, *id.* § 26, the Surface Resources Act made clear that the use was in fact non-exclusive, *id.* § 612(b). On claims located after 1955, therefore, the United States may use the surface of a claim and may grant the public the right to use it as well — as long as that use does not "endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto." *Id.*; *see also United States v. Curtis-Nevada Mines, Inc.*, 611 F.2d 1277, 1283–86 (9th Cir. 1980). Congress did not intend the Act to affect a miner's right to develop mineral deposits and use federal lands for mining purposes. Rather, Congress intended the Act to "strike[] a balance . . . between competing surface uses, and surface versus subsurface competing uses." S. Rep. No. 84-554, at 9 (1955).

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[2] This statute is also called "the Surface Use Act," "the Multiple Use Act," or "the Common Varieties Act."

3. The Forest Service Organic Administration Act and the Service's Part 228A regulations

The Organic Act of 1897 extended the rights conferred by the Mining Law to the national forests. 16 U.S.C. § 482; *Wilderness Society v. Dombeck*, 168 F.3d 367, 374 (9th Cir. 1999). The Act imposes a dual mandate on the Service to protect national forests from destruction while allowing mineral exploration and mineral resource development under the Mining Law. *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981) (opining that the "important interests" of mining and national forests "were intended to and can coexist"); *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 478 (9th Cir. 2000) (reiterating that the Act advances "the 'important and competing interests' of preserving forests and protecting mining rights" (quoting *Weiss*, 642 F.2d at 299)). After all, national forests "are not parks set aside for nonuse, but have been established for economic reasons." *United States v. New Mexico*, 438 U.S. 696, 708 (1978).

The Organic Act directs the Service to "make provisions for the protection against destruction by fire and depredations upon the public forests and national forests" and to make regulations necessary "to regulate their occupancy and use and to preserve the forests thereon from destruction." 16 U.S.C. § 551. But the Act includes an express carve-out for mining, providing that the Service may not "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof," as long as the person complies with applicable rules and regulations. *Id.* § 478.

In 1974, the Service promulgated surface use regulations under its Organic Act authority. 36 C.F.R. Part 228, Subpart A ("Part 228A regulations"). Those regulations "set forth rules and procedures through which use of the *surface* of National Forest System lands in connection with operations authorized by" the Mining Law "shall be conducted." *Id.* § 228.1 (emphasis added). The regulations do not, however, "provide for the management of *mineral* resources" because "the responsibility for managing such resources is in the Secretary of the Interior." *Id.* (emphasis added). They also "recognize[] that prospectors and miners have a statutory right, not mere privilege, under the 1872 mining law and the [Organic Act], to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production." 39 Fed. Reg. 31,317 (Aug. 28, 1974).

The Service designed its Part 228A regulations to ensure that mining operations are "conducted so as to minimize adverse environmental impacts on National Forest System surface resources." 36 C.F.R. § 228.1. The regulations apply to "[a]ll functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to" the regulations, "regardless of whether said operations take place on or off mining claims." *Id.* § 228.3(a); *see also id.* § 228.2.

Anyone wishing to conduct mining operations that will likely cause "significant disturbance of surface resources" must submit a mining plan to the Service for

approval. *Id.* § 228.4(a)(3). The regulations set out detailed requirements for a mining plan and for the Service's review of a proposed plan. *Id.* §§ 228.4(c)–(f), 228.5. They also require operations to be conducted "where feasible" to "minimize adverse environmental impacts on National Forest surface resources." *Id.* § 228.8 (listing specific resources, like air and water quality, solid waste disposal, scenic values, and fisheries and wildlife habitat). An operator must show in its mining plan how those requirements will be met. *Id.* § 228.4(c)(3). After the Service completes its review of a proposed plan, including any required NEPA analysis, the Service may approve the plan or notify the operator of any changes or additions required to meet the purpose of the regulations. *See id.* § 228.5(a)(1), (3).

4. The National Environmental Policy Act

NEPA seeks to ensure that federal agencies consider the environmental impacts of proposed major federal actions. 42 U.S.C. § 4332(C); *accord Winter v. NRDC, Inc.*, 555 U.S. 7, 16 (2008). The statute does not mandate any specific substantive results, "but simply provides the necessary process." *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002) (internal quotation marks omitted).

NEPA requires agencies to analyze the environmental consequences of a proposed federal action. *Id.* When an agency determines that a particular federal action will have significant environmental impacts, it must prepare an Environmental Impact Statement ("EIS"). 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.1. Under current NEPA regulations, an EIS must evaluate the direct effects, indirect effects, and cumulative

impacts of a range of alternatives consistent with the nature and scope of the proposed action. 40 C.F.R. §§ 1502.14, 1508.7, 1508.8; *Westlands Water District v. U.S. Department of Interior*, 376 F.3d 853, 865 (9th Cir. 2004).

B. Factual background

Rosemont submitted a preliminary mining plan to the Service for its approval in 2007. 3 E.R. 264–67; 5 E.R. 695 n.4. The plan proposed developing an open pit mine to recover an estimated 5.88 billion pounds of copper, 80 million ounces of silver, and 194 million pounds of molybdenum. 5 E.R. 696. The mining operations will occur on federal lands that are part of the Coronado National Forest and on adjacent and intermingled state and private lands located within the boundaries of the forest. 3 E.R. 270; 5 E.R. 696.

On June 6, 2017, the Forest Supervisor for the Coronado National Forest issued a Record of Decision ("ROD") responding to Rosemont's proposed mining plan and amending the forest management plan. 5 E.R. 681–822. This decision was the culmination of more than a decade of study, resulting in a 2,400-page EIS. 3 E.R. 331–52. It rejected Rosemont's proposed plan and selected an alternative configuration called the "Barrel Alternative." 5 E.R. 704. The Service conditioned its approval on multiple "mitigation and monitoring measures" and directed Rosemont to make other necessary changes and additions to satisfy the Service's Part 228A regulations and other applicable laws. *Id.* The Service instructed Rosemont to submit a revised mining plan that included the Service's required changes. 5 E.R. 695 n.4.

As detailed in the ROD, the project would consist of an open pit; a processing plant and associated facilities; transmission lines for power and water; and waste rock and tailings facilities. 5 E.R. 696.[3] The pit would be approximately 3,000 feet deep and 6,500 feet in diameter, encompassing roughly 955 acres of public and private land. 5 E.R. 725. The waste rock and tailings facilities would house nearly two billion tons of material that will remain after ore processing, 5 E.R. 723, and would be located on 2,447 acres of National Forest System lands, 4 E.R. 552.

The core of the project area, including the mine pit, covers a mix of federal, state, and private lands. 5 E.R. 725. In total, the project will disturb 5,431 acres of land, including 1,197 acres of private land (including patented claims) owned by Rosemont and 3,653 acres of National Forest System land. 5 E.R. 725–26; *see also* 5 E.R. 697 (map identifying affected parcels). The affected National Forest System lands are open to mining, and Rosemont has located unpatented mining claims on those lands. 3 E.R. 259; 4 E.R. 517; 5 E.R. 707, 772–73. Rosemont proposes to place its waste rock and tailings facilities on some of those unpatented claims. 4 E.R. 672; 5 E.R. 697, 707.

In the Service's understanding of the law (at issue in this appeal), its review of the proposed mining plan gave the Service no reason to investigate the validity of Rosemont's unpatented mining claims — that is, whether the claims contained

[3] "Waste rock" is rock that either contains no valuable minerals at all or contains minerals that would not be economical to remove. 4 E.R. 547. "Tailings" are the materials that remain once valuable minerals have been extracted from ore. 4 E.R. 545.

marketable mineral deposits. That is because it "is not . . . necessary to have a mining claim to explore for, process, and recover locatable minerals from Forest Service lands if the land is open to mineral entry." 4 E.R. 501; *accord* 3 E.R. 259; 5 E.R. 705.

In its NEPA analysis, the Service considered six alternatives, including a no-action alternative and Rosemont's proposed design. 5 E.R. 754-62. The Barrel Alternative ultimately selected by the Service was the one that, in the Service's judgment, best addressed impacts on "biological resources, cultural resources, and the surface water component of water resources." 5 E.R. 707. As the Service explained, the Barrel Alternative "reduce[s] impacts, compared with other alternatives, while allowing the proponent to develop its mineral resources in a manner that is consistent with applicable laws and regulations." 5 E.R. 722. For example, the Barrel Alternative "will result in the smallest amount of acres directly disturbed," 5 E.R. 708, and requires Rosemont to implement a robust mitigation and monitoring plan, 4 E.R. 553–660; 5 E.R. 707.

Rosemont submitted a revised final mining plan incorporating the Barrel Alternative and the necessary mitigation measures, and the Service approved that plan on March 20, 2019. *See* 2 E.R. 48–66.

C. Proceedings below

Several environmental groups and Indian tribes ("Plaintiffs") filed three separate lawsuits in the District of Arizona challenging the Service's analysis as well as the U.S. Fish and Wildlife Service's related analysis under the Endangered Species Act ("ESA").

Plaintiffs asserted that the agencies misapplied the Mining Law, the Organic Act, the Surface Resources Act, NEPA, the ESA, and other federal statutes. The district court consolidated the three cases. Rosemont intervened as a defendant and asserted a cross-claim against the Fish and Wildlife Service. In 2019, two other lawsuits challenging the Clean Water Act permit issued by U.S. Army Corps of Engineers for the project were filed, consolidated, and stayed. Those cases are not at issue.

The parties filed cross-motions for summary judgment in the consolidated cases. On July 31, 2019, the district court granted Plaintiffs' motions in two of the three cases and vacated and remanded the Service's ROD and EIS. That decision is at issue in this appeal. The court decided the remaining case on February 10, 2020, granting partial summary judgment to the Center for Biological Diversity on three of its ESA claims. *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, No. CV-17-00475-TUC-JAS, 2020 WL 620834 (D. Ariz. Feb. 10, 2020). That decision is not at issue.[4]

In the July 2019 decision on appeal, the district court held that the Service's failure to assess the validity of the claims that Rosemont proposed to use for its waste rock and tailings area amounted to an abdication of the Service's responsibilities under the Organic Act. 1 E.R. 26–35. As the court saw it, the Service may not approve a mining plan "without first determining who may, as a right, use the surface." 1 E.R. 26.

[4] Federal defendants acceded to the remand in No. CV-17-00475-TUC-JAS. Rosemont has separately appealed the court's grant of summary judgment in the Fish and Wildlife Service's favor on its cross-claim challenging the Service's designation of critical habitat for the jaguar.

The court concluded that Rosemont would have a right to use the surface of National Forest System lands for its waste rock and tailings facilities only if they were placed within the boundaries of valid mining claims — that is, claims containing a discovery of valuable mineral deposits. 1 E.R. 28–29.

The district court reviewed the record for evidence that the federal lands that Rosemont proposed to use for its waste rock and tailings facilities did in fact include valuable mineral deposits. 1 E.R. 30–33. Ultimately, the court concluded that "the record contains no information to show Rosemont discovered a valuable mineral deposit within the ore processing, or tailings and waste rock pile areas." 1 E.R. 33. Thus, the court reasoned, there was "no basis upon which the Forest Service could find the Mining Laws would authorize" Rosemont's use of those lands. *Id.*

The district court also ruled that because Rosemont's use of the lands for its waste rock and tailings facilities was "unauthorized" under the Mining Law, the Service erred in applying its Part 228A regulations to its review of those elements of Rosemont's mining plan. In the court's view, any use not regulated under the Part 228A regulations falls under the Service's Part 251 "special use" regulations. 1 E.R. 36–37. The court then held that the Service's failure to apply those regulations to parts of the Rosemont's mining plan "infected the FEIS," such that the Service "fail[ed] to consider reasonable alternatives" in its NEPA analysis. 1 E.R. 37. Because the court considered those flaws dispositive, it did not address the parties' other arguments. The court granted Plaintiffs' motions for summary judgment and vacated the Service's ROD and FEIS. 1 E.R. 10.

Rosemont moved to alter or amend the district court's judgment on August 30, 2019. The court denied that motion on October 28, 2019. 1 E.R. 1–2.

SUMMARY OF ARGUMENT

The Service regulates mining operations on National Forest System lands under a dual mandate. First, the Service must allow mineral exploration and mineral resources development authorized by the Mining Law on "open" National Forest System lands. 16 U.S.C. § 478. Second, it must protect national forests from destruction and adopt reasonable rules and regulations for mining operations within those forests. *Id.* §§ 478, 551. The Service's analysis of Rosemont's mining plan correctly reflects a nuanced and careful application of that dual mandate. The district court erred in holding otherwise.

1. The district court erred in holding that the Service should have ensured that Rosemont's unpatented mining claims, specifically those claims that Rosemont planned to use for its waste rock and tailings facilities, were valid before approving its proposed mining plan. The court misunderstood the distinction drawn by the Mining Law between the statutory right to enter, explore, and occupy open federal lands for mining purposes, 30 U.S.C. § 22, and the entirely separate right to secure property interests in federal lands, *id.* §§ 23, 26, 29, 35, 36, 42. A miner need not obtain a property right to exercise his statutory right to occupy lands open to mining. Because the lands that Rosemont proposes to use for its waste rock and tailings facilities are open, Rosemont has a statutory right to occupy those lands, and the Service had no reason to evaluate whether Rosemont *also* possessed valid mining claims.

Even assuming the Mining Law confines waste rock and tailings facilities to the four corners of a valid mining claim, the court erred in holding that the Service must assess the validity of Rosemont's mining claims *before* approving Rosemont's mining plan. Neither the Organic Act nor the Service's Part 228A mining regulations require the Service to undertake that analysis. The fact that those authorities refer to the Mining Law does not, as the district court reasoned, create an implicit requirement that the Service investigate a mining claim's validity before approving a mining plan on open lands. Although the Service *may* investigate the validity of mining claims in some cases, it was under no obligation to do so here, and its decision not to do so was reasonable.

2. The Service also correctly applied its Part 228A mining regulations instead of its Part 251 special use regulations — which expressly exclude mining operations — to Rosemont's proposed mining plan. In so doing, the Service did not abdicate its regulatory responsibilities, as the district court incorrectly reasoned. To the contrary, the Service recognized that it has "substantial regulatory power" over mining operations on lands within its jurisdiction, *Locke*, 471 U.S at 105, and its NEPA analysis reflects that it properly exercised that power here.

3. Even if the Service had an obligation to consider the factual basis for validity of some of Rosemont's mining claims, Plaintiffs are entitled only to a remand to the Service to allow *the agency* to consider these issues in the first instance. Thus, the district court erred in independently evaluating the administrative record to conclude that there was "no evidence of any mineralization" within Rosemont's mining claims.

STANDARD OF REVIEW

This Court reviews summary judgment rulings de novo and applies the same standard of review as the district court. *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014).

The agency actions challenged here are reviewed under the deferential standard of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). An agency action is arbitrary only if "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Great Old Broads for Wilderness v. Kimbell*, 709 F.3d 836, 846 (9th Cir. 2013) (internal quotation marks omitted). In reviewing technical analyses within the agency's expertise, the Court is "at its most deferential." *Id.*

ARGUMENT

I. The Service did not need to investigate the validity of any of Rosemont's mining claims before approving its mining plan.

The district court erred in holding that the Service had to consider whether Rosemont's mining claims were valid — that is, whether they included valuable mineral deposits — before approving Rosemont's mining plan. Because the Mining Law does not condition use of open federal lands on the location of a valid mining claim, the Service correctly concluded that it had no reason to investigate whether Rosemont's

claims were valid. Even assuming the Mining Law did include such a condition, neither the Organic Act nor the Service's Part 228A regulations require the Service to assess the validity of a miner's claims *before* approving his mining plan. Either way, the Service reasonably decided not to assess the validity of Rosemont's claims.

A. The Service had no reason to investigate the validity of Rosemont's mining claims because the Mining Law authorizes miners to use open federal lands for mining operations, including waste rock and tailings facilities.

The Mining Law creates two separate rights: it confers upon all miners a *statutory* right to access, explore, and occupy federal lands for mining purposes, 30 U.S.C. § 22; and it confers upon those miners who locate a valid mining claim, including discovery of a valuable mineral deposit, a separate *property* right enforceable against competing miners and the federal government, *id.* §§ 23, 26, 35, 36. Vis-à-vis the latter, a property right is necessary only if a miner seeks to assert that right against the United States — for example, if the miner attempts to patent his claim or mine on "withdrawn" lands. *Id.* § 29; 36 C.F.R. § 228.15. But a miner need not establish a property right to exercise the statutory right to use and occupy open lands for mining. *See* 30 U.S.C. § 22.

Because the lands that Rosemont proposes to use for its mining operations (including its storage and processing facilities) are open and because Rosemont is not asserting a property right against the United States, the Service had no reason to evaluate whether Rosemont's mining operations would take place on valid mining claims. The Service correctly recognized that the Mining Law gives Rosemont a statutory right to

access and occupy those open lands for mining purposes. 3 E.R. 259, 359, 446; 4 E.R. 500–01; 5 E.R. 705, 755. That conclusion was not arbitrary; instead, it reflected the agency's proper understanding of the Mining Law.

