DEPARTMENT OF AGRICULTURE

Forest Service

36 CFR Part 292

RIN 0596–AB39

Smith River National Recreation Area

AGENCY: Forest Service, USDA.

ACTION: Final rule.

SUMMARY: This final rule implements Section 8(d) of the Smith River National Recreation Area Act of 1990 and sets forth the procedures by which the Forest Service will regulate mineral operations on National Forest System lands within the Smith River National Recreation Area.

This rule supplements existing Forest Service regulations and is intended to ensure that mineral operations are conducted in a manner consistent with the purposes for which the Smith River National Recreation Area was established.

EFFECTIVE DATE: This rule is effective April 27, 1998.

FOR FURTHER INFORMATION CONTACT: Sam Hotchkiss, Minerals and Geology Management Staff, (202) 205–1535.

SUPPLEMENTARY INFORMATION:

Background

The Smith River National Recreation Area (SRNRA) was established by the Smith River National Recreation Area Act of 1990 (the Act) (16 U.S.C. 460bbb *et seq.*). The purpose of the Act is to ensure ''* * * the preservation, protection, enhancement, and interpretation for present and future generations of the Smith River watershed's outstanding wild and scenic rivers, ecological diversity, and recreation opportunities while providing for the wise use and sustained productivity of its natural resources * * *.''

In order to meet the purposes of the Act, Congress directed the Forest Service to administer the SRNRA to, among other things, provide for a broad range of recreation uses and improve fisheries and water quality. Subject to valid existing rights, Congress prohibited locatable mineral operations, prohibited mineral leasing (including leasing of geothermal resources), and limited the extraction of mineral materials within the SRNRA to situations where the material extracted is used for construction and maintenance of roads and other facilities within the SRNRA and in certain areas excluded from the SRNRA by the Act.

The SRNRA consists of approximately 300,000 acres of National Forest System lands in the Six Rivers National Forest in northern California. The Act divides the SRNRA into eight distinct management areas and specifies a management emphasis for each. There are also four areas within the exterior boundaries of the SRNRA that were expressly excluded from the provisions of the Act.

One of the eight management areas in the SRNRA is the Siskiyou Wilderness, most of which was designated by Congress on September 26, 1984. The Gasquet-Orleans Corridor was added to the Siskiyou Wilderness by the Act in 1990. The Act specifies that the Siskiyou Wilderness is to continue to be managed pursuant to the provisions of the Wilderness Act. In accordance with Section 4(d)(3) of the Wilderness Act, the federal lands within the Siskiyou Wilderness (excluding the Gasquet-Orleans Corridor addition) were withdrawn from the operation of the mining and mineral leasing laws, subject to valid existing rights, as of September 26, 1984.

The Act also redesignated the following rivers and some of their tributaries as components of the National Wild and Scenic Rivers System: (1) The Smith River; (2) the Middle Fork of the Smith River; (3) the North Fork of the Smith River; (4) the Siskiyou Fork of the Smith River; and (5) the South Fork of the Smith River. These same rivers and most of the designated tributaries had previously been designated components of the Wild and Scenic Rivers System on January 19, 1981, pursuant to Section 2(a)(ii) of the Wild and Scenic Rivers Act. The Act designated as wild segments two tributaries which had not previously been designated—Peridotite Creek, tributary to the North Fork of the Smith River, and Harrington Creek, tributary to the South Fork of the Smith River. The Act also changed the classification of some tributaries designated in 1981, from recreational to scenic or wild. For example, the lower 2.5 mile segment of Myrtle Creek, tributary to the Middle Fork of the Smith River, was reclassified as wild. In the Act, Congress directed that these designated wild and scenic rivers and tributaries be managed in accordance with the Act and the Wild and Scenic Rivers Act, whichever is more restrictive. In accordance with Section 9(a)(iii) of the Wild and Scenic Rivers Act, the federal lands within segments of designated rivers or tributaries classified ''wild'' (except for Peridotite Creek, Harrington Creek, and the lower 2.5 miles of Myrtle Creek that were reclassified in the Act) were withdrawn from the operation of the mining and mineral leasing laws, subject to valid existing rights on January 19, 1981.

Under this patchwork of wild and scenic rivers, wilderness, and national recreation area designations there emerge three different dates of withdrawal which apply to federal lands. First, there are the federal lands within ''wild'' segments of wild and scenic rivers (excluding those that were designated or reclassified as ''wild'' in the Act) which were withdrawn subject to valid existing rights on January 19, 1981, pursuant to Section 9(a)(iii) of the Wild and Scenic Rivers Act. Second, there are the federal lands within the Siskiyou Wilderness (excluding both the Gasquet-Orleans Corridor addition and the aforementioned ''wild'' segments of wild and scenic rivers) which were withdrawn subject to valid existing rights on September 26, 1984, pursuant to Section 4(d)(3) of the Wilderness Act. Third, the remaining federal lands that comprise the SRNRA (which includes, among others, the ''scenic'' and ''recreational'' segments of wild and scenic rivers, the ''wild'' segments of wild and scenic rivers as designated or reclassified by the Act, and the Gasquet-Orleans Corridor addition to the Siskiyou Wilderness) that were withdrawn subject to valid existing rights on November 16, 1990, pursuant to Section 8(a) of the Act.

Mining and prospecting for minerals have been important parts of the history of the Smith River area since the 1850's. Historically, mining operations within the Smith River area have been small-scale placer gold exploration and recovery operations within the bed and banks of the Smith River and its main tributaries. Panning, sluicing, and dredging operations occur predominantly during the summer months. In recent years, large, low-grade, nickel-cobalt resources in the uplands of the Smith River watershed have attracted the attention of prospectors. Based on a review of Bureau of Land Management (BLM) records, there were approximately 2,776 mining claims covering about 30,000 acres of National Forest System lands within the SRNRA upon the date of enactment of the Act in 1990. By May 1997, however, BLM records indicate that there were only approximately 297 mining claims covering about 7,700 acres of National Forest System lands in the SRNRA that met current filing requirements. None of the claims are for mill site locations. There are no active operations on mining claims or on lands with outstanding mineral rights.

In Section 8 of the Act, Congress addressed the extent to which mineral operations would be authorized within the SRNRA. Section 8(a) of the Act withdrew as of the effective date of the Act, all federal lands in the SRNRA from the operation of the mining, mineral and geothermal leasing laws subject to valid existing rights. Section 8(b) precluded the issuance of patents for locations and claims made prior to the establishment of the SRNRA. Section 8(c) of the Act prohibited all mineral operations within the SRNRA except where valid existing rights are established. Section 8(c) also prohibited the extraction of mineral materials such as, common varieties of stone, sand, and gravel, except if used in the construction and maintenance of roads and other facilities within the SRNRA and the excluded areas. Finally, under Section 8(d), the Secretary was authorized and directed to promulgate supplementary regulations to promote and protect the purposes for which the SRNRA was designated.

On November 8, 1994, the largest claimholder in the SRNRA filed suit against the Department of Agriculture in United States District Court for the Northern District of California alleging violations of the Act. *California Nickel Corp.* v. *Espy,* No. C94–3904–DLJ (N.D. Cal.). Specifically, the suit alleged that the Department violated the Act by not promulgating regulations for mineral operations in the SRNRA as required under Section 8(d). The Department did not dispute that Section 8(d) of the Act required the promulgation of supplementary regulations for the SRNRA. In fact, preliminary progress towards the development of a regulation had been made prior to the initiation of litigation.

On June 23, 1995, proposed supplementary regulations for mineral activities in the SRNRA were published in the **Federal Register** for notice and comment (60 FR 32633). Seven letters were received during the 60-day comment period and were considered in the development of a final rule which was published on April 3, 1996 (61 FR 14621). Upon publication, the claimholder who had initiated litigation against the agency amended its complaint to challenge the substance of the April 3, 1996, final rule. On March 14, 1997, the court invalidated three provisions of the April 3, 1996, final rule. *California Nickel Corp.* v. *Glickman,* No. C–94–3904–DLJ, slip op. (N.D. Cal. Mar. 14, 1997). Specifically, the court held that a provision limiting the period of approval of a plan of operations to 5 years was arbitrary and capricious because the agency had failed to evaluate whether mining under such a time constraint might result in a taking of private property. The court also ruled that the agency had been arbitrary and capricious by failing to explain why the supplementary regulations did not include a timetable for processing and reviewing plans of operations. Finally, the court ruled that mining operators had been denied due process because the rule did not include a mechanism by which Forest Service determinations that valid existing rights had not been established could be reviewed within the Department of the Interior.

On September 8, 1997, the Forest Service published a second proposed rule for notice and comment which included provisions that addressed the court's concerns (62 FR 47167). Specifically, the second proposed rule provided that plans of operations would be approved for the minimum time reasonably necessary for a prudent operator to complete mining operations. The second proposed rule also stipulated that plans of operations would be reviewed for completeness within 120 days of submission and that valid existing rights determinations would be completed within 2 years except when the Forest Service could show cause as to why additional time was necessary. Finally, the second proposed rule included a provision requiring the Forest Service to promptly request the Bureau of Land Management to initiate a contest action whenever it concluded that an applicant had failed to establish the presence of valid existing rights. Other modifications were made to clarify and improve the regulations generally, but they were not required as a result of the March 1997 court decision.

Four letters were submitted during the 60-day comment period that ended on November 7, 1997. The comments contained in these four letters were considered by the Forest Service in the development of this final rule. Based on the comments, several changes were made in the text of the final rule. Some of these changes were made to the provisions of the second proposed rule which had been added to respond to the court's concerns with the first final rule. For example, a new provision was added to this final rule which expressly provides for an extension of the approval period for a plan of operations. Additionally, the time to review a plan of operations for completeness was shortened from 120 to 60 days. Finally, the procedure by which a Forest Service valid existing rights determination is referred to the Bureau of Land Management was refined and clarified. These and other changes and the reasons for the changes are explained more fully in the following paragraphs.

All comments received are available for review in the Office of the Director, Minerals and Geology Management Staff, Auditors Building, 4th Floor, 201 14th Street, SW., Washington, DC, during regular business hours (8 a.m. to 5 p.m.) Monday through Friday. The Department appreciates the time and energy the reviewers invested in preparing these letters and in articulating their views regarding the proposed rule.

Analysis of Public Comment

Comments on the proposed rule dealt with general issues, including whether supplementary regulations are necessary, whether a taking of private property had occurred, whether the agency exceeded its authority to regulate mineral operations on National Forest System lands, whether the new provisions in the second proposed rule were the same or substantially similar to those in the first final rule that had been struck down by the court, whether the supplementary regulations were in furtherance of the Act, whether the supplementary regulations were punitive, whether mineral collecting was a permissible recreational activity in the SRNRA, whether the requirement for a plan of operations should apply to suction dredge and sluice operations, and whether delay by the Forest Service in promulgating the supplementary regulations caused the abandonment of more than 4,500 mining claims. In addition to the preceding general comments, several specific issues concerning the enumerated provisions of the proposed rule were raised. A summary of the comments and the Department's responses to them follows.

General Comments

1. *Supplementary mining regulations are unnecessary since the Forest Service already has adequate authority to protect the SRNRA in accordance with the Act.* One reviewer stated that there is no need for additional regulations pertaining to mineral operations in the SRNRA since existing Forest Service regulations governing these activities at 36 CFR part 228 provide ample protection to the SRNRA and its resources.

Response: The issue of whether additional regulation of mineral operations in the SRNRA is necessary was conclusively determined by Congress in Section 8(d) of the Act. This provision specifically states that ''the Secretary (of Agriculture) is authorized and directed to issue supplementary

regulations to promote and protect the purposes for which the (SRNRA) is designated.'' It is not within the discretion of the Department to evaluate whether such regulations are necessary. The Act obligates the Department to issue them, therefore, no change to the rule has been made based on the comment.

2. *The new regulations should not differ from the Forest Service's current mining regulations at 36 CFR part 228 unless ''some unique aspect of the SRNRA'' justifies a change.* One reviewer felt that the supplementary regulations for mineral operations in the SRNRA should be identical to the current mining regulations at 36 CFR part 228 unless ''a reasonable and rational justification * * * based upon some unique aspect of the SRNRA'' can be identified to justify the change.

Response: The Department disagrees with this comment for the following reasons. First, there is no indication in the Act or its legislative history that the supplementary mining regulations must mirror the current mining regulations at 36 CFR part 228 unless a unique attribute of the SRNRA might warrant a change. The Act vested the Department with considerably more discretion to determine the appropriate form and content of the supplementary regulations. It is worth noting, however, that the supplementary regulations build upon, and are integrated with, the Forest Service's current mining regulations at 36 CFR part 228.

Secondly, even assuming that this reviewer was correct, the Act and its legislative history contain numerous references to the unique attributes of the SRNRA which justify different and more stringent regulation of mineral development activities than elsewhere on National Forest System lands. Section 2 of the Act recognizes the ''invaluable legacy'' represented by the undammed and free-flowing Smith River; the unusual ''richness of ecological diversity,'' ''renowned anadromous fisheries,'' ''exceptional water quality,'' and ''abundant wildlife'' in the Smith River watershed; and the ''exceptional opportunities'' for wilderness, water sports, fishing, hunting, camping, and sightseeing. Similar language is contained in the House committee report and floor debate pertaining to the establishment of the SRNRA. *See,* H.Rep. No. 707, 101st Cong., 2d Sess. 11–12 (1990); 136 Cong. Rec. 24720 (Sept. 17, 1990). Thus, there appear to be several ''unique aspects'' in the SRNRA which justify departing from the general Forest Service mining regulations at 36 CFR part 228. Based on the foregoing discussion, no change was made to the rule.

3. *The second proposed rule utilizes many of the provisions from the first final rule that were invalidated by the court.* One reviewer criticized the second proposed rule for containing provisions that varied only slightly from those in the first final rule that were invalidated by the court.

Response: The Department disagrees with this reviewer's characterization.

