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**FSM 2800 - MINERALS AND GEOLOGY**

**CHAPTER 2810 - MINING CLAIMS**

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Associate Deputy Chief

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| <b>New Document</b>   | 2810  | 42 Pages |
| <b>Superseded Document(s) by Issuance Number and Effective Date</b> | 2810<br>(Amendment 2800-2006-5, 08/31/2006) | 42 Pages |

**Digest:**

2817.23a - Adds new code and caption "Compliance with the Clean Water Act." Provides direction for approving new Plans of Operations and complying with the Clean Water Act.

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This chapter is concerned with the administration of the laws relative to locatable or hard rock minerals on public domain land. The administration of the mineral leasing laws is covered in FSM 2820 and mineral materials are covered in FSM 2850.

**2810.1 - Authority**

See FSM 2801, 2817.1, and FSH 2809.15, chapter 10.1 for further direction on the Forest Service's surface management authorities for locatable minerals.

**2810.4 - Responsibility**

**2810.41 - Chief**

The Chief has the responsibility to determine whether or not decisions of the Department of the Interior Administrative Law Judges on mining claims shall be appealed to the Interior Board of Land Appeals and/or whether to seek review of mining claim decisions by the Secretary of the Interior.

**2810.42 - Deputy Chief, National Forest System**

The Deputy Chief, National Forest System, has the responsibility to advise the Chief on matters relating to decisions on mining claims by the Department of the Interior Administrative Law Judges and whether or not to appeal decisions to the Interior Board of Land Appeals and/or to seek review of decisions by the Secretary of the Interior.

**2810.43 - Washington Office, Director of Minerals and Geology Management**

The Washington Office, Director of Minerals and Geology Management has the responsibility to advise the Chief, Deputy Chief for National Forest System, and Regional Foresters on matters relating to appeals of decision of the Department of the Interior Administrative Law Judges to the Interior Board of Land Appeals and for procedures for reviewing mining claim decisions by the Secretary of the Interior.

**2810.44 - Regional Foresters**

Regional Foresters have the responsibility to forward to the Director of Minerals and Geology Management, Washington Office, recommendations, background materials, and rationale for appeals of decisions of Department of the Interior Administrative Law Judges to the Interior Board of Land Appeals and/or reviews by the Secretary of the Interior.

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## **2811 - BASIC ELEMENTS OF GENERAL MINING LAWS**

### **2811.1 - Lands Open to Mineral Entry**

All National Forest System lands which:

1. Were formerly public domain lands subject to location and entry under the U.S. mining laws,
2. Have not been appropriated, withdrawn, or segregated from location and entry, and
3. Have been or may be shown to be mineral lands, are open to prospecting for locatable, or hard rock, minerals (16 U.S.C. 482).

In prospecting, locating, and developing the mineral resources, all persons must comply with the rules and regulations covering the national forests (16 U.S.C. 478).

### **2811.2 - Locatable Minerals**

In general, the locatable minerals are those hard rock minerals which are mined and processed for the recovery of metals. They also may include certain nonmetallic minerals and uncommon varieties of mineral materials, such as valuable and distinctive deposits of limestone or silica.

Locatable minerals may include any solid, natural, inorganic substance occurring in the crust of the earth, except for the common varieties of mineral materials and leasable minerals. Mineral materials include sand, stone, gravel, pumicite, cinders, pumice (except that occurring in pieces over 2 inches on a side), clay, and petrified wood. Leasable minerals are coal, oil, gas, phosphate, sodium, potassium, oil shale, sulphur (in Louisiana and New Mexico), and geothermal steam.

### **2811.3 - Types of Mining Claims**

#### **2811.31 - Lode Claims**

Lode claims may be located only for veins or lodes or other rock in place, bearing metallic or certain other valuable deposits. Lode claims may not exceed 1,500 feet in length along the vein or lode and may not be more than 300 feet on each side of the middle of the vein at the surface. No mining regulation shall limit a claim to less than 25 feet on each side of the middle of the vein at the surface. The endlines of each claim shall be parallel (30 U.S.C. 23).

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### **2811.32 - Placer Claims**

Placer claims may be located only for valuable minerals that occur in other than vein or lode form, such as the gold contained in gravels and deposits or uncommon varieties of mineral materials. No placer claim shall include more than 20 acres for each individual claimant or up to a maximum of 160 acres for an association of eight locators. Placer claims shall conform to legal subdivisions when located on surveyed lands, unless the claim cannot be conformed to legal subdivisions, in which case a survey or plat is required, as in a gulch of shoestring placer (Snow Flake Fraction, 37 L.D. 250), with a metes-and-bounds description (30 U.S.C. 35, 36).

### **2811.33 - Millsite Claims**

A millsite claim may not exceed 5 acres and must be described by metes-and-bounds or by legal subdivisions. When nonmineral land not contiguous to a vein or lode is used or occupied by the proprietor of the vein or lode for mining or milling purposes, the nonadjacent surface ground may be included in an application for patent for such vein or lode (30 U.S.C. 42(a)).

Where nonmineral land is needed and used, or occupied by a proprietor of a placer claim for mining, milling, processing, beneficiation, or other operations in connection with such claim, the nonmineral land may be included in an application for patent for the placer claim (30 U.S.C. 42(b)). The number of millsites that may be legally located is based specifically on the need for mining or milling purposes, irrespective of the types or numbers of mining claims involved (30 U.S.C. 42).

### **2811.34 - Tunnel Site Claims**

A person who excavates a tunnel acquires for a distance of 3,000 feet from the face of the tunnel in a straight line and limited to the width of the tunnel, the right of possession of all veins or lodes not previously known to exist and discovered in the tunnel. After discovery, the owner may locate a lode claim on the surface extending 1,500 feet along the lode (Enterprise Mining Co., v. Rico-Aspen Consol. Mining Co., 167 U.S. 108). No rights are initiated to a vein until a lode location is properly marked on the ground. Failure to prosecute the work on the tunnel for 6 months is an abandonment of the right to all undiscovered veins on the line of such tunnel (30 U.S.C. 27).

### **2811.4 - Qualifications of Locators**

Citizens of the United States, or those who have declared their intention to become such, including minors who have reached the age of discretion and corporations organized under the laws of any State, may make mining locations. Agents may make locations for qualified locators (30 U.S.C. 22; 43 CFR 3832.1).

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### **2811.5 - Requirements for Valid Mining Claim**

The general mining laws impose certain obligations on a claimant who wishes to take advantage of the privileges those laws provide. A claimant must:

1. Discover a valuable deposit (FSM 2815.1, para. 1) of a locatable mineral in federally owned public domain land open to the operation of the mining laws. Satisfaction of other requirements of the 1872 act does not make a claim valid absent a discovery of a valuable deposit (30 U.S.C. 21-54).
2. Locate a claim on the valuable deposit.
3. Identify and monument the claim in the manner required by State law.
4. File in the appropriate office of the Bureau of Land Management a copy of the official record of the notice of location or certificate of location, including a description of the location of the mining claim or mill or tunnel site sufficient to locate the claimed lands on the ground. The copy must be filed within 90 days after the date of location of the claim(s).
5. Perform annual assessment work or annual labor worth at least \$100 on, or for the benefit of, the claim.
6. File a copy of an affidavit of assessment work or notice of intent to hold in the county office where the location notice or certificate is recorded.
7. File in the appropriate office of the Bureau of Land Management a copy of the affidavit of assessment work or notice of intent to hold. The copy must be filed by December 30 of each year following the calendar year in which the claim was located.

With the fulfillment of these requirements, a claimant obtains a valid mining claim. So long as such conditions continue to exist, the claimant is entitled to possession of the claim for mining purposes. It is optional with the claimant whether to apply for a patent. Patent procedures and requirements, are described in FSM 2815.

The term "valid claim" often is used in a loose and incorrect sense to indicate only that the ritualistic requirements of posting of notice, monumentation, discovery work, recording, annual assessment work, payment of taxes, and so forth, have been met. This overlooks the basic requirement that the claimant must discover a valuable mineral deposit. Generally, a valid claim is a claim that may be patented.

Although the statutes require the discovery of a valuable mineral deposit prior to the location of a claim, the courts and the Department of the Interior have recognized a right of possession, in the absence of the discovery required by statute, if the claimant is diligently prospecting. The Forest



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Service recognizes this principle, and in keeping with the policy of encouraging bona fide prospecting and mining, will not discourage or unduly hamper these activities. Rather, the Forest Service should aid the legitimate activities of a prospector making bona fide efforts to obtain a discovery on a good prospect. On the other hand, the Forest Service should oppose attempts by prospectors to build permanent structures, cut timber, build or maintain roads, unless authorized by a special use permit or approved operating plan.

A mining claim may lack the elements of validity and be invalid in fact, but it must be recognized as a claim until it has been finally declared invalid by the Department of the Interior or Federal courts.

A claim unsupported by a discovery of a valuable mineral deposit is invalid from the time of location, and the only rights the claimant has are those belonging to anyone to enter and prospect on National Forest lands.