1. Section 22 codifies a statutory right to explore and occupy open federal lands for mining purposes.

The statutory right to explore and conduct mining operations on federal lands is established in § 22 of the Mining Law, which provides that "all valuable mineral deposits in lands belonging to the United States . . . shall be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase." In short, it "allow[s] United States citizens to go onto unappropriated, unreserved public land to prospect for and develop certain minerals." *Locke*, 471 U.S. at 86; *accord Clouser*, 42 F.3d at 1524 & n.1 (recognizing that § 22 allowed the public to explore, prospect, and extract minerals from open lands).

When Congress enacted the Mining Law in the late 1800s, miners had been extracting minerals from federal lands for decades with no government permission to do so. Section 22 reflects Congress's intent to codify, not to limit, that right to develop federal minerals. After all, Congress enacted the Mining Law to "encourage the exploration of the public lands and the discovery and development of such minerals as may be found in them." *Consolidated Mutual Oil Co. v. United States*, 245 F. 521, 523 (9th Cir. 1917). As this Court has recognized: "No citation of authority is required to support the statement that the all-pervading purpose of the mining laws is to further

the speedy and orderly development of the mineral resources of our country." *United States v. Nogueira*, 403 F.2d 816, 823 (9th Cir. 1968).

The Mining Law thus imposes very few limits on a miner's right to enter and occupy open federal lands for mining purposes. Most importantly, it does not require a miner to locate a mining claim, let alone discover valuable minerals, before entering and occupying open lands to explore for and develop minerals. Indeed, § 22 says nothing at all about mining *claims*. Likewise, the section's reference to "occupation" of "the lands in which [valuable mineral deposits] are found" does not limit a miner's right of occupation to only those parcels of land on which deposits of valuable minerals are actually found. Instead, the reference to "valuable mineral deposits" is broadly "construed as including all lands chiefly valuable for other than agricultural purposes, and particularly as including non-metallic substances." *Northern Pacific Railway v. Soderberg*, 188 U.S. 526, 534 (1903); *see also Davis v. Wiebbold*, 139 U.S. 507, 522 (1891) (distinguishing between agricultural land and "mineral land"). Historically, phrases like "lands known to be valuable for minerals," "for mineral deposits," "known mines," and "land containing known mines" were "equivalent in meaning." *Brady's Mortgagee v. Harris*, 1900 I.D. LEXIS 12, at *21 (Dep't of Interior Jan. 22, 1900).

If the actual discovery of valuable minerals were necessary to occupy open lands, then a miner would need to *discover* minerals before *exploring* for them. But the Supreme Court has recognized the obvious fact that "exploration must precede the discovery of minerals, and some occupation of the land ordinarily is necessary for adequate and

systematic exploration." *Union Oil*, 249 U.S. at 346. In fact, § 22 imposes only two limits on a miner's right to enter and occupy federal lands for mining purposes.[5]

First, and most importantly, miners may prospect, explore, and develop mineral resources only on those federal lands that remain "free and open." 30 U.S.C. § 22; *see also Oklahoma v. Texas*, 258 U.S. 574, 599–600 (1922) ("Only where the United States has indicated that the lands are held for disposal under the land laws does the [Mining Law] apply . . . ."). Congress, the President, or the Department of the Interior may withdraw lands from mining if, for example, they decide that other values weigh against allowing mineral development in those areas. *See, e.g.*, 43 U.S.C. §§ 1714 (authorizing Interior to withdraw lands and explaining procedure), 1702(j) (explaining that Interior may withdraw lands "to maintain other public values in the area or reserv[e] the area for a particular public purpose or program").

For example, some federal lands administered by the Service have been withdrawn and classified as wilderness areas, *Hjelvik v. Babbitt*, 198 F.3d 1072, 1074 (9th Cir. 1999); national recreation areas, *Cook v. United States*, 42 Fed. Cl. 788, 789 (1999); or wildlife reserves, *Pathfinder Mines Corp. v. Hodel*, 811 F.2d 1288, 1291 (9th Cir. 1987). They have also been be withdrawn for agricultural use, *Wiebbold*, 139 U.S. at 522, and

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[5] Although the Mining Law imposes no additional limits, later-enacted statutes and regulations do. For example, a miner must prepare a mining plan for Service approval, 36 C.F.R. § 228.4, and any Service approval must accord with the ESA, 16 U.S.C § 1536. Moreover, miners must obtain permits under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, for activities that result in the deposit of dredge and fill material into navigable waters.

to protect cultural, tribal, and other environmental resources, *National Mining Ass'n*, 877 F.3d at 866–70. If the government has *not* withdrawn particular National Forest System lands, however, then the Mining Law's invitation to enter and occupy those lands for mineral development remains operative. 16 U.S.C. § 478; *see also* 4 E.R. 501 (explaining that "it is not even necessary to have a mining claim to explore for, process, and recover locatable minerals from Forest Service lands if the land is open to mineral entry").

Second, miners must follow "the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States." 30 U.S.C. § 22. As explained above (pp. 3–6), mining on federal lands had proceeded with no federal interference for nearly a century before enactment of the Lode Law. Rather than impose new limits on the already successful mining industry, § 22 merely "gave the sanction of law" to customs miners had developed with no federal oversight. *Benson Mining & Smelting Co. v. Alta Mining & Smelting Co.*, 145 U.S. 428, 431 (1892); *accord Forbes v. Gracey*, 94 U.S. 762, 763 (1876) (similar).

Local customs imposed no relevant limits on a miner's right to use federal lands for mining purposes. As particularly relevant here, miners customarily held additional ground as "necessary for the deposit of tailings from their claims." *McLaughlin v. Del Re*, 71 Cal. 230, 235–36 (1886) (recognizing custom of using additional land in California's "Old Gulch mining district"); *see also Ritter v. Lynch*, 123 F. 930, 932 (C.C.D. Nev. 1903) (recognizing that "[w]hen a place of deposit for tailings is necessary for the fair working of a mine, there can be no doubt of the miner's right to appropriate such

ground as may be reasonably necessary for this purpose, provided he does not interfere with pre-existing rights" (quoting *Jones v. Jackson*, 9 Cal. 237, 244 (1858)). But whether a miner had staked a claim did not affect his right to use federal land for mining and reasonably incident uses, like the waste rock and tailings facilities at issue here.

2. Subsequent sections of the Mining Law explain how miners may secure property rights in mining claims.

Just as § 22 of the Mining Law grants free access to open federal lands, subsequent sections of the Mining Law confer the ability to obtain separate rights — property rights — on those miners who locate mining claims, discover a valuable mineral deposit, and comply with applicable regulatory requirements. *Davis v. Nelson*, 329 F.2d 840, 846 (9th Cir. 1964) (explaining that "the validity of [a miner's] *title*" turns on whether "there [has] been a discovery of valuable mineral within the limits of the claim" (emphasis added)). Mining claims are "property in the fullest sense of that term; and may be sold, transferred, mortgaged, and inherited." *Wilbur v. United States ex rel. Krushnic*, 280 U.S. 306, 316 (1930); *accord Freese v. United States*, 639 F.2d 754, 757 (Ct. Cl. 1981) ("[F]ederal mining claims are 'private property' enjoying the protection of the fifth amendment."). Likewise, the Mining Law authorizes miners to locate unpatented mining claims without prior government approval. *Curtis-Nevada Mines*, 611 F.2d at 1281; *see also Davis*, 329 F.2d at 846.

For example, § 26 of the Mining Law provides that miners who locate mining claims "on any mineral vein, lode, or ledge" have "the exclusive right of possession and

enjoyment of all the surface" included within the boundaries of their claims.[6] Miners who desire fee simple ownership of claimed lands may take additional steps to patent those claims. *Id.* § 29 (describing patenting process). The Mining Law provided a similar invitation to miners to obtain property interests in non-mineral land by staking and patenting mill sites. *Id.* § 42. In so doing, the Mining Law implicitly recognized that miners were already occupying open, non-mineral lands for mining purposes.

Of course, the act of securing and perhaps even patenting a mining claim can yield significant benefits for miners interested in protecting their investments, and most miners where possible locate claims for that reason. *See Broder v. Natoma Water & Mining Co.*, 101 U.S. 274, 276 (1879). But nothing in the Mining Law *requires* a miner to secure a property right in federal lands under §§ 23, 26, 29, and 42 before exercising the statutory right under § 22 to enter, use, and occupy those lands for mining purposes.

B. The district court conflated the statutory right to enter and occupy open lands with the option to secure property rights to that land.

The district court erred in holding that the Service was required to consider whether the mining claims that Rosemont proposed to use for storage and processing facilities contained marketable minerals — i.e., whether the claims were valid — before approving Rosemont's mining plan. Because the lands were open, Rosemont had a

[6] As explained above (p. 8) and below (p. 29), the Surface Resources Act made that right *non*-exclusive. Otherwise, the Act did not limit rights conferred upon miners by the Mining Law.

statutory right to use them for its mining operations without securing property rights. Thus, the Service had no reason to consider whether the claims were valid.

First, the validity of a mining claim is relevant only when property rights are at issue. They are at issue, for example, when a mining claimant seeks to patent its mining claims. *See* 30 U.S.C. § 29. They are also at issue when a miner proposes to conduct mining operations on lands withdrawn from the Mining Law. *See supra* p. 20. Property rights are not at issue here, however, because Rosemont does not seek to assert property rights against the United States in the lands on which it proposes to place its waste rock and tailings facilities. *See* 3 E.R. 259, 359, 446; 4 E.R. 500–01; 5 E.R. 705, 755. Rosemont has not filed a patent application, does not propose to conduct mining operations on withdrawn lands, and has not asked the Service to determine its property rights for any other purpose. Instead, Rosemont seeks merely to use and occupy open lands for mining operations, as authorized by § 22 of the Mining Law.

Yet the district court relied almost exclusively on cases in which property rights were at issue. In so doing, the court conflated the statutory right to enter and occupy federal lands for mining and the property rights that may accrue from a valid mining claim. The court cited, for example, the Supreme Court's statement that "no right arises from an invalid claim of any kind." 1 E.R. 22, 27 (quoting *Best*, 371 U.S. at 337). In *Best*, holders of mining claims sought to enjoin Interior from administratively determining the validity of mining claims on lands that the government sought to use for a dam. 371 U.S. at 335. In rejecting that request, the Court recognized that mining

claims "are a unique form of property," *id.*, and they "give[] to the claimant certain exclusive possessory rights" even against the United States, but that "no right arises from an invalid claim of any kind," *id.* at 337 (internal quotation marks omitted). The district court took that statement to refer to statutory and property rights alike. 1 E.R. 22, 27. In context, however, the Supreme Court recognized only that the claimants had no *property* right in the lands without a valid claim. *Best*, 371 U.S. at 335–37.

The series of other cases on which the district court relied are inapposite for that same reason. *See, e.g.*, *Cameron*, 252 U.S. at 454–55 (explaining that if defendant's mining claim on withdrawn land is invalid, the "United States still has the paramount legal title to the tract, and also has the full beneficial ownership" and may therefore eject him); *Clouser*, 42 F.3d at 1525 (explaining that "only persons establishing that they discovered a valuable mineral deposit prior to the withdrawal possess a valid right to mine claims there"); *Lara v. Secretary of Interior*, 820 F.2d 1535, 1537 (9th Cir. 1987) (explaining, in appeal of Interior conclusion that mining claims were invalid, that plaintiff located mining claims two years before the land was withdrawn); *Waskey v. Hammer*, 223 U.S. 85, 90 (1912) (discussing validity in context of an ejection action brought by rival claimant). In short, all of those cases address circumstances in which validity was relevant because the outcome of the case turned on whether a property right existed. Here, the validity of Rosemont's mining claims is not relevant because the lands are open (not withdrawn), and Rosemont is not asserting a property right against the government or a rival private claimant.

Second, the district court incorrectly read the Surface Resources Act to limit mining and mining-related activities under the Mining Law to the four corners of a mining claim. 1 E.R. 22–23, 29. Congress enacted the Surface Resources Act to curb the practice of locating sham mining claims in order to gain property rights in federal lands for the construction of vacation homes, hotels, and the like. *See, e.g.*, *United States v. Backlund*, 689 F.3d 986, 996 (9th Cir. 2012) (holding that use of unpatented claim for exclusively residential purposes conflicted with the Surface Resources Act). The Act specifies that only "prospecting, mining or processing operations and uses reasonably incident thereto" may occur on a mining claim. 16 U.S.C. § 612(a).

The Surface Resources Act does not, as the court reasoned, 1 E.R. 28–29, suggest that the Mining Law authorizes miners to conduct prospecting, mining, or processing operations and reasonably incident activities *only* on mining claims. The Act "was corrective legislation, which attempted to clarify the law and to alleviate abuses that had occurred under the mining laws." *Curtis-Nevada Mines*, 611 F.2d at 1280. It did not change the lands to which the Mining Law applied or specify where mining operations may or may not occur. *See id.* ("Congress did not intend to change the basic principles of the mining laws when it enacted the [Surface Resources] Act.").

Third, the district court misunderstood the Mining Law's mill site provision to provide the exclusive avenue for miners to use additional lands for processing or milling facilities. 1 E.R. 35 & n.13. But § 42 simply confers upon miners the *option* to secure property interests in non-mineral lands for mining and milling, just as they may secure

property interests in mineral lands under other provisions: "Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode." 30 U.S.C. § 42(a). Nothing in § 42 *requires* a miner to secure a mill site to use or occupy open land for mining or milling. In fact, its reference to land "used or occupied" implicitly acknowledges that miners used unclaimed land for mining or milling, even before staking a mill site. *See, e.g.*, *Conway v. Fabian*, 108 Mont. 287, 305 (1939) (explaining that the "owner of tailings may deposit them either upon the public domain or on lands of which he has possession").

C. Regardless, the Service is not required to assess the validity of Rosemont's claims.

This Court ultimately need not decide whether the Mining Law allows miners to enter, explore, and develop mineral resources on open lands without a valid mining claim. The Mining Law aside, the district court erred in imposing on the Service an extra-statutory, extra-regulatory duty to assess whether Rosemont's mining claims were valid before approving the mining plan. No statute or regulation requires the Service to investigate validity — or the "factual basis" supporting validity — before approving a mining plan on open lands.

The Organic Act grants the Service authority to promulgate rules regulating the occupancy and use of the national forests and preserving the forests from destruction.

16 U.S.C. § 551. In addition, the Act makes clear that the Secretary may not "prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof." *Id.* § 478. There is no express direction in the Act regarding approval of mining plans; indeed, the Act does not mention mining plans at all, nor does the Act tie the Service's regulatory authority to the existence of a valid mining claim. *Cf. Okanogan*, 236 F.3d at 478 (rejecting argument that the Organic Act requires the Service to do everything in its power to restrict mining).

Like the Organic Act, nothing in the Service's regulations requires the Service to evaluate the validity of mining claims before approving a mining plan on open lands. As discussed above (pp. 9–11) and below (pp. 35–41), the requirement for approval of mining plans stems from the Service's Part 228A regulations. Those regulations mention validity only in reference to operations proposed on withdrawn *wilderness* lands. *See* 36 C.F.R. § 228.15(b) (specifying that only "[h]olders of unpatented mining claims validly established" may conduct mining operations in wilderness areas). Here, Rosemont proposes to use only *open* lands: the lands are not within wilderness areas, nor have they otherwise been withdrawn. Accordingly, the Service's regulations do not require the Service to investigate the validity of Rosemont's mining claims before approving its mining plan.

Nevertheless, the district court inferred an obligation to investigate the "factual basis" for validity from Part 228A's statement that it applies to "use of the surface of

National Forest System lands in connection with operations authorized by the United States mining laws." 36 C.F.R. § 228.1, *quoted in* 1 E.R. 36. But § 228.1 imposes no obligation on the Service to scrutinize the validity of a miner's unpatented claims before approving a mining plan; indeed, it "sets no substantive standards that [the Service] could violate." *Okanogan*, 236 F.3d at 478. "Rather, it merely explains the purpose of the remaining [Part 228A] regulations, which do set substantive standards." *Id.*

Further, construing § 228.1 to mean that operations on open lands are "authorized by the United States mining laws" only when the Service has confirmed that the operations will occur on valid mining claims is inconsistent with the agency's role on lands that have not been withdrawn from operation of the Mining Law. Moreover, the Forest Service is primarily responsible for regulating *surface use* of National Forest System lands, not for administering and verifying rights under the Mining Law, which is the prerogative of the Secretary of the Interior. 43 U.S.C. § 2. Indeed, it would make little sense for Congress to make the Service's regulatory authority turn on validity determinations, given that "plenary" authority to determine the validity of claims is vested in *Interior*, not in the Service. *Best*, 371 U.S. at 336.

In any event, the Mining Law itself contains no such requirement. Congress enacted the statute to encourage mineral development on federal lands with *limited* government oversight, and miners may locate mining claims on open land without prior government approval or review. *See supra* pp. 4–5, 25 (discussing self-initiated and self-executing rights). Preventing a miner from using his mining claims until the

government has independently confirmed that those claims are indeed valid is inconsistent with that framework.