On March 14, 1997, the court invalidated three provisions of the first final supplementary regulations for the SRNRA that had been published on April 3, 1996. *California Nickel Corp.* v. *Glickman,* No. C–94–3904–DLJ, slip op. (N.D. Cal. Mar. 14, 1997). The court first ruled that a provision limiting the approval period of a plan of operations for mining in the SRNRA to 5 years was arbitrary and capricious because the agency had failed to consider all the relevant factors in adopting this provision. Specifically the court concluded that there was no indication in the record that the agency had considered whether a 5-year limit might result in a taking of private property. *Id.* at 9–11. The court next ruled that a provision exempting plans of operations in the SRNRA from the generally applicable timetables for review set forth in the mining regulations at 36 CFR part 228, subpart A, was arbitrary and capricious because the agency failed to explain or justify its position. *Id.* at 11–13. Finally, the court held that the rule denied a mining operator due process because it did not provide a mechanism by which the Bureau of Land Management could review determinations by the Forest Service that valid existing rights had not been established by the operator. *Id.* at 13–17.

The Forest Service took the court's concerns seriously. Bearing in mind its overall responsibility to administer the SRNRA in conformance with the Act, the Forest Service published a second proposed rule on September 8, 1997, which specifically responded to the deficiencies that had been identified by the court (62 FR 47167).

With respect to the approval period for a plan of operations, the new proposed rule provided for approval for the ''minimum amount of time reasonably necessary for a prudent operator to complete the mineral development activities covered by the approved plan of operations.''

This provision ensures the protection of the SRNRA while providing mineral operators the necessary flexibility to conduct their activities. The Department believes this approach should allay concerns about the potential deprivation of property arising from an abbreviated approval period which might preclude the completion of mining operations. At the same time, this provision should ensure that mining operations will be conducted in an expeditious manner and will not be protracted over time to the detriment of the land and resources of the SRNRA.

With respect to timetables for reviewing plans of operations in the SRNRA, the second proposed rule provided that the Forest Service will notify the operator within 120 days whether all the necessary information to evaluate a plan of operations has been submitted. In addition, the second proposed rule provided that once the necessary information has been submitted, the determination of whether the operator has established valid existing rights will be completed within 2 years unless the agency can show good cause in writing as to why more time will be necessary. The preamble of the second proposed rule went into considerable detail to explain why this timetable, rather than the timetable set forth at 36 CFR part 228, subpart A, was more appropriate for reviewing plans of operation in the SRNRA.

Finally, with respect to appeals of valid existing rights determinations adverse to a mining operator, the second proposed rule provided that the Forest Service would notify the Bureau of Land Management promptly of adverse determinations and request the initiation of a mineral contest action against the pertinent mining claims.

The Department believes that the changes in the second proposed rule are significant and address the concerns identified by the court in its March 14, 1997, ruling. The Department also believes that the second proposed rule was faithful to, and consistent with, the legal obligations assumed by the Forest Service pursuant to the Act. It should be noted that each of the provisions added to the second proposed rule based on the March 14, 1997, court decision was further modified in response to comments that were received on the second proposed rule. Therefore, no changes were made to the rule based on this comment.

4. *The regulations are unlawful because they exceed the Forest Service's authority to administer minerals on National Forest System lands and do not promote and protect the purposes for which the SRNRA was established.* Two reviewers stated that the second proposed rule unlawfully augmented the Forest Service's authority to regulate minerals in the SRNRA. One of these reviewers added that by effectively eliminating recreational mining from

the SRNRA, the proposed rule was flawed because it did not ''promote and protect'' one of the purposes for which the SRNRA was established.

Response: The Department disagrees with this comment. This rule does not increase the authority of the Forest Service to regulate minerals in the SRNRA. Rather, it sets forth a system for determining whether a claimholder possesses valid existing rights and, where such rights exist, the terms and conditions under which National Forest System lands may be used to conduct mineral development activities. This system is entirely consistent with the authority delegated by Congress in Section 8(d) of the Act which, the Department believes, reflects an eminently reasonable compromise between an outright prohibition of all mining in the SRNRA (which might have led to potential takings liability) and permitting mining to continue without additional regulation (which might have adversely impacted the values for which the SRNRA was established).

The Department also rejects the assertion that mining was considered one of the ''recreational'' activities for which the SRNRA was established and which the Forest Service must ''promote and protect'' through its administration. Section 2 of the Act specifically identifies ''wilderness, water sports, fishing, hunting, camping, and sightseeing'' as recreational activities occurring in the SRNRA. Although this recitation is not necessarily exclusive, mining is clearly not the type of activity that fits comfortably within this class of recreation pursuits. No changes to the rule were made based on the comments of these two reviewers.

5. *The supplementary regulations target a single class of users and is punitive.* One reviewer contended that the second proposed rule was punitive and directed at a single class of users of the SRNRA, namely miners. This reviewer further noted that in other congressionally designated national recreation areas, supplementary regulations addressed activities other than just mining and affected parties other than just miners.

Response: The Department agrees that the supplementary regulations apply only to those wishing to conduct mineral operations in the SRNRA, but disagrees that they are punitive. The narrow focus of the regulations is based on the statutory authority in Section 8 of the Act which pertains explicitly and exclusively to mining. The legislative history of the Act reinforces the view that Congressional intent in adding this provision was to avoid or minimize mining practices that might negatively impact the resource values for which the SRNRA was established.

> With regard to mining, the amendments would give explicit recognition to the rights associated with valid existing claims, and direct the Secretary to issue supplementary regulations designed to ''promote and protect'' the purposes for which the recreation area is created. Although I remain concerned about the potential for destructive mining, I am hopeful that the supplemental regulations will address those concerns.

136 Cong. Rec. H13045, 13046 (Oct. 26, 1990) (Statement of Rep. Bosco).

The Department disagrees with the reviewer's suggestion that the scope of these regulations should be expanded based on similarly expansive supplementary regulations in other congressionally designated national recreation areas. The statutes which established these other areas specifically address the types of issues to be covered by the regulations. *See, e.g.,* the Sawtooth National Recreation Area Act, 16 U.S.C. 460aa–3, −10; the Hells Canyon National Recreation Area Act, 16 U.S.C. 460gg–7(a–e).

Since limiting the scope of this rule to mineral operations in the SRNRA is fully consistent with the Act and its associated legislative history, the Department declines to expand the scope of the final rule to address other uses and activities occurring within the SRNRA. Therefore, no changes to the rule were made based on this comment.

6. *The rule was drafted to eliminate mining from the SRNRA and, in so doing, it does not provide for the wise use and sustained productivity of its resources.* One reviewer asserted that the second proposed rule would result in the elimination of mining from the SRNRA and, thus, would not provide for the wise use and sustained productivity of resources as required by the Act.

Response: The Department disagrees with this comment. The Act, not this rule, prohibits mining in the SRNRA, except where valid existing rights can be established. This rule merely prescribes the procedure to be used by the Forest Service to determine whether valid existing rights are present and, if so, the appropriate terms and conditions under which the mining operations should be conducted in order to ensure that the values for which the SRNRA was established are protected in perpetuity. No change was made to this rule based on this comment.

7. *Forest Service's strategy of delay and burden has already resulted in abandonment of 4,500 claims in the SRNRA.* One reviewer accused the Department, through its delay in the promulgation of this rule, of being responsible for the abandonment of more than 4,500 mining claims in the SRNRA.

Response: The Department disagrees with this reviewer's contention. According to records maintained by the Bureau of Land Management, there were approximately 2,776 claims listed as ''open'' when the SRNRA was established in 1990. Assessment work for over one-half of those claims had not been recorded with BLM for the 1989–1990 assessment year. In some cases, assessment work had not been recorded for several years prior to the establishment of the SRNRA. As a result, in 1991, BLM issued ''abandoned and void'' decisions on 1,329 claims in the SRNRA. None of these abandonment decisions resulted from any actions, or lack thereof, as the case may be, by the Department. This meant that approximately 1,447 mining claims were still listed on National Forest System lands within the SRNRA in 1991.

Beginning with the 1993–1994 assessment year, the Bureau of Land Management instituted a new nationwide fee system requiring holders of more than ten claims to pay a $100 per claim fee while allowing holders of ten or fewer claims to obtain an exemption from the fee requirement. Of the approximately 1,447 mining claims in the SRNRA in 1991, fees were paid or exemptions obtained on only 320 claims. As a result, the Bureau of Land Management issued ''abandoned and void'' decisions on an additional 1,127 claims in the SRNRA. Once again, the abandonment of these claims was unrelated to Forest Service administration of the SRNRA.

Since then, the holders of an additional 23 claims have failed to pay the required fees or obtain an exemption to the fees. These claims also have been declared abandoned and void by BLM. Thus, there are only 297 open claims in the SRNRA at this time. No change to the rule was required based on this comment.

8. *Limiting ''recreational mining'' is inconsistent with the SRNRA.* Two reviewers stated that the purposes for which the SRNRA was designated include recreational mining and prospecting activity and that any attempt to limit recreational mining is at odds with congressional intent.

Response: Executive agencies of the Government cannot permit activities involving the search for, and removal of, minerals on federal lands, including National Forest System lands, except to the extent that Congress has enacted legislation authorizing those activities.

This limitation results from Section 3 of Article 4 of the United States Constitution which provides in pertinent part that: ''Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.'' Accordingly, as the United States Supreme Court has observed, the United States owns the minerals found on its lands ''and it lies in the discretion of Congress, acting in the public interest, to determine how much of the property it shall dispose.'' *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 336 (1936).

In 1872, Congress enacted general mining laws providing for the disposal of locatable minerals on federal lands now included in the SRNRA. 30 U.S.C. 22 *et seq.* However, in 1990, when Congress enacted the Act, it expressly withdrew the SRNRA from the operation of the mining laws, subject to valid existing rights. 16 U.S.C. 460bbb–6(a). As noted in the Supplementary Information section, some of the federal land within the SRNRA had been withdrawn from the operation of the mining laws prior to the enactment of the Act in 1990. Congress concluded that mining in the SRNRA was inconsistent with the purposes for which the SRNRA was established or else it would not have withdrawn these lands from the operation of the United States mining laws. To construe the Act as authorizing mining of locatable minerals, whether that mining is characterized as being for ''recreational'' or ''commercial'' purposes, absent the existence of valid existing rights, would frustrate Congressional intent to block that very activity.

In summary, the only mineral activities that may occur in the SRNRA are those for which valid existing rights have been established, those authorized by a mineral materials contract or permit, or those associated with outstanding mineral rights. The Department has no authority to allow locatable mineral activities on lands in the SRNRA, whether the activity is characterized as a recreational pursuit or a commercial venture, unless the Government determines that valid existing rights have been established. This prohibition applies even if an individual wishes to mine for personal enjoyment rather than financial gain and even if the impact on the lands and resources of the SRNRA is minimal. Therefore, no change has been made in the rule as a result of these comments.

9. *Plan of operations should not be required for suction dredge and sluice operations.* Two reviewers contended that the rule should not require plans of operations for suction dredge and sluice operations.

Response: Locatable mineral operations on National Forest System lands are primarily governed by the current locatable mineral regulations at 36 CFR part 228, subpart A. In the past, suction dredging operations in the SRNRA have been authorized by plans of operations, notices of intent, and, occasionally, without any written authorization at all. However, as noted previously, in establishing the SRNRA, Congress specified that subject to valid existing rights, all locatable mineral operations on federal land are prohibited. Furthermore, even in those instances where an operator establishes valid existing rights to conduct dredging operations, those operations would still be subject to regulation to ensure that the values for which the SRNRA was established were protected and enhanced.

By requiring a plan of operations for suction dredging activities, the Department can accomplish two objectives. First, it can verify that the operator possesses valid existing rights to conduct suction dredging operations. Second, it can ensure that the impacts of the suction dredging operations are minimized to the extent practicable in order to protect and preserve the values for which the SRNRA was established. The Department believes that in order to protect the unique fishery and other resource values of the SRNRA, careful and considered evaluation of all suction dredging activities is necessary. The best mechanism for this to occur is through the process of developing and reviewing a plan of operations. Therefore, no changes were made in the final rule to exempt suction dredging activities from the plan of operations requirements.

10. *Review periods of one to two years for proposals to conduct suction dredge operations is onerous and doesn't promote ''recreational mining''.* One reviewer asserted that suction dredge operations and sluicing have negligible impact on surface resources and should not be required to be approved under a plan of operations with a possible processing timeframe of 1 to 2 years.

Response: As an initial matter, it should be noted that the Department does not agree that all suction dredging and small scale sluicing operations have negligible environmental impacts. Furthermore, the impacts of these activities must be evaluated individually and cumulatively. It may well be that the effect of an individual operation is minimal, but the cumulative effect of several such operations may be significant.

With respect to the time it takes to review a plan of operations, the rule sets out 2 years as the maximum amount of time (except for good cause shown) to evaluate whether valid existing rights are present. Under certain circumstances, it may not take the full 2 years to complete this evaluation.

The issue concerning whether the Department has the authority to permit ''recreational mineral activities'' absent valid existing rights has been addressed previously. Based on the foregoing, no change was made in the final rule in response to this comment.

11. *Characterization of nickel-cobalt resources as ''low grade''.* One reviewer objected to the characterization of the nickel-cobalt resources in the uplands of the Smith River watershed as ''low-grade'' to the extent that this characterization suggests that the resources are either insignificant or unworthy of development and requested that the characterization ''low-grade'' be deleted from the preamble.

Response: ''Low grade'' is a phrase commonly used within the mining industry to describe situations where the anticipated percentage of elements in a given area is less than the percentage of the same elements currently being mined elsewhere. This is an apt description of the nickel-cobalt resources in the SRNRA. In fact, the holder of most of the claims in the SRNRA where the nickel-cobalt resources are located has previously acknowledged that the grade of the nickel-cobalt resources in the SRNRA is less than the grade of nickel-cobalt resources being mined in other parts of the world. No change was made to the rule as a result of this comment.

12. *The proposed rule underestimates the amount of time required for an operator to gather and submit information required as part of a plan of operations.* One reviewer commented that the proposed rule's estimate of 2 hours as the time required for an operator to gather and submit information required by the Forest Service as part of a plan of operations was too low.

Response: The Department has reassessed its original estimate. Initially, it was thought that an operator could gather the data and complete a plan of operations in 2 hours. The Department continues to believe that the vast majority of the data and information required for a plan of operations should be in the possession of the operator or is readily obtainable and should take only a couple of hours to compile and submit. However, in response to the

comments received on this issue, the estimated time to gather the requested information and prepare a plan of operations has been increased from 2 to 20 hours. The final information package submitted to the Office of Management and Budget estimates that it will take an average of 20 hours to gather and submit the information required for review and that, on average, two parties will submit plans of operation to the Forest Service each year for review. This results in an estimated total annual burden of 40 hours. Based on the comment regarding the time it takes to gather and submit information for a plan of operations, a change was made in the ''Controlling Paperwork Burdens on the Public'' section of the preamble for the second final rule.

