September 7, 2001

USDA-Forest Service – CAT
Attention: Roadless ANPR Comments
P.O. Box 221090
Salt Lake City, UT 84122

Re: Advanced Notice of Proposed Rulemaking on Roadless Area Conservation 66 F.R. 35918

Northwest Mining Association (NWMA) is a 106 year old non-profit, non-partisan trade association based in Spokane, Washington with a membership base of 2,000. NWMA's purpose is to support and advance the mineral resource and related industries. We do this by both representing and informing our members on technical, legislative and regulatory issues, and by disseminating educational materials related to mining. NWMA is committed to fostering sustainable economic opportunities and promoting environmentally responsible mining.

NWMA members reside in 42 states and are actively involved in exploration and mining operations on USFS administered lands, especially in the West. Our diverse membership includes every facet of the mining industry including geology, exploration, mining, engineering, equipment manufacturing, technical services, and sales of equipment and supplies. NWMA's broad membership represents a true cross-section of the American mining community from small miners and exploration geologists to both juniors and large mining companies.

This letter represents Northwest Mining Association's comments on the Advanced Notice Of Proposed Rulemaking (ANPR) published July 10, 2001, and specifically, NWMA's response to the ten (10) questions raised in said notice.

General Comments

NWMA strongly supports this re-examination of the Roadless Area Conservation Rule issued on January 12, 2001 (January 12 Rule), in the waning days of the Clinton administration. This re-examination and an extensive modification or, better yet, a complete rejection of the rule is critical to correct major flaws in both the content of the rule and in the process used in the roadless rulemaking procedure.

NWMA has maintained from the outset, beginning with the proposed Interim Rule published on January 28, 1998, that a national one-size-fits-all rule to manage roadless areas within the National Forest System was unnecessary and a wrong-headed approach to conserving roadless values as may be appropriate. We maintain that the best approach

to managing roadless values is to use the Forest Planning Process and make those decisions on a site-specific basis under the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA).

The establishment by administrative action on January 12, 2001, of roadless area protection for 60 million acres of non-wilderness areas has serious economic consequences to a large number of forest dependent local communities, states with significant national forest lands, and the nation as a whole. This alone justifies a serious, wholesale reconsideration of this rule. In addition, this area represents approximately **one-third** of the 192 million acres managed by the USFS. In the January 12 Rule, the Forest Service provided no evidence that a national roadless rule would improve the system under which local agency officials made decisions regarding road construction on a case-by-case basis utilizing the local forest planning process.

The USFS proposal would adversely affect NWMA members economically, spiritually and emotionally. A significant number of our members have made substantial investments in mineral related activities occurring within the National Forest System. Their future business interests are directly and irreparably harmed by the January 12 Rule, as needed access is prevented. Also, they take great pride and comfort in the knowledge that America has viable sources of minerals vital to our national security and future prosperity. The new rule has shaken their confidence in the ability of our country to achieve sustainability.

It is well known that development of hardrock minerals creates new wealth, which is distributed throughout the U.S. economy and society. The public lands, including USFS administered lands, provide a major source of domestic mineral production and allow the U.S. to be less dependent on uncertain foreign sources of raw materials. Mining on USFS administered lands also provides the Nation's highest paid non-supervisory wage jobs. These jobs are one of the cornerstones of diversified rural economies in many parts of the West. They also are the foundation for the creation of many non-mining service and support businesses found in or near National Forests. Hardrock mining on USFS administered land also provides substantial federal and state tax revenues. However, there are issues that affect our members that go beyond simple economics.

Many of our members, especially exploration geologists and drillers, entered their professions because of the opportunities to work close to nature. They pride themselves on being able to practice their respective arts in an environmentally responsible manner so they will not interfere with other long term uses and values. These members and their families living in neighboring communities affected by the January 12 rule also would suffer extreme emotional distress, as well as a deep philosophical and cultural loss, by being prevented from enjoying existing and newly declared Roadless Areas in the same manner as they have for as long as six generations. Such a human toll cannot be measured in dollars.

Our members, as well as their families, friends and neighbors who live, work or visit their communities have come to depend on the many opportunities available to use National Forest lands, including inventoried Roadless Areas. Their weekend pilgrimages allow them to find peace of mind and gain a positive emotional release that those that live in urbanized areas cannot

begin to comprehend. To arbitrarily deny these citizens the chance to fully utilize the limited access available in Roadless Areas would be an unconscionable act.

In addition to this comment letter, NWMA incorporates by reference as though fully set forth herein, its comment letter of April, 1998 on the Interim Rule, its comment letter dated December 17, 1999 on the Notice of Intent to Prepare an EIS on Roadless Areas Conservation, its comment letter dated July 14, 2000 on the Proposed Rule, and the comments of the National Mining Association, the Colorado Mining Association, and the Mining and Metallurgical Society of America.

