



February 25, 2009

Forest Service, USDA
Attn: Director, Minerals and Geology Management
Mail Stop 1126
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By Post and Electronic Mail

Re: Management of National Forest System surface resources where the mineral estate is privately held

Dear Director:

The Sierra Club appreciates the opportunity to submit these comments on behalf of its more than 1.3 million members and supporters, including the more than 25,000 members of its Pennsylvania Chapter and the volunteers serving upon its National Forest Protection and Restoration Committee. We submit these comments in response to the Forest Service's advance notice of proposed rulemaking, published on December 29, 2008, in the Federal Register. *See Fed. Reg. 79,424, 79,425.* Please ensure that these comments, and the accompanying exhibits, which are hereby incorporated by reference, are made part of the record for any decision taken addressing the issues raised by the advance notice. We reserve the right to submit further comments as long as the comment period remains open.

In the forty-six years since the Forest Service last revised its regulations concerning privately-held mineral rights, it has become very clear that more careful protections are needed for National Forests overlying privately-owned minerals. As climate change increases pressure on forest ecosystems, it is all the more important for the Service to ensure that mineral development does not further stress the ecosystems which it manages. Thus, it is appropriate that while the call for comments specifically addresses the Allegheny National Forest, which is particularly impacted by oil and gas exploration, it is broad enough to embrace management of all "National Forest System surface resources where the mineral estate is privately held." *See 73 Fed. Reg. 79,424, 79,425 (Dec. 29, 2008).*

In these comments, we first discuss problems that have emerged under existing regulations and the growing need for reform. We then establish that the Service has the power and duty to more vigorously protect public rights. Finally, we propose regulatory revisions to address the challenges ahead.

I. Oil and Gas Drilling in National Forests

According to some estimates, “national forest system lands contain approximately six million acres of outstanding mineral deposits.” Andrew C. Mergen, *Surface Tension: The Problem of Federal/Private Split Estate Lands*, 33 Land & Water L. Rev. 419, 430 (“*Surface Tension*”) (1998) (attached as Ex. 1). Protecting the public resources overlying private subsurface rights is thus a problem of considerable national importance.

These ‘split estates’ – where the public owns the surface but the mineral estate is in private hands – fall into two distinct categories: ‘reserved’ rights, which arise when a private landowner conveys only surface rights to the United States, and ‘outstanding’ rights, which result from the federal purchase of an existing surface estate when private subsurface rights have already vested. Split estates of both types entered the federal land system largely through the operation of two statutes, both passed in the first half of the twentieth century. See *Surface Tension*, 33 Land & Water L. Rev. at 430. The first of these, the Weeks Act of 1911, authorized federal land purchases for watershed protection, and was used to greatly expand forest system lands in the eastern half of the country. See 36 Stat. 961 § 6. To save funds, Congress allowed for these lands to be purchased without their underlying mineral estates, although it ensured that the government would retain regulatory authority over the underlying minerals. See 36 Stat. 961, 962 § 9. Similar purchases were authorized by the second statute, the Bankhead-Jones Farm Tenant Act of 1937, which led ultimately to the creation of the National Grassland system. That statute authorized significant land purchases, see 7 U.S.C. §§ 1010-1011, and also allowed the government to sell back mineral rights on lands which it had acquired, see 7 U.S.C. §§ 1033-39. The Bankhead-Jones Act, too, made clear that regulatory authority remained in the government. See, e.g., 7 U.S.C. § 1011(f), 1038.

The split estate system, in sum, began with real conservation gains and with the potential for a cooperative relationship between the federal government and private landowners. Unfortunately, the management experience for these split estates has been less positive.

The beleaguered Allegheny National Forest typifies the failures of the existing split estate regulations. At the time President Coolidge created the forest in 1923, it was intended to protect the watersheds of northwest Pennsylvania. See *Allegheny National Forest, Pennsylvania, By the President of the United States, a Proclamation, No. 1675* (Sept. 24, 1923) (attached as Ex. 2). The forest was acquired under the auspices of the Weeks Act. See 36 Stat. 961, 962 § 9. As a result, 93% of the mineral estate in the Allegheny is privately owned. See *Allegheny National Forest Final Environmental Impact Statement and Land and Resources Management Plan (“FEIS”)*, Appx. F (Mar. 2007) at F-1 (excerpts attached as Ex. 3). Over-hasty exploitation of those mineral rights, without sufficient Forest Service oversight, has severely damaged the overlying federal land.

Oil and gas development on the Allegheny has become a juggernaut in recent years. Although only about 225 wells per year were drilled from 1986-2005, 985 wells were drilled in 2005 alone, and the trend has continued upward. FEIS at F-5. At least 8,000 active wells are operating today according to the FEIS, and other estimates suggest that

there are at least 12,000 wells. *See id.* at F-5 – F-11. The wells are, of course, accompanied by other development, including at least 1,250 miles of roads used for private mineral exploitation on these public lands. *Id.* at F-5.

As a result, mineral development now ranks among the “dominant disturbance processes affecting forest vegetation” in the Allegheny. *See* FEIS at 10. These disturbances can be quite dramatic: For instance, an oil company is presently making plans to place as many as 160 new wellsites atop a treasured scenic overlook in the heart of the forest. *See* Heidi Zemach, *You can’t drive if you don’t drill Rimrock says oil executive*, Kane Republican (July 7, 2008) (attached as Ex. 4). In addition to the vast road network and the industrialization of the forest land, oil spills occur. In 2008, for instance, vandals were able to open valves on 25 oil storage tanks in the forest, filling beaver ponds with oil and covering a reservoir with a “brown mess.” *See* Kate Sager, *Bail upped for father, son in connection with oil spill in national forest*, Olean Times Herald (Aug. 20, 2008) (attached as Ex. 5). Regular operations, too, of course lead to pollution ranging from oil and gas byproducts and run-off to releases of air pollutants.

Tension between private subsurface rights and public surface lands, sometimes resulting in damage and often resulting in management challenges, is not limited to the Allegheny National Forest. As the General Accounting Office observed in the mid-1980s, conflicts between mineral rights and Forest Service planning – including wilderness designations – are substantial and not uncommon. *See* General Accounting Office, *Private Mineral Rights Complicate the Management of Eastern Wilderness Areas*, GAO/RCED 84-101 (1984) (attached as Ex. 6). At that time, just under a million acres of eastern wilderness areas were underlain by private mineral rights, *id.*, and mining companies were seeking to exploit minerals in areas ranging from the Boundary Waters of Minnesota to the Cranberry Wilderness in the Monongahela National Forest in West Virginia, *see id.* at 11-13. Challenges continue to the present. In Texas, for instance, oil and gas activities have damaged the experience of hikers on the Lone Star Hiking Trail, a National Recreation Trail which winds through the Sam Houston National Forest. *See* Forest Service Correspondence (June 16, 2004) (on file with author and attached as Ex. 7). The courts have also regularly seen these disputes in areas across the system. *See, e.g.,* *Duncan Energy Co. v. United States Forest Serv.*, 50 F.3d 584 (“*Duncan I*”) (8th Cir. 1995) (Custer National Forest in North Dakota); *Belville Mining Co. v. United States*, 999 F.2d 989 (6th Cir. 1993) (Ohio national forests); *United States v. Stearns Coal & Lumber Co.*, 816 F.2d 279 (6th Cir. 1987) (Kentucky national forests); *Downstate Stone Co. v. United States*, 712 F.2d 1215 (7th Cir. 1983) (Illinois national forests); *Izaak Walton League of America v. St. Clair*, 497 F.2d 849 (8th Cir. 1974) (Boundary Waters).

In the face of this boom, the Forest Service’s response must be clear and vigorous. Parties exercising private subsurface rights, it is generally agreed, have a right to reach the minerals which they own. But that right is not an unrestricted one, and particularly not so on public lands. The Service is charged with managing “a nationally significant” network of lands, “dedicated to the long-term benefit for present and future generations,” 16 U.S.C. § 1609(a), must do so according to principles of multiple use and sustained yield, *see, e.g.,* 16 U.S.C. § 1604(e)(1), and must provide for full public engagement with

its decisionmaking process, *see, e.g.*, 16 U.S.C. § 1612(a). The Service has considerable power to “regulate Forest System lands,” and, even in the face of private mineral rights, has the limited but substantial authority to itself “determine the reasonable use of the federal surface.” *See Duncan Energy Co. v. United States Forest Serv.*, 109 F.3d 497,498 (“*Duncan II*”) (8th Cir. 1997); *see also Duncan I*, 50 F.3d 584. The discretion to shape reasonable use restrictions, in turn, requires careful, public analysis under the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, and other statutes mandating public processes, including the Endangered Species Act (“ESA”). *See Sierra Club v. United States Dep’t of Energy*, 255 F. Supp. 2d 1177,1185-86, 1189 (D. Colo. 2002) (relying in part on *Duncan II* to hold that the Department of Energy was required to complete NEPA and EPA analyses before allowing the development of private mineral rights because it “maintains some discretion to determine how, where, and when mining can occur and ensure that surface use is reasonable”). We discuss the breadth of this authority in more detail later in these comments.