13. *The proposed rule effects a taking of property without just compensation in violation of the Fifth Amendment of the Constitution.* One reviewer suggested that the mere publication of a proposed rule for notice and comment violated the Fifth Amendment by taking property without just compensation.

Response: The Department disagrees with the comment. The Fifth Amendment states in part ''* * * nor shall private property be taken for public use without just compensation.'' The act of publishing a proposed rule for notice and comment does not deprive anyone of a property interest protected by the Fifth Amendment. Indeed, a proposed rule is not even enforceable. It is only after a final rule is published in accordance with the provisions of the Administrative Procedures Act that a regulation becomes enforceable. Thus, the publication of a proposed rule cannot constitute a taking. Therefore, no change to the preamble was made based upon this comment by a reviewer.

14. *Compliance with Executive Order 12630.* Several reviewers took issue with the means by which the agency satisfied the obligations of Executive Order 12630 which requires agency officials to evaluate the potential takings implications of their actions. These reviewers asserted that evaluating the agency action of publishing a proposed rule for potential takings liability was ''disingenuous,'' ''false reasoning,'' and ''make(s) a mockery'' of the Executive Order. Two of the reviewers suggested that the takings implication of the final rule should be evaluated as well.

Response: The Department disagrees with the reviewers. Executive Order 12630 was issued in 1988 to facilitate internal analysis of the potential takings implications of proposed agency actions. The objective of the Executive Order is to ensure that agency officials are notified in advance of the potential takings implications associated with proposed actions. Such advance notice should minimize inadvertent takings and may lead to modifications of the proposed action, although there is nothing in the Executive Order which requires an agency to modify proposed actions to avoid a potential taking. Executive Order 12630 specifically provides that it is ''intended only to improve the internal management of the Executive branch and is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person.''

The only agency action at issue in this instance was the publication of a proposed rule. As indicated previously, a proposed rule is not enforceable as law and, therefore, cannot affect private property. Furthermore, it would have been inappropriate to evaluate the underlying provisions of the proposed rule for takings implications since those provisions might be subsequently modified in the final rule.

A takings implication assessment has been prepared on this second final rule. It concludes that the action of publishing a final rule does not present the risk of a taking. It does, however, acknowledge that the regulation, as applied in a specific case, may present the risk of a taking. Since takings claims are highly fact specific, it is not prudent to engage in further conjecture at this time regarding whether private property might be taken as a result of the ''as applied'' affect of the rule on private property. Among the factors that would be considered if such a claim arose are the character of the government action, the economic impact of the government action on the property, and the reasonable investment backed expectations of the property owner. For obvious reasons, it is impossible to make judgments regarding these factors at this point. However, additional takings implication assessments will be prepared in accordance with Executive Order 12630 to evaluate potential takings risks associated with agency implementation of these supplementary regulations. No change was made to the final rule based on this comment. However, a takings implication assessment was prepared on the final rule.

Specific Comments on Proposed Subpart G

The following discussion addresses comments on specific sections of the proposed rule and, where applicable, identifies modifications in the final rule made as a result of the comments.

No comments were received on § 292.61—Definitions, § 292.66—Operating Plan Requirements, § 292.67—Operating Plan Approval, and § 292.68—Mineral Material Operations. Consequently, the final rule adopts the text of these sections as originally proposed, and no further discussion is included in this analysis.

In addition, in § 292.60, one typographical error has been corrected and paragraph (e) has been deleted. The decision to eliminate paragraph (e) which dealt with the effect of the supplementary mining regulations on ongoing mineral operations was made because there are no ongoing operations in the SRNRA at this time nor are any plans of operations currently being considered. Thus, it was determined that the deletion of paragraph (e) would simplify the supplementary regulations by eliminating a provision that discusses a contingency which does not exist. Beyond that, no additional changes were made to § 292.60 and it is not discussed further in this analysis.

Finally, citations in this final rule to these regulations or to other regulations applicable to the administration of National Forest System lands have been modified to conform with the format established by the Office of the Federal Register. These changes do not affect the rights and obligations of the Federal Government or any affected interests.

Section 292.62, Valid Existing Rights

Paragraph (a) of this section sets forth three definitions of ''valid existing rights'' that will be used to evaluate mining claims in the SRNRA. The only difference in the three definitions is the date by which the location and discovery of the valuable mineral deposit must have occurred. The definition that applies to a given mining claim will depend on whether the claim lies on federal lands within the corridor of a wild segment of a wild and scenic river designated in 1981, within that portion of the Siskiyou Wilderness designated in 1984, or within the remainder of the SRNRA. Paragraph (b) of this section provided that limited mining operations may be authorized in order to enable an operator to confirm that discovery of a valuable mineral deposit occurred prior to the applicable date of withdrawal. This paragraph provided that the operations would be ''limited in scope and duration'' but did not provide independent authority to prospect, explore, or make a new discovery.

Comment: The Forest Service is without authority to alter the United States mining laws in defining valid existing rights. One reviewer agreed

with the definition of valid existing rights in paragraph (a)(3) if it merely requires the claimant to have a valid mining claim as of the date of enactment of the Act, the claim has not been subsequently abandoned, and the appropriate fees and filings have been made. The reviewer objected to any additional requirements of the definition in paragraph (a)(3) which would allegedly alter the United States mining laws. In particular, the reviewer urged that paragraph (a)(3)(iv) be confined to the technical aspects of retaining a valid unpatented mining claim. The reviewer further stated that paragraph (a)(3)(iv) should not be construed to allow the Forest Service to evaluate the continued validity of a mining claim even though the reviewer acknowledged that the Bureau of Land Management possessed that authority.

Response: Initially, it should be noted that the United States mining laws do not contain a definition of ''valid existing rights.'' To the extent that a definition of ''valid existing rights'' exists, it is largely the product of judicial and administrative interpretations of the United States mining laws. The definition of ''valid existing rights'' in § 292.62(a) is fully consistent with the United States mining laws, relevant case law, and administrative interpretations. These authorities have long held that for a mining claim to be valid it must be properly located, supported by the discovery of a valuable deposit of a locatable mineral, located and held in good faith, and properly maintained in compliance with certain filing requirements and annual labor or fee requirements. For a mining claim located in a withdrawn area to constitute a valid existing right, the claim must have been valid prior to the effective date of the withdrawal of the area, continue to be held in good faith, continue to be maintained in compliance with filing and annual labor or fee requirements, and continue to be supported by the discovery of a valuable mineral deposit. The last element means that the mineral deposit must continue to remain valuable. In that regard, it is well established that the exhaustion of a mineral deposit or loss of its marketability will lead to a finding that the mining claimant no longer possesses valid existing rights.

To the extent that the reviewer is suggesting that the Forest Service may not examine issues relevant to the question of whether a mining claim constitutes a valid existing right, except in connection with a mineral contest initiated by the Bureau of Land Management, the position of this Department as well as the Department of the Interior is to the contrary.

> We recognize that a final determination that a claim is invalid for lack of discovery can be made only after a contest proceeding. We also recognize, however, that the mere location of a claim does not presumptively make it valid and that an agency operating under a mandate to minimize surface disturbance may properly require the mining claimant to affirmatively establish the existence of a valid existing right * * * before allowing operations to proceed.

Richard C. Swainbank, 141 IBLA 37, 44 (1997)(citation omitted). While *Swainbank* involved the National Park Service, its holding applies to the Forest Service, which, like the National Park Service, also operates under a mandate to minimize surface disturbance resulting from locatable mineral operations.

Since the Act withdrew the lands in the SRNRA from the operation of the United States mining laws subject to valid existing rights, it is not within the Department's discretion to authorize operations within the SRNRA unless the claimant can demonstrate that the mining claim satisfies all of the requirements in § 292.62(a) and, therefore, constitutes a valid existing right. No change has been made in the final rule in response to this comment.

Comment: The Forest Service must approve operations for the purpose of confirming a discovery of a valuable locatable mineral deposit. Two reviewers objected to § 292.62(b) because they contend it unlawfully gives the Forest Service broad discretion to refuse to permit operations necessary to confirm the discovery of a valuable mineral deposit consistent with the definition of valid existing rights in § 292.62(a). One of the reviewers who contended that the Forest Service must approve such operations, nonetheless, criticized the Forest Service for including this provision in the proposed rule, arguing that it simply provides another opportunity to delay a mining claimant's exercise of the rights accorded by the United States mining laws.

One of the reviewers also objected to the use of the term ''limited'' when describing operations to gather information to confirm the existence of a discovery of a valuable mineral deposit that predated the withdrawal of the SRNRA from the operation of the mining laws. The same reviewer also objected to the provision in § 292.62(b) which stated that the information gathering operations would be ''limited in scope and duration.''

The second reviewer proposed that the § 292.62(b) be revised to specifically authorize mineral operations necessary to demonstrate the quantity and quality of the mineralization.

Response: Section 292.62(b) was added to the second proposed rule to address situations that might arise in the SRNRA when a mining claimant must gather information to confirm that the discovery of a valuable mineral deposit occurred prior to the withdrawal of the SRNRA from the operation of the mining laws. In response to the comments received, this paragraph has been reworded to clarify that an authorized officer must approve a proposed plan of operations submitted by a mining claimant to conduct mineral operations which may be necessary to gather information to confirm the discovery of a valuable mineral deposit consistent with the rule's definition of ''valid existing rights.'' The claimant must, however, provide sufficient information to demonstrate that the exposure of valuable minerals on the claim predated the withdrawal of the land.

Section 292.62(b) codifies administrative interpretations of the United States mining laws which hold that, under certain circumstances, a mining claimant is entitled to an opportunity to collect further information to assist in the determination of whether the mining claim constitutes a valid existing right. The Department does not understand how a procedure that a mining claimant has voluntarily elected can constitute an impediment to an exercise of any rights which the claimant may possess. The procedure provides a mechanism for a claimant to bolster his claim of valid existing rights and presumably this procedure would not be elected by a claimant who is confident that he already possesses such rights. Accordingly, the Department sees no reason to modify § 292.62(b) based on this comment.

The Department agrees that there was no need to refer to operations conducted pursuant to § 292.62(b) as ''limited.'' Similarly, the Department agrees that there is no need to limit the scope and duration of operations carried out under § 292.62(b). Therefore, these words have been omitted from the final rule. However, these changes do not modify the Forest Service's authorities or a mining claimant's rights. The administrative interpretations of the United States mining laws on which § 292.62(b) is based, recognize that the mineral operations, which a mining claimant has the right to conduct on a claim located on withdrawn lands prior to a determination that the claim constitutes a valid existing right, are

inherently limited and those limitations are reflected in the other provisions of § 292.62(b). *See, e.g., United States* v. *Conner*, 139 IBLA 361, 372 (1997); *United States* v. *Crowley*, 124 IBLA 374, 378–379 (1992); *United States* v. *Mavros*, 122 IBLA 297, 310–311 (1992).

The Department does not agree that § 292.62(b) should be revised to require the authorized officer to approve mineral operations needed to demonstrate the quantity and quality of mineralization on a mining claim in the SRNRA. Mineral operations on withdrawn lands may not be permitted for the purpose of exposing new veins or lodes or performing work which would otherwise result in the discovery of a valuable mineral deposit. *United States* v. *Parker*, 82 IBLA 344, 384 (1984); *United States* v. *Chappell*, 42 IBLA 74, 81 (1979). Thus, the Government lacks authority to permit mineral operations pursuant to § 292.62(b) for the purpose of demonstrating the quantity and quality of mineralization on a mining claim unless those operations constitute an effort to confirm or corroborate the preexisting exposure of a valuable mineral deposit discovered prior to the withdrawal of the lands. *United States* v. *Chappell*, 42 IBLA 74, 81 (1979).

Based on the reviewers' comments, § 292.62(b) has been revised to clarify these points.

Section 292.63, Plan of Operations—Supplementary Requirements.

Paragraph (a) of this section specified that a plan of operations is required for all mineral development activities within the SRNRA where a plan would be required under 36 CFR part 228, subpart A, or when mechanical or motorized equipment would be used. Operations covered by this requirement would include, but not be limited to, those using suction dredges or sluices. Paragraph (b) specifically identified the information required in a plan of operations to evaluate an assertion of valid existing rights. Paragraph (c) identified the information required by the Forest Service to evaluate the operational details and impacts of the proposed mineral development activity as well as to determine the appropriate standards to mitigate and reclaim the affected areas.

Comment: A title report prepared by a private certified mineral title examiner should be sufficient to establish chain of title and valid existing rights. Two reviewers suggested that an operator should have an alternative way to satisfy the ''paperwork chain-of-title step'' by providing the Forest Service a report from a certified mineral title examiner or title company which shows an unbroken chain-of-title and valid existing rights.

Response: Proposed § 292.63(b) merely identified the specific information that must be furnished to the Forest Service by the operator in support of the operator's contention that the mining claim constitutes a valid existing right. The operator is free to use anyone, including private certified mineral title examiners or title companies, to collect and assemble the specified information in whatever manner the operator deems appropriate. Thus, no change is required in the rule to enable the operator to use private mineral title examiners or title companies to collect and submit the required information.

The respondents also might be suggesting that the Department should not question the opinion of a private certified mineral title examiner or title company on the issue of whether a mining claim constitutes a valid existing right. The Department does not agree with this suggestion. The Government has a duty to insure that valid mining claims are recognized, invalid mining claims are eliminated, and the rights of the public are preserved. *Cameron* v. *United States*, 252 U.S. 450, 460 (1920). This duty is significant because, as the Supreme Court also recognized in that case, unlawful mining claims result in private appropriations of land which rightfully belong to the public. The Department believes that it would be inappropriate to entrust a party retained and paid for by the proponent of an allegedly valid claim to discharge the government's duty to determine that very question.

For the same reasons, the information that is submitted to the Forest Service pursuant to § 292.63(b) cannot simply be a statement by a certified mineral title examiner or a title company that there is a continuous chain-of-title and that the mining claim constitutes a valid existing right. The submission made pursuant to § 292.63(b) must include the listed items and the information must be provided with specificity so that the government can fulfill its obligation to determine whether the operator has the right to conduct mineral operations in the SRNRA. Therefore, no change has been made to the final rule as a result of these comments.