NWMA Responses to ANPR Questions

1. ***Informed Decision-making*. What is the appropriate role of local forest planning as required by NFMA in evaluating protection and management of inventoried roadless areas?**

As a general matter, NWMA maintains that the decisions regarding management of roadless areas should be decided at the Forest level, not by top-down, administrative fiat from offices in Washington, DC. Local-level forest planning, as established by the NFMA has long been the mechanism used to develop forest plan decisions by the people most knowledgeable about the National Forest Lands in question. Local forest plans are developed through an open public process by agency personnel, industry representatives, environmentalists, elected officials, and citizens of the community. A national top-down, one-size-fits-all roadless conservation rule undermines the cooperative dialogue that takes place during each Forest's plan revision and cancels out years of research, scientific analyses, collaboration, and compromise.

The NFMA makes the land and resource management plan (forest plan) the focal point for management of each National Forest. After adoption of the forest plan, all "[r]esource plans...and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans." 16 U.S.C. 1604(i). If a proposed "resource plan" is not consistent with the forest plan, the NFMA requires analysis of a proposed plan amendment and the opportunity for public comment before the plan amendment can be adopted and implemented. *Id.* § 1604(d) and (f)(4). Forest plans are the engines that drive the forest management process.

The NFMA similarly recognizes the need to consider relative values and local conditions. In the NFMA, Congress concluded that it was "unwise to legislate national prescriptions" for all national forests because of the "wide range of climatic conditions, topography, geologic and soil types," and different local perspectives on appropriate land uses in a particular National Forest. S. Rep. No. 94-893, at 26 (1976). This prohibition against national prescriptions also extends to Forest Service actions:

> The Committee bill directs that guidelines be developed by the Secretary of Agriculture for the land management planning process. While planning guidelines will apply at all levels, *there is not to be a national land management prescription*. The general

> framework for the plans and appropriate management direction would be established on a national basis.... The *detailed application of this framework and direction would be reflected in individual plans*.... The Committee believes that in the development of land management plans, the land manager must pay particular attention to the identification of land suitability and capability for various types, level, and combinations of resource use,....and special resource relationships where hazards exist for the various resources [e.g., forest health issues].

S. Rep. No. 94-893, at 35. (emphasis added).

Notably, roadless areas were not one of the areas where Congress called for national-level rules and guidelines in 16 U.S.C. § 1604(g). Instead, the Statewide Wilderness Acts provide that roadless areas shall be managed as determined appropriate in individual forest plans.

In commenting on the NFMA bills, the Forest Service itself stated that iron-clad nationwide rules were unwise due to the variety of biological and socio-economic conditions encountered in the widespread National Forest System:

> The National Forest System is very diverse and contains a wide range of climatic conditions, topography, geologic and soil types, vegetative covers, and wildlife. Because of this diversity, we do not believe it is desirable or practical to legislate national prescriptions as would be done by S. 2926. We strongly recommend that S. 2926 not be enacted.

S. Rep. No. 94-893, at 46.

It is contrary to the design of the NFMA to institute a national proscription that all inventoried roadless areas shall remain roadless permanently, without regard to local biological, mineral, and socio-economic conditions. The Forest Service must rely on localized decision-making.

If the plan amendment process is circumvented, the Forest Service will not have any site-specific analysis of the biological, mineral, and socio-economic consequences of its decision for each roadless area, and the public will not have the ability to comment that roads should be permitted in a particular roadless area (just as the consensus forest plan had authorized).

The public lands of the United States managed by the USFS are dedicated to the multiple-use of all citizens. The Organic Administration Act of 1897 established this mandate, it was reaffirmed by the National Forest Management Act of 1976 (NFMA), and Congress has not changed that intent. Such multiple-use includes the exploration for, and development of the mineral resources lying on and under lands managed by the Forest Service. Proper use of such lands and the assets on those lands – including mineral resources – requires proper planning by the agency at the local, regional and national levels. The January 12 Rule improperly attempts to pre-empt the local planning process and ignored meaningful input by those most impacted by the Rule.

In 2000, the USFS was quite elusive in the description of the boundaries and specifying how many acres were to be included in proposed roadless areas. Nationally, descriptions varied from 40 to 63 million acres; an inventory of the existing infrastructure – including roads – within the proposed area under consideration was never provided; and neither was a description of private inholdings and other features of the areas under consideration. The so-called public meetings were orchestrated to limit meaningful input. Either no maps of the considered areas, or quite sketchy maps, were available in some, but not all, public meetings held to describe the process. This demonstrates why a proper and adequate planning regime – particularly at local and regional levels of the Forest Service – must be utilized to ensure that the issues and concerns of those citizens who are most affected by the rule are heard, and all the information needed for meaningful participation in the process is available.