For now, though, it suffices to say that the Forest Service’s use of its authority has often been unduly tentative, and insufficient to fulfill its mandate to protect the public lands with which it has been entrusted. In the Allegheny National Forest, for instance, the Service has repeatedly declined to perform NEPA analyses before it permits oil and gas extraction. Although the Service does negotiate for environmental improvements with those proposing drilling, these negotiations are not public and so do not receive careful scrutiny prior to the issuance of a permit. Likewise, the National Forests and Grasslands in Texas have also misread the limits of their authority over mineral rights to insist that no discretion remains with the Service to justify a NEPA analysis. As a result, development in both regions proceeds without sufficient analysis of its impacts, or robust protection of the publicly-owned surface estate.

Encouragingly, the Service does sometimes more fully exert its influence and authority. Even in the Allegheny, the most recent forest plan imposed significantly more robust standards and guidelines for oil and gas development. *See* FEIS at ROD-29. Although those regulations are presently under reconsideration after a Service reviewing officer found procedural flaws in their adoption, their substantive direction is encouraging. Other forests are also acknowledging their responsibilities. The Ottawa National Forest, in northern Michigan, for instance, conducts NEPA processes on drilling plans prior to issuing permits. *See* Ottawa National Forest, *Draft Environmental Assessment, Trans Superior Resource, Inc. Private Minerals Exploration in the Matchwood Tower Road Area* (July 2007) (attached as Ex. 8). But these heartening steps may lack staying power because they are not supported by national regulations consistent across the Forest system.

There is, then, a pressing need for action, and for clarity, on the Forest Service’s regulatory authority over private mineral rights. As the reviewing officer in the Allegheny forest plan appeal put it, a clear “description of this process is essential” to developing proper surface use regulations. *See* Allegheny National Forest 2007 Revised Land and Resources Management Plan Appeal Decision at 5 (Feb. 1, 2008) (excerpt attached as Ex. 9). Although the manner by which the eastern sections of the National

Forest System were purchased has left such rights as a lingering management challenge, the Service is far from helpless as it seeks to protect the public interest. It should now take the opportunity to clarify its authority over existing rights and to assert the public's interests when new split estate lands are acquired.

II. Climate Change Requires Reducing or Eliminating Other Stressors

Taking action now is particularly important because of the growing threat climate change poses to the nation's forests. The climate crisis will aggravate existing management challenges and will further stress ecosystems across the National Forest network. As the Service put it in its October 2008 *Forest Service Strategic Framework for Responding to Climate Change* ("*Framework*") (attached as Ex. 10):

We are already seeing the effects of changing weather patterns and extreme events on our Nation's forests and grasslands. Many of the most urgent forest and grassland management problems of the past 20 years, including increased wildfire severity and area burned, large-scale bark beetle infestations, and changing water regimes, have been driven in part by changing climate. Land use change, management practices, and disturbances on forests and grasslands have also contributed to increasing greenhouse gases.

Framework at 3. Signs of change are everywhere: In the western forests, for instance, "the death rates of mature trees have doubled" due to climate-linked stresses. See David Perlman, *Trees dying in the West at record rate*, San Francisco Chronicle (Jan. 23, 2009) (attached as Ex. 11).

In light of these challenges, the Service recognizes that "critical work is needed to help ecosystems adapt to the changes that will occur in our lifetimes." *Framework* at 4. Meeting that challenge is both ecologically necessary and legally required. The Service must ensure that the renewable resources of the system are administered "in full accord with the concepts of multiple use and sustained yield." 16 U.S.C. § 1607; see also 16 U.S.C. § 1600(3); 16 U.S.C. § 1604(e)(1). It must, in other words, maintain "without impairment the productivity of the land," do so "in perpetuity," and in conformance with "changing needs and conditions." See 16 U.S.C. § 531(a)-(b). Further, it must regulate to "provide for diversity of plant and animal communities," including taking steps "to preserve the diversity of tree species." 16 U.S.C. § 1604(g)(3)(B). These mandates demand properly managing split estate lands at all times, and now doubly so as climate change profoundly alters conditions across the system. The Service acknowledges as much, writing that "[w]ithout fully integrating consideration of climate change impacts into planning and actions, the Forest Service can no longer fulfill its mission." *Forest Service Framework* at 2.

The U.S. Climate Change Science Program agrees that readying the nation's forests for climate change is an urgent task. In a recent report, the Program concludes that "[c]limate change will exacerbate the impact of other major stressors on [national forest] and [national grassland] ecosystems." Linda Joyce et al., *National Forests*, in Susan H.

Julius et al., *Synthesis and Assessment Report 4.4: Preliminary Adaptation Options for Climate-Sensitive and Resources*, U.S. Climate Change Science Program (“*National Forests Adaptation*”) at 1 (2008) (attached as Ex. 12).

The Climate Change Science Program made clear that the Forest Service should respond by providing its ecosystems with ‘breathing room’ through reducing all other stresses which imperil ecological stability, writing:

Reducing the impact of current stressors is a “no regrets” adaptation strategy that could be taken now to help enhance ecosystem resilience to climate change, at least in the near term. Increased effort and coordination across agencies and with private landowners to reduce these stressors (especially air pollution, drought, altered fire regimes, fragmentation, and invasive species) would benefit ecosystems now, beginning to incorporate climate change incrementally into management and planning, and potentially reduce future interactions of these stressors with climate change.

National Forests Adaptation at 2 (emphasis in original). Prominent among the stressors these “no regrets” strategies should address, according to the Climate Change Science Program, are energy activities, including those in the Allegheny National Forest:

Of the estimated 99.2 million acres of oil and gas resources on federal lands, 24 million acres are under [Forest Service] management. . . . Principal causes of stress are transportation systems to access oil and gas wells, the oil and gas platforms themselves, pipelines, contamination resulting from spills or the extraction of oil and gas, and flue gas combustion, and other activities in gas well and oil well productions. The extent to which these stressors affect forests depends on the history of land use and ownership rights to subsurface materials in the particular [National Forest]. For example, oil and gas development is an important concern in the Allegheny [National Forest] because 93% of the subsurface mineral rights are privately held, and because exploration and extraction have increased recently due to renewed interest in domestic oil supplies and higher crude oil prices.

Id. at 12 (citations and measurement conversions omitted). The scale and scope of mineral extraction activities throughout the system, in other words, make them a serious challenge to fulfilling the Forest Service’s mandate of ensuring climate resilience across the system.

Because reserved and outstanding mineral rights on forest land drive a significant amount of mineral extraction activity on Forest Service land, particularly in the eastern half of the country, modernizing the regulations governing such rights must be a part of the Service’s climate adaptation strategy. Indeed, the Service’s governing statutes demand no less.

The question, then, is how best to harmonize the network of property rights created by prior rules with the Service’s urgent statutory and policy emphasis on adapting to climate

change, as well as how best to structure rules for private subsurface rights going forward. As we next discuss, this challenge, while significant, is far from insurmountable. Useful examples from other agencies can give shape to regulatory reforms and existing rights and rules already afford the Service a crucial degree of management and planning discretion that should be exercised to the fullest.

III. Forest Service Regulatory Authority

A. General Powers

As the Service works to “engage in rulemaking to provide clarity and direction” on the management of private mineral rights, 73 Fed. Reg. at 79,425, it must balance private rights with protecting the public trust. From the beginning, land acquisition statutes and regulations have recognized that private subsurface rights must be carefully regulated and that the Service has the power to do so.

The Forest Service represents the public and so has powers far greater than those of a private owner of a surface estate. The Constitution grants Congress the power to make “all needful rules and regulations respecting the territory or other property belonging to the United States,” Art. IV, § 3, cl.2, and “Congress, by statute, has delegated this authority to agencies such as the Forest Service,” *see Adams v. United States*, 255 F.3d 787, 795 (9th Cir. 2001). The responsibility is large: “[T]he power over the public land thus entrusted . . . is without limitations.” *Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976) (internal quotation marks and citations omitted). And this regulatory power “reaches beyond territorial limits,” extending to “private land adjoining public land when the regulation is for the protection of the federal property.” *Id.* (citing *Camfield v. United States*, 167 U.S. 518 (1897)); *see also Burlison v. United States*, 533 F.3d 419, 432-33 (6th Cir. 2008) (reading *Kleppe* to hold that Congress can “regulate access . . . by holders of [a private] dominant estate . . . to [a public] servient estate”); *Minnesota v. Block*, 660 F.2d 1240, 1249 (8th Cir. 1981) (observing that, in light of *Camfield* and *Kleppe*, “[u]nder this authority to protect public land, Congress’ power must extend to regulation of conduct on or off the public land that would threaten the designated purpose of federal lands.”).

It is entirely clear that this broad grant of authority extends to the regulation of private subsurface rights. In *Duncan I*, 50 F.3d at 588-89, the Eighth Circuit affirmed that the Service could regulate the exercise of outstanding mineral rights, relying upon the Property Clause to do so. The court concluded that “Congress has given the Forest Service broad power to regulate Forest System land.” *Id.* at 589. It affirmed that, while respecting private rights, the Service was free to “determine the reasonable use of the federal surface,” including “regulat[ing] surface access.” *Id.* The court reaffirmed this ruling several years later, again explaining that the Forest Service could regulate in ways that went beyond the authority granted to a private landowner by state law. *See Duncan II*, 109 F.3d at 498-500.