Comment: Evidence of past or present sales of minerals cannot be required to establish valid existing rights. Three respondents objected to what they perceived to be a mandatory requirement that an operator submit evidence of past and present sales of a valuable mineral as part of a plan of operations. One respondent noted that there is no requirement in the United States mining laws that a claimant must have actually marketed the minerals discovered in order to establish the validity of the mining claim. The other two reviewers contended that the requirement is not supported by case law or legal precedent. One respondent observed that minerals may not have been produced or sold from mining claims which constitute valid existing rights, particularly with respect to lode mining claims in the developmental stage. That respondent also noted that many mining claims have been patented before any production occurred.

Response: The Department agrees that the United States mining laws do not require that a mining claimant must have marketed minerals in order to establish the validity of a mining claim. It is possible for an operator to prove that a mining claim constitutes a valid existing right without having produced minerals from the claim or having sold any minerals that have been produced. The Department also agrees that mining claims have been patented before mineral production has occurred. In proposing § 292.63(b)(9), the Department did not intend to suggest that an operator could not make an adequate showing of valid existing rights absent mineral production or absent past or present sales of minerals from the claim, or to preclude the operator from making that showing.

Nonetheless, evidence of mineral sales is relevant to the operator's assertion that valid existing rights have been established. Sales information represents confirmable documentation that mineral production has occurred on a mining claim. Evidence of mineral production is important because Department of the Interior rules recognize that ''(u)ncontradicted evidence of the absence of production over an extended period of time may, in and of itself, establish a prima facie case of invalidity.'' *United States* v. *Miller*, 138 IBLA 246, 277 n.18 (1997) (citation omitted). The Department of the Interior has explained that ''(t)his rule reflects the principle that, given the varying economic conditions present over a period of many years, a mining claim will usually be developed unless it is not commercially feasible to do so profitably. In other words, the best evidence of what a prudent man would do is what a prudent man has done.'' *United States* v. *Knoblock*, 131 IBLA 48, 88 (1994) (citation omitted).

For these reasons, no change has been made in § 292.63(b)(9) of the final rule except to insert the word ''existing'' at the beginning of the paragraph. This

change makes it clear that an operator is not required to submit evidence of sales which have not occurred or to submit evidence which no longer exists. To the extent that sales evidence exists, it is directly relevant to the determination of valid existing rights and must be provided.

Comment: The reference in the preamble to § 292.63(c)(3) regarding concurrent reclamation was erroneous. One reviewer observed that the preamble referred to a provision of the proposed rule regarding concurrent reclamation at § 292.63(c)(3) but that no such provision existed in the text of the proposed rule.

Response: The reviewer is correct and a change was made in the final rule. The provision concerning concurrent reclamation is set forth at § 292.69. The Department apologizes for any confusion the incorrect citation may have caused.

Section 292.64, Plan of Operations—Approval

Section 292.64 of the proposed rule sets forth the procedure that would be followed to review and approve a plan of operations submitted in conformance with § 292.63. Paragraph (a) stated that within 120 days of submission, the Forest Service would notify the applicant whether all the necessary information had been included or whether additional documentation was necessary. In addition, where all the necessary information had been included, this paragraph further explained that except for good cause shown, the Forest Service would determine whether the applicant possessed valid existing rights within 2 years. Paragraph (b) provided that if an applicant failed to demonstrate to the satisfaction of the Forest Service that valid existing rights had been established, it would notify the applicant in writing of its finding and that it would request the Bureau of Land Management to initiate a mineral contest action. Paragraph (c) stated that an assessment by the Forest Service that an applicant does not possess valid existing rights was a final agency action that was not subject to further administrative appeal within the Department. Paragraph (d) explained that when valid existing rights are present, the Forest Service would proceed to review the rest of the plan of operations which consists largely of the operational details of the mineral development activities being proposed. Paragraph (e) required the Forest Service to notify the applicant whether the plan has been approved or rejected, and paragraph (f) required the Forest Service to explain in writing the reason(s) for not approving a plan. For plans that are approved, paragraph (g) required the Forest Service to establish an approval period which would be equal to the minimum amount of time it would reasonably take a prudent operator to complete the mineral development activities set forth in the plan. Paragraph (h) identified the circumstances that would justify a modification to an approved plan of operations. Finally, paragraph (i) required an operator to develop a new plan of operations or amend a previously approved plan of operations, if the mining operations differed in type, scope, or duration from those described in the original plan, and if those differences would result in resource impacts not anticipated when the original plan was approved.

Comment: The allocation of 120 days to determine whether an applicant had included all the required information in a plan of operations was excessive. All the reviewers remarked that the Forest Service should be able to determine in less than 120 days whether a plan of operations is complete.

Response: The Department agrees. Determination of whether a plan of operations is complete should be a fairly routine task that entails a comparison of the items listed in § 292.63 of the rule with the items submitted by the applicant as part of the plan of operations. Clearly, acknowledgment that a plan is complete should not be construed as a determination that valid existing rights have been established or that the plan has been approved. It merely means that the necessary information has been supplied and that the Forest Service will use this information to conduct its review. In light of the comments received, the time to complete this task has been shortened to 60 days in the final rule.

Comment: The proposed rule turns mining law ''upside down'' by making a claimant prove valid existing rights under a burdensome and lengthy process and unlawfully provides that mineral development activities of those possessing valid existing rights are subject to regulation. One reviewer contended that because claimants are entitled to the exclusive use and possession of the valuable minerals they discover, the proposed rule violates the United States mining laws by shifting the burden from the Government to the operator to demonstrate the establishment of valid existing rights. In addition, by making this burden as onerous and time consuming as possible, the reviewer asserted that the proposed rule is an attempt to drive all mining out of the SRNRA. Finally, this reviewer contended that the proposed rule violates Congress's specific instructions that mining claimants are not to be disturbed by the Department's management of the SRNRA.

Response: The Department disagrees with this reviewer's characterizations. The exclusive use and possession referred to by this reviewer applies to other private parties but not to the United States, which, in this instance, is responsible for the administration of the National Forest System lands in the SRNRA on which the claims are located. The mere location of a claim does not presumptively make it valid and an agency operating under a mandate to minimize surface disturbance may properly require the mining claimant to establish the existence of a valid existing right before allowing operations to proceed. *Richard C. Swainbank,* 141 IBLA 37, 44 (1997).

In response to the allegation that the process was ''as onerous and time consuming as possible,'' the Department merely states that one of the primary objectives of this rule is to ensure that those conducting mineral development activities in the SRNRA have established that they possess valid existing rights. The Department does not believe that a system, requiring that the party asserting valid existing rights produce whatever evidence is in its possession to substantiate its claim, is either onerous or time consuming. It is not the intent of the Department to eliminate mining in the SRNRA in those instances where valid existing rights have been established.

Finally, the Department disagrees with the assertion that holders of valid existing rights are not to be disturbed by the Forest Service's administration of the SRNRA. Although the reviewer refers to ''Congress'' specific instructions,'' no citation to the Act is supplied. The Department believes that the reviewer may be relying on Section 8(c) of the Act for this proposition. However, Section 8(c) prohibits mineral development activity on federally owned land in the SRNRA subject to valid existing rights. 16 U.S.C. 460bbb–6(c). Section 8(c) does not address under what circumstances mineral development activities may be conducted in the SRNRA where valid existing rights have been established. That direction is set forth in Section 8(d) of the Act which provides for the issuance of supplementary mining regulations. *Id.* at section 460bbb–6(d). Unlike Section 8(c), Section 8(d) does not include a ''subject to valid existing rights'' proviso. *Id.* Thus, all mining activities in the SRNRA are subject to

the supplementary regulations, a view corroborated by legislative history. The original version of the SRNRA legislation would have prohibited all mineral development activities. As a result of concerns for the potential takings liability associated with a blanket prohibition on all mining activities, the legislation was subsequently amended to prohibit mining subject to valid existing rights and to authorize supplementary regulations governing all mining operations for which valid existing rights were established. The chief sponsor of the Act commented,

> With regard to mining, the amendments would give explicit recognition to the rights associated with valid existing claims, and direct the Secretary to issue supplementary regulations designed to 'promote and protect' the purposes for which the recreation area is created. Although I remain concerned about the potential for destructive mining, I am hopeful that the supplemental regulations will address these concerns.

136 Cong. Rec. H13045, 13046 (Oct. 26, 1990) (Statement of Rep. Bosco). The Act and the legislative history are clear that only those operators who have established valid existing rights may conduct mineral development activities in the SRNRA and, where allowed, those activities must be conducted in conformance with the provisions of this rule.

Alternatively, the reviewer may be contending that the Department lacks authority to require a mining claimant to establish that a mining claim constitutes a valid existing right which survived the withdrawal and that the only means for the Government to consider the valid existing rights issue is in connection with a mineral contest proceeding before the Bureau of Land Management. If that is the reviewer's contention, it is plainly inconsistent with the Department of the Interior's administrative interpretations of the United States mining laws.

As discussed previously, there is nothing in the Act to suggest that persons with valid mining claims predating the establishment of the SRNRA were not to be disturbed by the Department's management of the SRNRA. Rather, Congress merely withdrew the SRNRA from the operation of the United States mining laws ''subject to valid existing rights'' just as it has done many times with respect to other federally owned lands. In discussing a situation where mining operations could only be conducted as an incident of a valid existing right, the Interior Board of Land Appeals observed that ''(a)ny inference * * * that the mere location of a mining claim raises a presumption of validity, vis-a-vis the United States is plainly wrong. The mere assertion of a claim to land is simply that.'' *Southern Utah Wilderness Alliance,* 125 IBLA 175, 188 n.7 (1993). The Board also observed that even in a contest proceeding brought by the government ''it is the claimant who must establish the validity of the claim.'' *Id.* The Board then recited its holding in *Havlah Group,* 60 IBLA 349, 361 (1981) that ''it is not unreasonable to require a claimant to make a preliminary showing of facts which support a valid existing right.'' *Id.* at 188. In *Havlah Group,* where a proposed plan of operations had been submitted for lands on which all actions of the Secretary of the Interior under the statute were ''subject to valid existing rights,'' the Board noted that once the claimant had submitted a preliminary showing, the Bureau of Land Management could either bring a mineral contest challenging the validity of the claim or permit the operations to go forward. 60 IBLA at 361. *See also, Richard C. Swainbank,* 141 IBLA 37, 44 (1997); *Richard C. Behnke,* 122 IBLA 131, 140 n.13 (1992). Thus, persons holding mining claims in the SRNRA are not entitled to any presumption that those claims constitute valid existing rights. It is fully consistent with the Act and the United States mining laws for the Department, which operates under a mandate to minimize surface disturbance caused by mining operations, to require claimants ''to affirmatively establish the existence of a valid existing right * * *.'' *Richard C. Swainbank,* 141 IBLA at 44. For these reasons, no changes have been made in the final rule in response to these comments.

Comment: There was no explanation of what might constitute ''good cause'' so as to justify an extension of time beyond 2 years for the Forest Service to complete a valid existing rights determination. One reviewer objected to § 292.64(a)(1) and asserted that the proposed rule failed to explain ''good cause'' or otherwise justify why it might take longer than 2 years to complete a valid existing rights determination given that, among other things, § 292.63(b) requires the operator to provide all of the information necessary to make a valid existing rights determination. With respect to the examples of good cause mentioned in the preamble to the proposed rule, the reviewer argued that matters such as budget and manpower availability are within the control of the Forest Service and that weather considerations are unimportant because there is little need for a site visit to determine the validity of the type of mining claims occurring in the SRNRA.

Response: The Department disagrees to the extent that the respondent suggests that the Forest Service only needs the information submitted by a claimant in order to make a valid existing rights determination. The Government has a responsibility to insure that valid mining claims are recognized, invalid mining claims are eliminated, and the rights of the public are preserved. *Cameron* v. *United States,* 252 U.S. 450, 460 (1920). This responsibility is significant because as the Supreme Court recognized in that case, invalid mining claims unlawfully appropriate public lands to private use contrary to the rights of the public. The Government's independent responsibility to determine the validity of a mining claim cannot be discharged merely by accepting at face value whatever information is supplied by the claimant, who is the proponent of the allegedly valid mining claims. In all cases, the Government must perform its own field examination of the mining claim which allegedly constitutes a valid existing right to confirm the information submitted by the operator.

As explained in great detail in the preamble to the proposed rule, the field examination of a mining claim and the preparation of a written mineral report by a certified mineral examiner is a complicated and lengthy process. While the Department will use its best efforts to complete the valid existing rights determination within 2 years, many factors acting singly, or in combination, may make it impossible. Among those factors are the inaccessibility of field sites due to flooding, landslides, or fires; the unavailability of qualified personnel due to reassignments for fire fighting or other emergencies, protracted medical leave, unanticipated retirements, other previously scheduled validity, or valid existing rights determinations; the time necessary to prepare environmental documents required for sampling on the claim; or the unique technical issues presented by a mining proposal. It is not possible to identify all of the events and contingencies that could cause a justifiable delay in a valid existing rights determination. For these reasons, no change was made in § 292.64(a)(1) in the final rule.

Comment: The number of mineral examiners in the Pacific Southwest Region of the Forest Service is unclear. One reviewer noted that there appeared to be a discrepancy in the second proposed rule regarding the number of Forest Service mineral examiners in the Pacific Southwest Region.

Response: There was no discrepancy. To clarify what was stated in the second proposed rule, there are five certified mineral examiners in the region. Two of the five are also certified review mineral examiners and, therefore, are qualified to conduct mineral examinations and to serve as reviewers who approve mineral reports prepared by other mineral examiners. No change was made in the final rule based upon this comment.

Comment: The FS has adequate staffing to handle the anticipated two plans per year in less than 2 years. Two reviewers asserted that the existing cadre of certified mineral examiners in the Pacific Southwest region should be able to complete valid existing rights determinations for claims in the SRNRA in less than 2 years since only two plans of operations are estimated to be submitted per year. One reviewer also asserted that the Department can allocate its financial and human resources as it deems appropriate and that it would be improper for the Department to deploy its manpower in a fashion which precludes completion of the required examinations in less than 2 years.