The district court's recognition that mill site claims may be located under the Mining Law on lands that are entirely non-mineral in character underscores its error. 1 E.R. 35 & n.13. If non-mineral lands are open under the Mining Law, a miner need only locate, use, occupy, and maintain mill sites on those lands under § 42 in order to have valid claims. Thus even without any valuable mineral deposits, the miner's use would be "authorized by" the Mining Law. It makes no practical sense to require the Service to evaluate mining claims for validity, when open federal land that is not mineral in character may be used for mineral processing operations.

Just as the Organic Act and Part 228A regulations do not require the Service to assess claim validity before approving a mining plan on open lands, Interior has concluded that no statute or regulation requires it to conduct that review either. *See Legal Requirements for Determining Mining Claim Validity Before Approving a Mining Plan of Operations*, M-37012 at 2 (Nov. 14, 2005) (legal opinion prepared by Interior's chief legal officer confirming that "no law requires a claim validity determination before mine plan approval on lands open to the operation of the Mining Law" (capitalization altered)), https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/M-37012.pdf.

As Interior has explained, the Mining Law "nowhere requires that [Interior] determine mining claim or mill site validity before allowing exploration or mineral development," on open lands. *Id.* at 2. Thus, the agency "has determined the validity

of only a very small percentage of the hundreds of thousands of unpatented mining claims and mill sites on" lands within its jurisdiction. *Id.* at 4 (stating that BLM "simply does not know and . . . need not know" whether mining claims on open lands are valid before approving a mining plan). Because Congress "explicitly delegated authority" to Interior to interpret the Mining Law, its position is entitled to deference. *McMaster*, 731 F.3d at 891 & n.3.

Of course, both Interior and the Service have *discretion* to consider whether mining claims located on open lands are valid. *See Cameron*, 252 U.S. at 460. But because the Service has *no legal duty* under the Organic Act or the Part 228A regulations (or under the Mining Law, for that matter) to conduct any sort of validity analysis before approving a mining plan on open lands, it usually does not do so. As the Service explained in responses to comments on the EIS, it is neither "common practice," nor Service "policy, to challenge mining claim validity, except when (a) proposed operations are within an area withdrawn from mineral entry; (b) when a patent application is filed; and (c) when the agency deems that the proposed uses are not incidental to prospecting, mining, or processing operations." 4 E.R. 677. There is no question here that the lands at issue are open; that the Service reviewed a mining plan, not a patent application; and that Rosemont proposes to use the National Forest System lands for purposes reasonably incident to prospecting, mining, or processing operations. Therefore, the Service's decision not to scrutinize the validity of Rosemont's claims was reasonable.

* * *

In sum, the district court erred in holding that the Service had a duty to investigate the validity of Rosemont's mining claims before approving Rosemont's mining plan. The Service had no reason to conduct that analysis because the Mining Law does not condition use of open federal lands on the location of a valid mining claim. Moreover, neither the Organic Act nor the Service's regulations require the Service to assess the validity of a miner's claims before approving his mining plan. The Service's decision not to investigate the validity of Rosemont's claims was reasonable.

II. The Service properly exercised its regulatory authority under the Organic Act.

The Service correctly analyzed Rosemont's entire mining plan under its Part 228A mining regulations instead of its Part 251 special use regulations. *See* 36 C.F.R. §§ 228.1, 228.2. Contrary to the district court's suggestion, this does not mean that the Service "abdicated" its duty under the Organic Act to protect National Forest System lands from destruction and depredation. 1 E.R. 26. In fact, the Service reasonably regulated Rosemont's proposed mining operations to minimize adverse environmental impacts on national forests as required by the Organic Act and its regulations.

A. The Service was right to analyze Rosemont's mining plan, including the proposed waste rock and tailings facilities, under its Part 228A regulations.

The Service regulates mining operations from the cradle to grave: the same regulatory framework applies from the beginning of exploration, 36 C.F.R. § 228.4, to the end of operations and final reclamation efforts, *id.* § 228.10. As a result, the Part

228A regulations apply to all mining operations on open National Forest System lands, "regardless of whether said operations take place on or off mining claims." *Id.* § 228.3(a); *see also* 3 E.R. 260 (noting that the Part 228A regulations "implement[] a longstanding policy of the Forest Service to efficiently administer locatable mineral operations including their ancillary uses whether or not they are on mining claims"). That framework does not change depending on the stage of development. 4 E.R. 499. Nor does it hinge on whether the operator has located a mining claim. *See id.* ("The regulations apply to locatable minerals activity, whether or not the operator has active or valid mining claims."). After all, Congress, not the Service, has opened the lands to mining. 16 U.S.C. § 482. The Service's regulations simply set forth *how* mining operations that affect surface resources may occur on those lands.[7]

Indeed, the Part 228A regulations define "operations" to encompass many different activities: "All functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands." 36 C.F.R. § 228.3(a). This "makes sense" because, as even the district court recognized,

[7] Like the Service, BLM regulates mining operations through one comprehensive regulatory framework. 65 Fed. Reg. 69,998, 70,013 (Nov. 21, 2000) (stating, in preamble to BLM regulations at 43 C.F.R. Subpart 3809, that the definition of "operations" addresses "cradle to grave" activities on public lands). BLM separately administers the establishment, maintenance, verification, and patenting of property interest in mining claims and mill sites. 43 C.F.R. Parts 3830 (Locating, Recording, and Maintaining Mining Claims or Sites), 3860 (Mineral Patent Applications).

the Mining Law authorizes activities that might occur off mining claims. 1 E.R. 36; *see also supra* pp. 20–25. There are also countless activities that might not involve the extraction or processing of ore but that are reasonably incident to that work, like road construction and reclamation efforts. *See* 5 E.R. 725–30; 3 E.R. 295–98, 406–08; *see also* 1 E.R. 36. Defining "operations" broadly allows the Service to fulfill its obligation under the Organic Act to ensure that *all* mining operations minimize adverse impacts to National Forest System lands. *See* 16 U.S.C. §§ 478, 551; 36 C.F.R. §§ 228.1, 228.8.

Rosemont's mining plan, including its proposed waste rock and tailings facilities, squarely fits within the scope of the Part 228A regulations. Plaintiffs do not dispute that Rosemont owns private lands containing a large mineral deposit (including lands patented under the Mining Law), and that Rosemont intends to mine that deposit. 4 E.R. 517; 5 E.R. 697. Nor do Plaintiffs dispute that the proposed waste rock and tailings facilities are an integral part of the development of that mineral deposit. As the Service explained, the "placement of waste rock and mill tailings on the Forest are considered to be activities connected to mining and mineral processing as per 36 CFR 228 subpart A, and as such they are authorized activities regardless of whether they are on or off mining claims." 3 E.R. 259. Therefore, the Service properly analyzed Rosemont's mining plan — including its proposed waste rock and tailings facilities — under its Part 228A regulations.

The district court incorrectly held that the Service should have instead split the mining plan into multiple parts and evaluated the waste rock and tailings facilities as if

Rosemont had sought authorization under the Service's Part 251 special use regulations. 1 E.R. 36–37. That holding conflicts with the text and structure of the Service's regulations. The Service's Part 251 regulations provide that "special uses" do not include uses "authorized by the regulations governing . . . minerals (part 228)." 36 C.F.R. § 251.50(a). In short, the two sets of regulations are mutually exclusive — the Service can apply only one. *See Backlund*, 689 F.3d at 996; *accord United States v. Lex*, 300 F. Supp. 2d 951, 959–60 (E.D. Cal. 2003) ("[B]ecause activity covered by the Forest Service's mining regulations is excluded from the special use regulations, the appellants could not obtain a special use authorization for their activity which was subject to the mining regulations." (citation omitted)).

For example, the Part 228A regulations require mine operators to submit a comprehensive mining plan that includes "all uses reasonably incident" to "prospecting, exploration, development, mining, or processing of mineral resources." 36 C.F.R. § 228.3(a); *see also id.* §§ 228.4(c)(3) (providing that mining plans must include information "sufficient to describe or identify the type of operations proposed and how they would be conducted"), 228.4(d) (supplements), 228.4(e) (modifications). The regulations require the mining plan to address "tailings, dumpage, deleterious materials, or substances." *Id.* § 228.8(c) (requiring tailings and waste rock "to be deployed, arranged, disposed of or treated so as to minimize adverse impact upon the environment and forest surface resources"); *id.* § 228.4(c)(3) (requiring a plan to include "measures to be taken to meet the requirements for environmental protection"). And

they do not allow the operator to omit those reasonably incident uses. *See id.* §§ 228.3(a), 228.4(c)(3). Nor do they require the operator to seek a special use permit under the Part 251 regulations for those uses. *Compare id.* §§ 228.4 (discussing the requirements for a mining plan), 228.5 (explaining the Service's approval process under Part 228A), *with id.* §§ 251.50(a) (explaining that before conducting a special use under Part 251, "individuals or entities must submit a proposal" and "obtain a special use authorization from the authorized officer"), 251.54 (detailing proposal requirements).

After analyzing a mining plan under Part 228A, the Service may take one of only five actions: (1) "approve[] the plan"; (2) determine that a plan is not required under the regulations; (3) notify the operator "of any changes in, or additions to," the plan "deemed necessary to meet *the purpose of the regulations in this part*"; (4) notify the operator that the Service needs more time to review the plan; or (5) determine that an EIS must be prepared before approval. *Id.* § 228.5(a) (emphasis added). There is no option for the district court's proposed sixth action: deny part of a mining plan and require the operator to apply for a Part 251 special use permit for reasonably incident uses like waste rock and tailings facilities. 1 E.R. 37.

Furthermore, the Service's Part 251 regulations do not encompass approval of mining operations. In fact, they expressly exclude it. 36 C.F.R. § 251.50(a). Those regulations set forth a different standard of review and procedures for approval. *See id.* § 251.54 (setting forth screening process that considers the public interest, management purpose, and the applicable forest land and resource management plan). The Service

may not authorize mining operations, including waste rock and tailings facilities, under those regulations because they require the Service to deny any special use involving "disposal of solid waste or disposal of radioactive or other hazardous substances." *Id.* § 251.54(e)(ix).

If the district court were correct that the Service's regulatory framework turned on the existence of valid mining claims rather than reasonably incident uses, the court would place the Service in a double bind. The Service *either* would need to spend significant time and resources investigating the validity of hundreds (if not thousands) of mining claims before processing mining plans, *or* would need to apply two sets of regulations to different parts and even phases of one mining plan. Neither approach is workable, and both ignore the Service's mandate to balance mining and forest resource protection. *Weiss*, 642 F.2d at 298; *see also Bohmker v. Oregon*, 903 F.3d 1029, 1038 (9th Cir. 2018) (discussing the dual mandate).

The district court's conclusion also directly contradicts this Court's precedent, which recognizes that the proposed *use* of the land, not the existence of a mining claim, dictates which set of regulations applies. *Backlund*, 689 F.3d at 996; *see also Clouser*, 42 F.3d at 1530 (observing that Forest Service regulation turns on the nature of the activity); *United States v. Doremus*, 888 F.2d 630, 633 (9th Cir. 1989) (recognizing that the Part 228A regulations apply to "reasonably incident" operations). In *Backlund*, for example, this Court upheld the Service's determination that a miner's year-round residence on National Forest System lands was not reasonably incident to his mining

activities and therefore "was not authorized by the mining laws and [the Part 228A] regulations." 689 F.3d at 996. The Court rejected the miner's argument that residency on a mining claim is always reasonably incident to mining "so long as the claim is valid." *Id.* The Court instead agreed with the Service that validity was irrelevant: because the miner's use of the land was unrelated to mining, it was a special use requiring authorization under the Service's Part 251 regulations. *Id.*

By contrast, it is undisputed that Rosemont proposes to use open federal lands (and its own private lands) for mining operations and reasonably incident uses. Indeed, the Service reasonably determined that Rosemont's proposed waste rock and tailings facilities were an indispensable part of its proposed mining operations. 3 E.R. 259; 4 E.R. 496; 5 E.R. 696. Thus, the Service's decision to apply its Part 228A regulations was not arbitrary or capricious. *Cf. Doremus*, 888 F.2d at 633 ("[A]lthough appellants have a right to dispose of vegetative resources where such disposal is 'reasonably incident' to their mining operation, they may not exercise that right without first obtaining approval of their operation in the manner specified in 36 C.F.R. Part 228.").

B. The Service correctly recognized the scope of its regulatory authority under Part 228A.

The district court also failed to appreciate that the Service's Part 228A regulations impose substantial, meaningful limits on mining operations. If operations will "likely cause a significant disturbance of surface resources," then the mine operator must submit a mining plan and may not proceed without the Service's approval. 36 C.F.R.

§ 228.4(a)(3), (4). As the Service noted in its original preamble to the regulations, "the essence of adequate regulation is development of operating plans which reflect both the necessities for environmental protection and for the use of surface resources in connection with mineral operations." 39 Fed. Reg. at 31,317. Indeed, miners "do not have an unfettered right to explore and mine federal lands." *Bohmker*, 903 F.3d at 1038.

Under its Part 228A regulations, the Service may not approve a mining plan if the plan lacks reasonable requirements to protect surface resources, or if the operator is unwilling or unable to make the necessary changes to minimize the adverse environmental impacts. 36 C.F.R. §§ 228.5(a)(3), 228.8. For instance, the Service may require miners to use non-motorized vehicles in some cases. *See, e.g.*, *Clouser*, 42 F.3d at 1529–31 (upholding Service decision requiring use of pack animals to access particular mining claims); *Public Lands for the People, Inc. v. USDA*, 697 F.3d 1192, 1194–99 (9th Cir. 2012) (upholding Service decision requiring miners to obtain advance permission to use motor vehicles in particular areas). It may also prohibit unreasonably destructive mining methods. 36 C.F.R. § 228.8; *cf. United States v. Richardson*, 599 F.2d 290, 291 (9th Cir. 1979) (affirming grant of Service's motion to enjoin blasting and bulldozing on unpatented mining claims). And the Service may condition its approval on the adoption of measures designed to minimize adverse impacts to the surface. *See* 36 C.F.R. § 228.5(a)(3) (providing that the Service may "[n]otify the operator of any changes in, or additions to, the [mining plan] deemed necessary to meet the purpose of the regulations"). The Service imposed those conditions here. 3 E.R. 300; 4 E.R. 553–660.

To be sure, the Service's regulatory authority over mining plans has its limits. The Service may neither prohibit mining operations on open National Forest System lands, 16 U.S.C. § 478, nor "unreasonably circumscribe[]" such operations "as to amount to a prohibition," *Weiss*, 642 F.2d at 299. Thus, the Service "cannot categorically deny a reasonable plan of operations." *Siskiyou Regional Education Project v. Rose*, 87 F. Supp. 2d 1074, 1086 (D. Ore. 1999); *accord Baker v. USDA*, 928 F. Supp. 1513, 1518 (D. Idaho 1996). That said, the Service regularly requires mining operators to add controls and conditions to mining plans, while recognizing that it may not disapprove reasonable plans that will be carried out in an environmentally responsible manner. *See Havasupai Tribe v. United States*, 752 F. Supp. 1471, 1491–92 (D. Ariz. 1990).

The Service correctly recognized those boundaries here. It observed that "[p]ursuant to Federal law, the Forest Service may reasonably regulate the use of the surface estate to minimize impacts to Forest Service surface resources." 5 E.R. 706. Moreover, the Service recognized its power to "reject an unreasonable [mining plan]." 5 E.R. 755. At the same time, the Service acknowledged it "cannot categorically prohibit mining or deny reasonable and legal mineral operations under the mining law." *Id.*; *accord* 3 E.R. 362; 4 E.R. 667.[8]

[8] The Service also identified the Surface Resources Act as one limit on its discretion to regulate Rosemont's mining activities. *See, e.g.*, 5 E.R. 706, 723. The Act applies only to the Service's regulation of non-mining uses on the surface of mining claims; it does not apply to its review of mining plans. The relevant limit on the Service's discretion to approve or deny mining plans originates in the Organic Act, 16 U.S.C. § 478, which the Service recognized. 3 E.R. 358–59; 4 E.R. 667; 5 E.R. 772.

The district court was wrong to assume that the Service's recognition of these limits of its authority amounted to a surrender of its regulatory responsibilities. 1 E.R. 37–39. The record reflects that the Service took seriously its duty to "consider the beneficial and adverse impacts of each alternative in determining reasonable measures to impose on the [project] for the protection of Coronado National Forest resources." 3 E.R. 362; 4 E.R. 553-660. Indeed, as discussed below (pp. 48–50), the Service rejected Rosemont's proposed mining plan and required Rosemont to submit a new plan with major changes and additions to "best achieve[] the minimization of impacts to Forest Service surface resources." 5 E.R. 706.

