

May 30, 2007

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Forest Service, USDA.
Minerals and Geology Management
(MGM)Staff, (2810), at Mail Stop 1126
Washington, DC. 20250-1126

Attn: Director

Re: Regulatory amendments of 36 CFR 261.2 and
261.10.

Comment and Direct and Constructive Notice

Dear Director:

This letter is to comment on the proposed, above captioned regulatory amendments. It constitutes, both, Public Lands for the People, Inc. comments and, my personal comments as an individual. Public Lands for the People, Inc., (PLP), is a California non-profit corporation dedicated to the protection of the environment as well as the preservation of lands, being held in trust for the public and for use by the public. PLP represents a base of around 40,000 constituent members. PLP and I, both, have legally protectable interests, which would be adversely affected by the failure of the USDA-Forest Service to heed these comments. Response to this letter should be sent to the above address.

The Forest Service intends to make regulatory amendments that purport to clarify issuing a criminal citation for unauthorized occupancy and use of National Forest system lands and facilities by mineral operators.

PLP and I have reason to believe that the proposed regulatory amendments are unlawful as applied to prospectors and miners operating under the 1872 Mining Act for the following reasons:

Violation of 30 U.S.C.A. 22 (Mining Act)

30 U.S.C.A. 22 clearly states: *"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". Emphasis added.

The National Forest cannot be free and open to exploration if the historical means of use by prospectors and miners can be prohibited by Forest Service through obstructions, Forest Order prohibitions and General Prohibitions under 36 CFR 261. The Forest Service has the power to reasonably regulate activities incident to mining upon the National Forest, but those same regulations fail when they operate to prohibit the customary usage by legitimate prospectors and miners. These proposed regulatory amendments are prohibitive and not merely regulatory in fundamental character and therefore are unlawful as proposed.

Violation of 30 U.S.C.A. 21(a) (Mineral Policy Act)

30 U.S.C.A. 21(a) clearly states:

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

The Forest Service cannot be fostering and encouraging domestic mining if they use regulations that have a prohibitive, hostile and chilling effect. It is very troubling to see the Forest Service continue to use general

prohibitions in another futile attempt to supplant the power of Congress. The Forest Service cannot prohibit that which Congress expressly authorized by the Mining Act. Nor can the Forest Service effectively repeal said mining law through the use of general prohibitions, such as the ones proposed. In other words, the Forest Service cannot prohibit that which Congress authorized under the Mining Act, which was a "right of self-initiation" under said act. No re-authorization of those rights can be given by the Forest Service absent a specific act of Congress with the consent of the Grantee.

To illustrate this concept the Supreme Court has said: "A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing;...." "A contract executed is one in which the object [10 U.S. 87, 137] of contract is performed; and this, says Blackstone, differs in nothing from a grant...." "A contract executed, as well as one which is executory, contains obligations binding on the parties. **A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right.** A party is, therefore, always estopped by his own grant." Fletcher v. Peck, 10 U.S. 87 (1810)

Violation of 30 U.S.C.A. 612(b) (Multiple Surface Use Act)

30 U.S.C.A. 612(b) clearly states:

"Rights under any mining claim hereafter located under the mining laws of the United States shall be subject, prior to issuance of patent therefore, 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 therefore, 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 there from 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". Emphasis added.

The regulatory amendments purport to prohibit mining related activities unless the Forest Service deems to authorize, when such authorization is required. To summarily prohibit mine access or occupancy, intentionally or by misapplication, to legitimate prospectors and miners with unpatented mining claims is unlawful. These regulatory amendments will materially interfere with claimants' and prospectors' existing rights to access and occupancy and other uses reasonably incident, thereto.

Again, the proposed regulatory amendments have a prohibitive, not merely a regulatory role, and are therefore unlawful as applied.