Response: An employee who is not certified as a review mineral examiner or as a mineral examiner, may only work on a valid existing rights determination under the direct supervision of someone who is certified. Only certified Forest Service mineral examiners or review mineral examiners are allowed to conduct valid existing rights determinations. There are only five such employees in the Pacific Southwest Region of the Forest Service. These five individuals are responsible for conducting valid existing rights determinations in all withdrawn areas in the Pacific Southwest Region, not just the SRNRA. It would be unfair to individuals whose claims lie outside the SRNRA if the Forest Service redirected the focus and energy of the five Pacific Southwest Region examiners so that valid existing rights determinations in the SRNRA would be completed first. There is no reason that mining claimants in the SRNRA should be afforded preference over others whose mining claims are located elsewhere in the region. Accordingly, even though it is estimated that only two plans of operations will be submitted annually for mining claims in the SRNRA, those plans must be reviewed, along with other plans submitted in the region, in the order that they were received.

The Department agrees that, in theory, it is possible to reassign Forest Service personnel from other regions to complete priority work assignments in the Pacific Southwest Region. However, agency staffing levels are at a significantly lower level than a decade ago due to reduced congressional appropriations. Current staffing levels do not permit reassignment of certified mineral examiners without creating substantial delays in the completion of work which those examiners are responsible to perform in their regularly assigned region. The work that would not be completed in the originating region includes the same type of work; that is, valid existing rights determinations required before operations are authorized in the many National Forest System areas that have been withdrawn from the operation of the United States mining laws subject to valid existing rights. Thus, this comment also fails to recognize that prioritizing valid existing rights determinations for claimants in the SRNRA will prejudice similarly situated claimants in other withdrawn areas.

Furthermore, as discussed in connection with the preceding comment, it is not just personnel limitations which may result in a valid existing rights determination taking 2 or more years to complete. Other factors, which may lengthen the time to make a determination, include: The short field season in the SRNRA; the time needed to prepare environmental documents required for surface disturbing sampling operations; or the inaccessibility of the mining claims due to flooding, fire conditions, landslides, or other natural conditions. For these reasons, no change has been made in § 292.64(a)(1) of the final rule in response to these comments.

Comment: The rule should include a provision requiring ''prompt'' notification of BLM of any adverse valid existing rights determination. One reviewer observed that the proposed rule properly required that notice of an adverse valid existing rights determination be given to an operator that states, among other things, that the Forest Service will promptly notify the Bureau of Land Management of its determination and request initiation of a mineral contest. However, the reviewer faulted the proposed rule for not containing a separate requirement that the authorized officer promptly notify the Bureau of Land Management of an adverse determination and request initiation of a mineral contest.

Response: Section 292.64(b) of the proposed regulation required the Forest Service to notify the operator of a determination that there is not sufficient evidence of valid existing rights. That paragraph also required the notice to the operator to state that the Forest Service will ''promptly'' notify the Bureau of Land Management of its determination and request the initiation of a mineral contest action. The Department believed that this provision would insure quick Forest Service action on the notification to the Bureau of Land Management. However, to make it perfectly clear that this is also an affirmative requirement, paragraph (b) has been broken down into paragraphs (b)(1) and (b)(2). Paragraph (2) contains this affirmative requirement to notify the Bureau of Land Management of the Forest Service's determination and to request the initiation of a mineral contest.

Comment: The Forest Service lacks authority to treat an authorized officer's decision that there is not sufficient evidence of valid existing rights as final agency action. One reviewer contended that § 292.64(c), which stated that an authorized officer's decision that there is not sufficient evidence of valid existing rights was final agency action, rendered the BLM mining claim contest action process meaningless. The reviewer also alleged that this provision conflicts with the March 14, 1997, decision in *California Nickel Corporation* v. *Glickman*, No. C94–3904–DLJ, slip op. (N.D. Cal.). The reviewer recommended that the final rule include a provision stating that the Forest Service must change its position concerning valid existing rights if the Department of the Interior rules in favor of the operator on a Forest Service's mineral contest. The reviewer also recommended that the Department make clear in the final rule that referral of the Department's preliminary adverse valid existing rights determination to the Department of the Interior is the appropriate administrative process rather than appeal through the Forest Service or the Department of Agriculture. Finally, the reviewer recommended that the final rule state that there is no final determination of valid existing rights until the Department of the Interior administrative process has been exhausted.

Response: The term ''final agency action'' in § 292.64(c) resulted in unintended confusion. This term was used merely to clarify that an authorized officer's determination would not be subject to appeal within the Department because the previous paragraph requires the issue to be referred to the Bureau of Land Management. In response to this comment and to avoid misinterpretation of the provision, the term ''final agency action'' has been omitted from § 292.64(c) in the final rule.

Other changes have been made to this section in the final rule to make it clear that resorting to the BLM contest

proceeding is not meaningless and to emphasize that the Forest Service will recognize that a claimant has valid existing rights if that is the final determination of the Department of the Interior or of a court reviewing the Department of the Interior's decision in the contest action. Specifically, § 292.64(b)(1) has been revised to clarify that the effect of the authorized officer's determination that there is insufficient evidence of valid existing rights is to stay further consideration of the proposed plan of operations pending final action on the valid existing rights issue by the Department of the Interior or by final judicial review. Also, § 292.64(d) has been revised to require the authorized officer to resume consideration of the plan of operations if the final agency action by the Department of the Interior or final judicial review of the Department of the Interior decision determines that valid existing rights exist.

Finally, to address the reviewer's concerns, the remainder of the language in § 292.64(c) has been retained to make it clear that a decision finding insufficient evidence of valid existing rights is not subject to appeal in this Department.

Comment: Once a valid existing rights determination is made in favor of the operator, the rule should make the authorized officer's review of the plan of operations subject to the Forest Service's general mining regulations set forth at 36 CFR 228.5. The proposed rule provides an unlimited amount of time to complete the review of the operational aspects of the mineral operation. One reviewer contended that there is no reason why the applicable time limitations in the Forest Service's general mining regulations should not apply to consideration of the operational aspect of a proposed plan of operations for the SRNRA. With regard to one of the reasons given by the Department in the second proposed rule for the absence of definite time limitations for reviewing a plan of operations (the need to comply with the National Environmental Policy Act (NEPA) for approval of large-scale operations), the reviewer noted that general regulations provide that the authorized officer must notify the operator no later than 30, or at times 90, days after the filing of a plan of operations that it cannot be approved until completion of NEPA compliance. The operator contended that this feature of the general mining regulations keeps the process moving while the proposed SRNRA regulations institutionalize delay.

Response: The reviewer may have overlooked several reasons, in addition to NEPA compliance, given by the Department for the absence of definite time limitations for reviewing proposed plans of operations. As was stated in the preamble to the second proposed rule, NEPA is just one of the statutes with which the Forest Service must comply in reviewing a proposed plan of operations. Compliance with the requirements of the Endangered Species Act (ESA) can take several years, and, in contrast to NEPA where the Forest Service is usually in charge of the compliance process, the priorities and resources of the National Marine Fisheries Service or the United States Fish and Wildlife Service often determine the pace of compliance with the ESA.

The reviewer also may be implying that § 228.5 of this chapter adequately reflects the requirements of NEPA by providing more than 90 days for NEPA compliance. That is not necessarily correct. While 36 CFR 228.5 provides for more than 90 days for review of a plan of operations when NEPA requires the preparation of an environmental impact statement, the regulations do not provide more than 90 days for review of a plan of operations when NEPA requires the preparation of an environmental assessment. However, the preparation of environmental assessments usually requires substantially more time than 90 days.

In relying on 36 CFR 228.5, the reviewer overlooks the fact, recognized in *Baker* v. *United States Department of Agriculture,* 928 F. Supp. 1513, 1519 (D.Idaho 1996), that a ''conspicuous conflict[] occurs between 36 CFR 228.5 and the requirements of the NEPA and the ESA.'' In *Baker,* the court found that the conflict arose because 36 CFR 228.5 was promulgated in 1974, before the 1978 promulgation of regulations concerning environmental assessments and before the 1986 promulgation of regulations under the Endangered Species Act. The *Baker* court held that the 90-day time limit in § 228.5 and the regulatory requirements of the NEPA and the ESA are in ''irreconcilable conflict.'' Therefore, the court held that ''the 90-day limit must give way'' due to the conflict with the more recent NEPA and ESA regulations. *Id.* at 1520. However, as the court held, this result does not mean that the ''Forest Service is unencumbered by time limitations in examining [plans of operations]'' because there are other time limits in the NEPA and ESA process as well as ''a general rule prohibiting unreasonable delays.'' *Id.* Consequently, even if the requirements of § 228.5 of this chapter are not applicable, Forest Service review of a proposed plan of operations ''remains subject to time constraints * * * '' and the SRNRA regulations will not institutionalize delay. *Id.*

For these reasons, the Department believes that it would be senseless and misleading to persons asserting that they possess valid existing rights to conduct locatable mineral operations in the SRNRA, to adopt supplementary regulations which rely on the time limitations for reviewing a plan of operations set forth in the Forest Service's general mining regulations as requested by the reviewer. While the Forest Service will make every effort to process plans of operations as expeditiously as possible, the Department has made no changes to the text of this section in the final rule.

Comment: The rejection of a plan of operations by the Forest Service is unlawful and would constitute a taking. One reviewer asserted that the Forest Service cannot simply refuse to approve a plan of operations as suggested in paragraphs 292.64(e) and (f). The reviewer alleged that a refusal to approve a plan of operations would preclude a claimant from working his claim and constitute a taking of the claimant's property. The reviewer argued that there was no comparable provision in the Department's general mining regulations at part 228, subpart A, of this title and no administrative basis for departing from those regulations. However, the reviewer also argued that § 228.5(a)(3) of this title, at least requires the authorized officer to ''[n]otify the operator of any changes in, or additions to, the plan of operations to meet the purpose of the regulations in this part.''

Response: The Department agrees that it does not have the authority to refuse to approve a reasonable plan of operations which is not otherwise prohibited by law. However, the Department is not obligated to allow unreasonable mining operations to be conducted on National Forest System lands. Thus, even with respect to mining operations which were being conducted before the promulgation of 36 CFR part 228, subpart A, it was held that the Department could prohibit unreasonable mining operations pursuant to the Surface Resources Act of 1955, 30 U.S.C. 611–14. *United States v. Richardson,* 599 F.2d 290, 291, 294–95 (9th Cir. 1979). The reason for the court's conclusion was that this statute ''supersede(d) and modif[ied] the pre-existing recognition of broad rights under 30 U.S.C. 26 * * *.'' *Id.* at 295.

This authority did not change with the promulgation of 36 CFR part 228,

subpart A. While the reviewer may argue that 36 CFR part 228, subpart A, does not allow the Forest Service to refuse to approve a plan of operations, that argument is inconsistent with 36 CFR 228.5(a)(3), a provision cited by the reviewer, which is only relevant when the Forest Service has refused to approve a proposed plan of operations. Indeed, in cases involving mining operations subject to 36 CFR part 228, subpart A, courts have found that Forest Service may refuse to approve an unreasonable plan of operations or a plan otherwise prohibited by a law such as the Endangered Species Act. ''(T)he Forest Service clearly has the power to reject an unreasonable plan (of operations).'' *Baker* v. *United States Department of Agriculture,* 928 F. Supp. 1513, 1518 (D. Idaho 1996). ''Of course, the Forest Service would have the authority to deny an unreasonable plan of operations or a plan otherwise prohibited by law. *E.q.* 16 U.S.C. 1538 (endangered species located at the mine site.).'' *Havasupai Tribe* v. *United States,* 752 F. Supp. 1471, 1492 (D. Ariz. 1990), *aff'd sub nom. Havasupai Tribe* v. *Robertson,* 943 F.2d 32 (9th Cir. 1991).

The second proposed rule did not embody a meaningful departure from 36 CFR 228.5(a). Proposed § 292.64(e) and (f) each specifically provided that disapproval of a plan of operations is an option available to the authorized officer. Similarly, when 36 CFR 228.5(a)(1) and (a)(3) are read together there is no doubt that disapproval of a plan of operations is also an option available to the Forest Service under the Department's general mining regulations. Also, while 36 CFR 228.5(a)(3) requires the authorized officer to ''(n)otify the operator of any changes in, or additions to, the plan of operations to meet the purpose of the regulations in this part,'' proposed § 292.64(f) requires the authorized officer to ''explain why the proposed plan of operations cannot be approved.'' The variation between 36 CFR 228.5 and 292.64(e) and (f) of this rule appears to be a distinction without a difference. At most, the difference is that under these final regulations, the Department gives the operator the discretion to propose an alternative plan of operations which, while addressing the authorized officer's concerns, also best meets the operator's objectives instead of prescribing the approach that the operator must adopt.

To avoid any confusion, it should be understood that the Forest Service will, where necessary, make every effort to resolve differences and to negotiate plans of operations that are acceptable to the operator and to the Forest Service before exercising the authority to refuse to approve a plan of operations. However, as a last resort, the Forest Service may in certain circumstances, be left no alternative except to refuse a plan of operations. Whether refusing to approve a plan of operations would constitute a taking cannot be ascertained at this juncture. However, to the extent that one of the factors considered in any regulatory takings claim is the reasonable, investment backed expectations of the property owner, it may be difficult for an operator to demonstrate that the agency's refusal to approve an unreasonable plan of operations requires payment of just compensation under the Fifth Amendment. For these reasons, no changes were made to the final rule in response to this comment.

Comment: The proposed time period for the mineral operations fails to give recognition to the operator's rights under the United States mining laws and provides another opportunity to delay mining. One reviewer argued that § 292.64(g) of the second proposed rule, which would establish a time period for the mineral operations authorized by an approved plan of operations equal to the minimum amount of time reasonably necessary for a prudent operator to complete the mineral development activities covered by the plan, would limit the length of time that the operator may engage in mining operations on a mining claim and consequently nullify the operator's rights under the United States mining laws, which do not include such a restriction. The reviewer contended that recognition of valid existing rights means that the Government must give respect and effect to the entirety of an operator's rights under the mining laws. The reviewer also contended that proposed § 292.64(g) provides another opportunity for the Forest Service to delay mining while the operator challenges the Forest Service's determination of the amount of time that would be reasonably necessary for a prudent operator to complete the mineral activities. Finally, the reviewer asserted that there is no reason why the final rule should not emulate the Forest Service's general mining regulations by merely requiring that the plan of operations describe the duration of the expected operations.