### **2811.6 - Abandonment of Mining Claim**

Abandonment of a mining claim may be made by a formal relinquishment of the claim by the owner, informally as a statement to that effect to others, failure to record the mining claim, or failure to file the notice of assessment work or notice of intention to hold a mining claim by December 30 of each year in accordance with Bureau of Land Management regulation (43 CFR part 3833).

### **2812 - PROVISIONS OF 1955 MULTIPLE-USE MINING ACT**

The 1955 Multiple-Use Mining Act (69 Stat. 367; 30 U.S.C. 601, 603, 611-615) amended the United States mining laws in several respects. The act provides that common varieties of mineral materials shall not be deemed valuable mineral deposits for purposes of establishing a mining claim.

The act also provides that:

1. Mining claims located subsequent to the act shall not be used, prior to patent, for purposes other than prospecting, mining, or processing and uses reasonably incident thereto;

- (a) Mining claims located subsequent to the act are (prior to issuance of patent) subject to the right of the United States to manage and dispose of vegetative surface resources, and to the right of the United States, its permittees and licensees to use so much of the surface for such purposes or for access to adjacent land. Such other activities shall not endanger or materially interfere with prospecting, mining, and mineral processing; and

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(b) Prior to patent, a claimant may not remove or use vegetative or other surface resources except to the extent required for prospecting, mining, or processing operation, or uses reasonably incident thereto (30 U.S.C. 612).

2. The Forest Service, in cooperation with the Secretary of the Interior, or such officer as the Secretary of the Interior may designate, is responsible for determining the existence and status for unpatented mining claims. The act provides procedures by which a claim located before July 23, 1955, may become subject to the restrictions set forth in paragraph 1 (30 U.S.C. 613).

3. The owner(s) of any unpatented mining claim located prior to the act may waive and relinquish all rights there under which are contrary to limitations in paragraph 1 (30 U.S.C. 614).

4. The act may not be construed as restricting any existing rights on any valid mining claim located prior to the act, except as a result of proceedings pursuant to Title 30, United States Code, section 613 (30 U.S.C. 613) or as a result of a waiver pursuant to 30 U.S.C. 614 and 615.

## **2813 - RIGHTS AND OBLIGATIONS OF CLAIMANTS**

### **2813.1 - Rights of Claimants**

By location and entry, in compliance with the 1872 act, a claimant acquires certain rights against other citizens and against the United States (FSM 2811).

#### **2813.11 - Rights of Possession Against Other Citizens (Third Parties)**

A valid mining claim creates a possessory interest in the land, which may be bartered, sold, mortgaged, or transferred by law, in whole or in part, as any other real property. A locator acquires rights against other possible (peaceable) locators when the locator has complied with the applicable Federal and State laws. Where more than one locator is involved on the same land, Forest Service actions should be impartial to all known locators of that land, as the controversy is the responsibility of the locators, not the Forest Service, to settle.

Fee simple title to a mining claim passes only with issuance of patent and, when patent is limited by some special provision of law, only to the extent provided in that law (FSM 2815).

#### **2813.12 - Rights to Minerals (Against United States)**

The claimant has the right to see or otherwise dispose of all locatable minerals, including uncommon varieties of mineral materials, on which the claimant has a valid claim. Rights to common variety mineral materials depend upon the status of the claim on July 23, 1955, and on subsequent actions taken under Title 30, United States Code, Section 613 (30 U.S.C. 613).

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1. For claims which are verified as being valid prior to July 23, 1955, the claimant may dispose of common variety mineral materials for which marketability had been established as of July 23, 1955.

2. For claims located after July 23, 1955, or otherwise made subject to 30 U.S.C. 612, the claimant may not sell or otherwise dispose of common varieties but may use them for mining purposes on the claim from which they are obtained.

**2813.13 - Surface Rights**

Surface rights depend to some degree on the status of the claim on July 23, 1955, and on subsequent actions under Title 30, United States Code, Sections 613-614 (30 U.S.C. 613-614).

**2813.13a - Claims Which Are Verified as Being Valid Prior to July 23, 1955**

Such claims on which rights have not been waived and which otherwise do not come under the terms of Title 30, United States Code, Section 612 (30 U.S.C. 612), carry the following rights under the General Mining Laws:

1. Right to exclusive possession and occupancy for mining purposes, including control of the surface. Permission must be obtained from the claimant to cross the claim with a road. The Forest Service must obtain a claimant's permission to harvest timber from the claim, except for removal of dead or diseased trees which constitute a menace to the Forest.

2. Right to cut timber on the claim to use for mining purposes and to provide clearance required to conduct mineral operations.

3. Right to remove timber for conversion to lumber to be used for mining purposes, provided that the same species and substantially equivalent volume is returned for use on the claim or group of claims from which it was cut.

4. Right to sell or otherwise dispose of timber required to be cut in conducting actual mining of the mineral deposits or for clearing for surface facilities needed for mining or processing of the mineral, provided that the rate of cutting is with equal pace to the actual mining or need of surface facilities.

5. Right to cut timber from a millsite for building milling or mining facilities on the millsite.

**2813.13b - Claims Validated Subsequent to Act of 1955**

Such claims which otherwise come under Title 30, United States Code, Section 612 (30 U.S.C. 612) carry the same surface rights as those described in section 2812, except for the following modifications:

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1. Right to occupancy and use necessary for prospecting, mining, and processing, but not the exclusive right to the surface. Lands containing such claims are subject to the rights of the United States to manage and dispose of the vegetative resources, to manage other resources except locatable minerals, and to the right of the United States, its permittees and licensees, to use so much of the surface area necessary for such purposes and for access to adjacent lands.

2. Right to cut timber on the claim for mining uses and for necessary clearing, except that timber cut in the process of necessary clearing cannot be sold by the claimant. The United States has the right to dispose of timber and other vegetative resources.

3. Right to additional timber required for mining purposes, if timber was removed from the claim by the Forest Service after claim location. The quantity and kind of timber to be provided, free of charge from the nearest available source which is ready for harvesting, will be substantially equivalent to that previously removed from the claim.

### **2813.14 - Right of Access to Claim**

The right of reasonable access for purposes of prospecting, locating, and mining is provided by statute. Such access must be in accordance with the rules and regulations of the Forest Service. However, the rules and regulations may not be applied so as to prevent lawful mineral activities or to cause undue hardship on bona fide prospectors and miners.

### **2813.2 - Obligations**

In order to successfully defend rights to occupy and use a claim for prospecting and mining, a claimant must meet the requirements as specified or implied by the mining laws, in addition to the rules and regulations of the Forest Service. These require a claimant to:

1. Comply with the provisions of Title 36, Code of Federal Regulations, Part 228 - Minerals, Subpart A - Locatable Minerals (36 CFR part 228, subpart A, 1872 Act Use Regulations, FSM 2817).
2. Discover a valuable mineral deposit.
3. Perform appropriate assessment work.
4. Record notice of location and either an affidavit of assessment work, a notice of intention to hold, or the detailed report provided by the Act of September 2, 1958 (30 U.S.C. 28-1) in the appropriate Bureau of Land Management office.
5. Comply with applicable laws and regulations of Federal, State, and local governments.
6. Maintain claim corners and boundaries so that the claim may be found and identified.
7. Be prepared to show evidence of mineral discovery.

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8. Not use the claim for any purposes other than prospecting, mining, or processing operations and uses reasonably incident thereto.

In addition, a claimant must recognize the lawful rights of other users of the National Forest.

## **2814 - RIGHTS AND OBLIGATIONS OF UNITED STATES**

### **2814.1 - Rights of United States**

The United States has, through Congress, the right to control the disposition of resources on the public lands and to develop all necessary rules and regulations. In regard to mining claims on National Forest System lands, the Forest Service and the Department of the Interior may exercise the rights discussed in FSM 2814.11 - 2814.16.

#### **2814.11 - Right To Examine Claims for Validity and To Contest If Appropriate**

The general authority of the Secretary of the Interior with respect to public lands, is described in Cameron v. United States, 252 U.S. 450 (1920) where the court said:

**By general statutory provisions the execution of the laws regulating the acquisition of rights in the public lands and the general care of these lands is confided to the Land Department, as a special tribunal; and the Secretary of the Interior, as the head of the Department is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved . . . (cases cited):**

**. . . the power of the Department to inquire into the extent and validity of the rights claimed against the Government does not cease until the legal title has passed . . . (The Department's) province is that of determining questions of fact and right under the Public Land Laws, or recognizing or disapproving claims according to their merits, and of granting or refusing patents as the law may give sanction for the one or the other . . .**

By interdepartmental agreement (FSM 2810.4), the Forest Service shares in administering the mining laws on National Forest System lands. FSM 2819 describes the Forest Service role and procedures in validity examinations and contests.

#### **2814.12 - Right To Regulate Prospecting and Mining Activities**

This right is contained in Title 16 United States Code, Section 551 (16 U.S.C. 551), and exercised in, among other regulations (36 CFR part 228, subpart A).

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### **2814.13 - Right To Manage and Dispose of Vegetative Surface Resources**

The right to manage other resources (except mineral deposits subject to location under the mining laws) and the limitations on such rights on claims validated prior to July 23, 1955, are found in FSM 2812 and 2813.