For example, private inholdings must be provided proper access so individuals owning those lands may enjoy their use. Likewise, the harvest of natural resource commodities, such as timber, livestock forage, and mineral deposits, must be considered in determining roadless area management. Forest Service statistics indicate that within the 58.5 million acres currently designated as roadless, 9 million acres are considered suitable for timber production. No figures were given for rangeland usage or for lands with mineral potential. A total of 2.8 million acres *actually contain* roads. Inholdings total 421,000 acres of private land and another 43,000 acres of state owned lands. These private and state lands must be guaranteed usable road access under any plan implemented.

The lands managed by the Forest Service, particularly in the Western U.S. including Alaska, contain a wealth of mineral resources available to our citizens to maintain their standard of living now, and into the distant future. However, before these mineral resources can be used they must be discovered, evaluated, and developed. Each of those steps, which appear deceptively simple, are quite complicated, expensive, and require access to Forest Service lands for their implementation. Roads are a critical part of that access. Exploration and development of located mineral resources cannot be undertaken without overland access to the area in which the resource base is located. The January 12th Rule basically ignored the much needed, and congressionally mandated, right of access to mineral resources on lands subject to the Rule. The study of the mineral potential of proposed Roadless Areas undertaken in the rulemaking process was grossly inadequate. In any event, even careful evaluations are notorious for under-estimating the actual mineral potential of an area. (See ANPR Question 5 below.)

The Forest Service has a limited role in the regulation of mineral resources since federally owned minerals are managed by the Department of Interior. For mineral activity on Forest Service lands, the appropriate role of the of local forest planning in evaluating protection and management of inventoried roadless areas is defined not only by NFMA, but also other statutes particular to mineral development. Among those statues which the agency must abide by in the course of planning are the Mining Law of 1872, and the Mining and Minerals Policy Act of 1970.

The relevant statutes and regulations governing the National Forest System, as interpreted and applied for almost a century, demonstrate that the Forest Service only has limited regulatory authority over disposition of mineral resources governed by the 1872 Mining Law, as amended.

This limited authority simply does not permit management of roadless areas that will unreasonably interfere with the exploration and development of minerals on lands open to mineral entry.

The Organic Administration Act of 1897, which remains a central statutory authority for the Forest Service today, does not provide the authority to limit locatable mineral exploration and mining on National Forest Lands. To the contrary, the Act explicitly states: "nor shall anything herein prohibit any person from entering . . . national forests for all proper and lawful purposes, including that of prospecting, locating and developing mineral resources. . . ." 16 U.S.C. § 478. Interpreting the Forest Service's Organic Act, the U.S. Court of Appeals for the Ninth Circuit recently stated:

> [T]he Forest Service may regulate use of National Forest lands by holders of unpatented mining claims, . . . but only to the extent that the regulations are "reasonable" and do not impermissibly encroach on legitimate uses incident to mining and mill site claims.

United States v. Shumway, 199 F.3d 1093, 1107 (9th Cir. 1999) (citing *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981)). *Accord Shumway*, 199 F.3d at 1107 (right of the Forest Service to manage surface resources shall be such as not to endanger or materially interfere with prospecting, mining or processing operations "or uses reasonably incident thereto"). Roads are most certainly "legitimate uses incident to mining and mill site claims" and the prohibition of road construction in inventoried roadless areas constitute a material interference with mining that is certainly an unreasonable and impermissible encroachment on legitimate uses.

Not only have courts and administrative adjudicatory bodies consistently interpreted the Organic Act regarding its applicability to locatable minerals, but the Congress in subsequent grants of authority to the Forest Service, has uniformly done so too. Thus, in 1960, Congress passed the Multiple-Use and Sustained-Yield Act ("MUSYA"), 16 U.S.C. §§ 528-531, which directed the Forest Service to manage the National Forests according to the principles of "multiple-use" and "sustained yield." Significantly, in the MUSYA, as in the Forest Service's Organic Act, Congress warned that "nothing" in the Act "shall be construed so as to affect the use or administration of the mineral resources of national forest lands . . . " 16 U.S.C. § 528. The Act's legislative history demonstrates a deliberate effort by Congress to limit Forest Service authority over mineral resources. The House of Representatives Interior Committee Reports on the Act states:

> It is made clear that nothing in the bill would affect the authority which the Secretary of the Interior has with respect to the mineral resources in the national forest lands. Thus, the bill would not impair mining operations and activities under the authorities which the Secretary of the Interior has with respect to such mineral resources.

House Report No. 1551 (Apr. 25, 1960).