Thus, the only remaining question is whether Congress has in any way limited the Service's authority to protect the public surface estate. The relevant statutes demonstrate the breadth of the Service's discretion.

First, the Bankhead-Jones Farm Tenant Act reserves broad authority to the Service. It grants authority to the Secretary of Agriculture to "make such rules and regulations as he deems necessary . . . [to] regulate the use and occupancy of property acquired by, or transferred to the Secretary" and provides for criminal penalties for violating such rules. *See* 7 U.S.C. § 1011(f). As the Eighth Circuit observed in *Duncan I*, considering § 1011, this is a "broad power" indeed. *See* 50 F.3d at 589.

Weeks Act acquisitions are similarly subject to regulation. The statute makes clear that reserved private rights underlying public lands "shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and administration" and that such private rights could not be acquired unless they would, "from their nature . . . in no manner interfere with the use of the lands so encumbered for the purposes of the [Weeks] Act." *See* 16 U.S.C. § 518. The Weeks Act also specifies that the Secretary is "authorized, under general regulations to be prescribed by him, to permit the prospecting development and utilization of the mineral resources of the lands acquired under the Act . . . , upon such terms and for specified periods or otherwise, as he may deem to be for the best interests of the United States." 16 U.S.C. § 520. Here, too, in other words, Congress has ensured that private rights will not trump public regulatory authority.

There remains, in fact, only one substantial check on the Service's regulatory authority, and then only for one class of mineral rights. A Weeks Act provision, 16 U.S.C. § 518, places some limits on new regulations of reserved rights, but not on outstanding rights. That section provides that in cases where "the owner from whom the United States receives title" has retained reservations of rights in a Weeks Act acquisition, the "rules and regulations" governing the acquisition "shall be expressed in and made part of the written instrument conveying title to the lands to the United States." *See id.*; *see also United States v. Srnsky*, 271 F.3d 595, 602 (4th Cir. 2001) (discussing this requirement). Deed terms in Weeks Act reservations thus have considerable importance although, as we discuss below, considerable flexibility remains.

Because of this distinction, the two classes of split estates warrant separate discussion.

B. Outstanding Rights

Outstanding rights present the more straight-forward situation. For such rights, there is both no contractual agreement between the Forest Service and the private rights-holder, and the Weeks Act limitations connecting applicable rules to deed terms do not apply. There, "the owner from whom the United States receive[d] title" to the surface estate, *see* 16 U.S.C. § 518, had not retained reserved rights to the subsurface – those rights had, instead, been sold long before – and so the Weeks Act restriction does not apply. In such

cases, nothing in the Forest Service's controlling statutes restrict it from applying the full force of its Property Clause regulatory authority over the public surface estate.

The *Duncan* cases addressed precisely this issue. In *Duncan I*, the court considered whether the Forest Service had the power to require a company holding outstanding mineral rights on a National Grassland to file for a special use permit prior to conducting ground disturbing activity. *See Duncan I*, 50 F.3d at 585-87. The court concluded that the Service did have such power, overruling a district court that had held that such regulation would "constitute an inverse condemnation of the mineral estate" under applicable state law. *See id.* at 587. The Eighth Circuit explained that, while state law might or might not authorize such actions, the Forest Service's position that "federal law gives it the authority to approve surface use plans" was correct. *See id.* at 588-89; *see also id.* at 591 (explaining the state law inconsistent with federal law in this area would likely be preempted). Locating this mandate in the Property Clause, the court emphasized the Service's "broad power." *See Id.* at 589.

Duncan I then endorsed the use of this authority to require holders of outstanding mineral rights to acquire special use permits for the use of the federal surface. Such special use permits are designed to govern "[a]ll uses of National Forest System lands," and are based upon detailed proposals filed with the Service, which are then processed publicly and in compliance with all relevant law *See* 40 C.F.R. §§ 251.50, 251.54. Proposals are reviewed for consistency with "standards and guidelines" in the appropriate forest plan, 40 C.F.R. § 251.54(e)(ii), and undergo analysis "in accordance with Forest Service NEPA procedures," 40 C.F.R. 251.54(g)(2)(ii). Such permits thus ensure that public lands are used for private purposes only after careful consideration.

In endorsing such a process, *Duncan I* drew an important distinction between the supposed "inverse condemnation" of a private subsurface estate perceived by the district court and the Forest Service's authority to regulate its own land. The court endorsed the Forest Service's argument that, by requiring a special use permit, "it is not prohibiting access to non-federal lands or diminishing *Duncan*'s rights, but only regulating the use of the federal surface." *Duncan I*, 50 F.3d at 589. The Service conceded that it could not "prohibit mineral development" and "recognize[d] the mineral holder's absolute right to develop its mineral estate," but insisted that the subsurface owner could not simply trample over the public's interest in the surface estate, and the court agreed. *See id.* at 581 & n.8; *see also Duncan II*, 109 F.3d at 499-500 (discussing the flexible bounds of the Forest Service's authority). Outstanding mineral rights are not diminished – or, indeed, directly regulated – by reasonable surface regulations. Thus, held the court, a special use permit was a perfectly reasonable regulatory measure, particularly as it ultimately concerned use of the federal surface, *not* the private subsurface rights.

This distinction answers the objections of some commentators who, after *Duncan I*, have observed that the Forest Service Manual appears to contemplate a narrower authority over outstanding rights. Such commentators point to Manual sections like FSM 2718.5, which observes that the Service "has limited control over outstanding rights except to prevent undue degradation or nuisance to adjacent surrounding National Forest System

land,” or FSM 2719, which notes that, on a “case-by-case basis”, the Service might waive a special use permit for “uses on land the United States acquired subject to occupancy without special use authorization because of reservations or outstanding rights.” *See also* FSM 2734, 2734.2 (making similar statements).

This limiting language is less than what it seems. First, of course, the Manual cannot trump the constitutional, statutory, or regulatory authority of the Forest Service, and nor can it override the clear statements of the courts, including the *Duncan* line of cases. And, second, reading the Manual to waive all or most regulatory authority over outstanding rights misunderstands its restrictions. The Manual makes the same commonsense point made by *Duncan I*: The Service cannot ultimately control the private subsurface rights themselves and so its authority over the rights themselves is limited. But the Manual provisions do not limit the Service’s right to regulate its *own* land – the federal surface – rather than the outstanding rights below it. There, as the *Duncan I* court observed, “the substance of the manual is consistent with the regulations,” in that it does not constrain the Service from regulating the federal surface and ensuring that the exercise of private rights does not damage the federal land. *See* 50 F.3d at 590; *see also id.* (discussing why one manual provision, FSM 2830.1, does not bar regulation of the federal surface overlying outstanding rights).

Indeed, the Forest Service has significant power over the federal surface even when it does not rely on its Property Clause authority. This point is confirmed by an unpublished but influential case concerning the Service’s right to control access to outstanding mineral rights on the Allegheny National Forest, *United States v. Minard Run Oil Co.*, 1980 U.S. Dist. Lexis 9570, *14-15 (W.D. Pa. 1980). In *Minard Run*, an oil company asserted its right to develop outstanding mineral rights without notice to the Forest Service, or any attempt to negotiate proper use of the federal surface. *See id.* at *2-10. The Service relied on neither deed terms nor federal law to litigate the case. The deed itself did not contain any “rules or regulations of the Secretary of Agriculture,” as would a Weeks Act reserved rights deed, because the mineral rights, like all outstanding rights, had been “severed from fee simple by a processor in title.” *See id.* at *3. And, for reasons not clear in the text of the case, the Service “specifically disclaimed any intention of proceeding as a sovereign in regulating the use of the surface.” *See id.* at *14 - *15. With such a cession of authority, the United States had “no greater rights than any other landowner.” *See id.* at * 15. But even those limited rights proved to be substantial.

Interpreting Pennsylvania law (which is materially similar to that in many other jurisdictions, *see, e.g., Surface Tension*, 33 Land & Water L. Rev. at 432-35), the court held that private rights must be exercised “with due regard to the owner of the surface.” 1980 U.S. Dist. Lexis 9570 at *18. In that context, the court held that the law required at least that the subsurface rights holder give at least 60 days notice of any planned mining, including the following information:

- (1) A designated field representative.
- (2) A map showing the location and dimensions of all improvements including but not limited to well sites and road and pipeline accesses.

- (3) A plan of operations, of an interim character if necessary, setting forth a schedule for construction and drilling.
- (4) A plan of erosion and sedimentation control
- (5) Proof of ownership of mineral title.

Id. at *22. The oil company was also required to either let the Service market all merchantable timber from the site, or to do so on the Service's behalf. *Id.* The Forest Service Manual has since adopted similar requirements, adding requirements for "[r]eclamation plans" and "[m]ethods for . . . prevention of water pollution." FSM 2832. In 1992, Congress also mandated that the *Minard Run Oil* conditions be fulfilled for all drilling on "outstanding oil and gas deposits" in the Allegheny National Forest. *See* 30 U.S.C. § 226(o).