### **2814.14 - Right To Manage and Dispose of Common Varieties of Mineral Materials**

Common varieties may be sold and are not locatable (FSM 2850) except for certain claims established prior to July 23, 1955 (FSM 2812). Uncommon varieties are locatable. See FSM 2813.12 for more information on uncommon varieties of mineral materials. The most troublesome problem of mineral materials is to determine whether a particular deposit is common (and salable) or special (and locatable). This matter, in case of question, should be referred to the Forest Service mineral examiner.

### **2814.15 - Right To Enter and Cross Claims**

The law includes the right of the United States to manage and protect national forest resources.

### **2814.16 - Right To Authorize Uses by Third Parties**

The United States has the right to authorize uses by third parties, if it will not conflict with prior rights of a claimant.

### **2814.2 - Obligations**

#### **2814.21 - Respect Claim and Claimant's Property**

The Forest Service must respect claims and claimants' property by using precautions to avoid damage to claim corner markers, excavations, and other mining improvements and equipment.

#### **2814.22 - Allow Mining Claimants To Obtain Timber**

(See FSM 2813.13.)

#### **2814.23 - Prevent Violations of Laws and Regulations**

Prevention of such violations regarding uses of National Forest System lands and resources includes an obligation to ensure that unauthorized uses of mining claims are eliminated, including unlawful use of buildings and other structures and the taking of common varieties of mineral materials.

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## **2814.24 - Provide Reasonable Alternatives**

Forest officers should provide bona fide prospectors and miners reasonable alternative access routes, exploration methods, special use permits, and operating plan provisions in order that they may carry out necessary mineral associated activities without violation of laws and regulations.

## **2815 - ACQUISITION OF TITLE**

### **2815.01 - Authority**

The 1872 Mining Act (30 U.S.C. 22) is the authority for the patenting of valid mining claims. Requirements and procedures are found in 43 CFR 3860.

### **2815.04 - Responsibility**

The responsibility for processing applications and passing title is primarily with the Department of the Interior (USDI). A USDI-U.S. Department of Agriculture (USDA) Memorandum of Understanding (FSM 1531.12) provides for the Forest Service to share in that responsibility regarding patent applications for National Forest System lands.

### **2815.05 - Definitions**

Patent. A document which conveys title to land. When patented, a mining claim becomes private property and is land over which the United States has no property rights, except as may be reserved in the patent. After a mining claim is patented, the owner does not have to comply with requirements of the General Mining Law or implementing regulations.

### **2815.1 - Requirements for Claimant**

In order to obtain a patent, a claimant must:

1. Substantiate the claim of a discovery of a valuable deposit of a locatable mineral on land open to mineral entry. The concept of valuable mineral has implications of suitable quality, sufficient quantity, relative scarcity (contrasted to common variety materials), recoverability, and marketability. The standard ordinarily applied to determine whether a discovery has been made is the prudent-man test which states: "Where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met."
2. Have a mineral surveyor make a patent survey, adjust claim boundaries, and correct errors, after which an amended location should be made.
3. Have made at least \$500 worth of mineral-related improvement per claim.

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4. Make application to the Bureau of Land Management which will review for adequacy of assertions, title, posting of notice, and other technical requirements.

5. Pay the purchase price for the land (\$2.50 per acre for a placer claim and \$5 per acre for a lode claim).

## **2816 - MINING ACTIVITIES IN SPECIAL AREAS**

### **2816.1 - Wilderness and Primitive Areas**

The National Wilderness Preservation System was established by the Wilderness Act of 1964 (88 Stat. 163, as amended, 16 U.S.C. 1131-1140).

#### **2816.11 - Rights and Restrictions in Wilderness**

1. Authority. Pursuant to Section 4(d)(3) of the Wilderness Act of September 3, 1964 (16 U.S.C. 1133), and subject to valid existing rights, the minerals in lands designated as wilderness were withdrawn from all forms of appropriation under the mining laws of January 1, 1984. Subsequent wilderness acts have later effective dates for withdrawal.

2. Administration of Activities. Claimants may conduct on-the-ground mining or mining related activities on valid mining claims in designated wilderness. However, before authorizing such activities under a plan of operations, the authorized officer must ensure that the claimant:

- a. Has complied with the filing for record requirements of Section 314(a)(1) and (2) of the Federal Land Management Policy Act of 1976.
- b. Made a discovery of a valuable minerals deposit before the date of withdrawal, and thus has a valid existing right as of that date.

The authorized officer must schedule an appropriate on-the-ground validity investigation by a qualified Forest Service mineral examiner when a claimant/operator files a Notice of Intention to Operate or Plan of Operations in accordance with Title 36, Code of Federal Regulations, section 228.4 (36 CFR 228.4).

In addition, the authorized officer should schedule validity investigations in response to mineral patent applications, in cases involving suspected occupancy misuse of mining claims, and for protection of Federal capital investment (such as administrative sites, trailheads, and airfields).

In accordance with 36 CFR 228.5(b), the authorized officer may approve operations for the sole purpose of performing requisite annual assessment work only when proposed activities will not cause significant impact to wilderness values and such activities are not specifically prohibited by the Wilderness Act. However, if proposed assessment work will cause significant impact and



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the operator is unable or unwilling to propose acceptable alternatives that will not cause significant impact, the authorized officer must first determine that a valid claim existed before the date of withdrawal before approving the operation.

If assessment work is not the purpose and/or the issue of validity has not been determined, 36 CFR 228.5(a)(3) provides a basis for requesting changes in the proposed plan of operations to include supporting evidence from the claimant/operator that a claim is valid. This evidence may include, but is not limited to, reports by mining engineers or geologists, data regarding grade and tonnage, production records, and assay reports, and must be verified by a Forest Service mineral examiner.

### **2816.12 - National Forest Primitive Areas**

The same basic management concepts and procedures apply to primitive areas as to wildernesses, except the patent restrictions do not apply.

### **2816.2 - National Recreation Areas**

The National Recreation Areas (NRA's) listed in exhibit 01 have been established by specific acts of Congress. There are certain restrictions concerning 1872 mining law activities for each national recreation area. All of the acts withdraw the minerals in the areas from location, entry, and patent under the United States mining laws.

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**2816.2 - Exhibit 01**

**National Recreation Areas**

| <u>States</u>    | <u>National Forest(s)</u>        | <u>National Recreation Area Name</u> | <u>Reference</u>   |
|------------------|----------------------------------|--------------------------------------|--|
| California       | Shasta-Trinity                   | Whiskeytown Shasta-Trinity           | Public Law 89-336 (11/8/65)<br>79 Stat. 1295,<br>16 U.S.C. 460q-460q-9<br>(See 16 U.S.C. 460q-5)         |
| Idaho            | Sawtooth                         | Sawtooth                             | PL 92-400 (8/22/72)<br>(86 Stat. 612)<br>16 U.S.C. 460aa-460aa-14<br><br>(See 16 U.S.C.460aa-9-460aa-11) |
| Oregon and Idaho | Wallowa-Whitman Nezperce Payette | Hells Canyon Hells Canyon            | PL 94-199 (12/31/75)<br>89 Stat. 1117; 16 U.S.C. 460gg-460gg-12 (See 16 U.S.C. 460gg-8)                  |
| Siuslaw          | Oregon                           | Dunes                                | PL 92-260 (3/23/72)<br>86 Stat. 99;<br>16 U.S.C. 460z-460z-13 (See 16 U.S.C. 460z-8)                     |
| Oregon           | Siuslaw                          | Cascade Head Scenic Research Area    | PL 93-535 (11/22/74)<br>88 Stat. 1732;<br>16 U.S.C. 541-541h (See 16 U.S.C. 541f)                        |
| Utah and Wyoming | Ashley                           | Flaming Gorge                        | PL 90-540 (10/1/68)<br>82 Stat. 904;<br>16 U.S.C. 460v-460v-8 (See 16 U.S.C. 460v-4)                     |

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### **2816.3 - Wild and Scenic Rivers**

All prospecting, mining operations, and all other activities on mining claims which are not perfected before inclusion of a river in the Wild and Scenic River System are subject to such regulations as the Secretary of Agriculture may prescribe to effectuate the purposes of the Wild and Scenic Rivers Act (16 U.S.C. 1280).

Subject to valid existing rights, the perfection of, or issuance of patent to, any mining claim affecting lands within the System shall confer or convey a right or title only to the mineral deposits and such rights to the use of the surface and the surface resources as are reasonably required to carrying on prospecting or mining operations and are consistent with such regulations as may be prescribed by the Secretary of Agriculture.

The regulations referred to in this section shall, among other things, provide safeguards against pollution of the river and unnecessary impairment of the scenery within the designated area.

Subject to valid existing rights, the minerals in Federal lands which are part of the System and constitute the bank or bed are situated within one-quarter mile of the bank of any river designated as wild and withdrawn from all forms of appropriation under the mining laws and from operation of the mineral leasing laws as of October 2, 1968, the date of the Wild and Scenic Rivers Act, or as of the date of inclusion of a river into the system.

The minerals in any Federal lands which constitute the bed or bank or are situated within one-quarter mile of the bank of any river designated for study as a potential addition to the System is withdrawn from all forms of appropriation under the mining laws during the periods specified in 16 U.S.C. 1278(b). This does not preclude prospecting in such a study area subject to such conditions as the Secretary of Agriculture finds appropriate to safeguard the area in the event it is subsequently included in the System.