Thus, Congress repeatedly has acknowledged through legislation and legislative history that the Forest Service does not have discretionary planning authority over mineral resources on National Forest lands.

Furthermore, the Forest Service's own regulations recognize this limitation on the Agency's authority over locatable minerals. For example, the regulations found at 36 C.F.R. Part 228, promulgated by the Forest Service in 1974, correctly set the boundaries of the Forest Service's limited authority over locatable mineral resources and mining activities. In the statement of purpose for the Part 228 regulations, the Forest Service recognized that there is a statutory right to enter public lands in search of minerals. Thus, the purpose of the regulations was to:

> [S]et forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. 21-54), *which confer a statutory right to enter upon the public lands to search for minerals*, shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources. It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.

36 C.F.R. § 228.1 (emphasis added). Clearly, prohibitions on the construction of roads for mineral exploration and mine development interferes with this statutory right. The Part 228 regulations, which remain in full force today, require mining claimants to obtain Forest Service approval of a plan of operations, and post necessary bonding to secure compliance with the plan of operation's reclamation requirements, but make no attempt to limit access to roadless areas. *See, e.g.*, 36 C.F.R. §§ 228.4, 228.5.

In the preamble to the Part 228 regulations, the Forest Service specifically and correctly recognized that it *may not* adopt surface regulations that impede upon the statutory mining rights:

> The Forest Service recognizes that prospectors and miners have a statutory right, not mere privilege, under the 1872 mining law and the Act of June 4, 1897, to go upon and use the open public domain lands of the National Forest System for the purposes of mineral exploration, development and production. Exercise of that right may not be unreasonably restricted. Specific provision has been made in the operating plan approval section of the regulations charging Forest Service administrators with the *responsibility to consider the economics of operations*, along with the other factors, in determining the reasonableness of the requirements for surface resource protection.

39 Fed. Reg. 31317 (Aug. 28, 1974) (emphasis added).

The Forest Service lacks the authority to manage roadless areas in a manner that impedes longstanding statutory rights to explore the public lands for minerals and develop the minerals discovered. The limitations on Forest Service authority with regard to minerals have been recognized and applied consistently. **Mineral exploration and development pursuant to the Mining Law of 1872 must be specifically exempted entirely from the draconian restrictions imposed by the January 12 Rule.**

2. ***Working Together*. What is the best way for the Forest Service to work with the variety of States, tribes, local communities, other organizations, and individuals in a collaborative manner to ensure that concerns about roadless values are heard and addressed through a fair and open process?**

NWMA strongly encourages the Forest Service to solicit and seriously consider comments made by local citizens, local, county and state governmental officials, and those most affected economically by the various forest management plans. We endorse the concept suggested by this question that local citizens and officials usually know best how individual actions on Forest Service lands will affect both the local communities as well as the various resources on the land, and how to best conserve and balance the sometimes competing values involved.

In our experience, collaboration is difficult, if not impossible to achieve on a National level. The January 12 Rule does not allow for cooperative solutions. The Rule is contrary to the Western Governors' Association's *Enlibra* principles. Collaboration should be the goal of the process at the local level in developing solutions to issues and management guidelines.

NEPA Provides a Road Map

The Forest Service has an excellent tool available to ensure that concerns about roadless values are heard and addressed through a fair and open process -- the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq*. NEPA requires "site-specific" analysis of major federal actions. Meaningful input by affected citizens and parties is a "must" for an adequate EIS. Such an EIS was not properly prepared for the January 12 rule.

The Council for Environmental Quality (CEQ) NEPA Regulations (*see* 40 C.F.R. § 1501.2), which are binding on the Forest Service, establish a complex system to ensure that the government considers the environmental impacts of its actions *before* taking those actions. This system requires notice to and comments from an informed public and other affected parties who provide the government with information about the potential environmental impacts the actions may have.

NEPA requires "responsible [federal] officials" to prepare an Environmental Impact Statement (EIS) on proposals for legislation and "other major Federal actions significantly affecting the quality of the human environment." Under NEPA, an agency must prepare an EIS when an action may have a significant environmental effect.

Federal agencies are required to begin the scoping process as soon as they determine that they will prepare an EIS. Under CEQ regulations, federal agencies must invite the *meaningful*

participation of interested agencies. This requirement expressly includes the appropriate States and State agencies. The purpose of the scoping process is to identify those issues that the agency should address in the EIS. A failure to conduct the scoping process in a manner that includes all interested parties and identifies all relevant issues is a violation of NEPA.

NEPA requires agencies to include a discussion of alternatives to the proposed action in the EIS and also requires the agencies to study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources. CEQ regulations require that agencies consider "reasonable alternatives not within the jurisdiction of the lead agency," together with the "no-action" alternative. The Forest Service failed to do this when promulgating the January 12 Rule now under reconsideration.