In light of the broader Property Clause authority recognized by *Duncan I & II*, the *Minard Run Oil* requirements, developed by treating the Service like a private landowner, must be seen as a floor, not a ceiling, for regulation. They guarantee basic rights – at least on the Allegheny under the decision and § 226(o), and nationally under the Manual. But they do not preclude the fuller exertion of the Service's powers – and, as both § 226(o) and *Minard Run Oil* precede the *Duncan* cases, cannot have implicitly disapproved them. As such, while the Service lacks authority to foreclose the exercise of outstanding rights, it maintains its authority over the federal surface above them. That surface, like every other square foot of the forest system, remains subject to the Service's broad powers and constitutes a part of the Service's equally broad public trust responsibility.

C. Reserved Rights

Reserved rights present a slightly more complicated case. These rights technically fall into two sub-classes. Some lands with reserved subsurface rights were acquired under the Bankhead Jones Farm Tenant Act, which does not contain a provision linking regulatory authority to deed provisions, as the Weeks Act does. That said, the two land types have long been administered similarly and, after the Bankhead Jones lands were folded into the forest system as National Grasslands in 1962, the two classes have fallen under a unified regulatory structure. *See* 36 C.F.R. §§ 213.1, 213.3, 213.4. That structure places considerable importance on deed terms, so, while the Service has more flexibility to regulate Bankhead Jones reserved rights, the starting place for reserved rights regulations for both land types is the language of the reservation.

Reserved rights are presently governed by 36 C.F.R. § 251.15, which was promulgated in 1963. That regulation sets out standard terms, which "shall be expressed in and made a part of the deed of conveyance to the United States" for all reserved rights split estates. *See id.* § 251.15(a). These terms help define the Service's regulatory authority, setting out baseline requirements while leaving room for regulatory discretion as the Service considers the exercise of any particular set of rights. *See id.* § 251.15(a)(1)-(7). This basic structure has been used for reserved rights since 1911, when the Weeks Act was passed. The deed terms themselves, however, have varied several times over the years,

as the Service refined its regulatory agenda. Likely because of the Weeks Act's linkage between deed terms and regulatory authority, *see* 16 U.S.C. § 518, each set of new terms makes clear that prior sets "continue to be effective in the cases to which they are applicable." *See* 40 C.F.R. 251.15(c). As a result, the Service's regulatory authority is best traced forward, beginning with the earliest deed terms and moving towards the present.

The Service promulgated deed term rules for Weeks Act acquisitions in 1911, 1937, 1947, and, finally, 1963. *See* FSM 2830.1. Rules for the National Grasslands appeared in 1938, 1939, and 1950. *See id.* (all rules attached as Ex. 13). In each case, the deed terms which cabin the Service's regulatory authority are broadly drawn, leaving ample room to protect the public interest. We start with the pre-1963 Weeks Act rules, and then turn to the National Grasslands rules.

The 1911 rules carve out significant federal regulatory discretion over reserved rights. The rules provide that rights-holders must first provide "satisfactory, written evidence of right or authority" and then restrict surface disturbance only to "so much . . . as is reasonably necessary for the purpose." 1911 Rule at (1)-(2). Several surface protections are included: "All reasonable provision" is to be made for surface support. *Id.* at (3). Water bodies are protected because "[a]ll miners or mining operators shall make provision to the satisfaction of the Forest Officer in charge for preventing the obstruction, pollution, or deterioration of streams, lakes, ponds or springs." *Id.* at (4). Other surface resources are also shielded, as "no timber, undergrowth, or reproduction shall be unnecessarily cut, destroyed, or damaged," and, if damage occurs, the forest must be reimbursed at "rates to be prescribed by the Forest Officer in charge." *Id.* at (5). Further, no timber at all "shall be cut or used in connection with any mining use or purpose" unless the appropriate Forest Officer gives permission upon proper payment. *Id.* at (6). Structures, roads, and other improvements "necessary in carrying out mining operations" are only to be located as the Service directs. *Id.* at (7).

And, under the 1911 rules, mining sites must not do permanent damage to public lands. All structures emplaced on the federal surface "shall be removed within six months after the completion of mining operations" or are forfeit to the United States. *Id.* at (8). "All destructible refuse, waste material and other debris caused by the mining operations . . . which interfere with the administration of the Forest or endanger forest growth" must be disposed of as the Service directs within six months after mining has been completed. *See id.* at (9). Finally, of course, mining operations must use due diligence to prevent forest fires. *See id.* at (10).

The 1911 rules, in short, invest the Service with considerable permitting power. No timber may be cut, no polluting activities undertaken, no roads cleared, or structures emplaced, without the Service's permission and direction. Just as the Service may regulate the federal surface without stepping on the toes of outstanding rights holders, it may, under the 1911 deeds, take a vigorous role in protecting the public's interests as against reserved rights holders.

The same is true under the 1937 rules. Under those rules, the Service made its control even more explicit, requiring the rights-holder to “have applied for and received from the Forest Supervisor a permit authorizing . . . use or occupancy” before any land disturbance can occur. 1937 Rule at (1). Even then, “[o]nly so much of the surface of the land shall be used or disturbed as is necessary.” *Id.* As under the 1911 rules, all structures must be removed after operations cease, although this time within a year, rather than six months. *Id.* at (1). If there is “damage of the land or any improvements thereon,” the subsurface owner must pay “what the Service determines is needed “to restore the land to a serviceable or safe condition or to repair or replace the improvements damaged or destroyed.” *Id.* at (2). Marketable timber products are to be reimbursed at market rates. *Id.* at (3). Pollution restrictions also persist, as “mining operators shall . . . make all reasonable provisions for the disposal of tailings, dumpage, and other deleterious materials” so as to protect water resources and, also, to prevent “deterioration of the land.” *Id.* at (4).

Notably, the 1937 rules also explicitly allow the Service to impose new regulatory requirements. They state that “[n]othing herein shall be construed to exempt the operator or the mining operations” from “compliance or conformity to any requirements of any law or regulation which later may be enacted or promulgated, and which otherwise would be applicable.” *Id.* at (5). In essence, deeds containing this clause are effectively free of the Weeks Act link between deed terms and regulatory authority, *see* 16 U.S.C. § 518, because the deed terms themselves open the door for new regulation.

The 1947 rules also generally maintain Forest Service discretion and emphasize the Service’s protective rules. Once again, the rules bar all use, occupancy, and disturbance until the subsurface owner “shall have applied for and received from the Forest Supervisor having jurisdiction a permit authorizing such use.” 1947 Rule at (b). Once again, all uses are limited to those “necessary” to the project, and a permit may only be issued upon “conditions necessary to protect national forest interests.” *Id.* at (a)-(b). These interests are not specified in the deed and so are necessarily specified by the governing statutes, regulations, and planning documents, as applied at the discretion of the Service. Failure to comply with these terms voids the permit. *Id.* at (b). For the first time, the 1947 rules also introduce permit fees, specifying a \$2 per acre annual charge. *Id.*

The 1947 rules maintain most other substantive restrictions. Once again, permittees must remove materials within a year after operations cease, *id.* at (c), pay for damaged timber, *id.* at (d), limit and remove substances which could cause water pollution, *id.* at (h), and use “due diligence” to prevent forest fires, *id.* at (h). A broad restoration duty also attaches, guaranteed by a bond. *Id.* at (e). Specifically, if “exercise of the reserved rights results in stripping, collapse, or other damage to the land or to improvements thereon,” the private owner must “repair or replace the improvements” and “restore the land to a condition safe and reasonably serviceable for usual national forest purposes.” *Id.*

Finally, like the 1937 rules, the 1947 rules ensure that the Weeks Act does not inhibit future legal shifts in management direction. They provide that “[n]othing herein

contained shall be construed to exempt operator or the mining operations from . . . compliance with or conformity to any requirements of any law which later may be enacted and which otherwise would be applicable.” *Id.* at (g).

The pre-1963 National Grasslands rules, issued in 1938, 1939, and 1950, largely mirror their Weeks Act counterparts. The 1938 and 1939 rules are both essentially identical to the 1937 rules, save for the fact that they do not include an explicit permit requirement. They do, however, include the broad proviso that the deed terms are not to be read to preclude future application of new “law[s] or regulation[s].” 1938 rule at (5), 1939 rule at (5). The 1950 rule is identical, in all relevant respect, to the 1947 rule governing Weeks Act acquisitions. So, in each case, the Service retained broad power to regulate to protect the public’s interests on the National Grasslands.

Perhaps because the grassland and forest rules paralleled each other, the Service unified the two sets of the rules in 1963, with 40 C.F.R. § 251.15, which presently governs reserved mineral rights. The 1963 rule maintains the discretion and protective mandate of the rules that came before it.