### **2816.4 - Power Site Withdrawals**

Mining Claims Rights Restoration Act of August 11, 1955 (Public Law 84-359; 69 Stat. 682-683; 30 U.S.C. 621-625).

1. General Provisions of Act. The Mining Claims Rights Restoration Act of 1955 provides, with certain restrictions, for mining, developing, and utilizing the mineral resources of all public lands withdrawn or reserved for power development. The Act:

- a. Requires that a mining locator file a notice of location with the appropriate Bureau of Land Management office within 60 days after the location is made.
- b. Suspends placer mining to allow the Secretary of the Interior to hold a public hearing and to consider whether to permit or prohibit placer mining.

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c. Provides for public hearings to determine whether proposed placer mining operations will substantially interfere with other uses of the land. The Secretary's order is based upon the findings from the public hearings. The act also provides for rules and regulations to govern bonds and deposits to insure restoration of lands involved in permitted placer mining operations.

The Bureau of Land Management has 60 days from the filing of a notice of a placer location to notify the claimant of any intention to hold a public hearing and thereby further delay mining activities.

2. Cooperative Case Actions. For claims on National Forest system lands, the Forest Service cooperates with the Bureau of Land Management in decisions about mining claims.

a. Action by State Director (BLM). Upon receipt of a notice of location of a placer or lode mining claim on National Forest System lands open for location under the Act of August 11, 1955, the State Director, immediately notifies the appropriate Regional Forester. At a minimum, the notification must include a copy of the notice of location, show the date it was filed in the Bureau of Land Management office, and, if it is a placer claim, must request a report.

b. Action by Forest Service. Upon such notification of a placer claim, the Forest Supervisor promptly prepares and submits a report including an environmental analysis and recommendations to the Regional Forester. The report must be based upon such field examination or other action as deemed necessary.

The Regional Forester sends a report to the State Director containing specific recommendations for or against a public hearing and for or against permitting the placer operations, setting forth clearly and concisely the reasons for the recommendation.

The Forest Service should be prepared to make a factual statement supporting its recommendation at any public hearing. Potential hazards of the proposed placer mining operations to other uses of the land, including damages from erosion and stream pollution, should be treated fully.

By the memorandum of understanding of April 1957 between the Bureau of Land Management and the Forest Service, the Forest Service has only 40 days, from the filing of a notice of a placer location in the BLM district office, to submit its report to the BLM district office manager through the State supervisor (FSM 1531.12a).

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### **2816.5 - Reclamation Withdrawals**

The Reclamation Act of June 17, 1902, as amended and supplemented (43 U.S.C. 416), provided for withdrawal from all uses, other than those provided for by the act, of lands of two categories:

1. Lands possibly needed for the construction of irrigation works.
2. Lands which may possibly be irrigated from such works. The withdrawal authority of that act was repealed by the Federal Land Policy and Management Act of 1976 (Public Law 94-579, sec. 704, 90 Stat. 2743.) No withdrawal may be made for any purpose except under the provisions of section 204 of that act.

### **2816.6 - Municipal Watersheds and Other Special Areas**

See FSM 2806.7 for direction on municipal watersheds and other areas which are withdrawn or in which restrictions on mining law activities exist.

### **2817 - SURFACE MANAGEMENT PROCEDURES UNDER 36 CFR PART 228, SUBPART A**

The regulations require that operations conducted under the authority of the mining laws which might cause significant surface resource disturbance must be covered by an operating plan approved by an authorized officer of the Forest Service, generally the District Ranger. Certain activities of little impact are specifically exempt from the operating plan requirement. Operators who are uncertain that their operations require an approved plan may submit a notice of intention to operate. Based on that notice, a determination is made by the District Ranger that a plan is or is not required. All notices and plans are submitted to the local District Ranger.

#### **2817.01 - Authority**

##### **2817.01a - Statutory Authority**

1. Organic Administration Act of June 4, 1897 (16 U.S.C. 473-475, 477-482, 551). This act authorizes the Secretary of Agriculture to issue rules and regulations for the use and occupancy of the National Forests and to protect them from unnecessary environmental impacts.
2. Multiple Use Mining Act of 1955 (30 U.S.C. 611-615). This Act authorizes the Forest Service to restrict mining operations on National Forest System lands to only those uses reasonably incident to mining and in a manner that minimizes adverse environmental impacts.

##### **2817.01b - Regulations**

Title 36, Code of Federal Regulations, Part 228, Subpart A. This subpart provides direction for administering locatable mineral operations on National Forest System lands.

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## **2817.02 - Objectives**

In managing the use of the surface and surface resources, the Forest Service should attempt to minimize or prevent, mitigate, and repair adverse environmental impacts on National Forest System surface and cultural resources as a result of lawful prospecting, exploration, mining, and mineral processing operations, as well as activities reasonably incident to such uses. This should be accomplished by imposition of reasonable conditions which do not materially interfere with such operations.

## **2817.03 - Policy**

The statutory right of the public to prospect, develop, and mine valuable minerals and to obtain a patent shall be fully honored and protected. Proprietary information relating to those rights and obtained through the administration of the agency's mineral regulations shall be protected to the full extent authorized by law.

The regulations at 36 CFR Part 228, Subpart A apply to all unpatented millsites, tunnel sites, and mining claims, including those not subject to 30 U.S.C. 612, and to activities, primarily prospecting, which may be conducted under the mining laws but not on claims.

The regulations at 36 CFR Part 228, Subpart A shall be administered in a fair, reasonable, and consistent manner and not as a means of inhibiting or interfering with legitimate, well-planned mineral operations.

The primary means for obtaining protection of surface resources should be by securing the willing cooperation of prospectors and miners. The willingness of the majority of prospectors and miners to comply with regulations, reasonably administered, is a principal key to the protection of environmental quality in the National Forest System. Face-to-face dialog with operators is encouraged.

However, when reasonable efforts have been made to obtain compliance with the regulations and the noncompliance is unnecessarily or unreasonably causing injury, loss, or damage to surface resources, authorized officers shall take enforcement action (FSM 2817.3(5)).

In the evaluation of a plan of operations, the certified minerals administrator should consider the environmental effects of the mineral operation, including whether the proposed operation represents part of a logical sequence of activities, and whether the proposed activity is reasonable for the stage proposed. For example, consider if the volume of material to be extracted as a sample is reasonable. A 10,000 ton bulk sample may not be reasonable prior to geochemical sampling and assaying.

Additionally, questions sometimes arise as to whether a proposed or existing use or activity is required for or reasonably incident to mining operations conducted under the 1872 Mining Law (FSM 2817.23, 2817.25, and 2818.1.)

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When questions about the logical sequence of activities or whether an activity or proposed use is reasonably incident occur, the authorized officer should request the assistance of a Forest Service mineral specialist or certified mineral examiner to evaluate the situation on the ground, and advise the officer whether the proposed or existing surface use is logically sequenced, reasonable, and consistent with existing laws and regulations.

The advice should be used to help with negotiations to secure willing cooperation. If negotiations fail, the advice should be formalized using surface use determination procedures (FSM 2817.03a and FSH 2809.15, ch. 10).

### **2817.03a - Surface Use Determinations**

If questions arise about the logical sequence of a proposed or existing activity, or whether the activity is reasonably incident, the authorized officer should request a surface use determination. Surface use determinations are investigations conducted by certified mineral examiners (FSM 2892), and formally documented in a report. Their purpose is to provide information, recommendations, and conclusions about reasonableness and justification for proposed or existing operations to the authorized officer.

The report can be as short or as long as necessary to address the issues. The level of detail for any particular section should only be as much as is relevant to supporting any conclusions and recommendations in the report, as determined by the specifics of each case. FSH 2809.15, chapter 10, provides procedures, instructions, and guidance for conducting surface use determinations and report writing.

### **2817.04 - Responsibility**

1. Forest Supervisors. Forest Supervisors are designated to act as "authorized officers" for the administration of regulations in 36 CFR part 228, subpart A. This authority may be redelegated to District Rangers except for approval of plans of operations for Research Natural Areas, Experimental Ranges, and Experimental Forests. Before a Forest Supervisor can approve a plan of operations in one of these areas, consultation and concurrence of the Station Director is necessary.

2. Station Directors. Station Directors have authority and responsibility to review and concur in or withhold concurrence from, a plan of operations affecting Research Natural Areas, Experimental Ranges, and Experimental Forests prior to the authorizing officer's approval of such a plan.

### **2817.1 - Notice of Intent to Operate**

Subject to certain exceptions (36 CFR 228.4(a)(1)), a notice of intent to operate is required from any person proposing to conduct operations which might cause significant disturbance of surface resources and who has chosen not to file an operating plan. A notice of intent to operate is not

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intended to be a regulatory instrument; it is a notice given to the Forest Service by an operator which describes the operator's plan to conduct operations on National Forest System (NFS) lands. The trigger for a notice of intent is the operator's reasonable uncertainty as to the significance of the potential effects of the proposed operations (70 FR 32713, June 6, 2005).