Furthermore, CEQ's NEPA regulations mandate that agencies "make diligent efforts to involve the public in preparing and implementing their NEPA procedures." 40 C.F.R. § 1506.6. Each agency "shall . . . [r]equest comments from the public, affirmatively soliciting comments from those persons or organizations who may be interested or affected." 40 C.F.R. § 1503.1(a)(4). In addition, an agency's final EIS must make meaningful reference to all responsible opposing viewpoints.

Thus, NEPA is designed to ensure that concerns about the impacts of federal actions are given a public airing and addressed in a fair and open process. The Forest Service needs to carefully comply with NEPA during this current process.

Rulemaking Process Resulting in January 12 Roadless Rule Did Not Comply With NEPA

NWMA is obligated to point out that the Forest Service would likely not be engaged in this ANPR process if adequate compliance with NEPA had occurred in developing the January 12 Rule. The Forest Service should learn from its past mistakes. The rulemaking process resulting in the January 12 rule was a rushed process with a predetermined outcome. Decisions were made based on inadequate or incomplete information, and pertinent data were ignored. As mentioned above, binding NEPA regulations require that there "shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action" that will be addressed in the EIS (40 C.F.R. 1501.7). In the rulemaking process resulting in the January 12 Rule, the Forest Service completely failed to provide the public with adequate information on details of the roadless area initiative to allow informed public comment on the scope of issues to be addressed or on the significance of issues related to the proposed action. How could the public possibly provide comments when the areas to be impacted by the proposed rule were not identified, and no information was provided on the location and size of the roadless areas to be studied or on environmental issues or alternatives. The environmental, social, and economic implications of the roadless rulemaking could not be properly analyzed in any environmental impact documents without this information.

In *California v. Bergland*, 483 F. Supp. 465 (E.D. Cal. 1980), *aff'd sub nom.*, *California v. Block*, 690 F.2d 753 (9th Cir. 1982), the U.S. Court of Appeals for the Ninth Circuit rejected under NEPA, a blanket approach to roadless reviews. In its review of the Forest Service's

RARE II program, the court in *Block* held that, "[h]aving decided to allocate simultaneously millions of acres of land to nonwilderness use, the Forest Service may not rely upon forecasting difficulties or the task's magnitude to excuse the absence of a reasonably thorough site-specific analysis of the decision's environmental consequences." *Id.* at 765. Indeed, "[b]road, generic statements neither inform the public of the environmental consequences of action, nor require the agency to take a 'hard look' at environmental factors." 483 F. Supp. at 465 ("[s]ite specific information is especially vital in considering wilderness issues."). The Forest Service, in pursuing this ANPR process, should dedicate time and resources to mapping the national forest system to determine exactly what areas are considered roadless, as well as the resources that are located in such areas.

3. *Protecting Forests*. How should inventoried roadless areas be managed to provide for healthy forests, including protection from severe wildfires and the buildup of hazardous fuels as well as to provide for the detection and prevention of insect and disease outbreaks?

The Forest Service should allow local forest-level decisions for forest health treatments, including timber thinning to reduce the risks of wildfire and control disease outbreaks. It is essential that roadless areas be accurately mapped, including those areas at risk of wildfire or insect and disease infestations so that management options can be properly assessed. Failure to take advantage of the latitude available to actively manage the forest health of roadless areas will only serve to increase threats to the integrity of Wilderness Areas, which are often nearby.

4. *Protecting Communities, Homes, and Property*. How should communities and private property near inventoried roadless areas be protected from the risks associated with natural events, such as major wildfires that may occur on adjacent federal lands?

Management of National Forests must place a priority on restoring forest health in order to minimize risks to adjacent private lands and communities. Healthy forests are far less prone to catastrophic wildfires or insect and disease infestations that can adversely impact adjacent non-federal holdings. The Forest Service must give National Forest neighbors meaningful opportunities to collaborate on decisions about federal lands that might place them at increased risk.

Another key ingredient for protecting communities is maintaining a sustainable economic environment that provides family wage jobs to local citizens. Economic development that can make use of natural resources within the National Forest is an essential element to preventing the decay and blight associated with communities in decline. The Forest Service is obligated to properly assess the economic impact, including the potential for mineral exploration and development, that would be created by managing roadless areas as *de facto* wilderness, then ensure that all adverse effects are fully mitigated.

5. *Protecting Access to Property*. What is the best way to implement the laws that ensure States, tribes, organizations, and private citizens have reasonable access to property they own within inventoried roadless areas?