The 1963 rule once again limits all surface use only to that which is “necessary in bona fide” mining work, and again requires that the mineral owner “app[ly] for and receive[] a permit” before operations can begin. 36 C.F.R. § 251.15(a)(2)(i)-(ii). The \$ 2 per acre annual fee also carries forward from the 1947 and 1950 rules. And, once again, the permit is to include all “conditions necessary to protect the interest of the United States.” *Id.* at § 251.15(a)(2)(ii). The restoration bond requirement persists. *See id.* at § 251.15(a)(2)(iii). The relevant substantive protections also continue to attach, including requirements that water pollution be controlled, that timber losses be repaid, and that all structures and materials be removed within one year after the permit has run its course. *See id.* at § 251.15(a)(3)-(7). The 1963 rules also provide that its terms do not exempt deed-holders from “compliance with or conformity to any law which later may be enacted.” *Id.* at § 251.15(a)(6).

In sum, then, the Service has, consistent with the Weeks and Bankhead-Jones Acts and with its broader statutory mission, always incorporated ample regulatory authority to protect the public’s interest.¹ Further, in each case, the rules envisioned that future regulatory requirements could be imposed, or that the Service could exercise its discretion to add further protections for the public lands as it considered each application to exploit private subsurface rights. And sensibly so. Because the Weeks Act was designed to protect public lands, the terms of contracts made under the acts should be

¹ Two resolutions passed by the Pennsylvania Legislature in 2007, H.R. 693 and S.R. 294, do not alter this analysis. The resolutions both reaffirm that Pennsylvania’s consent to the establishment of the Allegheny National Forest would be exceeded if the Service regulated private rights beyond the terms “of the written instrument conveying title to the lands to the United States.” First of all, federal authority trumps such after-the-fact state declarations and, in any event, the resolutions really just restate the terms of the Weeks Act, 16 U.S.C. § 518, by insisting that deed terms be used to determine the extent of the Service’s regulatory authority. As discussed, those existing deed terms reserve considerable regulatory authority and discretion to the Forest Service, thus allowing further regulation without offending the Pennsylvania resolutions.

construed “consistent with the purpose of the Act,” thereby ensuring “productive use of the surface by the United States.” *See Downstate Stone Co.*, 712 F.2d at 1217-19. Indeed, in some courts’ view, a private subsurface owner simply has “no right to mine . . . until he ha[s] completed [an] application for a permit and the Forest Service ha[s] determined whether a permit should issue.” *Izaak Walton League*, 497 F.2d at 853. While, as we discuss below, room exists to clarify the reach of this authority, and to simplify and strengthen the permitting process, existing deeds will not present a major hurdle to efforts to make positive change.

IV. Principles for Reform

The existing regulatory regime affords considerable latitude to the Service to ensure that private subsurface rights are not exploited in ways that damage the public surface lands. But, as discussed earlier, this authority has not always been fully employed. Too often, the Service has misread the rights of subsurface owners as erasing the management authority that its own deed terms in fact provide. Too, the complicated regulatory scheme, with multiple sets of rules for different sorts of reserved rights and ambiguity over the status of outstanding rights, no doubt also complicates management. Finally, the rules’ failure to explicitly incorporate NEPA and other procedural statutes has led some forests to fail to undertake such processes, even though mineral exploitation may rapidly become a dominant source of ecosystem disturbance.

Going forward, the Service should now work towards a unified permitting scheme, one that treats reserved rights and outstanding rights in the same manner, and with the same results. To the maximum degree allowed by the flexible terms of existing deeds, it should apply these regulations to existing rights, as well as newly-acquired split estates. It should insist on tough environmental protections for the federal lands it manages, standing on its long-established authority to condition mineral extraction on federal concurrence. And it should ensure that NEPA and other statutes imposing analytic requirements are always complied with, in a transparent public process, before any disturbance is allowed.

A. Ensuring a Transparent and Thorough Public Process

In various responses to comments over the years, the Service has insisted that NEPA and other statutes imposing analytic requirements do not apply to private mineral rights management, as the private owner ultimately has access rights, eliminating all Service discretion to make choices about how the rights are employed. This response is badly misguided: As discussed above, the Service has extensive authority over how, where, and when mineral extraction occurs. Insulating that decision from the public has foreclosed a vigorous discussion over how best to accommodate private subsurface rights on public lands and, no doubt, led to far more environmental damage than necessary. The Service should now correct this legal error, before it leads to further damage.

Allowing, for the purposes of these comments, that the Service lacks “veto authority” over mineral development,” *see Duncan I*, 50 F.3d at 591 n.8, many decisions remain to

be made. Such discretion triggers many critical public process statutes, including the ESA, NEPA, and the National Historic Preservation Act (“NHPA”). *See, e.g., National Association of Homebuilders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2533-34 (discussing an ESA regulation, 50 C.F.R. § 402.03, and holding that “the ESA’s [consultation] requirements would come into play only when an action results from the exercise of agency discretion”) (2007); *Department of Transportation v. Public Citizen*, 541 U.S. 752, 770 (articulating a similar rule for NEPA) (2004); 16 U.S.C. § 470f (requiring that any agency having “direct or indirect jurisdiction” or “having authority to license” any undertaking take its effects on historic and cultural resources into account). In each case, an open and accountable public process is then required to ensure that agency discretion is properly exercised.

Courts have made clear that the authority the Service retains over private mineral rights is more than sufficient to require such process. Indeed, the contrary argument was recently directly rejected by a federal court. In *Sierra Club v. Department of Energy*, 255 F.Supp.2d at 1185-86, the Department of Energy argued that it lacked “discretionary authority over mining” on private subsurface rights underlying an ecologically important area. The court, relying in part on the federal authority articulated in the *Duncan* line of cases, replied that “as a surface owner, [the Department] maintains some discretion to determine how, where, and when mining can occur and ensure that the surface use is reasonable.” *Id.* at 1186. Because the agency was “[a]rmed with discretionary authority to determine reasonable use of the surface estate” it had to “comply with NEPA concerning the development of the mining operation.” *Id.* The same analysis controlled in the ESA context. As the court explained, because the agency “maintained some discretion” over the mining, it had to engage in consultation to determine whether its activities would jeopardize the survival of threatened or endangered species. *See id.* at 1189.²

Other relevant cases emphasize the need to do careful and public analyses of mineral extraction on public lands, even when government authority is limited. In *Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988), for instance, the court considered whether the Forest Service had to do NEPA on mineral leases, holding that it did, and that a full Environmental Impact Statement (“EIS”) rather than a less formal Environmental Assessment (“EA”) was required because oil and gas extraction was “such highly intrusive activities,” whose effects very likely cannot be “reduce[d] . . . to insignificance.” *See id.* at 1450. *Connor*’s analysis of leases allowing surface occupancy is particularly germane here. Under such leases, the Service lacked “the absolute right to prevent all surface-disturbing activity,” but could still make “reasonable regulations which [were] consistent with oil and gas development and production.” *See id.* at 1449. The Service, in other words, was without “veto authority”, *see Duncan I*, 50 F.3d at 591 n.8, just as it is here. *Connor* affirmed that under such circumstances the government

² The NEPA categorical exclusions created by Section 390 of the Energy Policy Act of 2005, 119 Stat. 594, 42 U.S.C. § 15942, in no way affect this analysis. Those exclusions apply only to activities conducted “pursuant to the Mineral Leasing Act.” *See* 42 U.S.C. § 15942(a). Private mineral rights are not leased, and so are not covered by the exclusions.

could still “regulate many of the adverse environmental impacts of oil and gas activities.” See *Connor*, 848 F.2d at 1450.

NEPA and similar statutes also continue to apply even when statutes or regulations give an agency a limited time to make a decision, including in mineral extraction permitting processes. See *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 834-35 (9th Cir. 2008). And any perceived limits on NEPA analysis – and, by extension, analysis under other environmental statutes – cannot be defeated by any deed terms that might appear to be to the contrary because it is “clear that an agency may not limit its obligations to prepare an environmental assessment that complies with NEPA by entering into a contract.” See *Oregon Natural Resources Council Action v. United States Forest Service*, 445 F.Supp. 2d 1211, 1220-21 (collecting authority for that proposition, including *Metcalf v. Daley*, 214 F.3d 1135 (9th Cir. 2000)) (D. Or. 2006).

These conclusions are not surprising. The Forest Service bears a weighty public trust. It must “balance competing demands” and ensure that many public goods, including “‘outdoor recreation, range, timber, watershed, and wildlife and fish [habitat]’” are maintained. See *Lands Council v. McNair*, 537 F.3d 981, 990 (quoting 16 U.S.C. § 528) (9th Cir. 2008) (en banc). It is critical that public land management agencies strike that balance in a careful and public way. See *Oregon Natural Desert Association v. Bureau of Land Management*, 531 F.3d 1114, 1120- 21, 1142 n.24 (explaining the necessity of sound public process in land management and emphasizing that “[c]larity is at a premium” in NEPA and similar processes) (9th Cir. 2008).

Finally, the President has recently re-emphasized the need for open government. In a January 21, 2009 memo (attached as Ex. 14), issued just one day after taking office, President Obama reminded all agencies that, in the words of Justice Louis Brandeis, “sunlight is said to be the best of disinfectants.” Although the memo specifically concerned the Freedom of Information Act, its expression of a “profound national commitment to ensuring an open Government,” and its reminder that agencies should use “new technologies” to reach the public, should serve as an additional impetus to the Service to ensure that private parties may never exploit public lands without open and democratic analysis and oversight.