The notice of intent must include or describe:

1. Name and address of the operator.
2. Information sufficient to identify the area on the ground with reasonable certainty, preferably with maps.
3. The route of access to the area of operations.
4. The nature, in some detail, of the proposed operations, especially of surface disturbing activities, such as trenching, drill road and drill site construction, or tree cutting.
5. The proposed method of transport to the area of operations.
6. The date the operation is expected to begin and approximately the length of time to be required.

The notice is to be submitted to the District Ranger. The proposed operation described in the notice must be evaluated by the District Ranger. The District Ranger must inform the operator within 15 days after the notice is received either that the operation is exempt from the requirement for an operating plan or that one is required. If no operating plan is required for operations, that notification must be documented with a copy to the operator as promptly and simply as is feasible. The documentation should include the basis for the determination that a plan is not required. The documentation is part of the administrative record and may be helpful in subsequent administrative or judicial review. If the District Ranger determines that significant disturbance of the surface resources will likely result from the operations, the District Ranger will inform the operator of the requirement to prepare a plan of operations.

### **2817.11 - Determination of Significant Resource Disturbance**

The determination of what is significant can come only from a fair, reasonable, and consistent evaluation of proposed operations on a case-by-case basis. The term, significant, is site-sensitive. A particular surface resource-disturbing activity in one area, such as flat sage brush-covered ground, might not be significant, while the same operation in a high alpine meadow could be highly significant.

The phrase "will likely cause significant disturbance of surface resources", which triggers the requirement of submission and approval of a proposed plan of operations (36 CFR 228.4 (a)(3)) means that, based on past experience, direct evidence, or sound scientific projection, the District



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Ranger reasonably expects that the proposed operations would result in impacts to National Forest System lands (NFS) and resources which more probably than not need to be avoided or ameliorated by means such as reclamation, bonding, timing restrictions, and other mitigations measures to minimize adverse environmental impacts on NFS resources (70 FR 32713, June 6, 2005).

### **2817.2 - Plan of Operations**

Submission of a proposed plan of operations is required from all operators who will likely cause a significant disturbance of surface resources. Plans involving mining claims subject to Title 30, United States Code, section 612 (30 U.S.C. 612) are also subject to the restrictions of that act, and those restrictions should be incorporated in the approved plan. The plan must be submitted to the District Ranger. Prior submission and approval of a proposed plan of operations is not required if the proposed operations will be confined in scope to one or more of the exempted operations listed in Title 36, Code of Federal Regulations, section 228.4(a)(1) (36 CFR 228.4(a)(1)).

#### **2817.21 - Required Content of a Plan of Operations**

To properly serve its intended purpose, the proposed plan of operations must include the information described in paragraphs 1-8. Frequently needed information, but not required by the regulations, is enclosed in double parentheses.

1. Name, legal address and (telephone number) of the operator and of any lessees, assigns, or designees (and their duly appointed field representatives).
2. Names, legal mailing addresses, and (telephone numbers) of all owners other than the operator.
3. Name of mining district or mineralized area and the name of the claim(s) and/or property(ies) on which operation(s) will take place or will be based.
4. A location map of appropriate scale to show the general area in which operations will take place (location of claim(s) and/or property) and proposed route of access. In general, a forest recreation map should be adequate.
5. A surface disturbance map of the area within which onsite and offsite surface resource disturbing activities will, or could, take place. The scale and accuracy of the map must be adequate to permit identification of the site on the ground. A Geological Survey 7-1/2 minute topographic quadrangle map or its equivalent should suffice in most cases and should be tied to the general area location map.
6. The probable beginning and ending dates within which the proposed operation will be conducted (and, when appropriate, whether the operation will be intermittent or continuing).

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7. The type and magnitude of the proposed operations. This should be documented and closely tied to the information on the maps. The Forest Service requires sufficiently detailed information, especially on earthmoving and site clearance operations, to identify the precautions which the operator needs to take to reasonably prevent and/or minimize adverse environmental impacts on national forest surfaces during and after the proposed operations.

8. Plans for reclamation of disturbed areas not required for further operations and for erosion control, including provisions for filling excavations, grading of spoil banks, blocking of access roads, reseeding areas, and so forth. Although improvement of surface resource conditions, above those existing prior to the mining operations or preparations for future use, are desirable goals, they cannot be forced on operators as an added cost.

### **2817.22 - Proprietary Information**

Proprietary information generally should be required only for determining the reasonableness of proposed operations. Access to, interpretation, and evaluation of necessary information identified as proprietary and secret by the operator should be on a need-to-know basis insofar as Forest Service personnel are concerned. Generally, Forest Service mining experts are best qualified to evaluate such data, and insofar as possible the information should remain under the operator's control. When, at the request of the Forest Service, the operator includes and identifies such information in a proposed operating plan, said information should be labeled "For official use only" and kept securely and separate from the rest of the operating plan.

Common types of proprietary information may include geological and geophysical interpretations, maps and directly related interpretations, other data relating to the competitive rights of the operator, and privileged commercial and financial information.

When the public requests an operating plan, a determination must be made as to whether or not the plan contains proprietary information which must be withheld. The date of the information is relevant to this determination. Trade secrets or privileged commercial or financial information will ordinarily not be disclosed if such a disclosure is: (1) likely to cause substantial harm to the competitive position of the party from which it was obtained or (2) if furnished voluntarily, is likely to impair the Government's ability to obtain further information (FSH 6209.13, sec. 11, ex. 01).

### **2817.23 - Review and Approval of Plans**

When possible, the authorized officer or duly appointed representative shall review the plan of operations with the operator, on a person-to-person basis, to facilitate joint development of a reasonable agreement relative to the proposed operations. Consistent with the objectives in FSM 2817.02, negotiations may be needed to effect changes in the proposed operations in order to avoid unnecessary surface resource damage but without undue interference with the proposed

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operation. This may, in turn, reduce the amount of the surety bond which the operator must file with the appropriate Regional Director of Fiscal and Accounting Management before the plan of operations is approved (36 CFR 228.13(a)). In some cases, the operator and authorized officer may be able to totally eliminate the bond requirement.

The authorized officer must be fair, reasonable, and consistent in reviewing plans of operations and in determining the need for and amount of bonds required for reclamation purposes. Furthermore, the authorized officer shall bear in mind that the Forest Service function is the management and protection of surface resources in a manner compatible with reasonable and logical mining operations and not the management of mineral resources. In evaluating a proposed operating plan the authorized officer is expected to utilize mining geologists, mineral examiners, civil engineers, hydrologists, foresters, fisheries and wildlife biologists, cultural resource specialists, and landscape architects, where and when necessary.

Within 30 days after receipt of a plan of operations which meets the requirements of Title 36, Code of Federal Regulations, part 228, subpart A, (36 CFR part 228, subpart A) the authorized officer shall review the plan, prepare an environmental analysis according to instructions in FSM 1950, and notify the operator that the operating plan is:

1. Not required. (The plan of operations will serve as the "Notice of Intent to Operate").
2. Approved.
3. In need of changes or additions (to be specified).
4. Being reviewed, but that more time is necessary (for specified reasons) to complete the review. (Up to 60 additional days are allowed, but days during which the area of operations are inaccessible for inspection are not included when computing the 60-day period.)
5. Such that approval must be deferred until a final environmental statement has been prepared and filed by the Forest Service with the Council of Environmental Quality as provided in 36 CFR 228.4(f) (FSM 1950).
6. Cannot be approved because the area is not open to location and entry under the 1872 mining law.

In paragraphs 3, 4, and 5, pending approval of the plan, the authorized officer must approve any operation which will meet the environmental protection requirements of the regulations and which must be completed in order for the operator to comply with Federal and State laws.

Approval of a plan of operations by the Forest Service shall be accompanied by the following statements:

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**Approval of this operating plan does not constitute recognition or certification of ownership by any person named as owner herein.**

**Approval of this operating plan does not constitute now or in the future recognition or certification of the validity of any mining claim to which it may relate or to the mineral character of the land on which it lies.**

**2817.23a - Compliance With the Clean Water Act**

All newly approved Plans of Operations for mining operations on National Forest System lands must comply with the Federal Water Pollution Control Act of 1972, 33 U.S.C §§ 1251-1387 (Clean Water Act or CWA). Proposed mining activities, which can reasonably be expected to result in any discharges into waters of the United States are subject to compliance with CWA Sections 401, 402, and/or 404 as applicable.

1. CWA § 401 - Water Quality Certification: Pursuant to CWA § 401, both the Forest Service and the mining operator have CWA requirements to meet. If the mining activity “may result in any discharge into the navigable waters,” (CWA, Title IV, § 401(a) (1), 33 U.S.C. 1341(a), 1972) the mining operator must obtain a 401 certification from the designated CWA federal, state or tribal entity, typically the state. This 401 certification from the designated entity certifies that the operator’s mining activities and associated best management practices (BMPs), mitigation and/or reclamation are in compliance with applicable provisions of state, federal and/or tribal water quality requirements of the CWA. The mining operator must give a copy of this 401 certification to the Forest Service prior to the Agency approving the Plan of Operations. Pursuant to CWA, the Forest Service cannot authorize a Plan of Operations until the 401 certification has been obtained or waived by the designated entity. Finally, the Forest Service may not authorize a Plan of Operations if the designated entity denies the certification.