This is a critical question to NWMA because the exclusion of areas from exploration access today by preventing road construction limits future exploration for mineral commodities to meet the needs of our society. Leaving the area open to mineral exploration does not mean geologists and drillers engaged in exploration will immediately begin work in the area. That exploration will *only* occur if the area is conducive for specific mineral deposits that are in economic demand and for which adequate technical tools for exploration and extraction exist.

The Forest Service must fully recognize the realities of mineral exploration and development as it applies to the need for roaded access. The agency must not mandate a ban on road use or construction, as it will seriously diminish the lands available for exploration and development, now and in the future. Furthermore, preventing reasonable access exposes the Forest Service to 5th Amendment taking actions.

Therefore, NWMA believes the best way to implement the laws governing access is to adhere to the intent of Congress and stop attempting to amend legislation through rulemakings. If a law guarantees access, the Forest Service has no authority to infringe on that right. For example, the Forest Service has no statutory authority to prevent access to federal lands open to mineral entry pursuant to the Mining Law of 1872. Such access implies the ability to not only locate minerals but to develop them commercially. While NWMA acknowledges that Forest Service surface management authorities are broad enough to allow some say on how a mining claim may be accessed, these restrictions cannot be so burdensome as to constructively deny reasonable access.

NWMA agrees with the analysis on access to federal lands contained in "Forest Service Roads: A Synthesis of Scientific Information" found on the Forest Service Web Page created for this issue. In the section entitled Energy and Mineral Resources (p. 13), the document first acknowledges that "Federal law and Forest Service policy clearly support exploration for and extraction of resources from public lands." The document then states that "under the Mining Law of 1872, U.S. citizens and firms have the right to explore for and stake claims to selected minerals on all public domain lands not specifically withdrawn from mineral entry" and that the Forest Service "cannot unilaterally deny exploration access to National Forest lands." It notes that access to unpatented holdings, patented claims, leases, and severed mineral rights can be restricted but seldom denied. Regarding use of roads as necessary for access, the document asserts that the Forest Service:

> can affect the location and design of roads built on National Forest lands to support energy and mineral activity. In addition, the agency can in some instances place stipulations on access, i.e., limiting road use to certain months, permitting aerial access only, or precluding surface occupancy. Constraints that are unduly expensive to fulfill or so restrictive as to make an otherwise economic mineral deposit uneconomic, however, might well be perceived as denying reasonable access.

NWMA would add that permitting aerial access only or precluding surface occupancy can only legally be applied by the Forest Service in designated Wilderness Areas, and then, only in certain circumstances.

The Wilderness Act of 1964 specifically states that "in any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of the Agriculture shall ... permit ingress and egress to [claims] by means which have been or are being customarily enjoyed with respect to other such areas similarly situated." 16 U.S.C. §1134.

Forest Service Manual and Regulations Specifically Acknowledge Right of Access

The Forest Service Manual Chapter on Mining Claims (Chapter 2810) specifically acknowledges right of access to a mining claim: "the right of reasonable access for purposes of prospecting, locating and mining is provided by statute. Such access must be in accordance with the rules and regulations of the Forest Service. However, the rules and regulations may not be applied so as to prevent lawful mineral activities or to cause undue hardship on bona fide prospectors and miners." Forest Service regulations also emphasize protection of miner's right to access. (See 36 CFR 228.1 – mining laws confer a statutory right of entry and 36 CFR 261.1(4)(b) – regulatory prohibitions shall not preclude activities authorized under the Mining Law.) Thus, if the Forest Service simply implements the laws as Congress intended, reasonable access can be made available to mining claims while still conserving roadless values.

6. ***Describing Values*. What are the characteristics, environmental values, social and economic considerations, and other factors the Forest Service should consider as it evaluates inventoried roadless areas?**

In pursuing the ANPR process, the Forest Service must understand that a "national roadless rule" is unnecessary (and probably unlawful) given the existence of the Wilderness Act of 1964. Congress passed the Wilderness Act to establish a National Wilderness Preservation System because several decades of management of the public lands by administrative agencies through designation as "roadless," "primitive," "canoe," "wild," or "wilderness" areas, resulted in a patchwork administrative scheme for setting aside "wilderness areas" for special protection from multiple-uses. As the House Report accompanying the Act explained:

> A statutory framework for the preservation of wilderness would permit long-range planning and assure that no future administrator could arbitrarily or capriciously either abolish wilderness areas that should be retained or *make wholesale designations of additional areas in which use would be limited.* This committee accordingly endorses the concept of a legislatively authorized wilderness preservation system.

House Report (Interior and Insular Affairs Committee) No. 15338, July 2, 1964, at 3616-17 (emphasis added).