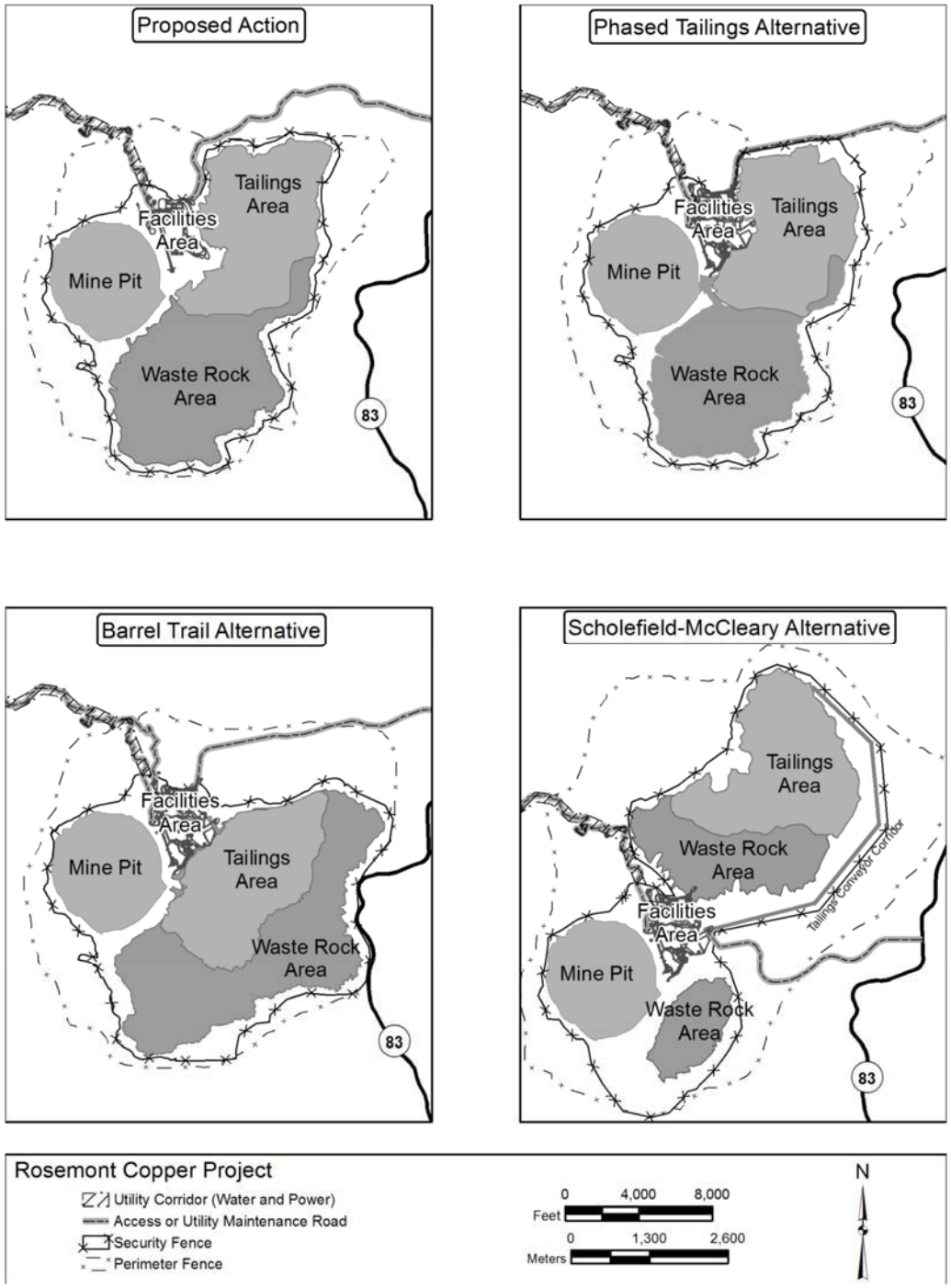
C. The Service's NEPA analysis shows that it exercised its authority reasonably.

The district court ruled that the Service's failure to apply its Part 251 special use regulations to Rosemont's proposed placement of waste rock and tailings "infected the [EIS] and led to the Forest Service misinforming the public and failing to consider reasonable alternatives" in its NEPA analysis. 1 E.R. 37. But the Service's decision to analyze Rosemont's entire mining plan under its Part 228A regulations was not arbitrary or capricious. *See supra* pp. 35–41. Thus, there was no error that could have "infected" the Service's NEPA analysis. In any event, that analysis took the requisite hard look at the project's impacts: the Service considered reasonable alternatives to Rosemont's proposed action (including a no-action alternative), and the agency ultimately selected the alternative it determined would cause the least surface disturbance. 5 E.R. 754–61.

The Service evaluated a range of alternatives before selecting a group for further detailed study. 3 E.R. 452–66; 5 E.R. 761–62. In the process, the Service rejected an alternative that would have limited Rosemont's mining operations to its private lands because it would be "technically and financially infeasible, and would not meet the purpose of and need for action." 5 E.R. 844. As the Service explained, the "storage volume of this area . . . would fit, at the most, 852 million cubic yards," which is "insufficient for this operation, and would limit Rosemont's access to their mineral resources." *Id.* That sort of technical analysis is entitled to substantial deference. *See Protect Our Communities Foundation v. Jewell*, 825 F.3d 571, 581 (9th Cir. 2016).

Contrary to the district court's suggestion, 1 E.R. 38 n.15, NEPA does not require the Service to analyze "[a]lternatives that are unlikely to be implemented" or "alternatives which are infeasible, ineffective, or inconsistent with the [agency's] basic policy objectives." *Resources Ltd. v. Robertson*, 35 F.3d 1300, 1307 (9th Cir. 1993) (internal quotation marks omitted). Likewise, the Organic Act does not require the Service to select, or even consider, the most environmentally preferable mining alternatives. *Okanogan*, 236 F.3d at 477. To the contrary, the Service's Part 228A regulations require the Service to "consider[] the economics of the operation along with the other factors in determining the reasonableness of the requirements for surface resource protection." 36 C.F.R. § 228.5(a). Thus, the Service's decision to exclude various action alternatives from detailed study was reasonable and consistent with well-established law.

The Service ultimately considered six alternatives in detail, including a no-action alternative, Rosemont's proposed plan, and four action alternatives. 5 E.R. 754-61. The differences among the action alternatives "focus[ed] on placement and design of the tailings and waste rock facilities," 5 E.R. 707, including various potential placements:



3 E.R. 299.

The Service also studied a no-action alternative in detail. 3 E.R. 263, 298, 304–08, 475–90. "A no action alternative in an EIS allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action." *CBD v. U.S. Department of Interior*, 623 F.3d 633, 642 (9th Cir. 2010); *accord* 40 C.F.R. § 1502.15. It is meant to "provide a baseline" against which the action alternatives are evaluated. *CBD*, 623 F.3d at 642. Thus, the Service explained that the "no action alternative was developed to provide an environmental baseline with which to compare the action alternatives." 5 E.R. 755. It recognized that under the no-action alternative, Rosemont "would not develop the Rosemont mineral deposit at this time," and therefore the environment "would not be affected by the construction, operation, reclamation, or closure of the mine." 3 E.R. 298. The Service considered that no-action alternative in detail, comparing it against each action alternative. *See* 3 E.R. 263, 298, 304–08, 475–90.

After a thorough review of each alternative, the Service selected Alternative 4 — the Barrel Alternative — because it "will result in the smallest amount of acres directly disturbed." 5 E.R. 708. That alternative restricts the footprint of the tailings and waste rock facilities, placing them closer to the mine pit and shifting them south. 3 E.R. 432, 439; 3 E.R. 299 (map); 5 E.R. 796. This "constrained footprint" avoids and minimizes numerous environmental impacts. 5 E.R. 708. For example, it will directly impact the fewest waterways and springs; directly disturb the fewest acres of riparian areas; and

modify the fewest acres of vegetation. 5 E.R. 708–09. The adjusted placement of the waste rock and tailings facility also "carefully avoids impacting one of the more significant cultural sites" within the project area (the Ballcourt Site). 5 E.R. 717.

Additionally, the Barrel Alternative was the only one that did not include a heap leach facility. 5 E.R. 756. "Heap leaching" uses a special surface and solvents to extract minerals from ore. 4 E.R. 535, 537; *see also* 3 E.R. 296. Rosemont's proposed heap leach facility was a subject of concern for several commenters, who noted that the leaching process could lead to groundwater contamination during operation of the mine and after closure. 4 E.R. 520; 5 E.R. 711–13. The Service determined that removal of the facility would "reduce[] or avoid[] a number of environmental impacts." 5 E.R. 713.

The Service further conditioned its approval of Rosemont's mining plan on significant environmental, cultural, and other mitigation and monitoring requirements. 5 E.R. 730–36 (summarizing the relevant environmental safeguards, including avoidance, mitigation, and monitoring); 4 E.R. 553–660 (mitigation and monitoring plan). For example, Rosemont must establish programs to protect and enhance habitat for native fish and wildlife species, including buying conservation land and water rights. 5 E.R. 743–46.

To be sure, the Service recognized that "[t]here is no one action alternative that completely mitigates or eliminates effects on important resource values when the proposal results in the placement of about 1.9 billion tons of waste rock and tailings on the landscape." 5 E.R. 723. It grappled with its obligation to select "an alternative that

represents the best balance of mitigating effects and avoiding significant impacts to cultural, social, and resource values while allowing mining activities authorized in Federal law." *Id.* But the Service ultimately determined that selection of the Barrel Alternative fulfilled its dual mandate to prevent destruction and depredation without impermissibly encroaching on mining operations authorized by the Mining Law. *See Weiss*, 642 F.2d at 299. That is exactly what the Organic Act instructed the Service to do. *See Okanogan*, 236 F.3d at 478 (holding that text of the Organic Act "does not support Plaintiffs' assertion that, when the Forest Service is forced to choose between project alternatives, environmental interests always trump mining interests").

The district court was wrong to suggest that the Service should have instead selected the no-action alternative. 1 E.R. 37–38 & n.15. The Service was not required to select the no-action alternative. To the contrary, because the Service determined that the Barrel Alternative would allow mining to proceed while minimizing adverse environmental impacts, the Organic Act prohibited the Service from selecting the no-action alternative. 16 U.S.C. § 478; 4 E.R. 670. As this Court has admonished, the Service may not "categorically prohibit mining or deny reasonable and legal mineral operations." 5 E.R. 755; *Weiss*, 642 F.2d at 299.

To the extent that the district court held otherwise, it erred. NEPA does not mandate particular substantive results. *South Coast Air Quality Management District v. FERC*, 621 F.3d 1085, 1092 (9th Cir. 2010). Nor may it "be used to broaden [an agency's] congressionally-limited role." *Id.*; *NRDC, Inc. v. EPA*, 822 F.2d 104, 129 (D.C.

Cir. 1987) ("NEPA, as a procedural device, does not work a broadening of the agency's substantive powers."); *Cape May Green, Inc. v. Warren*, 698 F.2d 179, 188 (3d Cir. 1983) (NEPA "does not expand the jurisdiction of an agency beyond that set forth in its organic statute."). Applying these principles, other courts have correctly recognized that NEPA "does not expand the authority of the Forest Service to include rejection of an otherwise reasonable plan of operations." *See, e.g.*, *Havasupai Tribe*, 752 F. Supp. at 1492 (upholding Service EIS that analyzed the no-action alternative as baseline, but ultimately selected an action alternative that approved a modified mining plan).

In sum, the Service's NEPA analysis shows that it properly exercised its authority under the Organic Act.

III. Even if a remand to the Service were in order, the district court went too far.

For the reasons discussed above (pp. 19–49), this Court should reverse the district court's order in its entirety. But even if the Court disagrees with the Service on the merits, it should nonetheless reverse the district court's decision to the extent that it did more than vacate and remand to the Service. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

It is well established that a federal court is "not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry." *INS v. Ventura*, 537 U.S. 12, 16 (2002) (quoting *Florida Power*, 470 U.S. at 744). Thus, if a court determines that an agency's action is unsupported, it

should generally remand to that agency "for decision of a matter that statutes place primarily in agency hands." *Id.* at 16. It should "not compensate for the agency's dereliction by undertaking its own inquiry into the merits." *San Luis*, 747 F.3d at 603 (internal quotation marks omitted).

Here, the district court "seriously disregarded" the Service's "legally mandated role." *Ventura*, 537 U.S. at 17. After concluding that the Service failed to adequately consider the "factual basis" supporting the validity of Rosemont's mining claims, the court conducted its own de novo review of the administrative record. 1 E.R. 30–33. Based on a general discussion of the geology in the EIS, the court declared that there was "no evidence of any mineralization" within some of Rosemont's claims. 1 E.R. 17; *see also* 1 E.R. 30–33. It is unclear whether the court intended its statements to be conclusive validity determinations like the determinations made by Interior or simply its own assessment of the evidence in the administrative record. But either way, the court overstepped.

First, the court's decision includes several statements suggesting that Rosemont's claims are legally invalid based on the court's own review. *See, e.g.*, 1 E.R. 12 ("[T]he record reflected that the unpatented claims were invalid."); *id.* (stating that Rosemont had "invalid unpatented mining claims"). If the court intended its order to constitute a final determination of the validity of Rosemont's claims, the court clearly erred. It is Interior — not the district court or the Service — that has primary jurisdiction to determine mining claim validity. *Best*, 371 U.S. at 339; *Cameron*, 252 U.S. at 460. At a

minimum, therefore, the court should have refrained from declaring Rosemont's claims "invalid." *Cf. United States v. Haskins*, 505 F.2d 246, 253 (9th Cir. 1974) (holding that the district court properly referred a patent application to Interior for administrative processing); *Mach-Tronics, Inc. v. Zirpoli*, 316 F.2d 820, 834 (9th Cir. 1963) ("administrative determination should precede adjudication in the courts").

Besides, any validity determination would be improper on this record. Under the Due Process Clause, mining claimants are entitled to a factual hearing before their claims are declared invalid. *Collord v. U.S. Department of Interior*, 154 F.3d 933, 935 (9th Cir. 1998); *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). Likewise, validity determinations typically include on-the-ground field examinations to test for the presence of valuable mineral deposits. *See, e.g.*, *Freeman*, 83 F. Supp. 3d at 178–79. Here, the court did not hold a factual hearing, nor did it conduct an on-the-ground examination of Rosemont's claims. In fact, it did not even specify which of Rosemont's 850 unpatented mining claims it believed lacked a valuable mineral deposit. Accordingly, to the extent that the court conclusively declared any of Rosemont's mining claims invalid, that part of the court's decision should be vacated.

Second, the court also erred even if it intended only to offer its own assessment of the evidence in the administrative record. The Service never represented that the administrative record contained all the evidence necessary for the court or the Service (or anyone else) to evaluate the "factual basis" for validity of Rosemont's mining claims. Indeed, the court itself recognized that "the administrative record provides, at best,

internally inconsistent evidence." 1 E.R. 31. Yet the court went on to evaluate and weigh the (incomplete) evidence on its own, disregarding this Court's instruction that it is not the "proper role" for a federal court to "act as a panel of scientists." *Lands Council v. McNair*, 629 F.3d 1070, 1076 (9th Cir. 2010) (internal quotation marks omitted). Thus, even if this Court holds that the Service must evaluate the "factual basis" for validity of Rosemont's mining claims before approving Rosemont's mining plan, the Court should remand so that the Service has "the opportunity to address the matter in the first instance in light of its own expertise." *Ventura*, 537 U.S. at 17.

CONCLUSION

For these reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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June 15, 2020
90-1-4-14991

STATEMENT OF RELATED CASES

The following case is related within the meaning of Circuit Rule 28-2.6: *Center for Biological Diversity v. U.S. Fish & Wildlife Service*, 9th Cir. No. 20-15654 (docketed Apr. 14, 2020) (Rosemont appeals the district court's grant of summary judgment to the U.S. Fish and Wildlife Service on Rosemont's cross-claim asserted under the Endangered Species Act in a consolidated case in the district court).

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 19-17585 and 19-17586

I am the attorney or self-represented party.

This brief contains 13,970 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

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[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

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- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ *Amelia G. Yowell*

Date June 15, 2020

ADDENDUM

UNITED STATES CODE

2018 EDITION

CONTAINING THE GENERAL AND PERMANENT LAWS
OF THE UNITED STATES ENACTED THROUGH THE
115TH CONGRESS

(ending January 2, 2019, the last law of which was signed on January 14, 2019)

Prepared and published under authority of Title 2, U.S. Code, Section 285b,
by the Office of the Law Revision Counsel of the House of Representatives

VOLUME ONE

ORGANIC LAWS

TITLE 1—GENERAL PROVISIONS
TO
TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES
§§ 101–5949

UNITED STATES
GOVERNMENT PUBLISHING OFFICE
WASHINGTON : 2019

effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

§ 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

HISTORICAL AND REVISION NOTES

Derivation	*U.S. Code*	*Revised Statutes and Statutes at Large*
.....	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

ABBREVIATION OF RECORD

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

CHAPTER 8—CONGRESSIONAL REVIEW OF AGENCY RULEMAKING

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

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VOLUME ELEVEN

TITLE 16—CONSERVATION

§§ 431–1891d

UNITED STATES
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section, shall be as far as practicable controlled and administered in accordance with the following provisions. No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of said section, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

(June 4, 1897, ch. 2, § 1, 30 Stat. 34.)

REFERENCES IN TEXT

Section 471 of this title, referred to in text, was repealed by Pub. L. 94–579, title VII, § 704(a), Oct. 21, 1976, 90 Stat. 2792.