The task ahead, then, is to make explicit what is already implicit in every deed the Service has signed and in every decision it makes regarding private subsurface rights: Public rights are at stake and public process is required by statute, regulation, and the terms of the deeds. The Service should clarify its regulations to state as much forthrightly, both for existing rights and for new deeds. We propose language to this effect in Section V, below.

B. Protecting the Public Interest in National Forest Lands

In addition to ensuring that mineral extraction is not permitted without careful, public environmental analyses, the Service has opportunities to improve the substantive merits

and procedural efficiency of the subsurface rights management process. In this section, the Sierra Club proposes principles the Service should incorporate in revised regulations.

i. Enhancing Substantive Protections

As we have demonstrated above, the Service has retained considerable authority over outstanding and reserved rights and is bound by statute to see that they are exercised without compromising the public trust. It is startling, then, that the present regulatory structure is so limited. Existing regulations, *see* 36 C.F.R. § 251.15, FSM 2800, are, in many regards, less comprehensive and less protective than those used to govern private subsurface rights by the National Park Service and the Fish and Wildlife Service. They are also, in some ways, less protective than the Forest Service's own minerals leasing, special use, and access to non-federal lands regulations. The Service should incorporate the protections offered by these complementary regulations into its own split estate regulations, as well as looking for ways to extend and modernize existing approaches. As one commentator puts it, "Forest Service regulations . . . are remarkably general. More comprehensive regulations, like those adopted by the Park Service, have the advantage of putting mineral operators and developers on notice as to what is expected of them and when." *Surface Tension*, 33 Land & Water L. Rev. at 465. Now that the Service has the opportunity to develop such regulations, it should swiftly do so.

The National Park Service's regulations are a sound place to begin. These regulations, codified at 36 C.F.R. §§ 9.30 *et seq.*, and known as the "9B regulations," set out an extensive framework for use in managing private subsurface rights. They are designed to "prevent or minimize damage to the environment and other resource values." *See* 36 C.F.R. § 9.30(a). Features of these regulations worth borrowing include:

- A ban on using federal water unless the operator either has superior rights or "the removal of the water . . . will not damage the [federal] resources." *See* 36 C.F.R. § 9.35.
- A requirement that operations be conducted "in a manner which utilizes technologically feasible methods least damaging to the federally-owned or controlled" resources. *See* 36 C.F.R. § 9.37(a)(1).
- A ban on permit approval where "operations would substantially interfere with . . . preservation of [the federal resources'] natural and ecological integrity in perpetuity, or would significantly injure the federally-owned or controlled lands or waters." *See* 36 C.F.R. § 9.37(a)(3).
- Clear operating standards which, among other things, prevent operations within 500 feet of most aquatic resources, *see* 36 C.F.R. § 9.41, and make explicit provisions for safety, *see id.* & §§ 9.42-9.47.
- Requirements that all waste be "confined so as to prevent escape" and be "stored and disposed of or removed from the area as quickly as practicable in such a manner as to prevent contamination." *See* 36 C.F.R. § 9.45.

- Detailed reclamation requirements, including a provision requiring that native vegetation communities be reestablished. *See* 36 C.F.R. § 9.39.

The Fish and Wildlife Service's regulations, which are used to manage the National Wildlife Refuge System, are also instructive. Although much shorter than the Park Service's rules, they provide some rules worth considering, including:

- A requirement that, “[s]o far as is practicable,” operations be conducted “in such a manner as to prevent damage, erosion, pollution, or contamination to the lands, waters, facilities, and vegetation of the area.” *See* 50 C.F.R. § 29.32.
- A requirement that the “[p]hysical occupancy of the area be kept to the minimum space compatible with the conduct of efficient mineral operations.” *See id.*
- A requirement that all waste “be kept in the smallest practicable area, . . . be confined so as to prevent escape as a result of rains and high water or otherwise, and . . . be removed from the area as quickly as possible.” *See id.*
- A requirement that all extraction facilities be “removed from the area when the need for them has ended” and that the “area . . . be restored as nearly as possible to its condition prior to the commencement of operations.” *See id.*

The Forest Service can also learn from its own regulations in related substantive areas. The Forest Service mineral leasing and locatable minerals regulations offer protections that the reserved rights regulations do not presently explicitly incorporate. This gap is inappropriate: While there are important legal distinctions between leased minerals, mining claims, and split estates, ecosystems experience the same stresses from extraction activity grounded on any of these regimes. Thus, the Service should be striving to ensure that ecosystems affected by private subsurface right exploitation are no less protected than those affected by leasing or mining claims. Protections worth considering, drawn from both the Service's general “locatable minerals” regulations and its oil and gas leasing regulations include:

- Explicit requirements that all information on mining operations be made available to the public. *See* 36 C.F.R. § 228.6.
- Regular inspections to ensure that the operator is complying with all regulations and the plan of operations. *See* 36 C.F.R. §§ 228.7, 228.112, 228.113.
- Operations requirements, including explicit protection of air and water quality, scenic values, and fisheries and wildlife habitat. *See* 36 C.F.R. § 228.8.
- A requirement that any roads constructed for mining purposes be closed to normal vehicular traffic after operations cease, and then restored. *See* 36 C.F.R. § 228.8(f).

- A requirement that operators “conduct reclamation concurrently with other operations.” *See* 36 C.F.R. § 228.108(g).

The Forest Service should also look to its own regulations governing special use permits and access to non-federal lands, which contain significant protections, including:

- Requirements that proposed uses be consistent with Forest Service policies and regulations and with the applicable forest plan. *See* 36 C.F.R. § 251.54(e).
- Siting requirements designed to “cause the least damage to the environment, taking into consideration feasibility and other relevant factors.” *See* 36 C.F.R. § 251.56(ii)(F).
- A requirement that all roads “minimize[] damage or disturbance to National Forest System lands and resources.” *See* 36 C.F.R. §§ 251.11, 251.114.

Finally, the Service should look for ways to extend protections, consistent with its duties under relevant statutes to manage public resources. This effort is particularly important because, as noted earlier, climate change makes it crucial to extend protective measures to embrace stressors that previously may not have been fully regulated. The Service should consider the following:

- The Forest Service retains the authority to purchase private subsurface rights, including existing rights. *See, e.g.*, 16 U.S.C. §§ 515, 518. Such purchases should be considered in cases where the damage to public resources outweighs the cost of acquiring the private mineral rights, and that the damage cannot be adequately mitigated by shaping permit terms. Such areas might include those designated or recommended as wilderness or with wilderness characteristics, *see Oregon Natural Desert Association*, 531 F.3d at 1134-35, 16 U.S.C. § 1131 *et seq.*, critical habitat for threatened or endangered species, *see* 16 U.S.C. § 1533, research natural areas, *see* 36 C.F.R. § 251.23, roadless areas, wetland and stream areas, including flood plains, and other areas designated as significant in relevant forest plans, but purchase should be considered in the first instance in all cases to ensure that the Service does not automatically or arbitrarily rule out this important option.
- The Service should ensure that the public is compensated for the full value of ecosystem services lost due to private mining operations. Reclamation and restoration bond monies do not appear to cover lost use value during the mining term, but only the later cost of recovery. The public should not give up this value for free. Recalibrating use fees – which presently remain at the bargain basement rate of \$2 per acre annually – to reflect actual lost ecosystem resource values would better protect the public trust.
- The Service should explicitly require consideration of mineral extraction techniques, including directional drilling, that can be conducted from outside Forest Service lands or particularly sensitive areas. Operators using such techniques should, however, remain subject to all regulatory requirements. *Cf.* 36 C.F.R. § 9.32(e).

Integrating these and similar protections into private mineral management going forward is simple enough: They should be included in new deeds. Existing deeds present some challenges, although they are not insurmountable. As we have discussed, the 1937, 1938, and 1939 rules all explicitly provide for the application of new regulations, and so deeds issued under these rules can directly be governed by the new terms. Provisions in the 1947, 1950, and 1963 rules allowing for new laws may also embrace the new terms. To the extent they do not, the general permitting requirements in those rules, along with the 1911 rules, which allows for mining only once the Forest Supervisor has agreed to terms will allow for the Service to impose most new requirements through the permitting process. Nonetheless, the Service should probably incorporate a savings clause in any new regulations to ensure that valid existing rights are not compromised by new regulatory requirements.

ii. Unifying Procedural Requirements

Reserved rights and outstanding rights should be treated the same way for permitting purposes. The present situation – in which the Service has clear regulations for reserved rights but permits outstanding rights through the special use permit process, if at all – is confusing and unnecessarily complex. Initially, then, “the Forest Service should, if only to avoid future challenges to its authority, bring these [outstanding rights] regulations in line with its reserved mineral rights regulations.” *See Surface Tension*, 33 Land & Water L. Rev. at 465.