2. CWA § 402 - National Pollutant Discharge Elimination System (NPDES) Permit: During the analysis of a mining proposal, if the Forest Service determines that a point source discharge into a stream or other water body can reasonably be expected to occur, the Agency should inform the proponent that a CWA § 402 NPDES permit will be required. The Forest

Service has no authority over the issuance of CWA § 402 NPDES permits. The state is usually the designated CWA entity for these permits, although a tribe or the U.S. Environmental Protection Agency may be responsible in some areas.

3. CWA § 404 - Dredge & Fill Permit: If proposed mining operations will result in dredged or fill materials being discharged into waters of the United States, the Forest Service should inform the proponent that a CWA § 404 permit may be required. The Army Corps of Engineers district in which the proposed activities are to take place should be consulted by the proponent to obtain an appropriate permit.

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The Forest Service should request that the operator provide the Agency with a copy of the operator's 401 certification request made to the designated CWA entity. If the Forest Service does not receive a copy of the CWA § 401 certification from either the operator or the designated CWA entity within 60 days (or other reasonable time frame according to the entity's own CWA implementing regulations and/or guidance) of the operator's submittal, the Forest Service should then send a letter (and require delivery confirmation) to the designated CWA entity and:

- a. Identify the operator and the proposed activities,
- b. Provide a copy of the operator's requested certification, and
- c. Notify the designated CWA entity that the Forest Service has not received the agency's decision on the 401 certification. Request that the designated CWA entity respond to this letter with a decision within 30 days from its receipt. Inform the designated CWA entity that if no response is received, the Forest Service will consider the certification to be waived with respect to the proposed Plan of Operations.

If the designated CWA entity issues any of the above permits or certifications to the mining operator, the substantive provisions of these water quality instruments that have not already been included in the Forest Service terms and conditions of the plan approval should be noted in the case file as additional state, federal or tribal requirements of the operator's Plan of Operations.

In addition, if the Forest Service has a CWA agreement with the state in which operations are to occur, the Agency may be a "designated management agency" (DMA) for CWA implementations on NFS lands and have responsibilities to ensure that water resources are protected using nonpoint source controls. Therefore, a Plan of Operations may also include measures the Agency determines necessary to protect water resources, e.g. BMPs, in addition to any others listed by the state, tribe or federal entity. Ideally the terms and conditions necessary to protect water quality on NFS land would be an interactive process with the state, and would include preventive, protective and/or restorative measures for both point and nonpoint pollution sources. This cooperation is particularly important when dealing with impaired waters as defined by the CWA § 303(d), where no further water resource degradation is allowed.

### **2817.24 - Bonds**

Prior to approval of a plan of operation, the operator may be required to furnish a guarantee to perform reclamation work in an amount equal to the estimated cost of that work. Guarantee may be in the form of approved surety bonds, cash bond, or irrevocable letter of credit (FSM 6562). If security in lieu of surety bond is received, the security will be sent to the Regional Director of Fiscal Management. If the guarantee is cash, the check or money order should be drawn payable to the Forest Service, U.S. Department of Agriculture. If a surety bond is submitted, the surety must be among those appearing on the quarterly list of acceptable sureties furnished by the Treasury Department and authorized to do business in the state in which the operation occurs.

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Whenever a bond furnished under an approved plan of operations shall be found unsatisfactory, a new bond that is satisfactory must be furnished within 15 days from the date the operator is notified that the bond in question is not satisfactory.

The release of the surety bond or equivalent cash deposits is conditioned upon the Forest Service's acceptance of the operator's reclamation of the disturbed surface resources in accordance with Title 36, Code of Federal Regulations, section 228.8(g) (36 CFR 228.8(g)).

The authorized Forest Service officer must, in writing, promptly relieve the operator from any further reclamation responsibilities on those areas on which such reclamation requirements agreed upon in the approved plan of operation have been completed and accepted by the Forest Service. This may occur piecemeal, if the reclamation takes place in approved stages.

All reasonable effort should be made, through agreements with States which require bonds for reclamation disturbances in National Forests, to avoid double bonding.

#### **2817.24a - Reclamation Bond Estimates**

Obtain performance bonds to cover the estimated reclamation costs for prospecting, mining, and other mineral operations on National Forest System lands (FSM 6561.4). When estimating such bonds, estimators should follow the guidance found in the Forest Service's *Training Guide for Reclamation and Administration*, adopted in April 2004 for plans of operations authorized and administered under Title 36, Code of Federal Regulations, part 228, subpart A (36 CFR part 228, subpart A).

#### **2817.24b - Reclamation Bond Reviews**

All reclamation bonds will be annually reviewed for adequacy, considering such factors, for example, as changing site conditions and unforeseen disturbances.

#### **2817.25 - Access**

The term, "access," as used in Title 36, Code of Federal Regulations, part 228, subpart A (36 CFR part 228, subpart A), is limited to operations under the 1872 mining law and refers to means of ingress and egress, such as roads, trails, bridges, tramways, and landing fields for aircraft. It refers also to modes of transport, such as any type of wheeled or tracked vehicle, whether used on or off roads; to any type of aircraft and boat; and to saddle and pack animals. Access to patented mining claims, mineral leases, and private property inholdings are not subject to 36 CFR part 228, subpart A nor to the access provisions as discussed herein.

Not all means or modes of access in connection with operations under the 1872 mining law require advance approval (36 CFR 228.4(a) and 228.12).

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Any person prospecting, locating, and developing mineral resources in National Forest System lands under the 1872 mining law has a right of access for those purposes. Such persons need not have located a mining claim to exercise that right.

Operations are defined as “[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 in this part, regardless of whether said operations take place on or off mining claims.” (36 CFR 228.3(a).) Unless modified by the Forest Service and agreed to by the operator/claimant, approval of an operating plan includes approval of the means of access and modes of transport described in the plan. Road construction or restoration on mining claims covered by an operating plan requires no separate permit or written authorization and neither are subject to charge.

An approved operating plan is not required for use of vehicles on existing public roads and Forest Development Roads. However, use of existing Forest Development Roads is subject to the road regulations, 36 CFR part 212, and to control in accordance with FSM 7770.

Commercial hauling on existing roads requires a road use permit if the road is posted with this requirement under 36 CFR 212.7(a)(2). Such use may require deposits for maintenance or reconstruction work to accommodate the planned use.

An operator must receive advance approval to use existing roads that have been closed by or with the approval of the Forest Service. Use of such closed roads must be authorized through the plan of operations approval process.

If no operating plan is required under 36 CFR 228.4(a)(1), as would be the case if after receiving a notice of intent the authorized officer determines that significant disturbance of surface resources is not likely to occur, no special authorization is necessary. For instance, in the situation where the road is closed only by a locked gate, the operator/claimant should be provided access through the gate as necessary to accomplish the proposed activity.

Reasonably necessary use of vehicles off roads by persons operating under the 1872 mining law in areas closed to off road use of vehicles does not in itself automatically require an operating plan. An operating plan is required when such use will likely result in significant disturbance of surface resources. Operators intending to use vehicles off roads in areas closed to such use are required to file a notice of intent with the authorized officer when the activity or use might cause significant disturbance of surface resources.

Provisions in an operating plan for regulating means of access should be evaluated in comparison with existing criteria in FSM 7721.1 governing similar uses for other purposes. This helps to maintain consistent treatment of National Forest System users.

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The Forest Service is not obligated to approve access if the proposed means of access or mode of transport is not reasonably necessary for the work to be performed for prospecting, locating, and developing mineral resources. An operator who proposes means or modes of access that will result in significant disturbance of surface resources will be required to justify the proposal. Forest Service minerals geologists or mineral examiners should be consulted in evaluating such justification. The primary consideration is that the means and modes of access must be reasonably necessary for the particular situation. Road building, for instance, should no longer be condoned or accepted simply to satisfy the first year's assessment requirements or to get a bulldozer to a claim so that baseless "discovery" cuts can be made that are not justified by actual mineral evidence. Use the guides in paragraphs 1-4 to help in judging whether certain modes of access are reasonably necessary:

1. Construction of a road will not ordinarily be necessary for:
  - a. The mere acts of locating and establishing the boundaries of mining claims.
  - b. Geologic mapping, surface sampling (including geochemical), and most geophysical work.
  - c. Bulldozer work of minor scope that may be justifiable for surface mapping and sampling on mining claims, but the terrain is such that a road is not needed to get the equipment to the site.
  - d. Moving drills, accessory equipment, and personnel to drill sites if the terrain is such that a road is not needed.
2. Road construction, reconstruction, or restoration may ordinarily be justifiable for:
  - a. Controlling and mitigating surface resource disturbance when there is an intensive drilling program involving a number of drills or frequent passage of personnel, supply trucks, water trucks, and similar repetitive travel.
  - b. Underground exploration and development work requiring frequent access to the property for personnel, equipment, and supplies.
3. Under some circumstances, pack animals, helicopters, and even boats, might be justifiable alternative modes of transport.
4. The activities in paragraphs 1, 2, and 3 apply mostly to mineral exploration. Development, construction, and operations of mines, mills, and related facilities usually require good road access.