Two other reviewers also objected to the proposal to set the operating timeframe for the minimum amount of time necessary, arguing that unforeseen events, such as changes in market conditions, severe weather, strikes, acts of God, or force-majeure can delay start-up and completion timeframes. Both reviewers also noted that additional mineral reserves may be identified after production begins so that additional time is required to mine the deposit. One reviewer recommended that the timeframe be left open ended or at the very least set for 300 percent of the minimum amount of time anticipated. That reviewer also stated that a guaranteed right to extend the operating timeframe must be provided. Finally, that reviewer contended that § 292.64(g) could cause a takings by making financing unavailable and stated that a takings impact analysis had not been prepared for this provision. The other reviewer recommended that the timeframe be left open ended or set by the miner.

Response: Several reviewers appear to have assumed that it was not possible to obtain an extension of the time period provided in an approved plan of operations to conduct authorized operations. This interpretation was not the Department's intent. Accordingly, a new § 292.64(h)(4), is included in the final rule. This new paragraph makes it clear that a plan of operations may be modified to extend its term or scope when the criteria set forth in § 292.64(i) for submission of a supplemental plan of operations or a modification of the plan of operations pursuant to 36 CFR 228.5, are not triggered. The final rule consequently cannot be construed as preventing an operator from fully mining a valuable locatable mineral deposit in the SRNRA on a mining claim which continues to constitute a valid existing right.

The other comments concern the standard included in proposed § 292.64(g) for establishing the term of approval for a plan of operations. The United States mining laws do not address the question of the duration of mining operations. However, judicial and administrative interpretations of the mining laws have long made it clear that ''(u)nder the mining laws Congress has made public lands available to people for the purpose of mining valuable mineral deposits and not for other purposes.'' *United States* v. *Coleman,* 390 U.S. 599, 602 (1968). Indeed, the ''all-pervading purpose of the mining laws is to further the speedy and orderly development of the mineral resources of our country.'' *United States* v. *Nogueira,* 403 F.2d 816, 823 (9th Cir. 1968)(citation omitted). Mining claims which do not ''conform to the law under which they are initiated * * * work an unlawful private appropriation in derogation of the rights of the public.'' *Cameron* v. *United States,* 252 U.S. 450, 460 (1920). Thus it is beyond dispute

that the Government has a definite interest in seeing that operations on mining claims are diligently pursued to a conclusion, that the lands are reclaimed, and that the reclaimed lands are restored to other public uses, particularly where Congress has given the lands a special designation and management emphasis such as in the case of the SRNRA. These interests are all fostered by requiring the completion of mining operations within the time provided for in proposed § 292.64(g) of this part. Therefore, this provision does not conflict with the United States mining laws. For the same reasons, it would be inappropriate to adopt a final rule which provides that the term of approval of a plan of operations is open-ended, is 300 percent of the minimum amount of time reasonably necessary for a prudent operator to complete the authorized operations, or is unilaterally established by the operator.

Limiting the period of approval of a plan of operations, as provided in the second proposed rule, does not conflict with a determination that an operator has valid existing rights because that determination is time dependent and not conclusive of present conditions and rights. It is beyond dispute that a mining claim, which constituted a valid existing right at one time, may lose that status. A claim can become invalid due to a change in markets which results in a loss of the discovery or due to failure to make certain filings or payments. Even if a discovery can be shown to exist on a mining claim, the claim can be invalidated upon a showing that it was not located or held in good faith for mining purposes. *In re Pacific Coast Molybdenum Co.,* 75 IBLA 16, 35 (1983). Moreover, where valid existing rights continue to be maintained and an operator requires additional time to complete operations, such time can be provided pursuant to either § 292.64(h)(4) or § 292.64(i) of the final rule. These final rules appropriately consider and recognize valid existing rights. Therefore, no change was made to the rule in response to these comments.

The Department agrees that severe weather, strikes, acts of God, and force-majeure situations can delay start-up and completion of mineral operations. However, delays occur regardless of what criteria the Government selects to determine the time period for approval of a plan of operations. Rather than adjusting the final rule to provide additional time for the conduct of operations, which in many cases might be unnecessary, the Department believes that the course of action consistent with the long-standing interpretations of the United States mining laws is to approve operations for the minimum amount of time reasonably necessary for a prudent operator to complete the operations and to provide for an extension if, and when, there is a delay in the start-up or completion of the approved operations. However, the Department cautions that changes in market conditions, in and of itself, would not necessarily warrant an extension in the approval period since it might actually result in the loss of a discovery and of the valid existing right. Similarly, the suggestion that an operator is entitled to an extension of the term of approval for a plan of operations where operations have not been completed overlooks the fact that a variety of circumstances can result in the loss of a valid existing right to conduct operations on a mining claim after the initial approval of a plan of operations. Therefore, it might be inconsistent with the United States mining laws to extend the term of approval of the plan of operations in some circumstances where the suggested criteria are met. Accordingly, the final rule was not changed in response to these suggestions.

The Department agrees that more time in addition to that authorized by a plan of operations may be required to mine additional mineral reserves identified after mineral production begins pursuant to the approved plan. However, this fact does not justify the suggestion that the original term of approval of a plan should be inflated to cover such a contingency. It is well established that mining activities are subject to regulation to protect the environment. Congress also has specifically declared that the policy of the Federal Government is to encourage private enterprise in ''the reclamation of mined land, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment * * *.'' 30 U.S.C. 21a. The environmental impacts of mining mineral reserves that are identified after approval of a plan obviously could not have been adequately considered or mitigated by the authorized officer in reviewing the proposed plan. Thus, it would be inconsistent with 30 U.S.C. 21a and probably other environmental statutes, for the Forest Service to permit the mining of reserves identified after mineral production begins without review of those operations pursuant to § 292.64(h)(4) or § 292.64(i) of this final rule, as applicable. Consequently, the possibility that additional reserves might be identified after mineral production begins does not justify the suggestion that the period of approval for a plan of operations should be longer than the minimum amount of time reasonably necessary for a prudent operator to complete the approved mineral development activities. The final rule has not been changed in response to this comment.

The Department agrees that mining operations might be delayed as a consequence of an operator's decision to challenge the Forest Service's determination of the amount of time that would be reasonably necessary for a prudent operator to complete the approved mineral operations. The same is true with respect to all requirements included in an approved plan of operations and, for that matter, in all authorizations issued by the Government. The only way to eliminate this risk would be to permit mining claimants to engage in unrestricted and unregulated mining on National Forest System lands. Congress rejected that option in 1897 when it enacted the Organic Administration Act which authorized the Department of Agriculture to promulgate reasonable rules and regulations to protect the surface of National Forest System lands from the adverse impacts of locatable mineral operations. 16 U.S.C. 551. In enacting 30 U.S.C. 21a, Congress restated that the policy of the Federal Government is to encourage private enterprise in ''the reclamation of mined land so as to lessen any adverse impact of mineral extraction and processing upon the physical environment * * *.'' Thus, the fact that an operator's challenge that the term of approval of a plan of operations might delay the commencement of the approved operations does not warrant a change in § 292.64(g). The likelihood that a challenge to an approved plan of operations will delay the start-up of such operations is a risk that the operator must evaluate and assume in deciding whether to bring the challenge. No change to the rule was made based upon these suggestions.

From a legal standpoint, the Department disagrees with the reviewer's contention that the inability to secure financing, in and of itself, may result in a taking and we are unaware of any case which supports such a proposition. As described in some detail previously, takings cases are highly fact specific inquiries which generally require a court to consider the following factors: the character of the governmental action, the economic impact of that action, and the reasonable investment-backed expectations of the property owner. The inability to obtain financing may have some bearing on

one or more of the aforementioned factors, but it is not dispositive.

From a practical standpoint, however, it seems somewhat counter intuitive to contend that an operator would be unable to obtain financing based on the establishment of an approval period that was calculated to be sufficient for a prudent operator to complete the mining operations as documented in the plan of operations. However, in light of the change made to the final rule which expressly allows for extensions in the approval period, the Department believes that this reviewer's concern about the potential takings implications of this provision has been resolved.

For these reasons, § 292.64(g) of this part is reasonable and within the authority of the agency. This provision is preferable to the agency's general mining regulations which do not specifically address the issue of the term of approval of a plan of operations other than to require that the proposed plan of operations submitted by the operator must describe the period during which the proposed activity will take place.

The Department believes that adopting the requirement in § 292.64(g) of this subpart may result in the following benefits. Specifying the term of approval of a plan of operations should result in increasing the promptness with which mining operations are pursued to a conclusion, and the promptness with which the lands are reclaimed and restored to other public uses. Regrettably, past experience suggests that, on occasion, operators behave less diligently once the mining phase ceases and the reclamation phase begins because reclamation operations are costly rather than profitable. Where the term of a plan of operations is fixed rather than open-ended, sanctions can be imposed for failure to complete the reclamation activities by the plan's termination date. This fosters the well recognized purposes of the United States' laws of furthering the speedy and orderly development of the nation's mineral resources and insuring that federal lands are not in an unreclaimed state, or reclaimed at public expense, to the detriment of the right of the American people to use public lands. These goals are particularly important where, as in the case of the SRNRA, Congress has withdrawn lands from the operation of the United States mining laws subject to valid existing rights and specified special purposes for which the lands are to be administered.

Also knowing when mineral operations must be completed will improve the agency's ability to evaluate the environmental impacts of those activities because those impacts are dependent on the rate at which the activities are conducted as well as the nature of the activities. Better information regarding the likely impacts of mineral operations should result in the preparation of better environmental documents required by procedural statutes such as the National Environmental Policy Act and better compliance with substantive environmental statutes such as the Endangered Species Act. Better information about the likely impacts of mining also will allow the Government to make more accurate determinations regarding the amount of the bond that an operator should be required to post.

For these reasons, § 292.64(g) of this part was not revised in response to the comments. However, a new § 292.64(h)(4), was included in the final rule to clarify that it is possible to modify an approved plan of operations to extend its term or scope.

Comment: Section 292.64(i) of the proposed rule contains an erroneous reference to § 292.64. One reviewer detected that § 292.64(i) included a reference to § 292.64 rather than § 292.63.

Response: The Department recognizes the potential for confusion resulting from including a reference to § 292.64 in § 292.64. To rectify the matter, this final rule paragraph has been changed to eliminate any reference to a section of the supplementary regulations. It should be well understood that if a new or supplemental plan of operations is necessary, it will be subject to the review and approval provisions of these supplementary regulations.

Section 292.65, Plan of Operations—Suspension

This section of the second proposed rule authorized the Forest Service to suspend mineral development activities if the operations are being conducted in violation of applicable law, regulation, or the terms and conditions of the operator's approved plan of operations. Except in cases where the violations present an imminent threat of harm to public health, safety, or the environment, this provision required the Forest Service to give the operator 30 days advance notice of the suspension. The 30-day notice should, in most instances, give the operator sufficient time to correct the violations prior to the suspension taking effect. In cases where mineral operations present an imminent threat of harm to public health, safety, or the environment (or where such harm is already occurring), regardless of whether the operator is in violation of applicable laws, regulations, or the terms and conditions of the plan of operations, the second proposed rule authorized the Forest Service to take immediate action to suspend the mineral development activity. In these cases, the rule directed the Forest Service to notify the operator of the reason for the action as soon as it is reasonably practicable after the suspension.

Comment: Suspension authority is duplicative of existing authority and may result in regulatory abuse. One reviewer noted that the Forest Service already has broad enforcement authority to suspend mining operations and that this provision in the rule is, therefore, unnecessary and will lead to regulatory abuses by the Forest Service.

Response: The current United States Department of Agriculture regulations at 36 CFR part 228, subpart A, do not contain a provision authorizing the Forest Service to suspend a mineral operation, in whole or in part, if an operator is not in compliance with applicable statutes, regulations or terms and conditions of the approved plan of operations. Where there is an immediate threat to public health, safety, or the environment, presented by the mining operation, this provision allows the Forest Service to respond quickly. The potential for regulatory abuse, if any, is significantly reduced by requiring written notice to the operator which informs him or her of the basis for the suspension.

Where there is no threat to public health, safety or the environment, there realistically is no potential for ''regulatory abuse'' feared by this reviewer since the Forest Service must inform the operator in writing of the proposed suspension 30 days before it takes effect. Generally, it is presumed that 30 days should be sufficient time for the operator to address the concern which led to the issuance of the suspension notice. For these reasons, no change has been made to the second final rule as a result of this comment.

Section 292.69, Concurrent Reclamation.

The second proposed rule stipulated that reclamation of National Forest System lands and resources should occur concurrently with the mineral operation ''to the maximum extent practicable.''

Comment: The operator, not the Forest Service, should determine what is reasonable and practicable reclamation. One reviewer acknowledged that concurrent reclamation is a reasonable requirement to protect the SRNRA so long as it is interpreted sensibly. However, the reviewer asserted that

what is reasonable and practicable should be left to the judgment of the operator, not the Forest Service.

Response: The regulations being adopted to govern mineral operations in the SRNRA provide the operator an opportunity to give input concerning reclamation measures appropriate for lands disturbed by the mining activities. Section 292.63(b) of this part requires the operator to submit a proposed plan of operations. Section 292.63(c) requires the proposed plan to address environmental protection requirements, including reclamation. Presumably an operator would not propose reclamation activities considered to be impracticable. Assuming that the Forest Service agrees that the proposed plan of operations provides, to the maximum extent possible, that reclamation shall proceed concurrently with the mineral operations and satisfies the other requirements of 36 CFR 228.8, the reclamation would be approved. It is standard Forest Service practice to work with an operator to fashion a mutually agreeable solution in cases where the Forest Service concludes that the proposed reclamation is unreasonable.

However, for a number of reasons, the Department cannot agree that the operator should be given unilateral permission to determine how reclamation of National Forest System lands should occur. Most importantly, the statute, which extended the United States mining laws to National Forest System lands reserved from the public domain, charged the Department to ''insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction * * *.'' 16 U.S.C. 551. Adopting the policy advocated by the reviewer would effectively delegate the Department's statutory duties to those whom the Department is required to regulate.

The manner in which lands are reclaimed also has an enormous bearing on their ability to be restored to other productive uses. The Forest Service has the ultimate responsibility to specify the manner in which mined lands are reclaimed so that the rights of the public in those lands are preserved.