CODIFICATION

"National forests" and "national forest" substituted in text for "public forest reserves" and "public forest reservation", respectively, on authority of act Mar. 4, 1907, ch. 2907, 34 Stat. 1269, which provided that forest reserves shall hereafter be known as national forests.

§ 476. Repealed. Pub. L. 94–588, § 13, Oct. 22, 1976, 90 Stat. 2958

Section, acts June 4, 1897, ch. 2, § 1, 30 Stat. 35; June 9, 1900, ch. 804, 31 Stat. 661; Feb. 1, 1905, ch. 288, § 1, 33 Stat. 628; June 30, 1906, ch. 3913, 34 Stat. 684; Mar. 3, 1925, ch. 457, § 3, 43 Stat. 1132; May 27, 1952, ch. 337, 66 Stat. 95, authorized the Secretary of Agriculture to sell timber from national forests. See section 472a of this title.

VALIDATION OF TIMBER SALES CONTRACTS

Pub. L. 94–588, § 15, Oct. 22, 1976, 90 Stat. 2960, provided that:

"(a) Timber sales made pursuant to the Act of June 4, 1897 (30 Stat. 35, as amended; 16 U.S.C. 476), prior to the date of enactment of this section [Oct. 22, 1976] shall not be invalid if the timber was sold in accord with Forest Service silvicultural practices and sales procedures in effect at the time of the sale, subject to the provisions of subsection (b) of this section.

"(b) The Secretary of Agriculture is directed, in developing five-year operating plans under the provisions of existing fifty-year timber sales contracts in Alaska, to revise such contracts to make them consistent with the guidelines and standards provided for in the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended [16 U.S.C. 1600 et seq.], and to reflect such revisions in the contract price of timber. Any such action shall not be inconsistent with valid contract rights approved by the final judgment of a court of competent jurisdiction."

§ 477. Use of timber and stone by settlers

The Secretary of Agriculture may permit, under regulations to be prescribed by him, the use of timber and stone found upon national forests, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such national forests may be located.

(June 4, 1897, ch. 2, § 1, 30 Stat. 35; Feb. 1, 1905, ch. 288, § 1, 33 Stat. 628.)

CODIFICATION

"National forests" substituted in text for "reservations" on authority of act Mar. 4, 1907, ch. 2907, 34 Stat. 1269, which provided that forest reserves shall hereafter be known as national forests.

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with provisions of sections 473, 474 to 482, and 551 of this title with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

Act Feb. 1, 1905 transferred certain functions with regard to administration of public forests from Secretary of the Interior to Secretary of Agriculture.

§ 478. Egress or ingress of actual settlers; prospecting

Nothing in sections 473 to 478, 479 to 482 and 551 of this title shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of national forests, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of Agriculture. Nor shall anything in such sections prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests.

(June 4, 1897, ch. 2, § 1, 30 Stat. 36; Feb. 1, 1905, ch. 288, § 1, 33 Stat. 628.)

CODIFICATION

"National forests" substituted in text for "reservations" and "forest reservations" on authority of act Mar. 4, 1907, ch. 2907, 34 Stat. 1269, which provided that forest reserves shall hereafter be known as national forests.

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with provisions of sections 473, 474 to 482, and 551 of this title with respect to pre-construction, construction, and initial operation of transportation system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy

by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

Act Feb. 1, 1905, transferred certain functions with regard to administration of public forests from Secretary of the Interior to Secretary of Agriculture.

§ 478a. Townsites

When the Secretary of Agriculture determines that a tract of National Forest System land in Alaska or in the eleven contiguous Western States is located adjacent to or contiguous to an established community, and that transfer of such land would serve indigenous community objectives that outweigh the public objectives and values which would be served by maintaining such tract in Federal ownership, he may, upon application, set aside and designate as a townsite an area of not to exceed six hundred and forty acres of National Forest System land for any one application. After public notice, and satisfactory showing of need therefor by any county, city, or other local governmental subdivision, the Secretary may offer such area for sale to a governmental subdivision at a price not less than the fair market value thereof: *Provided, however*, That the Secretary may condition conveyances of townsites upon the enactment, maintenance, and enforcement of a valid ordinance which assures any land so conveyed will be controlled by the governmental subdivision so that use of the area will not interfere with the protection, management, and development of adjacent or contiguous National Forest System lands.

(Pub. L. 85–569, July 31, 1958, 72 Stat. 438; Pub. L. 94–579, title II, § 213, Oct. 21, 1976, 90 Stat. 2760.)

CODIFICATION

Section is also set out as section 1012a of Title 7, Agriculture.

AMENDMENTS

1976—Pub. L. 94–579 substituted provisions setting forth the procedures applicable to designation of townsites of tracts of National Forest System lands in Alaska or the eleven contiguous Western States for provisions setting forth the procedures applicable to designation of townsites from any national forest lands or lands administered by the Secretary of Agriculture under the Bankhead-Jones Farm Tenant Act.

SAVINGS PROVISION

Amendment by Pub. L. 94–579 not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976, see note set out under section 1701 of Title 43, Public Lands.

§ 479. Sites for schools and churches

The settlers residing within the exterior boundaries of national forests, or in the vicinity thereof, may maintain schools and churches within such national forest, and for that purpose may occupy any part of the said national forest, not exceeding two acres for each schoolhouse and one acre for a church.

(June 4, 1897, ch. 2, § 1, 30 Stat. 36.)

CODIFICATION

"National forests" substituted in text for "forest reservations", and "national forest" substituted for "reservation" and "forest reservation" on authority of act Mar. 4, 1907, ch. 2907, 34 Stat. 1269, which provided that forest reserves shall hereafter be known as national forests.

§ 479a. Conveyance of National Forest System lands for educational purposes

(a) Authority to convey

Upon written application, the Secretary of Agriculture may convey National Forest System lands to a public school district for use for educational purposes if the Secretary determines that—

(1) the public school district seeking the conveyance will use the conveyed land for a public or publicly funded elementary or secondary school, to provide grounds or facilities related to such a school, or for both purposes;

(2) the conveyance will serve the public interest;

(3) the land to be conveyed is not otherwise needed for the purposes of the National Forest System;

(4) the total acreage to be conveyed does not exceed the amount reasonably necessary for the proposed use;

(5) the land is to be used for an established or proposed project that is described in detail in the application to the Secretary, and the conveyance would serve public objectives (either locally or at large) that outweigh the objectives and values which would be served by maintaining such land in Federal ownership;

(6) the applicant is financially and otherwise capable of implementing the proposed project;

(7) the land to be conveyed has been identified for disposal in an applicable land and resource management plan under the Forest and Rangeland Renewable Resources Planning Act of 1974 (16 U.S.C. 1600 et seq.); and

(8) an opportunity for public participation in a disposal under this section has been provided, including at least one public hearing or meeting, to provide for public comments.

(b) Acreage limitation

A conveyance under this section may not exceed 80 acres. However, this limitation shall not be construed to preclude an entity from submitting a subsequent application under this section for an additional land conveyance if the entity can demonstrate to the Secretary a need for additional land.

(c) Costs and mineral rights

(1) A conveyance under this section shall be for a nominal cost. The conveyance may not include the transfer of mineral or water rights.

(2) If necessary, the exact acreage and legal description of the real property conveyed under this section shall be determined by a survey satisfactory to the Secretary and the applicant. The cost of the survey shall be borne by the applicant.

(d) Review of applications

When the Secretary receives an application under this section, the Secretary shall—

(1) before the end of the 14-day period beginning on the date of the receipt of the application, provide notice of that receipt to the applicant; and

(2) before the end of the 120-day period beginning on that date—

SUBCHAPTER IV—SUSTAINED-YIELD FOREST MANAGEMENT

SUBCHAPTER V—FOREST FOUNDATION

SUBCHAPTER VI—NATIONAL FOREST SYSTEM TRAILS STEWARDSHIP

SUBCHAPTER I—GENERAL PROVISIONS

§ 551. Protection of national forests; rules and regulations

The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside under the provisions of section 471[1] of this title, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this section, sections 473 to 478 and 479 to 482 of this title or such rules and regulations shall be punished by a fine of not more than $500 or imprisonment for not more than six months, or both. Any person charged with the violation of such rules and regulations may be tried and sentenced by any United States magistrate judge specially designated for that purpose by the court by which he was appointed, in the same manner and subject to the same conditions as provided for in section 3401(b) to (e) of title 18.

(June 4, 1897, ch. 2, § 1, 30 Stat. 35; Feb. 1, 1905, ch. 288, § 1, 33 Stat. 628; Pub. L. 87–869, § 6, Oct. 23, 1962, 76 Stat. 1157; Pub. L. 88–537, Aug. 31, 1964, 78 Stat. 745; Pub. L. 90–578, title IV, § 402(b)(2), Oct. 17, 1968, 82 Stat. 1118; Pub. L. 101–650, title III, § 321, Dec. 1, 1990, 104 Stat. 5117.)

REFERENCES IN TEXT

Section 471 of this title, referred to in text, was in the original a reference to act Mar. 3, 1891, 26 Stat. 1103, and was repealed by Pub. L. 94–579, title VII, § 704(a), Oct. 21, 1976, 90 Stat. 2792.

CODIFICATION

"National forests" substituted in text for "forest reservations" on authority of act Mar. 4, 1907, ch. 2907, 34 Stat. 1269, which provided that forest reserves shall hereafter be known as national forests.

AMENDMENTS

1964—Pub. L. 88–537 provided that persons charged with violation of such rules and regulations may be tried and sentenced by any United States commissioner specially designated for that purpose by the court by which he was appointed, in the same manner as in section 3401(b) to (e) of title 18.

1962—Pub. L. 87–869 substituted "by a fine of not more than $500 or imprisonment for not more than six months, or both" for "as is provided for in section 104 of title 18".

CHANGE OF NAME

"United States magistrate judge" substituted for "United States magistrate" in text pursuant to section 321 of Pub. L. 101–650, set out as a note under section 631 of Title 28, Judiciary and Judicial Procedure. Previously, "United States magistrate" substituted for "United States commissioner" pursuant to Pub. L. 90–578. See chapter 43 (§ 631 et seq.) of Title 28.

SHORT TITLE OF 2016 AMENDMENT

Pub. L. 114–275, § 1, Dec. 14, 2016, 130 Stat. 1405, provided that: "This Act [enacting section 551c–1 of this title and provisions set out as a note under section 551c–1 of this title] may be cited as the 'Prescribed Burn Approval Act of 2016'."

SHORT TITLE OF 1990 AMENDMENT

Pub. L. 101–286, § 1, May 9, 1990, 104 Stat. 171, provided that: "This Act [enacting sections 551b and 551c of this title, amending sections 18i and 558c of this title and section 1737 of Title 43, Public Lands, and enacting provisions set out as notes under this section and section 551b of this title] may be cited as the 'Wildfire Disaster Recovery Act of 1989'."

REPEAL; SAVINGS PROVISION

Section repealed by Pub. L. 94–579, title VII, § 706(a), Oct. 21, 1976, 90 Stat. 2793, effective on and after Oct. 21, 1976, insofar as applicable to the issuance of rights-of-way over, upon, under, and through the public lands and lands in the National Forest System. Such repeal not to be construed as terminating any valid lease, permit, patent, etc., existing on Oct. 21, 1976, see section 701 of Pub. L. 94–579, set out as a note under section 1701 of Title 43, Public Lands.

TRANSFER OF FUNCTIONS

Enforcement functions of Secretary or other official in Department of Agriculture, insofar as they involve lands and programs under jurisdiction of that Department, related to compliance with provisions of sections 473, 474 to 482, and 551 of this title with respect to pre-construction, construction, and initial operation of transporta-

[1] See References in Text note below.

tion system for Canadian and Alaskan natural gas transferred to Federal Inspector, Office of Federal Inspector for Alaska Natural Gas Transportation System, until first anniversary of date of initial operation of Alaska Natural Gas Transportation System, see Reorg. Plan No. 1 of 1979, §§ 102(f), 203(a), 44 F.R. 33663, 33666, 93 Stat. 1373, 1376, effective July 1, 1979, set out in the Appendix to Title 5, Government Organization and Employees. Office of Federal Inspector for the Alaska Natural Gas Transportation System abolished and functions and authority vested in Inspector transferred to Secretary of Energy by section 3012(b) of Pub. L. 102–486, set out as an Abolition of Office of Federal Inspector note under section 719e of Title 15, Commerce and Trade. Functions and authority vested in Secretary of Energy subsequently transferred to Federal Coordinator for Alaska Natural Gas Transportation Projects by section 720d(f) of Title 15.

Act Feb. 1, 1905, transferred certain functions with regard to administration of public forests from Secretary of the Interior to Secretary of Agriculture.

NATIONAL COMMISSION ON WILDFIRE DISASTERS

Pub. L. 101–286, title I, May 9, 1990, 104 Stat. 171, established a National Commission on Wildfire Disasters to study the effects of disastrous wildfires, resulting from natural or other causes, and to make recommendations concerning steps necessary for smooth and timely transition from loss of natural resources due to such fires, directed the Commission to make findings and develop recommendations for consideration by the Secretaries of Agriculture and the Interior with respect to future management of National Forest System lands, national parks, Bureau of Land Management public lands, and community redevelopment activities and programs, directed the Commission to submit to the Secretaries of Agriculture and the Interior, not later than Dec. 1, 1991, a report containing its findings and recommendations, directed the Secretaries to submit the report to specific committees of Congress, and provided for the Commission to cease 90 days after submission of the report.

EXISTING RIGHTS-OF-WAY

Provisions of section 706(a) of Pub. L. 94–579, Oct. 21, 1976, 90 Stat. 2793, except as pertaining to rights-of-way, not to be construed as affecting the authority of the Secretary of Agriculture under this section, see note set out under section 1701 of Title 43, Public Lands.

§ 551a. Cooperation by Secretary of Agriculture with States and political subdivisions in law enforcement

The Secretary of Agriculture, in connection with the administration and regulation of the use and occupancy of the national forests and national grasslands, is authorized to cooperate with any State or political subdivision thereof, on lands which are within or part of any unit of the national forest system, in the enforcement or supervision of the laws or ordinances of a State or subdivision thereof. Such cooperation may include the reimbursement of a State or its subdivision for expenditures incurred in connection with activities on national forest system lands. This section shall not deprive any State or political subdivision thereof of its right to exercise civil and criminal jurisdiction, within or on lands which are a part of the national forest system.

(Pub. L. 92–82, Aug. 10, 1971, 85 Stat. 303.)

§ 551b. Omitted

CODIFICATION

Section, Pub. L. 101–286, title II, § 202, May 9, 1990, 104 Stat. 174, which required the Secretaries of Agriculture and the Interior, for areas under their respective jurisdictions, to submit annual reports to Congress on rehabilitation needs resulting from disastrous forest fire damage, terminated, effective May 15, 2000, pursuant to section 3003 of Pub. L. 104–66, as amended, set out as a note under section 1113 of Title 31, Money and Finance. See, also, pages 47 and 108 of House Document No. 103–7.

§ 551c. Planning for fire protection

(a) Volunteer firefighters

The Secretaries of Agriculture and the Interior shall annually offer training programs to certify volunteers for suppressing forest fires on National Forest System lands, National Park System lands and Bureau of Land Management public lands in the event that the appropriate Secretary determines that such volunteers are needed. In carrying out this subsection, the Secretaries should utilize existing authorities to train volunteer firefighters for use in fire emergencies. The Secretaries should assess the capabilities of educational institutions and other public and private organizations to provide such training programs.

(b) "Educational institutions" defined

For the purposes of this section, the term ''educational institutions'' shall include institutions established pursuant to the Act of July 2, 1862 (7 U.S.C. 301 et seq., commonly known as the ''Morrill Act''), or the Act of August 30, 1890 (7 U.S.C. 321 et seq., commonly known as the ''Second Morrill Act'').

(c) Mobilization of local equipment

Not later than one year after May 9, 1990—

(1) the Secretary of Agriculture shall submit to the Congress information with respect to regions of the National Forest System, and

(2) the Secretary of the Interior shall submit to the Congress information with respect to the Bureau of Land Management public lands on a State-by-State basis and each region of the National Park System

that documents mobilization plans that provide for the use of firefighting equipment in cases of fire emergencies that may occur in each such area that may be highly prone to disastrous forest fires.

(d) Presuppression needs

Not later than one year after May 9, 1990, information from the Secretary of Agriculture on presuppression needs for each region of the National Forest System and information from the Secretary of the Interior on the presuppression needs for each region of the National Park System and for each State unit of the Bureau of Land Management shall be submitted to Congress. These reports shall include needs, including an estimate of the funds required, for fire prevention, fuel reduction, training and seasonal fire crews.

(Pub. L. 101–286, title II, § 203, May 9, 1990, 104 Stat. 175.)

REFERENCES IN TEXT

Act of July 2, 1862, referred to in subsec. (b), is act July 2, 1862, ch. 130, 12 Stat. 503, as amended, popularly known as the Morrill Act and also as the First Morrill Act, which is classified generally to subchapter I (§ 301 et seq.) of chapter 13 of Title 7, Agriculture. For complete classification of this Act to the Code, see Short Title note set out under section 301 of Title 7 and Tables.