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Evaluations of proposals for construction, reconstruction, or restoration of roads should include possible alternatives. Construction to a different standard than proposed, or of a different means of access, or other modes of transport may in some situations prove less damaging to surface resources and still serve the intended purpose as well or better without adding unbearable or unjustifiable economic burdens on the operator.

### **2817.26 - Operations in Wilderness**

FSM 2323.7 through 2323.75 cover prospecting and mining in wilderness under the authority of the mining laws. Where the direction in these sections requires permits or other authorization for prospecting, mining, and associated uses, the operating plan required by Title 36, Code of Federal Regulations, part 228, subpart A (36 CFR part 228, subpart A), and by the direction in this chapter would meet those requirements. The operating plans must include provisions for protection and management of surface resources, environment, and wilderness character.

The sensitive nature of wilderness requires an approved operating plan for those operations in wildernesses. Those activities otherwise generally prohibited within wilderness--including the use of mechanized transport, aircraft, or motorized equipment--shall be authorized only when proven to be the best management practice and to be essential (36 CFR 228.15(b)). An approved operation plan shall serve as authorization for such otherwise prohibited activities on mining claims in wilderness.

Access across wilderness to a claim or to areas in which an operator has no mining claims, which will result in any disturbance of surface resources or which is otherwise generally prohibited by the Wilderness Act, shall be authorized only by issuance of a special-use permit (FSM 2817.25).

### **2817.3 - Inspection and Noncompliance**

1. Under Approved Operating Plan. When activities are being conducted under an approved operating plan, regular compliance inspections must be conducted to ensure reasonable conformity to the plan and to guard against unforeseen detrimental effects. The frequency, intensity, and complexity of inspection shall be commensurate with the potential for irreparable and unreasonable damage to surface resources.

2. Without Operating Plan. When operations are being conducted without an operating plan because it was determined none was required, the need for regular inspections shall be determined on a case-by-case basis. Timely inspections shall help assure conformance to the environmental protection requirements of the regulations, as well as identify operations that vary from those described in the notice of intention and which may require an operating plan.

3. Detection. Forest officers shall make note of, and report on, all operations for which neither notices of intention to operate or operating plans have been submitted. Such operations shall be identified and inspected as soon as practicable to determine if a plan of operations or a notice of intent is required.

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4. Inspector Qualifications. Inspections shall be conducted by Forest Service mineral administrators who are familiar with the equipment and methods needed to find and produce minerals and who can accurately assess the significance of surface resource disturbance. Inspectors should be capable of identifying those activities of an operator which:

- a. Are reasonably necessary to the operation,
- b. The activities could perhaps be done differently with less effect on surface resources without endangering or hindering the operation, and
- c. Activities that are unreasonable or unnecessary.

Employees who perform administration of locatable mineral operations shall be certified as a Locatable Minerals Administrator or work under the guidance and oversight of a certified Locatable Minerals Administrator (FSM 2891.03).

5. Noncompliance. Wherever practicable, acts of noncompliance should be discussed with the operator, either in person or by telephone, in an attempt to secure willing and rapid correction of the noncompliance. Such discussions shall be made a matter of record in the operator's case file. Where the operator fails to take prompt action to comply and the noncompliance is unnecessarily or unreasonably causing injury, loss, or damage to surface resources, the authorized officer must take prompt noncompliance action. See FSM 2818 for direction on resolving unauthorized residential occupancy on mining claims.

- a. Notice of Noncompliance. The first step in any noncompliance action is to serve a written notice of noncompliance to the operator or the operator's agent, in person, by telegram, or by certified mail. This notice must include a description of the objectionable or unapproved activity, an explanation of what must be done to bring the operation into compliance, and a reasonable time period within which compliance must be obtained. Continued refusal of the operator to comply after notice would usually require enforcement action.
- b. Enforcement Action. Civil or criminal enforcement, or a combination of both, are available for enforcement of Title 36, Code of Federal Regulations, part 228, subpart A (36 CFR part 228, subpart A). The decision on which procedure, or combination, to use shall depend upon the particular facts in each case and the probability of success and possible consequences. The regional mineral staff or the local Office of the General Counsel shall be consulted for advice prior to any enforcement action to ensure consistency and conformance with mineral law and regulation. The appropriate U.S. Attorney shall be consulted to coordinate the criminal and civil actions.

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(1) Civil Action. Two types of civil relief in Federal District Court are available: damage recovery and injunctive. An action to recover costs of repairing damages or to compensate for irreparable damages would be appropriate for those cases where such damages have already occurred and no further operations were being conducted or likely to be conducted. Such damage suits require extended periods of time for completion. Injunctive relief can be obtained quickly when the facts of a particular case warrant such action. There must be strong justification that the party requesting relief is suffering or would suffer irreparable harm and that harm must usually be incompensable. Moreover, it must be likely that the complainant would actually succeed on the merits of the case.

(2) Criminal Action. In cases where unnecessary and unreasonable damage is occurring and where reasonable attempts fail to obtain an operating plan or to secure compliance with an approved operating plan, the operator may be cited for violation of the appropriate section of 36 CFR part 261 or part 262, according to existing delegation of authority.

## **2818 - OCCUPANCY ON MINING CLAIMS**

One of the most difficult problems of the Forest Service in regard to minerals is that of unauthorized residential occupancy on mining claims. The problem arises primarily out of:

1. Imprecision in the law regarding occupancy,
2. Historical laxity of the Government in taking action against suspected unauthorized occupancy, and
3. The difficulty in legally determining intent, which is at the heart of the issue.

The basis of the occupancy issue is the 1872 Act which states, "Except as otherwise provided, 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; . . ." (30 U.S.C. 22). The meaning of that statute has been broadened and clarified by court decisions and legal interpretations. For example, it is generally accepted that a claimant to an unpatented mining claim is entitled to uses of the surface that are reasonably necessary to the accomplishment of bona fide prospecting, exploration, mining, and processing of locatable minerals. On the other hand, it follows that a claimant to an unpatented claim is not entitled to certain uses of the surface where such uses are not reasonably necessary or where the claimant is not actually involved in bona fide minerals-related activities.

In order for structures, including residences, to be authorized under the United States mining laws and laws requiring the management of surface resources, two conditions must be met:

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1. The structure must be reasonably necessary for use in prospecting, mining, or processing of locatable mineral resources and,
2. The structure must be covered by an approved operating plan or special use permit. Generally, a structure is not necessary for annual assessment work.

### **2818.01 - Authority**

Judicial decisions rendered in the 30 years since Title 36, Code of Federal Regulations, part 228, subpart A (36 CFR part 228, subpart A), was promulgated, gave content to the meaning of the term “significant disturbance.” For example, it is well established that the construction or maintenance of structures, such as cabins, mill buildings, showers, tool sheds, and outhouses on National Forest System lands constitutes a significant disturbance of National Forest System resources. *United States v. Brunskill*, 792 F.2d 938, 941 (9<sup>th</sup> Cir. 1986); *United States v. Burnett*, 750 F. Supp. 1029, 1035 (D. Idaho 1990). (70 FR 32713, June 6, 2005.)

### **2818.02 - Policy**

The Forest Service must prevent and eliminate unauthorized use and occupancy of National Forest System lands.

### **2818.1 - Actions Under 1872 Act Use Regulations**

Title 36, Code of Federal Regulations, part 228, subpart A (36 CFR part 228, subpart A) provides a logical and effective means of controlling new occupancy problems through the requirements for an operating plan. If the mining laws are used as justification for a new structure, the structure must be covered in an approved operating plan, in which the reasonable necessity is explained--unless the structure is authorized by a special use permit due to other considerations.

1. Potential For Need of Structures. The necessity for structures in regard to mineral activities depends upon several factors:
  - a. The stage of mineral activities,
  - b. The expected size and life of the proposed operations,
  - c. The remoteness of the site,
  - d. The amount and kind of equipment requiring protection and storage, and so forth. For example, a tool-storage structure may be a reasonable necessity if the plan of operations is for a long period of active exploration or development, and it is inconvenient to transport tools to and from the claim. On the other hand, a residence

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will not be necessary to conduct minimal assessment work on a mere indication of mineral. The area of operations will seldom be so remote, or other "needs" so compelling, as to justify residential occupancy on the claim.

2. Potential for Residential Occupancy. When it appears that residential occupancy, may be, an issue on an unpatented claim, the District Ranger shall take timely action to inform the claimant in writing of:

- a. Rights regarding use and occupancy,
- b. The requirements of 36 CFR part 228 subpart A, and
- c. The Forest Service responsibility for surface resource management and protection. Exhibit 01 is a sample letter for this purpose. The claimant should be encouraged to demonstrate the facts, reasons, and purpose for use or occupancy. The Forest Service must make a diligent effort to resolve differences through agreement and document all communications and actions relative to the requirements in paragraphs 2a-c.

Except in the most clear cut cases, the District Ranger should request the assistance of a Forest Service mineral specialist or certified mineral examiner (FSH 2809.15, sec. 10.5) to evaluate the situation on the ground, and advise the officer whether the proposed or existing surface use is logically sequenced, reasonable, and consistent with existing laws and regulations.