Violation of 16 U.S.C.A 478 (Organic Act)

16 U.S.C.A. 478 which states in part: "...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". Emphasis added.

These regulatory amendments will be unlawfully used by the Forest Service to prohibit claimants' and prospectors' existing rights to access and occupancy. The Congressional intent of 16 U.S.C.A. 478 was to bar the Forest Service

from crossing the line into the realm of unreasonable regulation.

Again, the proposed regulatory amendments have a prohibitive, not merely a regulatory role, and are therefore unlawful as applicable upon prospectors' and Miners acting under the authority of the mining law.

Violation of 16 U.S.C.A.472 (Transfer Act)

16 U.S.C.A 472 clearly states: "The Secretary of the Department of Agriculture shall execute or cause to be executed all laws affecting public lands reserved under the provisions of section 471 of this title, or sections supplemental to and amendatory thereof, after such lands have been so reserved, excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands". Emphasis added.

These regulatory amendments will be unlawfully used by the Forest Service to prohibit and affect claimants' and prospectors' customary and existing rights to survey, prospect, locate, appropriate and enter.

Again, the proposed regulatory amendments have a prohibitive, not merely a regulatory role, and are therefore unlawful, as their intended effect upon prospectors and miners acting under the authority of the Mining Act.

Violation of 36 CFR 228.1 (Purpose of Mineral regulations) and Regulatory Flexibility Act (5 U.S.C.A. 601 et. seq.)

36 CFR 228.1 clearly states:

"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.A. 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.

In the recent case of *Karuk v. Forest Service*, (379 F. Supp.2d 1071, July 1, 2005) the court said:

"In 1974, pursuant to the Organic Act, the Forest Service promulgated regulations governing the use of surface resources in connection with the mining activities on national forests. See 39 Fed. Reg. 31317 (Aug. 28, 1974) (presently codified as amended at 36 C.F.R. Part 228, subpart A (referred to herein as the "Part 228 regulations")). Before the Forest Service issued the final regulations, the House Committee on Interior and Insular Affairs, Subcommittee on Public Lands (the "Subcommittee") held oversight hearings and heard testimony from the Chief of the Forest Service and representatives from both the mining and environmental communities. *Id.* Following these hearings, the Subcommittee chairman wrote the Chief of the Forest Service and stated that "the 1897 [Organic] Act clearly cannot be used as authority to prohibit prospecting, mining, and mineral processing" in national forests. See Letter from Rep. John Melcher to John McGuire, Forest Service Chief (June 20, 1974), reproduced in S. Dempsey, *Forest Service Regulations Concerning the Effect of Mining Operations *1078 on Surface Resources*, 8 Nat. Res. Law 481, 497-504 (1975). He further urged that the final regulations be reasonable and not "extend further than to require those things which preserve and protect the National Forests from needless damage by prospectors and miners." *Id.* The Subcommittee chairman also specifically expressed concerns regarding "the possibility of unreasonable enforcement of the regulations, with resulting cost increases that could make otherwise viable mineral operations prohibitively expensive." 39 Fed. Reg. 31317." Emphasis added.

The Forest Service in 1974 assured the Congressional subcommittee that their proposed regulations would not be unreasonably enforced. Nowhere in the history of 36 CFR 228 did the Forest Service state to Congress that they would ever apply the general prohibitions (criminal penalties) found at 36 CFR 261 to the acts of prospectors and miners operating under the Mining Act. Had the Forest Service clearly stated to Congress that they wished to prohibit mining in the future, they would have exposed their hostility toward the Congressional intent of the Mining and Mineral Policy Acts. Instead, in 1984 (and after losing *U.S. v. Craig*) the Forest Service snuck the

applicability of 36 CFR 261 to 36 CFR 228 under the heading of leasable minerals (Subpart B of 36 CFR 228) in the federal register; therefore, no miners dealing with locatables (Subpart A of 36 CFR 228) ever commented on the unlawfulness of 36 CFR 261's applicability because they were never given adequate notice that the proposed change would have an effect upon them.