The easiest way to unify regulations governing reserved and outstanding rights, while also harmonizing those rules with the regulations governing access to non-federal lands generally, *see* 36 C.F.R. Part 251, Subpart D, is probably through the special use permit process. As the discussion of regulatory requirements above suggests, those regulations, which are already used for most access requests, already incorporates significant public comment and environmental review processes. They are also designed to be generally applicable to “[a]ll uses of National Forest System lands, improvements, and resources.” *See* 36 C.F.R. § 251.50. Rather than developing and maintaining an entirely separate mineral rights permitting process, which would necessarily incorporate many of the requirements of the special use process, it makes the most sense to use the administrative experience built up for special uses to bring private subsurface rights management into that system.

That said, mineral rights issues will deserve some special treatment, not explicitly provided for in the special use permit process, because of the scope and scale of the disturbance they entail. The substantive protections recommended above should thus be folded into the special use permit analysis process through an additional, clarifying subsurface rights regulation. Such a rule should contain all relevant additional considerations which Forest Service officials must use in the permitting process to ensure that public resources are protected.

C. Properly Balancing the Public Interest and Private Rights

Nothing in these proposed reforms would bar private subsurface owners from exercising their rights; indeed, the *Duncan* cases explicitly endorsed the special use permit process as an appropriate tool to reasonably regulate private rights. *See, e.g., Duncan I*, 50 F.3d at 591; *Duncan II*, 109 F.3d at 499-500. As demonstrated, such regulation is well within the Service’s constitutional and statutory authority; it also will not expose the Service to meritorious demands for compensation for takings under the Fifth Amendment’s Due Process clause.

The courts are loathe to require compensation for a regulatory “public program adjusting the benefits and burdens of economic life to promote the common good,” and therefore eschew *per se* rules, instead engaging in careful weighing of the public interest and private rights involved. *See Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322-28 (2002). Doing so, they remain “cognizant that ‘government regulation – by definition – involves the adjustment of rights for the public good,’” *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (quoting *Andrus v. Allard*, 444 U.S. 51, 65 (1979)), and so are only likely to find a taking where the regulation verges on destroying all the regulated property’s value. *See, e.g., Tahoe-Sierra*, 535 U.S. at 330-31; *see also Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124-25 (observing that “this Court has accordingly recognized, in a wide variety of contexts, that government may execute laws or programs that adversely affect recognized economic values.”) (1978).

It should come as no surprise, then, that courts regularly hold that regulation of mining to protect “important public interests” is not a taking. *See, e.g., Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 485-93 (1987); *Stearns Co. v. United States*, 396 F.3d 1354 (Fed. Cir. 2005) (limits on mining in a National Forest do not constitute a taking); *Rith Energy, Inc. v. United States*, 247 F.3d 1355 (Fed. Cir. 2001) (regulation of mining does not trigger a taking). That the National Park Service’s regulations, which are quite comprehensive, have never been successfully challenged as takings also demonstrates the broad constitutional scope afforded for regulation in this area. The Service could certainly properly adopt similar regulations.

V. Proposed Regulations

In light of the Forest Service’s authority and the need for change outlined above, the Sierra Club proposes revising 36 C.F.R. § 251.15 along the lines discussed above. In most cases, the proposed language below is drawn directly from the existing Forest Service and National Park Service regulations, or directly adopts those regulations. The regulatory language also includes a clause addressing the application of existing rules, with the intention of applying as much of the new framework as possible to rights held under those frameworks. Doing so helps guarantee that the revised structure will produce swift conservation benefits.

* * * * *

Conditions, rules and regulations to govern exercise of private mineral rights underlying National Forest System lands.

(a) These regulations, except as provided in paragraphs (m) and (n) of this section, control all activities within the jurisdiction of the Forest Service arising from the exercise of rights not owned by the United States to enter upon Forest Service lands and to prospect for, mine and remove minerals, oil, gas, or other inorganic substances. They govern both rights outstanding at the time the United States acquired the surface estate and rights reserved by a former owner at the time that that owner conveyed lands to the United States. These regulations shall be expressed in and made a part of the deed of conveyance to the United States of any land conveyed with reservations of rights on or after their effective date.

These regulations are not intended to result in the taking of a property interest, but rather to impose reasonable regulations on activities which involve and affect federally-owned lands.

(b) None of the lands in which mineral rights are reserved or outstanding shall be so used, occupied, or disturbed due to the exercise of those rights until the record owner of the rights, or his or her successors, assigns, or lessees, shall have applied for and received a permit authorizing such use, occupancy, or disturbance of those specifically described parts of the lands as may reasonably be necessary to exercise of the rights. The permit shall be applied for and considered in accordance with the provisions of subpart B of this part, which concerns special uses of National Forest System lands. To the extent that exercise of reserved or outstanding mineral rights requires access across National Forest System lands, the permit shall also be applied for and considered in accordance with the provisions of subpart D of this part, which concerns access to non-federal lands. In the event of direct and irreconcilable conflict between the terms of this section and subparts B or D, the terms of this section shall govern. Notwithstanding any provision of subparts B and D of this part:

(1) Issuance of a permit for, or approval of, the exercise of reserved or outstanding mineral rights is a major federal action subject to 42 U.S.C. § 4332, and all other relevant statutory provisions and implementing regulations of the National Environmental Policy Act.

(2) Issuance of a permit for, or approval of, the exercise of reserved or outstanding mineral rights is an agency action subject to 16 U.S.C. § 1536, and all other relevant statutory provisions and implementing regulations of the Endangered Species Act.

(3) Issuance of a permit for, or approval of, the exercise of reserved or outstanding mineral rights is a federal or federally-assisted undertaking subject to 16 U.S.C. § 470f, and all other relevant statutory provisions and implementing regulations of the National Historic Preservation Act.

Issuance of a permit must also be in accordance with all other applicable law.

(c) A permit may only be processed if the applicant has submitted satisfactory evidence of authority to exercise such rights to the Forest Service.

(d) Prior to issuing a permit, the Forest Service shall in every instance consider whether the interests of the United States are better served by purchasing all or a portion of the rights the permit applicant seeks to exercise, and if the Service can secure the funds to make such a purchase. The Service should weigh the value to the public of the affected land, and the value that would be lost if the private rights are exercised, against the costs associated with effecting a purchase. Such a purchase shall be considered with particular care where exercise of the rights in question would impair the resource values of:

- (1) Lands designated as wilderness pursuant to 16 U.S.C. § 1131 *et seq.*, or recommended for such designation.
- (2) Lands possessing wilderness characteristics.
- (3) Roadless areas.
- (4) Lands designated as critical habitat for threatened or endangered species under 16 U.S.C. § 1533.
- (5) Research Natural Areas designated under 36 C.F.R. § 251.23.
- (5) Lands containing wetlands, rivers, streams, floodplains, and other important aquatic resources.
- (6) Any other area designated as significant for conservation purposes in the applicable land and resource management plan prepared under the National Forest Management Act, or deemed to be of particular significance by the Forest Service.

The Forest Service's decision shall be set out in writing.

(e) A permit shall be issued only upon initial payment of an annual fee, which shall be set to recoup the full value of all ecosystem goods and services lost to the public due to the exercise of the reserved or outstanding rights.

(f) In addition to the annual fee, timber and/or young growth cut or destroyed in connection with exercise of the reserved or outstanding right shall be paid for at rates determined by the Forest Service to be fair and equitable for comparable timber and/or young growth in the locality. All slash resulting from cutting or destruction of timber or young growth shall be disposed of as required by the Forest Service.

(g) As part of the proposal required by 36 C.F.R. § 251.54(d), the holder of reserved or outstanding rights shall submit in writing a plan of operations which shall include, at a minimum, the information required by 30 U.S.C. § 226(o)(3)(A)-(E), the information required by 36 C.F.R. § 9.36, as applicable to the proposed operations, except that the words "Forest Supervisor" shall be substituted for the word "Superintendent" in those regulations, and any other information that the Forest Service determines is necessary. Such proposals should always be submitted so as to allow ample time for careful consideration and for public comment and involvement. If required by 30 U.S.C. § 226(o), a proposal shall be submitted at least 60 days prior to the date the applicant

wishes to commence surface disturbing activities, but the Service may take longer than 60 days to process such a proposal, or any proposal, provided that the Service should consider proposals reasonably expeditiously.

(h) In addition to the requirements of subparts B and D of this part, any reserved or outstanding rights shall be exercised only in accordance with following conditions, rules and regulations, whose requirements shall be made a part of the permitting process under those sections and shall be set out in the permit required by paragraph (b) of this section:

(1) Only so much of the surface of the lands shall be occupied, used, or disturbed as is necessary in bona fide prospecting for, drilling, mining (including the milling or concentration of ores), and removal of the reserved or outstanding minerals, oil, gas, or other inorganic substances. Where directional drilling or other reasonably available methods would allow operations to proceed without disturbing all or a significant portion of the surface of the lands, then only such methods shall be allowed. In every case, the operator must utilize the technologically feasible methods least damaging to the federally-owned or controlled lands, waters and resources of the affected lands while assuring the protection of public health and safety.