The advice should be used to help with negotiations to secure willing cooperation. If negotiations fail, the advice should be formalized using the surface use determination procedures (FSM 2817.03a and FSH 2809.15, ch. 10).

As stated in FSM 2817.03, willing cooperation should be sought, but legal remedies are available through the Department of Justice.

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**2818.1 - Exhibit 01**

**Sample Letter**

CERTIFIED MAIL--RETURN RECEIPT REQUESTED

2810  
(Date)

(Name and address of claimant)

Dear \_\_\_\_\_:

(Introductory statement) \_\_\_\_\_ . As District Ranger, I must inform you of Forest Service policy regarding mining activity and uses of the surface on a mining claim.

The mining laws give the public the right to prospect and to locate and claim valuable mineral deposits which they may discover on certain lands. On the other hand, the mining laws prohibit a claimant from using unpatented mining claims for purposes other than for mineral-related activities. Forest Service policy is to encourage bona fide prospecting and mining and to allow uses that are reasonably necessary for these purposes, but we must oppose unauthorized uses of a claim. This policy applies to the use of claims for residences. If we determine that a claim is being used for unauthorized uses, we are required by law to take steps to end such uses.

The Federal regulations found in 36 CFR part 228, subpart A provide procedures to follow regarding mineral related activities under the mining laws on National Forest lands. Specifically they require that any activity by an operator which might cause significant surface resource disturbance must be conducted according to a plan of operations approved by the Forest Officer. (Your cabin) (Any structure which you may plan to build) (The building which you have under construction) must be covered by such a plan of operations. In order for that structure to be authorized under a plan, you must be able to show a reasonable necessity resulting from planned prospecting, exploration, or mining activities. If you have any questions about the requirements of a plan of operations or the justification for a structure, please come to see us so we can discuss it.

Sincerely,

District Ranger

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### **2818.2 - Uninhabitable Cabin on Mining Claim**

An uninhabitable cabin on National Forest land is an administrative problem, because it may easily be repaired and used for purposes unrelated to mining. The mining claimant may give permission to have the cabin removed when the claimant realizes that it represents a hazard to the administration of the area. Until an unoccupied cabin is removed, it is the District Ranger's responsibility to question any activity involving its repair or use (36 CFR 228.10). If repairs are started on a cabin, the District Ranger shall proceed as stated in FSM 2818.1.

### **2818.3 - Use of Surface Use Determinations and Validity Determinations**

Historically, residential occupancies which appeared to be unauthorized under the mining laws have been resolved through the use of validity determinations by the Department of the Interior. However, the regulations in Title 36 Code of Federal Regulations, part 228, subpart A (36 CFR part 228, subpart A) are believed to be the best tool--ultimately--for preventing unauthorized uses.

As is the case with policies regarding surface management procedures (FSM 2817.03), the use of face to face negotiations is the preferred method of resolving unauthorized occupancies. As part of those negotiations, the authorized officer should request the assistance and advice of a Forest Service mineral specialist or mineral examiner. If negotiations fail, the officer should request that the advice be formalized according to surface use determination procedures of FSH 2809.15, chapter 10.

Generally, the use of validity determinations should be limited to those rare occasions where the certified mineral examiner believes that it would be useful given the specific details of the case. Otherwise, the use of validity determinations should be limited to situations where valid existing rights must be verified where the lands in question have been withdrawn from mineral entry (FSM 2811.5, para. 1) or meeting Forest Service interagency agreement obligations regarding patent applications (FSM 2815).

### **2819 - MINING CLAIM CONTESTS**

The validity test is based on the legal concept that a mining claim is not valid without a discovery of a valuable mineral deposit. Title 43, Code of Federal Regulations, section 3831. (43 CFR 3831.1) states that "Rights to mineral lands, owned by the United States, are initiated by prospecting for minerals thereon, and upon the discovery of minerals, by locating the lands upon which such discovery has been made."

1. The order of action by regulation is:
  - a. Prospecting,

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- b. Discovery, and
- c. Location of a claim.

This procedure entitles the claimant to the minerals discovered, the right to mine them, and, under certain circumstances, the right to a patent to the surface of the claim. Prior to obtaining a patent, a claimant's rights on the land are limited to those reasonably necessary in connection with prospecting, mining, or processing operations. Prior to a discovery, a claim cannot be valid. In practice, most claims are staked and located prior to discovery on the basis of a prospect or mere indication of a mineral deposit. This practice protects the claimant's rights from other prospectors, but it does not grant any rights against the United States. Department of the Interior decisions have upheld the right of a claimant to hold and work a claim prior to "discovery," provided the claimant is diligently seeking a discovery on a promising prospect. However, it remains a legal fact that a claim is not, and cannot be, valid prior to the discovery of a valuable mineral deposit.

Accordingly, if a claim is found to lack a discovery of a valuable mineral deposit by the Department of the Interior or in a Federal court, the claim is null and void. The Forest Service then is in a better position in trespass actions against a claimant for unauthorized residences or other uses. While, in fact, a claimant with a valid discovery does not have more surface rights than one without a valid discovery, judges have tended to depend heavily on validity findings because of the implications of good faith of the claimant.

- 2. The mining laws are comprised of two parts:
  - a. The statutes themselves, which are general in nature; and
  - b. The decisions of the courts and of the Department of the Interior, which interpret and apply the statutes to specific cases.

In considering whether to contest the validity of a mining claim or to challenge questionable mining claim occupancy and use, the Forest Service is guided by the pertinent statutes and decisions.

No adjudicative power has been given to the Forest Service. Thus, statements about validity are statements of belief and not formal determinations. The conclusions reached by a Forest Service mineral examiner are based on physical facts interpreted in the light of professional expertise. Consistent with those conclusions and beliefs the Forest Service should attempt to resolve conflicts without resort to legal action. If those attempts are unsuccessful, appropriate legal action is required. The facts should be referred to the Office of the General Counsel before deciding if legal action is appropriate.



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### **2819.1 - Forest Service Role**

1. Request for Mineral Examination. When administrative problems of a mineral nature arise or unauthorized use of a mining claim is believed to exist which cannot be satisfactorily resolved, the District Ranger should submit a request to the Regional Office via the Forest Supervisor on Form FS-2800-4, Request for Mineral Examination--Mining Location. A Forest Service mineral examiner, who has been properly authorized, may go on an unpatented mining claim to make a mineral investigation. Every effort should be made for amicable entry and examination of the claims, preferably accompanied by the mining claimant or the claimant's duly appointed representative.

2. Use of Force. If the mining claimant threatens or uses force to prevent the mineral examiner from going on the land, the Forest Supervisor and regional office Mining Geologist should be notified. If the forest is unable to get the claimant to agree to the examination, it may be necessary to work through the U.S. Attorney to secure the participation and protection of a U.S. Marshal.

3. Report of Mineral Examination. The mineral examiner's findings, conclusions, recommendations, together with pictures and maps, will be compiled in a Report of Mineral Examination, and sent to the Regional Office for technical review and approval by the Regional Mineral Examiner. This report will be the basis for a decision on whether or not to contest the claim. In situations where the mineral examiner's conclusions are urgently needed, the examiner will, when possible, inform the District Ranger at the time of examination or soon thereafter.

4. Problem Resolution. Concerted effort should be made to resolve problems, or terminate unauthorized use, through reasoning, persuasion, and agreement. The knowledge that, in the opinion of a Forest Service mineral examiner, a claim is not valid can be of assistance in this respect. When this fails, contest action may be required.

### **2819.2 - Department of the Interior Role**

Although adverse proceedings might be required for a variety of reasons, such as trespass, patent application, land classification, land clearance, and so forth, each case is initiated with a request from the Regional Forester that the land office issue a complaint. (Assuming, of course, that the claim is not supported by a verifiable discovery of a valuable mineral deposit and the action meets with the approval of the Regional Attorney.)

The most common legal action is a contest of claim validity which is conducted by and under the regulations of the Department of the Interior. To that Department, Congress has given adjudicative powers in matters relating to all the land laws, including the mining laws. The decision in a mining claim contest is a formal determination of validity. The authority of the Department of the Interior to rule on claim validity was confirmed by the Supreme Court in Best v. Humboldt Placer Mining Co., 371 US 334 (1963).

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**2819.3 - Actions Before Magistrates and in Federal Court**

1. Initiating Action. Action is initiated by the filing of a Forest Officer's sworn complaint with supporting affidavits (if appropriate), setting forth the nature of the offense. If probable cause appears, the complaint is followed by a summons to appear, or less frequently, a warrant of arrest. On arraignment, a not guilty plea is followed by trial. A guilty plea or decision can result in imprisonment or a fine. Typical mining claim related cases tried by magistrates have involved continuing occupancy after a mining claim is declared invalid, and off-claim road construction without a permit. Another sort of case which potentially could be tried is nonmineral occupancy of a claim, the validity of which has not been determined formally.

2. United States District Court. Numerous cases have been resolved in the Federal courts and should continue to be resolved there. Actions are initiated in the U.S. District Court and can be brought by claimants as well as by the United States.

3. Review. Suits by claimants generally seek review of decisions resulting from contests. Forest Service participation is extremely limited, since the review is to Department of the Interior decisions.