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TITLE 30—MINERAL LANDS AND MINING

TO

TITLE 33—NAVIGATION AND NAVIGABLE WATERS

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in utilization and depletion of these resources, together with such recommendations for legislative programs as may be necessary to implement the policy of this section."

SHORT TITLE

Pub. L. 91–631, §1, Dec. 31, 1970, 84 Stat. 1876, provided: "That this Act [enacting this section] may be cited as the 'Mining and Minerals Policy Act of 1970'."

§ 22. Lands open to purchase by citizens

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, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

(R.S. §2319.)

CODIFICATION

R.S. §2319 derived from act May 10, 1872, ch. 152, §1, 17 Stat. 91.

Words "Except as otherwise provided," were editorially supplied on authority of act Feb. 25, 1920, ch. 85, 41 Stat. 437, popularly known as the Mineral Lands Leasing Act, which is classified to chapter 3A (§181 et seq.) of this title.

SHORT TITLE

Sections 22 to 24, 26 to 28, 29, 30, 33 to 35, 37, 39 to 43, and 47 of this title are based on sections of the Revised Statutes which are derived from act May 10, 1872, ch. 152, 17 Stat. 91, popularly known as the "General Mining Act of 1872" and as the "Mining Law of 1872".

§ 23. Length of claims on veins or lodes

Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, located prior to May 10, 1872, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the 10th day of May 1872, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th day of May 1872 render such limitation necessary. The end lines of each claim shall be parallel to each other.

(R.S. §2320.)

CODIFICATION

R.S. §2320 derived from act May 10, 1872, ch. 152, §2, 17 Stat. 91.

§ 24. Proof of citizenship

Proof of citizenship, under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

(R.S. §2321.)

REFERENCES IN TEXT

Sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43, referred to in text, were in the original "this chapter", meaning chapter 6 of title 32 of the Revised Statutes, consisting of R.S. §§2318 to 2352.

CODIFICATION

R.S. §2321 derived from act May 10, 1872, ch. 152, §7, 17 Stat. 94.

§ 25. Affidavit of citizenship

Applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record or before any notary public of any State or Territory.

(Apr. 26, 1882, ch. 106, §2, 22 Stat. 49.)

§ 26. Locators' rights of possession and enjoyment

The locators of all mining locations made on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim existed on the 10th day of May 1872 so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. Nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

(R.S. §2322.)

CODIFICATION

R.S. §2322 derived from act May 10, 1872, ch. 152, §3, 17 Stat. 91.

§ 27. Mining tunnels; right to possession of veins on line with; abandonment of right

Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the

(Pub. L. 103–66, title X, § 10103, Aug. 10, 1993, 107 Stat. 406.)

REFERENCES IN TEXT

The Mining Law of 1872 (30 U.S.C. 28), referred to in text, probably means act May 10, 1872, ch. 152, 17 Stat. 91, as amended. That act was incorporated into the Revised Statutes as R.S. §§ 2319 to 2328, 2331, 2333 to 2337, and 2344, which are classified to sections 22 to 24, 26 to 28, 29, 30, 33 to 35, 37, 39 to 42, and 47 of this title. For complete classification of R.S. §§ 2319 to 2328, 2331, 2333 to 2337, and 2344 to the Code, see Tables.

This Act, referred to in text, is Pub. L. 103–66, Aug. 10, 1993, 107 Stat. 312, known as the Omnibus Budget Reconciliation Act of 1993. The annual claim maintenance fee required under this Act probably refers to the fee required under section 28f of this title. For complete classification of this Act to the Code, see Tables.

SIMILAR PROVISIONS

Similar provisions were contained in Pub. L. 102–381, title I, Oct. 5, 1992, 106 Stat. 1378, 1379.

§ 28i. Failure to pay

Failure to pay the claim maintenance fee or the location fee as required by sections 28f to 28*l* of this title shall conclusively constitute a forfeiture of the unpatented mining claim, mill or tunnel site by the claimant and the claim shall be deemed null and void by operation of law.

(Pub. L. 103–66, title X, § 10104, Aug. 10, 1993, 107 Stat. 406; Pub. L. 111–88, div. A, title I, Oct. 30, 2009, 123 Stat. 2908.)

CODIFICATION

Pub. L. 111–88, which directed the amendment of section 28i of title 30, United States Code, was executed by making the amendment to section 10104 of Pub. L. 103–66, which is classified to this section, to reflect the probable intent of Congress. See 2009 Amendment note below.

SIMILAR PROVISIONS

Similar provisions were contained in Pub. L. 102–381, title I, Oct. 5, 1992, 106 Stat. 1378, 1379.

AMENDMENTS

2009—Pub. L. 111–88 substituted "28*l*" for "28k". See Codification note above.

§ 28j. Other requirements

(a) Federal Land Policy and Management Act requirements

Nothing in sections 28f to 28k of this title shall change or modify the requirements of section 314(b) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744(b)), or the requirements of section 314(c) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1744(c)) related to filings required by section 314(b), and such requirements shall remain in effect with respect to claims, and mill or tunnel sites for which fees are required to be paid under this section.

(b) Omitted

(c) Fee adjustments

(1) The Secretary of the Interior shall adjust the fees required by sections 28f to 28k of this title to reflect changes in the Consumer Price Index published by the Bureau of Labor Statistics of the Department of Labor every 5 years after August 10, 1993, or more frequently if the Secretary determines an adjustment to be reasonable.

(2) The Secretary shall provide claimants notice of any adjustment made under this subsection not later than July 1 of any year in which the adjustment is made.

(3) A fee adjustment under this subsection shall begin to apply the first assessment year which begins after adjustment is made.

(Pub. L. 103–66, title X, § 10105, Aug. 10, 1993, 107 Stat. 406.)

CODIFICATION

Section is comprised of section 10105 of Pub. L. 103–66. Subsec. (b) of section 10105 of Pub. L. 103–66 amended section 28 of this title.

SIMILAR PROVISIONS

Similar provisions were contained in Pub. L. 102–381, title I, Oct. 5, 1992, 106 Stat. 1378, 1379.

§ 28k. Regulations

The Secretary of the Interior shall promulgate rules and regulations to carry out the terms and conditions of sections 28f to 28k of this title as soon as practicable after August 10, 1993.

(Pub. L. 103–66, title X, § 10106, Aug. 10, 1993, 107 Stat. 407.)

SIMILAR PROVISIONS

Similar provisions were contained in Pub. L. 102–381, title I, Oct. 5, 1992, 106 Stat. 1378, 1379.

§ 28*l*. Collection of mining law administration fees

In fiscal year 2009 and each fiscal year thereafter, the Bureau of Land Management shall collect from mining claim holders the mining claim maintenance fees and location fees; such fees shall be collected in the same manner as authorized by sections 28f and 28g of this title only to the extent provided in advance in appropriations Acts.

(Pub. L. 111–8, div. E, title I, Mar. 11, 2009, 123 Stat. 704; Pub. L. 111–88, div. A, title I, Oct. 30, 2009, 123 Stat. 2907.)

AMENDMENTS

2009—Pub. L. 111–88 substituted "from mining claim holders the mining claim maintenance fees and location" for "mining law administration" and struck out "those" before "authorized".

§ 29. Patents; procurement procedure; filing: application under oath, plat and field notes, notices, and affidavits; posting plat and notice on claim; publication and posting notice in office; certificate; adverse claims; payment per acre; objections; nonresident claimant's agent for execution of application and affidavits

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title, and section 661 of title 43, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of

the claim or claims in common, made by or under the direction of the Director of the Bureau of Land Management, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the Director of the Bureau of Land Management that $500 worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of $5 per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43. Where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits.

(R.S. § 2325; Jan. 22, 1880, ch. 9, § 1, 21 Stat. 61; Mar. 3, 1925, ch. 462, 43 Stat. 1144, 1145; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

REFERENCES IN TEXT

Sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43, referred to in text, were in the original "this chapter", meaning chapter 6 of title 32 of the Revised Statutes, consisting of R.S. §§ 2318 to 2352.

CODIFICATION

R.S. § 2325 derived from act May 10, 1872, ch. 152, § 6, 17 Stat. 92.

AMENDMENTS

1925—Act Mar. 3, 1925, affected words, in first sentence of text, now reading "United States supervisor of surveys," and words, in next to last sentence of text, now reading "register of the proper land office." Those words formerly read "United States surveyor general" and "register and receiver of the proper land office," respectively. This act abolished the office of surveyor general, and transferred to and consolidated with the Field Surveying Service, under the jurisdiction of the U.S. Supervisor of Surveys, the administration, equipment, etc., of such office, and consolidated the offices and functions of the register and receiver.

TRANSFER OF FUNCTIONS

Director of the Bureau of Land Management substituted for United States Supervisor of Surveys wherever appearing. In the establishment of The Bureau of Land Management by Reorg. Plan No. 3 of 1946, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100, set out in the Appendix to Title 5, Government Organization and Employees, the office of Supervisor of Surveys was abolished and the functions and powers were transferred to the Secretary of the Interior, to be performed by such officers or agencies of the Department as might be designated by the Secretary. Under that authority, the functions and powers formerly exercised by the Supervisor of Surveys were delegated to the Chief Cadastral Engineer, subject to the supervision of the Director of the Bureau of Land Management. In the general reorganization and realignment of functions of the Bureau, the office of the Chief Cadastral Engineer was abolished, and the functions of that office have been delegated to the Director of the Bureau of Land Management. See 43 C.F.R. § 9180.0-3(a)(1).

Office of register of district land office abolished and all functions of register transferred to Secretary of the Interior, or to officers and agencies of Department of the Interior as Secretary may designate, by Reorg. Plan No. 3 of 1946, § 403, set out in the Appendix to Title 5.

See also Transfer of Functions note set out under section 1 of this title.

§ 30. Adverse claims; oath of claimants; requisites; waiver; stay of land office proceedings; judicial determination of right of possession; successful claimants' filing of judgment roll, certificate of labor, and description of claim in land office, and acreage and fee payments; issuance of patents for entire or partial claims upon certification of land office proceedings and judgment roll; alienation of patent title

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the Director of the Bureau

interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and the Director of the Bureau of Land Management in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

(R.S. § 2327; Apr. 28, 1904, ch. 1796, 33 Stat. 545; Mar. 3, 1925, ch. 462, 43 Stat. 1144; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

CODIFICATION

R.S. § 2327 derived from act May 10, 1872, ch. 152, § 8, 17 Stat. 94.

AMENDMENTS

1925—Act Mar. 3, 1925, affected words now reading "United States supervisor of surveys" in first and second sentences of text. These words formerly read "the surveyor-general." This act abolished the office of surveyor general, and transferred to and consolidated with the Field Surveying Service, under the jurisdiction of the U.S. Supervisor of Surveys, the administration, equipment, etc., of such office.

TRANSFER OF FUNCTIONS

Director of the Bureau of Land Management, substituted for United States Supervisor of Surveys wherever appearing. In the establishment of the Bureau of Land Management by Reorg. Plan No. 3 of 1946, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100, set out in the Appendix to Title 5, Government Organization and Employees, the office of Supervisor of Surveys was abolished and the functions and powers were transferred to the Secretary of the Interior, to be performed by such officers or agencies of the Department as might be designated by the Secretary. Under that authority, the functions and powers formerly exercised by the Supervisor of Surveys were delegated to the Chief Cadastral Engineer, subject to the supervision of the Director of the Bureau of Land Management. In the general reorganization and realignment of functions of the Bureau, the office of the Chief Cadastral Engineer was abolished, and the functions of that office have been delegated to the Director of the Bureau of Land Management. See 43 C.F.R. § 9180.0-3(a)(1).

See also note set out under section 1 of this title.

§ 35. Placer claims; entry and proceedings for patent under provisions applicable to vein or lode claims; conforming entry to legal subdivisions and surveys; limitation of claims; homestead entry of segregated agricultural land

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands. And where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the 10th day of May 1872, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead purposes.

(R.S. §§ 2329, 2331; Mar. 3, 1891, ch. 561, § 4, 26 Stat. 1097.)

CODIFICATION

R.S. § 2329 derived from act July 9, 1870, ch. 235, § 12, 16 Stat. 217.

R.S. § 2331 derived from act May 10, 1872, ch. 152, § 10, 17 Stat. 94.

SUBMERGED LANDS ACT

Provisions of this section as not amended, modified or repealed by the Submerged Lands Act, see section 1303 of Title 43, Public Lands.

§ 36. Subdivisions of 10-acre tracts; maximum of placer locations; homestead claims of agricultural lands; sale of improvements

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the 9th day of July 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

(R.S. § 2330; Mar. 3, 1891, ch. 561, § 4, 26 Stat. 1097.)

CODIFICATION

R.S. § 2330 derived from act July 9, 1870, ch. 235, § 12, 16 Stat. 217.

SUBMERGED LANDS ACT

Provisions of this section as not amended, modified or repealed by the Submerged Lands Act, see section 1303 of Title 43, Public Lands.

§ 37. Proceedings for patent where boundaries contain vein or lode; application; statement including vein or lode; issuance of patent: acreage payments for vein or lode and placer claim; costs of proceedings; knowledge affecting construction of application and scope of patent

Where the same person, association, or corporation is in possession of a placer claim, and also a

of Land Management. In the general reorganization and realignment of functions of the Bureau, the office of the Chief Cadastral Engineer was abolished, and the functions of that office have been delegated to the Director of the Bureau of Land Management. See 43 C.F.R. § 9180.0–3(a)(1).

In sentence beginning "The Director of the Bureau of Land Management shall also have power", "Director of the Bureau of Land Management" substituted for "Commissioner of the General Land Office" in two instances and "Director" for "Commissioner" on authority of Reorg. Plan No. 3 of 1946, § 403, set out in the Appendix to Title 5. Section 403 of Reorg. Plan No. 3 of 1946, abolished the office of the Commissioner of the General Land Office and consolidated the functions of the General Land Office with the Grazing Service to form the Bureau of Land Management.

Office of register of district land office abolished and all functions of register transferred to Secretary of the Interior, or to officers and agencies of Department of the Interior as Secretary may designate, by Reorg. Plan No. 3 of 1946, § 403, set out in the Appendix to Title 5.

See also note set out under section 1 of this title.

§ 40. Verification of affidavits

All affidavits required to be made under sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title, and section 661 of title 43 may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

(R.S. § 2335; Mar. 3, 1925, ch. 462, 43 Stat. 1145; 1946 Reorg. Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

REFERENCES IN TEXT

Sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43, referred to in text, were in the original "this chapter", meaning chapter 6 of title 32 of the Revised Statutes, consisting of R.S. §§ 2318 to 2352.

CODIFICATION

R.S. § 2335 derived from act May 10, 1872, ch. 152, § 13, 17 Stat. 95.

AMENDMENTS

1925—Act Mar. 3, 1925, affected words in first sentence of text, now reading "before the register of the land office." Such words formerly read "before the register and receiver of the land-office." Such act is treated more fully in note under section 29 of this title.

TRANSFER OF FUNCTIONS

Office of register of district land office abolished and all functions of register transferred to Secretary of the Interior, or to officers and agencies of Department of the Interior as Secretary may designate, by Reorg. Plan No. 3 of 1946, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100, set out in the Appendix to Title 5, Government Organization and Employees.

See also note set out under section 1 of this title.

§ 41. Intersecting or crossing veins

Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right-of-way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

(R.S. § 2336.)

CODIFICATION

R.S. § 2336 derived from act May 10, 1872, ch. 152, § 14, 17 Stat. 96.

§ 42. Patents for nonmineral lands: application, survey, notice, acreage limitation, payment

(a) Vein or lode and mill site owners eligible

Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location made on and after May 10, 1872, of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43 for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

(b) Placer claim owners eligible

Where nonmineral land is needed by the proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, and is used or occupied by the proprietor for such purposes, such land may be included in an application for a patent for such claim, and may be patented therewith subject to the same requirements as to survey and notice as are applicable to placers. No location made of such nonmineral land shall exceed five acres and payment for the same shall be made at the rate applicable to placer claims which do not include a vein or lode.

(R.S. § 2337; Pub. L. 86–390, Mar. 18, 1960, 74 Stat. 7.)

REFERENCES IN TEXT

Sections 21, 22 to 24, 26 to 28, 29, 30, 33 to 48, 50 to 52, 71 to 76 of this title and section 661 of title 43, referred to in subsec. (a), were in the original "this chapter", meaning chapter 6 of title 32 of the Revised Statutes, consisting of R.S. §§ 2318 to 2352.

CODIFICATION

R.S. § 2337 derived from act May 10, 1872, ch. 152, § 15, 17 Stat. 96.

AMENDMENTS

1960—Pub. L. 86–390 designated existing provisions as subsec. (a) and added subsec. (b).

tive validity to any mining claim hereafter located under such mining laws: *Provided, however*, That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common varieties" as used in this subchapter and sections 601 and 603 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in this subchapter and sections 601 and 603 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the replacement of wood by silica or other matter.