However, it explicitly reserved for itself, the Congress, the power to designate any and all future wilderness areas. *See, e.g.*, 16 U.S.C. § 1131 ("no Federal lands shall be designated as 'wilderness areas' except as provided for in this chapter or by subsequent Act"); 16 U.S.C. § 1132(c) ("[a] recommendation of the President for designation as wilderness shall become

effective only if so provided by an Act of Congress"); 16 U.S.C. § 1132(e) (no modification or adjustment of boundaries without legislative assent).

Through its express decision not to create buffer zones and instead limiting the special protection for wilderness areas to that area within carefully drawn boundaries, Congress made clear that the remaining lands not designated wilderness were to remain open to multiple uses. *See, e.g.,* 16 U.S.C. § 1133 ("[n]othing in this chapter shall be deemed to interfere with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple-Use Sustained-Yield Act of June 12, 1960 (74 Stat. 215)."). Thus, one value must be to allow a multitude of uses, including mining.

Indeed, even within congressionally designated wilderness areas, Congress stated that nothing in the Act "shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources," 16 U.S.C. § 1133(d)(2). E*ven in wilderness areas, Congress contemplated roaded areas in relation to mining exploration and development, in certain circumstances.*

The Forest Service traditionally has respected congressional will in regard to management of non-wilderness areas. For example, the Forest Service Manual on Recreation, Wilderness, and Related Resource Management explicitly forbids the maintenance of "buffer strips of undeveloped wildland to provide an informal extension of wilderness." FSM § 2320.3(5).

The Forest Service must refrain from attempting to create the functional equivalent of congressionally designated wilderness areas in this roadless proposal. In the rulemaking process leading up to the January 12 rule, the Forest Service failed to do this by implicitly incorporating "wilderness values" to create unlawful buffer zones by informally extending congressionally authorized Wilderness Areas:

> Areas without roads have inherent values and characteristics that are becoming scarce in an increasingly developed landscape. While National Forest System inventoried roadless areas represent only about 2 percent of the total landbase of the United States, they provide significant opportunities for dispersed recreation, clean, clear sources of public drinking water, and large undisturbed landscapes that provide privacy and seclusion. In addition, these areas serve as bulwarks against the spread of invasive species and often provide important habitat for rare plant and animal species, support the diversity of native species, and provide opportunities for monitoring and research.

Forest Service Roadless Web Page, Question and Answers (2000).

Given such statements, it is difficult to discern how the protected roadless areas created by the January 12 rule would differ in any significant manner from wilderness areas established under the Wilderness Act of 1964. The Forest Service must respect the fact that the overwhelming majority of the roadless areas that are the subject of the ANPR and the January 12 rule were

expressly rejected by Congress for Wilderness designation during consideration and passage of 19 separate pieces of legislation. In fact, virtually all areas targeted by this proposed action were specifically left open to mineral location under the Mining Law of 1872, leasing under the Mineral Leasing Act of 1920, mineral material sales, as well as for other multiple-uses, when Congress decided against wilderness designations for these areas pursuant to the Wilderness Act of 1964. Thus, "wilderness values" cannot be applied wholesale and without specific authorization from Congress.

The wisdom of respecting the will of Congress is illustrated in the following examples:

The Absaroka-Beartooth Wilderness Area was designated by Congress in 1978 (92 Stat. 162). Three mineral resource assessment studies were conducted during the period 1969 through 1975 as surveys of wilderness and primitive areas mandated by the provisions of the Wilderness Act. These early studies covered 790 square miles and delineated areas of high, moderate, and low potential for the occurrence of various mineral commodities. The House Report (No. 95-927) which accompanied S. 1671, a bill to designate the Absaroka-Beartooth Wilderness, stated:

> Although the area does contain significant mineral values, several areas containing active mining claims were excluded from the original wilderness proposal by the Senate Committee on Energy and Natural Resources. In addition, the committee recommended deletion of an area containing active mining claims above the west fork of the Stillwater River to exclude the bulk of mining claims . . . . *This deletion eliminates most known mineral provinces from the wilderness (including over 99 percent of the so-called Stillwater complex), and should ensure that wilderness and potential mineralized areas do not overlap*.

The Stillwater complex is a "layered mafic intrusive" of igneous rock which spans a surface area approximately 28 miles long by 4 miles wide. A layered mafic intrusive occurs when molten magma intrudes into sedimentary rock and as it cools segregates into distinct mineralogical and textural layers. In the case of the Stillwater, this layering is up to 18,000 feet thick. These layers contain platinum, palladium, chromium, nickel, copper, cobalt, and other minerals. The current mining by NWMA member Stillwater Mining Company (SMC) involves only a 3 to 8 feet layer in the middle of the 18,000-foot thick complex. This is the domestic source of platinum and palladium in the United States.