Finally, there are great economic incentives for operators to perform as little reclamation as possible, because reclamation represents the most controllable cost of mineral operations. Letting operators determine the type and scope of reclamation would likely result in lesser protection being afforded the lands and resources within the SRNRA than is provided outside the SRNRA. This practice would be contrary to the statutory requirements to protect and preserve the values of the SRNRA. For these reasons, no change has been made to § 292.69 as a result of the comment.

Comment: The extreme requirements in the concurrent reclamation provision are not justified. One reviewer objected to the requirement in proposed § 292.69 that plans of operations should provide, to the maximum extent practicable, that reclamation proceed concurrently with the mineral operation. The reviewer asserted that there is no administrative justification for departure from the agency's general mining regulations which provide that reclamation must occur upon the exhaustion of the mineral deposit or at the earliest practicable time during operations, or within 1 year of the completion of operations, unless a longer time is allowed by the authorized officer. The reviewer also asserted that there is no administrative justification for departure from the reclamation provision of the first final rule which called for concurrent reclamation when practicable, not to the maximum extent practicable. The reviewer asserts that § 292.69 provides another opportunity for the Forest Service to impose unreasonable and expensive procedures upon an operator and, thereby, deprive him of his property rights.

Response: As discussed previously, past experience demonstrates that operators tend to be less diligent once mining ceases and reclamation begins because reclamation of operations are costly rather than profitable. The Department believes that requiring concurrent reclamation to the maximum extent practicable will result in reclamation being initiated and completed sooner than it would be under the standards set forth in 36 CFR 228.8 of the Department's general mining regulations or the April 3, 1996, final rule. This result is important for a number of reasons.

The first involves the purposes of the Act. Section 2 of the Act specifically enumerated the features that led to the designation of the SRNRA. Some of these features included: (1) It represents one of the last wholly intact vestiges of an invaluable legacy of wild and scenic rivers, (2) it exhibits a richness of ecological diversity unusual in a basin of its size, and (3) it offers exceptional opportunities for a wide range of recreational activities, including wilderness, water sports, fishing, hunting, camping, and sightseeing. The purposes of the Act are to ensure ''* * * the preservation, protection, enhancement, and interpretation for present and future generations of the Smith River watershed's outstanding wild and scenic rivers, ecological diversity, and recreation opportunities while providing for the wise use and sustained productivity of its natural resources * * *.'' 16 U.S.C. 460bbb–2(a).

The SRNRA was recognized by Congress as a unique area to be protected to the extent allowable by law. In addition, in Section 8 of the Act entitled ''Minerals,'' Congress directed the Secretary of Agriculture to promulgate supplementary regulations to promote and protect the purposes for the recreation area is designated. 16 U.S.C. 460bbb–6(d). Therefore, this rule is specifically designed to supplement the current locatable mineral regulations at 36 CFR part 228, subpart A, and thus provide a greater degree of protection for the federal lands and resources in the SRNRA than may be available for federal lands and resources administered elsewhere.

One additional protective measure is the concurrent reclamation requirement in § 292.69. This requirement will ensure that mined land is restored to another productive use in the shortest possible time. Reclamation will be required to the fullest extent practicable. This will fulfill the Department's statutory obligation under the Act to promote and protect the values for which the SRNRA was designated.

Secondly, requiring concurrent reclamation to the maximum extent practicable will foster the Federal Government's policy to encourage private enterprise in ''the reclamation of mined lands, so as to lessen any adverse impact of mineral extraction and processing upon the physical environment'' as established by Congress in 30 U.S.C. 21a. Reclamation either eliminates or dramatically reduces the adverse impacts of mineral extraction upon the environment. In most, if not all cases, requiring more prompt reclamation will reduce the amount of environmental impacts caused by mineral extraction.

Finally, the benefits of requiring concurrent reclamation to the maximum extent practicable—increasing the promptness with which mined lands are returned to other productive uses and reducing the overall quantum of adverse impacts of mineral extraction upon the environment—are consistent with the Department's charge to ''ensure the objects of such reservations, namely to regulate their occupancy and use and to preserve the forests thereon from destruction * * *.'' 16 U.S.C. 551. Thus, the departure from the reclamation requirements in 36 CFR 228.8 and the April 3, 1996, final rule is reasonable and adequately justified.

Mining claimants in the SRNRA have no right to conduct mineral operations without adhering to reclamation requirements. The law, which extended the United States mining laws to National Forest System lands reserved from the public domain, specifically provides that persons entering national forests for the purposes of prospecting, locating, and developing the mineral resources thereof, ''must comply with the rules and regulations covering such national forests.'' 16 U.S.C. 478. Moreover, another section of that statute charged the Department to ''insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction * * *.'' 16 U.S.C. 551. Also, while the reclamation requirement in § 292.69 of the second proposed rule is admittedly stricter than the reclamation requirements in 36 CFR part 228, subpart A, or the April 3, 1996, final rule, it only requires concurrent reclamation to the ''maximum extent practicable,'' which is by definition, achievable. The concurrent reclamation requirement by its own terms, therefore, does not amount to a prohibition on a mining claimant's entitlement to conduct mineral operations on a mining claim in which valid existing rights have been established. Consequently, the assertion that the concurrent reclamation requirement in § 292.69 effects a taking of the claimant's property rights is without merit.

For these reasons, no change has been made in § 292.69 as a result of the comment.

Section 292.70, Indemnification.

The second proposed rule specified that the owners and/or operators of mining claims and the owners and/or lessees of outstanding mineral rights would be liable for the following: (1) Indemnifying the United States for injury, loss, or damage which the United States incurs as a result of any mining operation in the SRNRA; (2) payments made by the United States in satisfaction of claims, demands, or judgments for such injury, loss, or damage; and (3) costs incurred by the United States, including attorney's fees and expenses, for any action involving noncompliance with an approved plan of operations or activities outside a mutually agreed to operating plan.

Comment: The indemnification provision is vague and of questionable legal authority. In addition to suggesting that this section was vague and potentially over inclusive, one reviewer requested the agency to specify the authority under which it may seek indemnification from operators to recover costs associated with, among other things, injury, loss, or damage to National Forest System lands and resources resulting from mineral operations in the SRNRA. This reviewer concluded that since this is a new provision for the SRNRA, there must be new statutory authority or a recent change in the law from which it is derived. If no such new authority exists, the reviewer argued that this provision must be deleted.

Response: The authority for the indemnification provision in the supplementary regulations for mining in the SRNRA is derived from the Organic Administration Act of 1897, 16 U.S.C. 551, which states in relevant part that,

> The Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests which may have been set aside or which may be hereafter set aside * * * and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction * * *.

The reviewer's presumption that the Forest Service must be able to point to a recent change in the law to support the inclusion of an indemnification provision in this rule because it is ''new and unique'' in the SRNRA is unfounded. The authority dates back to 1897 with the enactment of the Organic Administration Act. Similar indemnification provisions are incorporated into several other regulations which prescribe the terms for various uses of National Forest System lands. For example, the regulations governing issuance of special use authorizations for uses such as rights-of-way, ski areas, and communications facilities contain an indemnification provision (36 CFR 251.56(d)). The regulations governing the leasing and development of oil and gas resources on National Forest System lands also includes an indemnification provision (36 CFR 228.110).

The Department does not find the indemnification provision unconstitutionally vague or overly inclusive. In *Village of Hoffman Estates* v. *The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), the Supreme Court enumerated a number of factors which affect the degree of vagueness which the Constitution tolerates. For example, a less strict vagueness test will apply if a regulation is economic in nature, does not contain criminal sanctions, and does not implicate constitutionally protected rights. In *United States* v. *Doremus*, 888 F.2d 630 (9th Cir. 1989), the United States Court of Appeals for the Ninth Circuit rejected a vagueness challenge to a Forest Service regulation prohibiting certain types of conduct related to mining activities on National Forest System lands.

This second final rule meets all the factors required by the Supreme Court ruling. Consequently, there have been no changes made to the text of the final rule based on this comment.

Comment: The provision authorizing collection of attorneys' fees and expenses is unlawful. One reviewer asserted that the Department lacks the statutory authority to include attorneys' fees and expenses in § 292.70(c) as items for which the Government can be indemnified, in the event an operator is found to be conducting mineral development activities in the SRNRA where a plan of operations or operating plan has not been approved or where the activities are not in compliance with an approved plan of operations or an approved operating plan.

Response: Although the Department does not agree that the authority to recover attorneys' fees and expenses does not exist, the final rule has been modified to eliminate these items from the rule. However, to the extent independent authority exists to recover attorneys' fees and expenses under statutes including, but not limited to, the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601 *et seq.* or the Federal Water Pollution Control Act, 33 U.S.C. 1251 *et seq.*, the Department reserves the right to seek such a recovery in the event unauthorized mineral operations in the SRNRA result in violations of one or more of these authorities.

Regulatory Impact

This second final rule has been reviewed under USDA procedures and Executive Order 12866 on Regulatory Planning and Review. It has been determined that this regulation is not a significant rule. It will not have an annual effect of $100 million or more on the economy and will not adversely affect productivity, competition, jobs, the environment, public health and safety, or State and local governments.

This second final rule will not interfere with an action taken or planned by another agency and it will not raise new legal or policy issues. Finally, this action will not alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients of such programs. In short, little or no effect on the National economy will result from this second final rule, since it affects only mining activities on

National Forest System lands in the SRNRA. Accordingly, this final rule is not subject to OMB review under Executive Order 12866.

Moreover, this final rule has been considered in light of the Regulatory Flexibility Act (RFA)(5 U.S.C. 601 *et seq.*), and it has been determined that this action will not have a significant economic impact on a substantial number of small entities as defined by the RFA because of its limited scope and application. Also, this second final rule does not adversely affect competition, employment, investment, productivity, innovation, or the ability of United States based enterprises to compete in local or foreign markets.

Environmental Impact

An environmental assessment and a Finding of No Significant Impact titled ''Regulation of Mineral Operations on National Forest System Lands within the Smith River National Recreation Area'' have been prepared and both documents are available upon request by calling the contact listed earlier in this rulemaking under **FOR FURTHER INFORMATION CONTACT**.

Controlling Paperwork Burdens on the Public

The second proposed rule modified a previously approved information collection to include the requirement that a plan of operations include additional information identifying hazardous or toxic materials used in the operation, the mineral wastes that might be generated, and how public health and safety are to be maintained.

This information collection modification was discussed in the preamble of the second proposed rule and comment was requested specifically on the information collection. As discussed in the comment and response section, the one comment received on the collection stated that the time for collecting the additional information was not sufficient. The agency has increased the estimate of burden hours from 2 hours to 20 hours in response to this comment.

The final information collection package for this rulemaking has been reviewed by the Office of Management and Budget according to the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and implementing regulations at 5 CFR part 1320. The information requirements in this rule have been assigned control number 0596–0138 for use through September 30, 1998.

No Takings Implications

In compliance with Executive Order 12630 and the Attorney General's Guidelines for the Evaluation of Risk and Avoidance of Unanticipated Takings, the takings implications of the second final rule have been reviewed and considered. It has been determined that there is no risk of a taking.

Civil Justice Reform Act

This final rule has been reviewed under Executive Order 12778, Civil Justice Reform. Upon adoption of this rule: (1) All State and local laws and regulations that are in conflict with this final rule or which would impede its full implementation would be preempted; (2) no retroactive effect would be given to this final rule and; (3) it would not require administrative proceedings before parties would file suit in court challenging its provisions.

Unfunded Mandates Reform

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538), which the President signed into law on March 22, 1995, the Department has assessed the effects of this rule on state, local, and tribal governments and the private sector. This rule does not compel the expenditure of $100 million or more by any State, local, or tribal governments or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required.

List of Subjects in 36 CFR Part 292

Administrative practice and procedure, Environmental protection, Mineral resources, National forests, and National recreation areas.

Therefore, for the reasons set forth in the preamble, part 292 of Chapter II of Title 36 of the Code of Federal Regulations is amended by adding a new subpart G to read as follows:

PART 292—NATIONAL RECREATION AREAS

Subpart G—Smith River National Recreation Area

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292.60 Purpose and scope.
292.61 Definitions.
292.62 Valid existing rights.

Locatable Minerals

292.63 Plan of operations—supplementary requirements.
292.64 Plan of operations—approval.
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292.66 Operating plan requirements—outstanding mineral rights.
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Mineral Materials

292.68 Mineral material operations.

Other Provisions

292.69 Concurrent reclamation.
292.70 Indemnification.Subpart G—Smith River National Recreation Area

Subpart G—Smith River National Recreation Area

Authority: 16 U.S.C. 460bbb *et seq.*

§ 292.60 Purpose and scope.

(a) *Purpose.* The regulations of this subpart set forth the rules and procedures by which the Forest Service regulates mineral operations on National Forest System lands within the Smith River National Recreation Area as established by Congress in the Smith River National Recreation Area Act of 1990 (16 U.S.C. 460bbb *et seq.*).

(b) *Scope.* The rules of this subpart apply only to mineral operations on National Forest System lands within the Smith River National Recreation Area.

(c) *Applicability of other rules.* The rules of this subpart supplement existing Forest Service regulations concerning the review, approval, and administration of mineral operations on National Forest System lands including, but not limited to, those set forth at parts 228, 251, and 261 of this chapter.

(d) *Conflicts.* In the event of conflict or inconsistency between the rules of this subpart and other parts of this chapter, the rules of this subpart take precedence, to the extent allowable by law.

§ 292.61 Definitions.

The special terms used in this subpart have the following meaning:

Act means the Smith River National Recreation Area Act of 1990 (16 U.S.C. 460bbb *et seq.*).

Authorized officer means the Forest Service officer to whom authority has been delegated to take actions pursuant to the provisions of this subpart.

Hazardous material means any hazardous substance, pollutant, contaminant, hazardous waste, and oil or other petroleum products, as those terms are defined under any Federal, State, or local law or regulation.

Outstanding mineral rights means the rights owned by a party other than the surface owner at the time the surface was conveyed to the United States.

SRNRA is the abbreviation for the Smith River National Recreation Area, located within the Six Rivers National Forest, California.

§ 292.62 Valid existing rights.

(a) *Definition.* For the purposes of this subpart, valid existing rights are defined as follows:

(1) *For certain ''Wild'' River segments.* The rights associated with all mining claims on National Forest System lands within the SRNRA in ''wild'' segments of the Wild and Scenic Smith River, Middle Fork Smith River, North Fork Smith River, Siskiyou Fork Smith River, South Fork Smith River, and their designated tributaries, except Peridotite Creek, Harrington Creek, and the lower 2.5 miles of Myrtle Creek, which:

(i) Were properly located prior to January 19, 1981;

(ii) Were properly maintained thereafter under the applicable law;

(iii) Were supported by a discovery of a valuable mineral deposit within the meaning of the United States mining laws prior to January 19, 1981, which discovery has been continuously maintained since that date; and

(iv) Continue to be valid.