Not only that but, 36 CFR 261.1(a) (scope) states that: *"The prohibitions in this part apply, except as otherwise provided..."* clearly intended 36 CFR 228 to regulate mineral activities. Again, 36 CFR 228.1 clearly states: *"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.A. 21-54), as reflected in U.S. v. Craig (published in Terry S. Maley, Mining Law, 6th ed., page 715).* This proposed regulatory amendment is a significant and controversial change to the historical interpretation and violates the Regulatory Flexibility Act (5 U.S.C.A. 601 et. seq.)

The Forest Service cannot substitute its regulatory authority under the 1897 Organic Act for that of the 1872 Mining Act, nor can the Forest Service effectively repeal said mining law through the use of general prohibitions, such as the ones proposed.

Violation of Executive Order 12630

Executive order 12630 requires each agency of the federal government avoid interference with civil constitutionally protected property rights. PLP and I assume and believe that the Forest Service will use these changes to 36 CFR 261 as a vehicle to prohibit mine occupancy as demonstrated from the Lex and McClure cases and the written intent within the proposed changes to 36 CFR 261.10, 261.2 regulations.

In Bruce W. Crawford (86 IBLA 350. 1985) the court stated that:

"Where ongoing mining activities are taking place, a challenge to occupancy as being not reasonably incident to mining requires that the mining claimant be given notice and an opportunity for a hearing at which he might establish that his occupancy is reasonably related to his

actual mining operations, prior to issuance of an order directing that occupancy cease."

The court also said that:

"...the effect of an order requiring appellants to cease occupancy is tantamount to a taking of their right to mine. We find no difficulty in concluding that, to the extent to which BLM's actions may be predicated on the statutory limitation that allowable surface uses of unpatented mining claims are only those reasonably incident to mining, a decision ordering **the cessation or limitation** of occupancy in the instant case may only be entered after notice and an opportunity for hearing. Cf. United States v. Nogueira, supra at 825. In the absence of such an opportunity for a hearing, a decision premised on the conclusion that all occupancy should be proscribed could not be sustained."
Emphasis added.

The Forest Service fully intends on prohibiting or limiting mining occupancy with criminal citations without meaningful administrative notice and opportunity for a hearing (Due Process), and as such, will be taking the right to mine. Therefore, the Forest Service intends on violating Executive Order 12630 with the proposed regulatory changes upon 36 CFR 261.

Violation of 5th Amendment of the Constitution (Due Process)

The proposed rule-changes in 36 CFR 261.10 (general prohibitions) has added language ending that states in part: *"...when such authorization is required."* The Forest Service may be inferring how they wish to criminalize 36 CFR 228.4(a)(4) without due process of law.

36 CFR 228.4(a)(4) states:

"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 shall submit a proposed plan of operations for approval and that the operations can not be conducted until a plan of operations is approved"

A vague and standard-less District Ranger determination, decided in a vacuum without environmental analysis and without peer review and inherently controversial in nature,

is arbitrary and capricious. No prospector or miner is obligated to follow a hidden, unpublished District Ranger law that encourages abuse by those in authority (with a bias against mining) who have no schooling in mine engineering, geology, or no practical knowledge from previous work in the mining industry.

Administrative rules or regulations which give rise to criminal penalties must be written so that they fill in details of what is otherwise broad statutory proscription against wrongdoing; they must describe with particularity what is permitted and what is forbidden, and must create a standard that eliminates, rather than creates, vagueness and uncertainty. Criminal statute that fail to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute or that is so indefinite that it encourages arbitrary and erratic arrests and convictions is void for vagueness, as a matter of due process.

Conclusion

Congress has refused to repeal the Mining Law of 1872. Administrative agencies such as the Forest Service lack the authority to effectively repeal the statute by regulations.

For the reasons cited above, PLP and I request that the Forest Service withdraw the proposed amendments to 36 CFR 261.2 and 261.10 to ensure the Forest Service does not violate the Laws of the United States, nor the rights of its citizens.

Respectfully submitted,

Clark Pearson
Northern Director, Public Lands for the People Inc.