(2) In the prospecting for, mining, and removal of reserved minerals, oil, gas, or other inorganic substances all reasonable provisions shall be made for the disposal of tailings, dumpage, and other deleterious materials or substances in such manner as to prevent obstruction, pollution, or deterioration of Forest Service resources. In particular, oilfield brine, and all other waste and contaminating substances must be kept in the smallest practicable area, must be confined so as to prevent escape as a result of percolation, rain, high water or other causes, and such wastes must be stored and disposed of or removed from the area as quickly as practicable in such a manner as to prevent contamination, pollution, damage or injury to the Forest Service's lands, water (surface and subsurface), facilities, cultural resources, wildlife, and vegetation, or visitors.

(3) The regulations set out at 36 C.F.R. §§ 9.41-9.44, the first sentence of § 9.46, § 9.47, and § 228.8(a), (b), and (d)-(f), shall apply to all permits for the exercise of reserved and outstanding mineral rights, except that the words "Forest Supervisor" shall be substituted for the word "Superintendent" where it appears in those regulations.

(4) While any activities and/or operations incident to the exercise of the reserved or outstanding rights are in progress, the operators, contractors, subcontractors, and any employees thereof shall use due diligence in the prevention and suppression of fires, and shall comply with all rules and regulations applicable to the land.

(5) The record owner of the reserved or outstanding right, or his or her successors, assigns, or lessees, shall repair or replace any improvements damaged or destroyed by the mining operations and restore the land and shall provide for a bond in

sufficient amount to guarantee such repair, replacement or restoration. Restoration shall, to the maximum extent possible, be conducted concurrently with other operations, must, in any event, begin as soon as possible after completion of approved operations, and must in all circumstances commence not later than six months thereafter, unless a longer period of time is authorized in writing by the Forest Supervisor. The operator shall, at a minimum:

- (i) Remove all above ground structures, other improvements, materials, and equipment used for operations, except that such structures, improvements, materials, and equipment may remain where they are to be used for continuing operations which are the subject of approved special use permit or unless the Forest Supervisor so authorizes. If the Forest Supervisor does not so authorize, all structures, other improvements, and materials must be removed within one year. Should the holder of the permit fail to do so within the specified time, the Forest Service may remove, destroy or otherwise dispose of said structures, improvements, materials, and equipment at the permittee's expense, or in lieu thereof, may upon written notice to the permittee, assume title thereto in the name of the United States.;
- (ii) Remove all other man-made debris resulting from operations;
- (iii) Remove or neutralizing any contaminating substances;
- (iv) Plug and cap all nonproductive wells and fill dump holes, ditches, reserve pits and other excavations;
- (v) Grade to reasonably conform the contour of the area of operations to a contour similar to that which existed prior to the initiation of operations, where such grading will not jeopardize reclamation;
- (vi) Replace the natural topsoil necessary for vegetative restoration; and
- (vii) Reestablish native vegetative communities.

Restoration is unacceptable unless it provides for the safe movement of native wildlife, the reestablishment of native vegetative communities, the normal flow of surface and reasonable flow of subsurface waters, and the return of the area to a condition which does not jeopardize visitor safety or public use of the affected land.

(i) All permit application materials, and all other information required by this section, or other applicable authority, shall be submitted in both paper and electronic form and shall be made promptly available to the public in the most expeditious manner possible, including, whenever possible, posting such materials upon appropriate Forest Service websites. In all cases, permits, permit application materials, and all other information required by this section, or other applicable authority, shall be made available to the public on written or oral request, without the necessity of a formal request under the

Freedom of Information Act. No permit, or other approval of the exercise of reserved or outstanding rights, shall issue without a public comment period of at least 30 days addressing the planned activity. Where a permit is being processed according to subparts B and D of this part, the comment period shall begin when an application is formally accepted and a public notice shall issue at that time. The Service shall consider and respond to all comments.

(j) Forest Officers shall periodically inspect operations to determine if the operator is complying with the regulations in this part and an approved permit. Failure to comply with the terms and conditions of the aforesaid permit shall be cause for termination of all rights to use, occupy, or disturb the surface of the lands covered thereby, but in event of such termination a new permit shall be issued upon application when the causes for termination of the preceding permit have been satisfactorily remedied and the United States reimbursed for any resultant damage to it.

(k) All rules and regulations heretofore issued by the Secretary of Agriculture to govern the exercise of reserved or outstanding mineral rights shall continue to be effective in the cases to which they are applicable, but are hereby superseded as to mineral rights hereafter reserved in conveyances under such programs and to outstanding mineral rights on lands hereafter acquired by the United States. However, the Service shall, to the extent that those prior-issued rules and all applicable law allow, apply these rules to all reserved and outstanding rights on its lands. Therefore, with regard to those prior-issued rules and regulations:

(1) The permit required by paragraph (a)(2)(i) of the rules governing reserved rights issued on April 30, 1963; paragraph (b) of the rules governing reserved rights issued on August 6, 1950; and paragraph (b) of the rules governing reserved rights issued on July 3, 1947; and paragraph (1) of the rules governing reserved rights issued on January 23, 1937 shall be construed to be the permit required by paragraph (b) of this section.

(2) Compliance with the terms and conditions set out and incorporated by this section shall be deemed necessary to protect the interests of the United States, the Government, and the National Forest System under paragraph (a)(2)(ii) of the rules governing reserved rights issued on April 30, 1963; paragraph (b) of the rules governing reserved rights on issued on August 6, 1950; paragraph (b) of the rules governing reserved rights issued on July 3, 1947.

(3) The terms and conditions set out and incorporated by this section shall be used to determine the degree of surface occupation or disturbance which is reasonably necessary under paragraph (2) of the rules governing reserved rights issued on July 8, 1911, shall also be used to determine whether timber, undergrowth, or reproduction has been unnecessarily cut, destroyed, injured, or damaged under paragraph (6) of those rules, and shall be construed to set out the terms under which the location of buildings, camps, roads, bridges, and other structures or improvements necessary in carrying on mining operations may be approved under paragraph (7) of those rules.

(4) To the extent they conflict with any terms of the rules governing reserved rights issued on April 30, 1963, August 6, 1950, July 3, 1947, June 22, 1939, March 10, 1938, and January 23, 1937, the requirements of this section are to be treated as later enacted or promulgated laws or regulations under paragraph (6) of the 1963 rules, paragraph (h) of the 1950 rules, paragraph (g) of the 1947 rules, paragraph (5) of the 1939 rules, paragraph (5) of the 1938 rules, and paragraph (5) of the 1937 rules and applied to the full extent that those rules allow.

(5) In any instance of direct and irreconcilable conflict between these rules and valid existing rights, established pursuant to prior rules governing reserved or outstanding mineral rights, which is not resolved by paragraphs (k)(1)-(5) of this section, the conflicting provisions of these rules do not apply to the extent of the conflict, except that paragraphs (b)(1)-(3) and (i) shall apply in all instances. Moreover, the Service shall exercise all authority available to it under law to realize as many of the purposes and requirements of this section as possible.

(l) Nothing herein contained shall be construed to exempt operators or the mining operations from any requirements of applicable State laws, nor from compliance with, or conformity to, any requirement of any law or regulation which later may be enacted or promulgated, and which otherwise would be applicable.

(m) The conditions, rules and regulations set forth in paragraphs (a)-(j), this section shall not apply to reservations contained in conveyances of lands to the United States under the Act of March 3, 1925, as amended (43 Stat. 1133, 64 Stat. 82; 16 U.S.C. § 555), except that paragraphs (b)(1)-(3) and (i) of this section shall apply in all instances.

(n) In cases where a State, or an agency, or a political subdivision thereof, reserves minerals, oil, gas, or other inorganic substances, in the conveyance of land to the United States under authorized programs of the Forest Service and there are provisions in the laws of such State or in conditions, rules and regulations promulgated by such State, agency or political subdivision thereof, which the Chief, Forest Service, determines are adequate to protect the interest of the United States in the event of the exercise of such reservation, the Chief, Forest Service, is hereby authorized, in his discretion, to subject the exercise of the reservation to such statutory provisions or such conditions, rules and regulations in lieu of the conditions, rules and regulations set forth in paragraphs (a) through (j) of this section, except that paragraphs (b)(1)-(3) and (i) of this section shall apply in all instances. In that event, such statutory provisions or such conditions, rules and regulations shall be expressed in and made a part of the deed of conveyance to the United States and the reservation shall be exercised thereunder and in obedience thereto.

* * * * *

A revision along these lines would afford the Forest Service a leadership position among the federal land management agencies. These revisions incorporate the most protective provisions of existing law and strengthen them by adding clear ecosystem management goals and public information requirements. While still ensuring that private subsurface

rights holders may access their property, they protect the public's resources and establish a unified permitting process for all private subsurface rights.

VI. Conclusion

The Sierra Club thanks the Forest Service for the opportunity to offer these comments. The need for regulatory reform is pressing and we urge the Service to take the opportunity to improve a regulatory structure that has too often failed to protect public resources in the past. We also remind the Service that if it does take this opportunity to revise its regulations, all appropriate procedures must be followed for the revision itself, including compliance with the terms of the Administrative Procedure Act, NEPA, NHPA, and ESA. We look forward to collaborating further with the Service as it works to improve management of the public lands.

Sincerely,

/s/ Craig Holt Segall

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