(2) *For Siskiyou Wilderness.* The rights associated with all mining claims on National Forest System lands within the SRNRA in the Siskiyou Wilderness except, those within the Gasquet-Orleans Corridor addition or those rights covered by paragraph (a)(1) of this section which:

(i) Were properly located prior to September 26, 1984;

(ii) Were properly maintained thereafter under the applicable law;

(iii) Were supported by a discovery of a valuable mineral deposit within the meaning of the United States mining laws prior to September 26, 1984, which discovery has been continuously maintained since that date; and

(iv) Continue to be valid.

(3) *For all other lands.* The rights associated with all mining claims on National Forest System lands in that portion of the SRNRA not covered by paragraph (a)(1) or (a)(2) of this section which:

(i) Were properly located prior to November 16, 1990;

(ii) Were properly maintained thereafter under the applicable law;

(iii) Were supported by a discovery of a valuable mineral deposit within the meaning of the United States mining laws prior to November 16, 1990, which discovery has been continuously maintained since that date; and

(iv) Continue to be valid.

(b) *Operations to confirm discovery.* The authorized officer shall authorize those mineral operations that may be necessary for the purpose of gathering information to confirm or otherwise demonstrate the discovery of a valuable mineral deposit consistent with the definition in paragraph (a) of this section or to obtain evidence for a contest hearing regarding the claim's validity, upon receipt of a proposed plan of operations as defined in § 292.63 of this subpart to conduct such operations and of sufficient information from the operator to show an exposure of valuable minerals on a claim that predates the withdrawal of the federal land from the operation of the United States mining laws. The authorized officer shall authorize only those operations that may be necessary to confirm or demonstrate the discovery of a valuable mineral deposit prior to the date of withdrawal of the federal land on which the claim is situated. Pursuant to this paragraph, the authorized officer shall not authorize any operations which would constitute prospecting, exploration, or otherwise uncovering or discovering a valuable mineral deposit.

Locatable Minerals

§ 292.63 Plan of operations—supplementary requirements.

(a) *Applicability.* In addition to the activities for which a plan of operations is required under § 228.4 of this chapter, a plan of operations is required when a proposed operation within the SRNRA involves mechanical or motorized equipment, including a suction dredge and/or sluice.

(b) *Information to support valid existing rights.* A proposed plan of operations within the SRNRA must include at least the following information on the existence of valid existing rights:

(1) The mining claim recordation serial number assigned by the Bureau of Land Management;

(2) A copy of the original location notice and conveyance deeds, if ownership has changed since the date of location;

(3) A copy of affidavits of assessment work or notices of intention to hold the mining claim since the date of recordation with the Bureau of Land Management;

(4) Verification by the Bureau of Land Management that the holding or maintenance fees have been paid or have been exempted;

(5) Sketches or maps showing the location of past and present mineral workings on the claims and information sufficient to locate and define the mining claim corners and boundaries on the ground;

(6) An identification of the valuable mineral that has been discovered;

(7) An identification of the site within the claims where the deposit has been discovered and exposed;

(8) Information on the quantity and quality of the deposit including copies of assays or test reports, the width, locations of veins, the size and extent of any deposit; and

(9) Existing evidence of past and present sales of the valuable mineral.

(c) *Minimum information on proposed operations.* In addition to the requirements of paragraph (b) of this section, a plan of operations must include the information required at §§ 228.4 (c)(1) through (c)(3) of this chapter which includes information about the proponent and a detailed description of the proposed operation. In addition, if the operator and claim owner are different, the operator must submit a copy of the authorization or agreement under which the proposed operations are to be conducted. A plan of operations must also address the environmental requirements of § 228.8 of this chapter which includes reclamation. In addition, a plan of operations also must include the following:

(1) An identification of the hazardous materials and any other toxic materials, petroleum products, insecticides, pesticides, and herbicides that will be used during the mineral operation, and the proposed means for disposing of such substances;

(2) An identification of the character and composition of the mineral wastes that will be used or generated and a proposed method or strategy for their placement, control, isolation, or removal; and

(3) An identification of how public health and safety are to be maintained.

§ 292.64 Plan of operations—approval.

(a) *Timeframe for review.* Except as provided in paragraph (b) of § 292.62 of this subpart, upon receipt of a plan of operations, the authorized officer shall review the information related to valid existing rights and notify the operator in writing within 60 days of one of the following situations:

(1) That sufficient information on valid existing rights has been provided and the anticipated date by which the valid existing rights determination will be completed, which shall not be more than 2 years after the date of notification; unless the authorized officer, upon finding of good cause with written notice and explanation to the operator, extends the time period for completion of the valid existing rights determination.

(2) That the operator has failed to provide sufficient information to review a claim of valid existing rights and, therefore, the authorized officer has no obligation to evaluate whether the operator has valid existing rights or to process the operator's proposed plan of operations.

(b)(1) If the authorized officer concludes that there is not sufficient

evidence of valid existing rights, the officer shall so notify the operator in writing of the reasons for the determination, inform the operator that the proposed mineral operation cannot be conducted, advise the operator that the Forest Service will promptly notify the Bureau of Land Management of the determination and request the initiation of a mineral contest action against the pertinent mining claim, and advise the operator that further consideration of the proposed plan of operations is suspended pending final action by the Department of the Interior on the operator's claim of valid existing rights and any final judicial review thereof.

(2) If the authorized officer concludes that there is not sufficient evidence of valid existing rights, the authorized officer also shall notify promptly the Bureau of Land Management of the determination and request the initiation of a mineral contest action against the pertinent mining claims.

(c) An authorized officer's decision pursuant to paragraph (b) of this section that there is not sufficient evidence of valid existing rights is not subject to further agency or Department of Agriculture review or administrative appeal.

(d) The authorized officer shall notify the operator in writing that the review of the remainder of the proposed plan will proceed if:

(1) The authorized officer concludes that there is sufficient evidence of valid existing rights;

(2) Final agency action by the Department of the Interior determines that the applicable mining claim constitutes a valid existing right; or

(3) Final judicial review of final agency action by the Department of the Interior finds that the applicable mining claim constitutes a valid existing right.

(e) Upon completion of the review of the plan of operations, the authorized officer shall ensure that the minimum information required by § 292.63(c) of this subpart has been addressed and, pursuant to § 228.5(a) of this chapter, notify the operator in writing whether or not the plan of operations is approved.

(f) If the plan of operations is not approved, the authorized officer shall explain in writing why the plan of operations cannot be approved.

(g) If the plan of operations is approved, the authorized officer shall establish a time period for the proposed operations which shall be for the minimum amount of time reasonably necessary for a prudent operator to complete the mineral development activities covered by the approved plan of operations.

(h) An approved plan of operations is subject to review and modification as follows:

(1) To bring the plan into conformance with changes in applicable federal law or regulation; or

(2) To respond to new information not available at the time the authorized officer approved the plan, for example, new listings of threatened or endangered species; or

(3) To correct errors or omissions made at the time the plan was approved, for example, to ensure compliance with applicable federal law or regulation; or

(4) To permit operations requested by the operator that differ in type, scope, or duration from those in an approved plan of operations but that are not subject to paragraph (i) of this section.

(i) If an operator desires to conduct operations that differ in type, scope, or duration from those in an approved plan of operations, and if those changes will result in resource impacts not anticipated when the original plan was approved, the operator must submit a supplemental plan or a modification of the plan for review and approval.

§ 292.65 Plan of operations—suspension.

(a) The authorized officer may suspend mineral operations due to an operator's noncompliance with applicable statutes, regulations, or terms and conditions of the approved plan of operations.

(1) In those cases that present a threat of imminent harm to public health, safety, or the environment, or where such harm is already occurring, the authorized officer may take immediate action to stop the threat or damage without prior notice. In such case, written notice and explanation of the action taken shall be given the operator as soon as reasonably practicable following the suspension.

(2) In those cases that do not present a threat of imminent harm to public health, safety, or the environment, the authorized officer must first notify the operator in writing of the basis for the suspension and provide the operator with reasonably sufficient time to respond to the notice of the authorized officer or to bring the mineral operations into conformance with applicable laws, regulations, or the terms and conditions of the approved plan of operations.

(b) Except as otherwise provided in this section, the authorized officer shall notify the operator not less than 30 days prior to the date of the proposed suspension.

Outstanding Mineral Rights

§ 292.66 Operating plan requirements—outstanding mineral rights.

(a) Proposals for mineral operations involving outstanding mineral rights within the SRNRA must be documented in an operating plan and submitted in writing to the authorized officer.

(b) An operating plan for operations involving outstanding mineral rights within the SRNRA must include the following:

(1) The name and legal mailing address of the operator, owner, and any lessees, assigns, and designees;

(2) A copy of the deed or other legal instrument that conveyed the outstanding mineral rights;

(3) Sketches or maps showing the location of the outstanding mineral rights, the proposed area of operations, including, but not limited to, existing and/or proposed roads or access routes identified for use, any new proposed road construction, and the approximate location and size of the areas to be disturbed, including existing or proposed structures, facilities, and other improvements to be used;

(4) A description of the type of operations which includes, at a minimum, a list of the type, size, location, and number of structures, facilities, and other improvements to be used;

(5) An identification of the hazardous materials and any other toxic materials, petroleum products, insecticides, pesticides, and herbicides that will be used during the mineral operation and the proposed means for disposing of such substances;

(6) An identification of the character and composition of the mineral wastes that will be used or generated and a proposed method or strategy for their placement, control, isolation, remediation, or removal; and

(7) A reclamation plan to reduce or control on-site and off-site damage to natural resources resulting from mineral operations. The plan must:

(i) Provide reclamation to the extent practicable;

(ii) Show how public health and safety are maintained;

(iii) Identify and describe reclamation measures to include, but not limited to, the following:

(A) Reduction and/or control of erosion, landslides, and water runoff;

(B) Rehabilitation of wildlife and fisheries habitat to be disturbed by the proposed mineral operation; and

(C) Protection of water quality.

(iv) Demonstrate how the area of surface disturbance will be reclaimed to a condition or use that is consistent

with the Six Rivers National Forest Land and Resource Management Plan.

§ 292.67 Operating plan approval—outstanding mineral rights.

(a) Upon receipt of an operating plan, the authorized officer must review the information related to the ownership of the outstanding mineral rights and notify the operator that:

(1) Sufficient information on ownership of the outstanding mineral rights has been provided; or

(2) Sufficient information on ownership of outstanding mineral rights has not been provided, including an explanation of the specific information that still needs to be provided, and that no further action on the plan of operations will be taken until the authorized officer's receipt of the specified information.

(b) If the review shows outstanding mineral rights have not been verified, the authorized officer must notify the operator in writing that outstanding mineral rights have not been verified, explain the reasons for such a finding, and that the proposed mineral operation cannot be conducted.

(c) If the review shows that outstanding mineral rights have been verified, the authorized officer must notify the operator in writing that outstanding mineral rights have been verified and that review of the proposed operating plan will proceed.

(d) The authorized officer shall review the operating plan to determine if all of the following criteria are met:

(1) The operating plan is consistent with the rights granted by the deed;

(2) The operating plan is consistent with the Six Rivers National Forest Land and Resource Management Plan; and

(3) The operating plan uses only so much of the surface as is necessary for the proposed mineral operations.

(e) Upon completion of the review of the operating plan, the authorized officer shall notify the operator in writing of one of the following:

(1) The operating plan meets all of the criteria of paragraphs (d)(1) through (d)(3) of this section and, therefore, is approved;

(2) The operating plan does not meet one or more of the criteria in paragraphs (d)(1) through (d)(3) of this section. Where feasible, the authorized officer may indicate changes to the operating plan that would satisfy the criteria in paragraphs (d)(1) through (d)(3) of this section and, thus, if accepted by the operator, would result in approval of the operating plan.

(f) To conduct mineral operations beyond those described in an approved operating plan, the owner or lessee must submit, in writing, an amended operating plan to the authorized officer at the earliest practicable date. New operations covered by the proposed amendment may not begin until the authorized officer has reviewed and responded in writing to the proposed amendment. The authorized officer shall review a proposed amendment of an approved operating plan to determine that the criteria in paragraphs (d)(1) through (d)(3) of this section are met.

Mineral Materials

§ 292.68 Mineral material operations.

Subject to the provisions of part 228, subpart C, and part 293 of this chapter, the authorized officer may approve contracts and permits for the sale or other disposal of mineral materials, including but not limited to, common varieties of gravel, sand, or stone. However, such contracts and permits may be approved only if the material is not within a designated wilderness area and is to be used for the construction and maintenance of roads and other facilities within the SRNRA or the four excluded areas identified by the Act.

Other Provisions

§ 292.69 Concurrent reclamation.

Plans of operations involving locatable minerals, operating plans involving outstanding mineral rights, and contracts or permits for mineral materials should all provide, to the maximum extent practicable, that reclamation proceed concurrently with the mineral operation.

§ 292.70 Indemnification.

The owner and/or operator of mining claims and the owner and/or lessee of outstanding mineral rights are jointly and severally liable in accordance with Federal and State laws for indemnifying the United States for the following:

(a) Costs, damages, claims, liabilities, judgments, injury and loss, including those incurred from fire suppression efforts, and environmental response actions and cleanup and abatement costs incurred by the United States and arising from past, present, and future acts or omissions of the owner, operator, or lessee in connection with the use and occupancy of the unpatented mining claim and/or mineral operation. This includes acts or omissions covered by Federal, State, and local pollution control and environmental statutes and regulations.

(b) Payments made by the United States in satisfaction of claims, demands, or judgments for an injury, loss, damage, or costs, including for fire suppression and environmental response action and cleanup and abatement costs, which result from past, present, and future acts or omissions of the owner, operator, or lessee in connection with the use and occupancy of the unpatented mining claim and/or mineral operations.

(c) Costs incurred by the United States for any action resulting from noncompliance with an approved plan of operations or activities outside an approved operating plan.

Dated: March 12, 1998.

Brian Eliot Burke,

Deputy Under Secretary, NRE.

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