(July 23, 1955, ch. 375, §3, 69 Stat. 368; Pub. L. 87–713, §1, Sept. 28, 1962, 76 Stat. 652.)

AMENDMENTS

1962—Pub. L. 87–713 defined "petrified wood", and provided that no deposit of petrified wood shall be deemed a valuable mineral deposit within the mining laws of the United States.

REGULATIONS FOR REMOVAL OF LIMITED QUANTITIES OF PETRIFIED WOOD

Pub. L. 87–713, §2, Sept. 28, 1962, 76 Stat. 652, provided that: "The Secretary of the Interior shall provide by regulation that limited quantities of petrified wood may be removed without charge from those public lands which he shall specify."

§ 612. Unpatented mining claims

(a) Prospecting, mining or processing operations

Any mining claim hereafter located under the mining laws of the United States shall not be used, prior to issuance of patent therefor, for any purposes other than prospecting, mining or processing operations and uses reasonably incident thereto.

(b) Reservations in the United States to use of the surface and surface resources

Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefor, to the right of the United States to manage and dispose of the vegetative surface resources thereof and to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States). Any such mining claim shall also be subject, prior to issuance of patent therefor, to the right of the United States, its permittees, and licensees, to use so much of the surface thereof as may be necessary for such purposes or for access to adjacent land: *Provided, however*, That any use of the surface of any such mining claim by the United States, its permittees or licensees, shall be such as not to endanger or materially interfere with prospecting, mining or processing operations or uses reasonably incident thereto: *Provided further*, That if at any time the locator requires more timber for his mining operations than is available to him from the claim after disposition of timber therefrom by the United States, subsequent to the location of the claim, he shall be entitled, free of charge, to be supplied with timber for such requirements from the nearest timber administered by the disposing agency which is ready for harvesting under the rules and regulations of that agency and which is substantially equivalent in kind and quantity to the timber estimated by the disposing agency to have been disposed of from the claim: *Provided further*, That nothing in this subchapter and sections 601 and 603 of this title shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian relating to the ownership, control, appropriation, use, and distribution of ground or surface waters within any unpatented mining claim.

(c) Severance or removal of timber

Except to the extent required for the mining claimant's prospecting, mining or processing operations and uses reasonably incident thereto, or for the construction of buildings or structures in connection therewith, or to provide clearance for such operations or uses, or to the extent authorized by the United States, no claimant of any mining claim hereafter located under the mining laws of the United States shall, prior to issuance of patent therefor, sever, remove, or use any vegetative or other surface resources thereof which are subject to management or disposition by the United States under the preceding subsection (b). Any severance or removal of timber which is permitted under the exceptions of the preceding sentence, other than severance or removal to provide clearance, shall be in accordance with sound principles of forest management.

(July 23, 1955, ch. 375, §4, 69 Stat. 368.)

§ 613. Procedure for determining title uncertainties

(a) Notice to mining claimants; request; publication; service

The head of a Federal department or agency which has the responsibility for administering surface resources of any lands belonging to the United States may file as to such lands in the office of the Secretary of the Interior, or in such office as the Secretary of the Interior may designate, a request for publication of notice to mining claimants, for determination of surface rights, which request shall contain a description of the lands covered thereby, showing the section or sections of the public land surveys which embrace the lands covered by such request, or if such lands are unsurveyed, either the section or sections which would probably embrace such lands when the public land surveys are extended to such lands or a tie by courses and distances to an approved United States mineral monument.

The filing of such request for publication shall be accompanied by an affidavit or affidavits of a person or persons over twenty-one years of age setting forth that the affiant or affiants have examined the lands involved in a reasonable effort to ascertain whether any person or persons were in actual possession of or engaged in the working of such lands or any part thereof, and, if no person or persons were found to be in actual possession of or engaged in the working of said lands or any part thereof on the date of such examination, setting forth such fact, or, if any person or persons were so found to be in actual possession

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(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

(Pub. L. 91–190, title I, § 101, Jan. 1, 1970, 83 Stat. 852.)

COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE

Pub. L. 91–213, §§ 1–9, Mar. 16, 1970, 84 Stat. 67–69, established the Commission on Population Growth and the American Future to conduct and sponsor such studies and research and make such recommendations as might be necessary to provide information and education to all levels of government in the United States, and to our people regarding a broad range of problems associated with population growth and their implications for America's future; prescribed the composition of the Commission; provided for the appointment of its members, and the designation of a Chairman and Vice Chairman; required a majority of the members of the Commission to constitute a quorum, but allowed a lesser number to conduct hearings; prescribed the compensation of members of the Commission; required the Commission to conduct an inquiry into certain prescribed aspects of population growth in the United States and its foreseeable social consequences; provided for the appointment of an Executive Director and other personnel and prescribed their compensation; authorized the Commission to enter into contracts with public agencies, private firms, institutions, and individuals for the conduct of research and surveys, the preparation of reports, and other activities necessary to the discharge of its duties, and to request from any Federal department or agency any information and assistance it deems necessary to carry out its functions; required the General Services Administration to provide administrative services for the Commission on a reimbursable basis; required the Commission to submit an interim report to the President and the Congress one year after it was established and to submit its final report two years after Mar. 16, 1970; terminated the Commission sixty days after the date of the submission of its final report; and authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such amounts as might be necessary to carry out the provisions of Pub. L. 91–213.

EXECUTIVE ORDER NO. 11507

Ex. Ord. No. 11507, eff. Feb. 4, 1970, 35 F.R. 2573, which related to prevention, control, and abatement of air and water pollution at federal facilities was superseded by Ex. Ord. No. 11752, eff. Dec. 17, 1973, 38 F.R. 34793, formerly set out below.

EXECUTIVE ORDER NO. 11752

Ex. Ord. No. 11752, Dec. 17, 1973, 38 F.R. 34793, which related to the prevention, control, and abatement of environmental pollution at Federal facilities, was revoked by Ex. Ord. No. 12088, Oct. 13, 1978, 43 F.R. 47707, set out as a note under section 4321 of this title.

§ 4332. Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, and shall accompany the proposal through the existing agency review processes;

(D) Any detailed statement required under subparagraph (C) after January 1, 1970, for any major Federal action funded under a program of grants to States shall not be deemed to be legally insufficient solely by reason of having been prepared by a State agency or official, if:

(i) the State agency or official has statewide jurisdiction and has the responsibility for such action,

(ii) the responsible Federal official furnishes guidance and participates in such preparation,

(iii) the responsible Federal official independently evaluates such statement prior to its approval and adoption, and

(iv) after January 1, 1976, the responsible Federal official provides early notification

to, and solicits the views of, any other State or any Federal land management entity of any action or any alternative thereto which may have significant impacts upon such State or affected Federal land management entity and, if there is any disagreement on such impacts, prepares a written assessment of such impacts and views for incorporation into such detailed statement.

The procedures in this subparagraph shall not relieve the Federal official of his responsibilities for the scope, objectivity, and content of the entire statement or of any other responsibility under this chapter; and further, this subparagraph does not affect the legal sufficiency of statements prepared by State agencies with less than statewide jurisdiction.[1]

(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

(G) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;

(H) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(I) assist the Council on Environmental Quality established by subchapter II of this chapter.

(Pub. L. 91–190, title I, § 102, Jan. 1, 1970, 83 Stat. 853; Pub. L. 94–83, Aug. 9, 1975, 89 Stat. 424.)

AMENDMENTS

1975—Subpars. (D) to (I). Pub. L. 94–83 added subpar. (D) and redesignated former subpars. (D) to (H) as (E) to (I), respectively.

CERTAIN COMMERCIAL SPACE LAUNCH ACTIVITIES

Pub. L. 104–88, title IV, § 401, Dec. 29, 1995, 109 Stat. 955, provided that: "The licensing of a launch vehicle or launch site operator (including any amendment, extension, or renewal of the license) under [former] chapter 701 of title 49, United States Code [now chapter 509 (§ 50901 et seq.) of Title 51, National and Commercial Space Programs], shall not be considered a major Federal action for purposes of section 102(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(C)) if—

"(1) the Department of the Army has issued a permit for the activity; and

"(2) the Army Corps of Engineers has found that the activity has no significant impact."

EX. ORD. NO. 13352. FACILITATION OF COOPERATIVE CONSERVATION

Ex. Ord. No. 13352, Aug. 26, 2004, 69 F.R. 52989, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, it is hereby ordered as follows:

SECTION 1. *Purpose*. The purpose of this order is to ensure that the Departments of the Interior, Agriculture, Commerce, and Defense and the Environmental Protection Agency implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation, with an emphasis on appropriate inclusion of local participation in Federal decisionmaking, in accordance with their respective agency missions, policies, and regulations.

SEC. 2. *Definition*. As used in this order, the term "cooperative conservation" means actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals.

SEC. 3. *Federal Activities*. To carry out the purpose of this order, the Secretaries of the Interior, Agriculture, Commerce, and Defense and the Administrator of the Environmental Protection Agency shall, to the extent permitted by law and subject to the availability of appropriations and in coordination with each other as appropriate:

(a) carry out the programs, projects, and activities of the agency that they respectively head that implement laws relating to the environment and natural resources in a manner that:

(i) facilitates cooperative conservation;

(ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;

(iii) properly accommodates local participation in Federal decisionmaking; and

(iv) provides that the programs, projects, and activities are consistent with protecting public health and safety;

(b) report annually to the Chairman of the Council on Environmental Quality on actions taken to implement this order; and

(c) provide funding to the Office of Environmental Quality Management Fund (42 U.S.C. 4375) for the Conference for which section 4 of this order provides.

SEC. 4. *White House Conference on Cooperative Conservation*. The Chairman of the Council on Environmental Quality shall, to the extent permitted by law and subject to the availability of appropriations:

(a) convene not later than 1 year after the date of this order, and thereafter at such times as the Chairman deems appropriate, a White House Conference on Cooperative Conservation (Conference) to facilitate the exchange of information and advice relating to (i) cooperative conservation and (ii) means for achievement of the purpose of this order; and

(b) ensure that the Conference obtains information in a manner that seeks from Conference participants their individual advice and does not involve collective judgment or consensus advice or deliberation.

SEC. 5. *General Provision*. This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

GEORGE W. BUSH.

§ 4332a. Accelerated decisionmaking in environmental reviews

(a) In general

In preparing a final environmental impact statement under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.), if the lead agency modifies the statement in response to comments that are minor and are confined to factual corrections or explanations of why the comments do not warrant additional agency re-

[1] So in original. The period probably should be a semicolon.

CODE OF FEDERAL REGULATIONS

Title 36

Parks, Forests, and Public Property

Parts 200 to 299

Revised as of July 1, 2019

Containing a codification of documents of general applicability and future effect

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PART 228—MINERALS

Subpart A—Locatable Minerals

Subpart B—Leasable Minerals

Subpart C—Disposal of Mineral Materials

Subpart D—Miscellaneous Minerals Provisions

Subpart E—Oil and Gas Resources

Authority: 16 U.S.C. 478, 551; 30 U.S.C. 226, 352, 601, 611; 94 Stat. 2400.

Source: 39 FR 31317, Aug. 28, 1974, unless otherwise noted. Redesignated at 46 FR 36142, July 14, 1981.

Subpart A—Locatable Minerals

§ 228.1 Purpose.

It is the purpose of these regulations to set forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. 21–54), which confer a statutory right to enter upon the public lands to search for minerals, shall be conducted

so as to minimize adverse environmental impacts on National Forest System surface resources. It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.

§ 228.2 Scope.

These regulations apply to operations hereafter conducted under the United States mining laws of May 10, 1872, as amended (30 U.S.C. 22 *et seq.*), as they affect surface resources on all National Forest System lands under the jurisdiction of the Secretary of Agriculture to which such laws are applicable: *Provided, however*, That any area of National Forest lands covered by a special Act of Congress (16 U.S.C. 482a–482q) is subject to the provisions of this part and the provisions of the special act, and in the case of conflict the provisions of the special act shall apply.

§ 228.3 Definitions.

For the purposes of this part the following terms, respectively, shall mean:

(a) *Operations.* All functions, work, and activities in connection with prospecting, exploration, development, mining or processing of mineral resources and all uses reasonably incident thereto, including roads and other means of access on lands subject to the regulations in this part, regardless of whether said operations take place on or off mining claims.

(b) *Operator.* A person conducting or proposing to conduct operations.

(c) *Person.* Any individual, partnership, corporation, association, or other legal entity.

(d) *Mining claim.* Any unpatented mining claim or unpatented millsite authorized by the United States mining laws of May 10, 1872, as amended (30 U.S.C. 22 *et seq.*).

(e) *Authorized officer.* The Forest Service officer to whom authority to review and approve operating plans has been delegated.

§ 228.4 Plan of operations—notice of intent—requirements.

(a) Except as provided in paragraph (a)(1) of this section, a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources. Such notice of intent to operate shall be submitted to the District Ranger having jurisdiction over the area in which the operations will be conducted. Each notice of intent to operate shall provide information sufficient to identify the area involved, the nature of the proposed operations, the route of access to the area of operations, and the method of transport.

(1) 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;

(ii) 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 which generally might include searching for and occasionally removing small mineral samples or specimens, gold panning, metal detecting, non-motorized hand sluicing, using battery operated dry washers, and collecting of mineral specimens using hand tools;

(iii) Marking and monumenting a mining claim;

(iv) Underground operations which will not cause significant surface resource disturbance;

(v) Operations, which in their totality, will not cause surface resource disturbance which is substantially different than that caused by other users of the National Forest System who are not required to obtain a Forest Service special use authorization, contract, or other written authorization;

(vi) 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; or

(vii) Operations for which a proposed plan of operations is submitted for approval;

(2) The District Ranger will, within 15 days of receipt of a notice of intent

to operate, notify the operator if approval of a plan of operations is required before the operations may begin.

(3) An operator shall submit a proposed plan of operations to the District Ranger having jurisdiction over the area in which operations will be conducted in lieu of a notice of intent to operate if the proposed operations will likely cause a significant disturbance of surface resources. An operator also shall submit a proposed plan of operations, or a proposed supplemental plan of operations consistent with §228.4(d), to the District Ranger having jurisdiction over the area in which operations are being conducted if those operations are causing a significant disturbance of surface resources but are not covered by a current approved plan of operations. The requirement to submit a plan of operations shall not apply to the operations listed in paragraphs (a)(1)(i) through (v). The requirement to submit a plan of operations also shall not apply to 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 will likely cause a significant disturbance of surface resources.

(4) If the District Ranger determines that any operation is causing or will likely cause significant disturbance of surface resources, the District Ranger shall notify the operator that the operator must submit a proposed plan of operations for approval and that the operations can not be conducted until a plan of operations is approved.

(b) Any person conducting operations on the effective date of these regulations, who would have been required to submit a plan of operations under §228.4(a), may continue operations but shall within 120 days thereafter submit a plan of operations to the District Ranger having jurisdiction over the area within which operations are being conducted: *Provided, however,* That upon a showing of good cause the authorized officer will grant an extension of time for submission of a plan of operations, not to exceed an additional 6 months. Operations may continue according to the submitted plan during its review, unless the authorized officer determines that the operations are unnecessarily or unreasonably causing irreparable damage to surface resources and advises the operator of those measures needed to avoid such damage. Upon approval of a plan of operations, operations shall be conducted in accordance with the approved plan. The requirement to submit a plan of operations shall not apply: (1) To operations excepted in §228.4(a) or (2) to operations concluded prior to the effective date of the regulations in this part.

(c) The plan of operations shall include:

(1) The name and legal mailing address of the operators (and claimants if they are not the operators) and their lessees, assigns, or designees.

(2) A map or sketch showing information sufficient to locate the proposed area of operations on the ground, existing and/or proposed roads or access routes to be used in connection with the operations as set forth in §228.12 and the approximate location and size of areas where surface resources will be disturbed.

(3) Information sufficient to describe or identify the type of operations proposed and how they would be conducted, the type and standard of existing and proposed roads or access routes, the means of transportation used or to be used as set forth in §228.12, the period during which the proposed activity will take place, and measures to be taken to meet the requirements for environmental protection in §228.8.

(d) The plan of operations shall cover the requirements set forth in paragraph (c) of this section, as foreseen for the entire operation for the full estimated period of activity: *Provided, however,* That if the development of a plan for an entire operation is not possible at the time of preparation of a plan, the operator shall file an initial plan setting forth his proposed operation to the degree reasonably foreseeable at that time, and shall thereafter file a supplemental plan or plans whenever it is proposed to undertake any significant surface disturbance not covered by the initial plan.

(e) At any time during operations under an approved plan of operations, the authorized officer may ask the operator to furnish a proposed modification of the plan detailing the means of minimizing unforeseen significant disturbance of surface resources. If the operator does not furnish a proposed modification within a time deemed reasonable by the authorized officer, the authorized officer may recommend to his immediate superior that the operator be required to submit a proposed modification of the plan. The recommendation of the authorized officer shall be accompanied by a statement setting forth in detail the supporting facts and reasons for his recommendations. In acting upon such recommendation, the immediate superior of the authorized officer shall determine:

(1) Whether all reasonable measures were taken by the authorized officer to predict the environmental impacts of the proposed operations prior to approving the operating plan,

(2) Whether the disturbance is or probably will become of such significance as to require modification of the operating plan in order to meet the requirements for environmental protection specified in § 228.8 and

(3) Whether the disturbance can be minimized using reasonable means. Lacking such determination that unforeseen significant disturbance of surface resources is occurring or probable and that the disturbance can be minimized using reasonable means, no operator shall be required to submit a proposed modification of an approved plan of operations. Operations may continue in accordance with the approved plan until a modified plan is approved, unless the immediate superior of the authorized officer determines that the operations are unnecessarily or unreasonably causing irreparable injury, loss or damage to surface resources and advises the operator of those measures needed to avoid such damage.

(f) Upon completion of an environmental analysis in connection with each proposed operating plan, the authorized officer will determine whether an environmental statement is required. Not every plan of operations, supplemental plan or modification will involve the preparation of an environmental statement. Environmental impacts will vary substantially depending on whether the nature of operations is prospecting, exploration, development, or processing, and on the scope of operations (such as size of operations, construction required, length of operations and equipment required), resulting in varying degrees of disturbance to vegetative resources, soil, water, air, or wildlife. The Forest Service will prepare any environmental statements that may be required.

(g) The information required to be included in a notice of intent or a plan of operations, or supplement or modification thereto, has been assigned Office of Management and Budget Control #0596–0022. The public reporting burden for this collection of information is estimated to vary from a few minutes for an activity involving little or no surface disturbance to several months for activities involving heavy capital investments and significant surface disturbance, with an average of 2 hours per individual response. This includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief (2800), Forest Service, USDA, P.O. Box 96090, Washington, DC 20090–6090 and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

[39 FR 31317, Aug. 28, 1974. Redesignated at 46 FR 36142, July 14, 1981, and amended at 54 FR 6893, Feb. 15, 1989; 69 FR 41430, July 9, 2004; 70 FR 32731, June 6, 2005]

§ 228.5 Plan of operations—approval.

(a) Operations shall be conducted in accordance with an approved plan of operations, except as provided in paragraph (b) of this section and in § 228.4

(a), (b), and (e). A proposed plan of operation shall be submitted to the District Ranger, who shall promptly acknowledge receipt thereof to the operator. The authorized officer shall, within thirty (30) days of such receipt, analyze the proposal, considering the economics of the operation along with the other factors in determining the reasonableness of the requirements for surface resource protection, and;

(1) Notify the operator that he has approved the plan of operations; or

(2) Notify the operator that the proposed operations are such as not to require an operating plan; or

(3) Notify the operator of any changes in, or additions to, the plan of operations deemed necessary to meet the purpose of the regulations in this part; or

(4) Notify the operator that the plan is being reviewed, but that more time, not to exceed an additional sixty (60) days, is necessary to complete such review, setting forth the reasons why additional time is needed: *Provided, however,* That days during which the area of operations is inaccessible for inspection shall not be included when computing the sixty (60) day period; or

(5) Notify the operator that the plan cannot be approved until a final environmental statement has been prepared and filed with the Council on Environmental Quality as provided in § 228.4(f).

(b) Pending final approval of the plan of operations, the authorized officer will approve such operations as may be necessary for timely compliance with the requirements of Federal and State laws, so long as such operations are conducted so as to minimize environmental impacts as prescribed by the authorized officer in accordance with the standards contained in § 228.8.

(c) A supplemental plan or plans of operations provided for in § 228.4(d) and a modification of an approved operating plan as provided for in § 228.4(e) shall be subject to approval by the authorized officer in the same manner as the initial plan of operations: *Provided, however,* That a modification of an approved plan of operations under § 228.4(e) shall be subject to approval by the immediate superior of the authorized officer in cases where it has been determined that a modification is required.

(d) In the provisions for review of operating plans, the Forest Service will arrange for consultation with appropriate agencies of the Department of the Interior with respect to significant technical questions concerning the character of unique geologic conditions and special exploration and development systems, techniques, and equipment, and with respect to mineral values, mineral resources, and mineral reserves. Further, the operator may request the Forest Service to arrange for similar consultations with appropriate agencies of the U.S. Department of the Interior for a review of operating plans.

§ 228.6 Availability of information to the public.

Except as provided herein, all information and data submitted by an operator pursuant to the regulations in this part shall be available for examination by the public at the Office of the District Ranger in accordance with the provisions of 7 CFR 1.1–1.6 and 36 CFR 200.5–200.10. Specifically identified information and data submitted by the operator as confidential concerning trade secrets or privileged commercial or financial information will not be available for public examination. Information and data to be withheld from public examination may include, but is not limited to, known or estimated outline of the mineral deposits and their location, attitude, extent, outcrops, and content, and the known or planned location of exploration pits, drill holes, excavations pertaining to location and entry pursuant to the United States mining laws, and other commercial information which relates to competitive rights of the operator.

§ 228.7 Inspection, noncompliance.

(a) Forest Officers shall periodically inspect operations to determine if the operator is complying with the regulations in this part and an approved plan of operations.

(b) If an operator fails to comply with the regulations or his approved plan of operations and the noncompliance is unnecessarily or unreasonably causing injury, loss or damage to surface resources the authorized officer

shall serve a notice of noncompliance upon the operator or his agent in person or by certified mail. Such notice shall describe the noncompliance and shall specify the action to comply and the time within which such action is to be completed, generally not to exceed thirty (30) days: *Provided, however,* That days during which the area of operations is inaccessible shall not be included when computing the number of days allowed for compliance.

§ 228.8 Requirements for environmental protection.

All operations shall be conducted so as, where feasible, to minimize adverse environmental impacts on National Forest surface resources, including the following requirements:

(a) *Air Quality.* Operator shall comply with applicable Federal and State air quality standards, including the requirements of the Clean Air Act, as amended (42 U.S.C. 1857 *et seq.*).

(b) *Water Quality.* Operator shall comply with applicable Federal and State water quality standards, including regulations issued pursuant to the Federal Water Pollution Control Act, as amended (33 U.S.C. 1151 *et seq.*).

(c) *Solid Wastes.* Operator shall comply with applicable Federal and State standards for the disposal and treatment of solid wastes. All garbage, refuse, or waste, shall either be removed from National Forest lands or disposed of or treated so as to minimize, so far as is practicable, its impact on the environment and the forest surface resources. All tailings, dumpage, deleterious materials, or substances and other waste produced by operations shall be deployed, arranged, disposed of or treated so as to minimize adverse impact upon the environment and forest surface resources.

(d) *Scenic Values.* Operator shall, to the extent practicable, harmonize operations with scenic values through such measures as the design and location of operating facilities, including roads and other means of access, vegetative screening of operations, and construction of structures and improvements which blend with the landscape.

(e) *Fisheries and Wildlife Habitat.* In addition to compliance with water quality and solid waste disposal standards required by this section, operator shall take all practicable measures to maintain and protect fisheries and wildlife habitat which may be affected by the operations.

(f) *Roads.* Operator 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. Unless otherwise approved by the authorized officer, roads no longer needed for operations:

(1) Shall be closed to normal vehicular traffic,

(2) Bridges and culverts shall be removed,

(3) Cross drains, dips, or water bars shall be constructed, and

(4) The road surface shall be shaped to as near a natural contour as practicable and be stabilized.

(g) *Reclamation.* Upon 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.

(h) Certification or other approval issued by State agencies or other Federal agencies of compliance with laws and regulations relating to mining operations will be accepted as compliance with similar or parallel requirements of these regulations.

§ 228.9 Maintenance during operations, public safety.

During all operations operator shall maintain his structures, equipment, and other facilities in a safe, neat and workmanlike manner. Hazardous sites or conditions resulting from operations shall be marked by signs, fenced or

otherwise identified to protect the public in accordance with Federal and State laws and regulations.

§228.10 Cessation of operations, removal of structures and equipment.

Unless otherwise agreed to by the authorized officer, operator shall remove within a reasonable time following cessation of operations all structures, equipment and other facilities and clean up the site of operations. Other than seasonally, where operations have ceased temporarily, an operator shall file a statement with the District Ranger which includes:

(a) Verification of intent to maintain the structures, equipment and other facilities,

(b) The expected reopening date, and

(c) An estimate of extended duration of operations. A statement shall be filed every year in the event operations are not reactivated. Operator shall maintain the operating site, structures, equipment and other facilities in a neat and safe condition during nonoperating periods.

§228.11 Prevention and control of fire.

Operator shall comply with all applicable Federal and State fire laws and regulations and shall take all reasonable measures to prevent and suppress fires on the area of operations and shall require his employees, contractors and subcontractors to do likewise.

§228.12 Access.

An operator is entitled to access in connection with operations, but no road, trail, bridge, landing area for aircraft, or the like, shall be constructed or improved, nor shall any other means of access, including but not limited to off-road vehicles, be used until the operator has received approval of an operating plan in writing from the authorized officer when required by §228.4(a). Proposals for construction, improvement or use of such access as part of a plan of operations shall include a description of the type and standard of the proposed means of access, a map showing the proposed route of access, and a description of the means of transportation to be used. Approval of the means of such access as part of a plan of operations shall specify the location of the access route, design standards, means of transportation, and other conditions reasonably necessary to protect the environment and forest surface resources, including measures to protect scenic values and to insure against erosion and water or air pollution.

§228.13 Bonds.

(a) Any operator required to file a plan of operations shall, when required by the authorized officer, furnish a bond conditioned upon compliance with §228.8(g), prior to approval of such plan of operations. In lieu of a bond, the operator may deposit into a Federal depository, as directed by the Forest Service, and maintain therein, cash in an amount equal to the required dollar amount of the bond or negotiable securities of the United States having market value at the time of deposit of not less than the required dollar amount of the bond. A blanket bond covering nationwide or statewide operations may be furnished if the terms and conditions thereof are sufficient to comply with the regulations in this part.

(b) In determining the amount of the bond, consideration will be given to the estimated cost of stabilizing, rehabilitating, and reclaiming the area of operations.

(c) In the event that an approved plan of operations is modified in accordance with §228.4 (d) and (e), the authorized officer will review the initial bond for adequacy and, if necessary, will adjust the bond to conform to the operations plan as modified.

(d) When reclamation has been completed in accordance with §228.8(g), the authorized officer will notify the operator that performance under the bond has been completed: *Provided, however,* That when the Forest Service has accepted as completed any portion of the reclamation, the authorized officer shall notify the operator of such acceptance and reduce proportionally the amount of bond thereafter to be required with respect to the remaining reclamation.

[39 FR 31317, Aug. 28, 1974; 39 FR 32029, Sept. 4, 1974]

§ 228.14 Appeals.

Appeal of decisions of an authorized officer made pursuant to this subpart is governed by 36 CFR part 214 or 215.

[78 FR 33724, June 5, 2013]

§ 228.15 Operations within National Forest Wilderness.

(a) The United States mining laws shall extend to each National Forest Wilderness for the period specified in the Wilderness Act and subsequent establishing legislation to the same extent they were applicable prior to the date the Wilderness was designated by Congress as a part of the National Wilderness Preservation System. Subject to valid existing rights, no person shall have any right or interest in or to any mineral deposits which may be discovered through prospecting or other information-gathering activity after the legal date on which the United States mining laws cease to apply to the specific Wilderness.

(b) Holders of unpatented mining claims validly established on any National Forest Wilderness prior to inclusion of such unit in the National Wilderness Preservation System shall be accorded the rights provided by the United States mining laws as then applicable to the National Forest land involved. Persons locating mining claims in any National Forest Wilderness on or after the date on which said Wilderness was included in the National Wilderness Preservation System shall be accorded the rights provided by the United States mining laws as applicable to the National Forest land involved and subject to provisions specified in the establishing legislation. Persons conducting operations as defined in §228.3 in National Forest Wilderness shall comply with the regulations in this part. Operations shall be conducted so as to protect National Forest surface resources in accordance with the general purposes of maintaining the National Wilderness Preservation System unimpaired for future use and enjoyment as wilderness and to preserve its wilderness character, consistent with the use of the land for mineral location, exploration, development, drilling, and production and for transmission lines, water lines, telephone lines, and processing operations, including, where essential, the use of mechanized transport, aircraft or motorized equipment.

(c) Persons with valid mining claims wholly within National Forest Wilderness shall be permitted access to such surrounded claims by means consistent with the preservation of National Forest Wilderness which have been or are being customarily used with respect to other such claims surrounded by National Forest Wilderness. No operator shall construct roads across National Forest Wilderness unless authorized in writing by the Forest Supervisor in accordance with §228.12.

(d) On all mining claims validly established on lands within the National Wilderness Preservation System, the operator shall take all reasonable measures to remove any structures, equipment and other facilities no longer needed for mining purposes in accordance with the provisions in §228.10 and restore the surface in accordance with the requirements in §228.8(g).

(e) The title to timber on patented claims validly established after the land was included within the National Wilderness Preservation System remains in the United States, subject to a right to cut and use timber for mining purposes. So much of the mature timber may be cut and used as is needed in the extraction, removal, and beneficiation of the mineral deposits, if needed timber is not otherwise reasonably available. The cutting shall comply with the requirements for sound principles of forest management as defined by the National Forest rules and regulations and set forth in stipulations to be included in the plan of operations, which as a minimum incorporate the following basic principles of forest management:

(1) Harvesting operations shall be so conducted as to minimize soil movement and damage from water runoff; and

(2) Slash shall be disposed of and other precautions shall be taken to minimize damage from forest insects, disease, and fire.

(f) The Chief, Forest Service, shall allow any activity, including

prospecting, for the purpose of gathering information about minerals in National Forest Wilderness except that any such activity for gathering information shall be carried on in a manner compatible with the preservation of the wilderness environment as specified in the plan of operations.

Subpart B—Leasable Minerals

§§ 228.20–228.39 [Reserved]

Subpart C—Disposal of Mineral Materials

SOURCE: 49 FR 29784, July 24, 1984, unless otherwise noted.

§ 228.40 Authority.

Authority for the disposal of mineral materials is provided by the Materials Act of July 31, 1947 (30 U.S.C. 601 *et seq.*), as amended by the Acts of August 31, 1950 (30 U.S.C. 603–604), July 23, 1955 (30 U.S.C. 601, 603), and September 25, 1962 (30 U.S.C. 602), and by the following: the Act of June 4, 1897 (16 U.S.C. 477); the Act of March 4, 1917 (16 U.S.C. 520); the Bankhead-Jones Farm Tenant Act of July 22, 1937 (7 U.S.C. 1010); the Act of September 1, 1949 (section 3) (30 U.S.C. 192c); the Act of June 30, 1950 (16 U.S.C. 508b); the Act of June 28, 1952 (section 3) (66 Stat. 285); the Act of September 2, 1958 (16 U.S.C. 521a); the Act of June 11, 1960 (74 Stat. 205); the Federal Highway Act of August 27, 1958 (23 U.S.C. 101 *et seq.*); and the Alaska National Interest Lands Conservation Act of December 2, 1980 (section 502) (16 U.S.C. 539a).

§ 228.41 Scope.

(a) *Lands to which this subpart applies.* This subpart applies to all National Forest System lands reserved from the public domain of the United States, including public domain lands being administered under the Bankhead-Jones Farm Tenant Act of July 22, 1937 (7 U.S.C. 1010); to all National Forest System lands acquired pursuant to the Weeks Act of March 1, 1911 (36 Stat. 961); to all National Forest System lands with Weeks Act status as provided in the Act of September 2, 1958 (16 U.S.C. 521a); and to public lands within the Copper River addition to the Chugach National Forest (16 U.S.C. 539a). For ease of reference and convenience to the reader, these lands are referred to, throughout this subpart, as *National Forest lands.*

(b) *Restrictions.* Disposal of mineral materials from the following National Forest lands is subject to certain restrictions as described below:

(1) *Segregation or withdrawals in aid of other agencies.* Disposal of mineral materials from lands segregated or withdrawn in aid of a function of another Federal agency, State, territory, county, municipality, water district, or other governmental subdivision or agency may be made only with the written consent of the governmental entity.

(2) *Segregated or withdrawn National Forest lands.* Mineral materials may not be removed from segregated or withdrawn lands where removal is specifically prohibited by statute or by public land order. Where not specifically prohibited, removal of mineral materials may be allowed if the authorized officer determines that the removal is not detrimental to the values for which the segregation or withdrawal was made, except as provided in paragraph (b)(1) of this section. Where operations have been established prior to the effective date of this Subpart and where not prohibited by statute, they may be permitted to continue. Nothing in this subparagraph is intended to prohibit the exercise of valid existing rights.

(3) *Unpatented mining claims.* Provided that claimants are given prior notice and it has been determined that removal will neither endanger nor materially interfere with prospecting, mining, or processing operations or uses reasonably incident thereto on the claims, disposal of mineral materials may be allowed from:

(i) Unpatented mining claims located after July 23, 1955; and/or

(ii) Unpatented mining claims located before July 23, 1955, and on which the United States has established the right to manage the vegetative and other surface resources in accordance with the Multiple Use Mining Act of July 23, 1955 (30 U.S.C. 601, 603, 611–615).

(4) *Acquired Bankhead-Jones lands.* Mineral materials on lands which were