The January 12 Rule seriously affects not only ongoing and planned development and production activities of SMC, but also future mineral exploration activities of SMC and other companies. Significant areas of the SMC mining claim group along the complex are adversely affected. Roads will be required to construct additional ventilation shafts and escapeways to maintain safe operation of the mine. Delays in approval of surface activities necessary for underground operations will increase the cost to the company and may reduce the amount of economic reserves. Bypassed mineralized areas may be lost. Expensive changes in mining methodology may be required. In addition, the January 12 Rule illegally threatens to halt further exploration activities in the Stillwater complex.

Another example of the harm created by improperly imposing wilderness values through a National Roadless Rule is the Independence Range, which lies northwest of Elko, Nevada, and Southwest of the Jarbidge Wilderness on the Humboldt National Forest. The initial Jarbidge Wilderness was designated as part of the Wilderness Act legislation of 1964. 16 U.S.C. 1132 (a). Subsequent additions to the Wilderness were made in 1989 (103 Stat. 1784). It was clear in the Act and in the legislative history that no buffer zones or protective perimeters were to be created around the Nevada wilderness areas, other lands were to be managed for multiple-use, and that no further statewide roadless area review and evaluation of National Forest System lands in Nevada were to be conducted without Congressional authorization (Congressional Record, Sept. 20, 1989, S 11510-11515; Attachment 10).

NWMA member AngloGold Jerritt Canyon Corp. (AngloGold) is the majority owner and operator of the AngloGold-Meridian Joint Venture that operates the Jerritt Canyon Mine on the Humboldt-Toyaibe National Forest in the Independence Range. This important gold producer has an annual production of approximately 350,000 oz., and has approximately 425 employees. North of the Jerritt Canyon Mine approximately 8 miles is the Big Springs mining area formerly operated by the Independence Mining Company (predecessor of AngloGold) which has produced as much as 60,000 oz. of gold annually in the 1980s and early 1990s. Separating and abutting these two highly productive and mineralized mining areas is an area of "inventoried roadless area" identified in the DEIS, Volume 2, page 117.

The express purpose of the January 12 Rule is to prohibit road construction and reconstruction in the unroaded portions of inventoried roadless areas. For mineral activities with "valid existing rights," preparation of an EIS likely would be required. No analysis is undertaken to support this decision other than to say that the Forest Service has determined that these actions may have a significant effect on the quality of the human environment. *See* DEIS at page 3-143.

Under the January 12 Rule, exploration and development activities will be significantly reduced or eliminated in the "roadless area" between Big Springs and Jerritt Canyon. The delay of years and the EIS expense of hundreds of thousands to a million dollars or more will be prohibitive to almost any exploration project. There is a significant potential for the loss of an otherwise economic resource and the associated loss of local jobs. Thus, the important value of economic well-being for nearby communities must be considered.

Thus, the January 12 Rule must be modified to ensure that reasonable road access is preserved in roadless areas in order to explore for and develop locatable mineral resources pursuant to the 1872 Mining Law and the intent of Congress in designating wilderness area boundaries, and to maintain local economic vitality.

In exercising its authority over federal forest lands, Congress established the National Forest System through the Organic Administration Act of 1897, 30 Stat. 11 (June 4, 1897). By operation of the Transfer Act of 1905, 33 Stat 628 (February 1, 1905) stewardship of the national forests was transferred from the Department of the Interior to the Department of Agriculture. What followed over the ensuing decades was a series of enactments in which Congress consistently and clearly specified that stewardship over the national forests would be guided by the principles of multiple use and sustained yield, set forth is such laws as the

Multiple-Use-Sustained-Yield Act of 1960, 16 U.S.C. §§ 528-31 (MUSYA); the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§ 1600-14; and the National Forest Management Act of 1976, 16 U.S.C. §1600 *et seq*. Thus, the values of multiple-use must also be thoroughly considered.

Given the multiple-use mandate imposed by MUSYA, the Forest Service must accept that even designated roadless areas serve a wide variety of purposes, as the 7th Circuit has held, "the national forests, unlike national parks, are not wholly dedicated to recreational and environmental values." Cronin v. United States Department of Agriculture, 919 F.2d 439, 444 (7th Cir. 1990). Indeed, MUSYA directs administration of the National Forest System "for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." Thus, economic values have equal weight with other natural resource values.

There has been no change in the multiple use principles for Forest Service management set forth in the Forest Service Organic Act of 1897, Multiple-Use Sustained Yield Act of 1960 or in the Forest and Rangeland Renewable Resources Act of 1974 as amended by the National Forest Management Act of 1976. Indeed, **the United States Supreme Court has held that**:

> the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for two purposes – "[t]o conserve water flows and to furnish a continuous supply of timber for the people . . . National forests were not reserved for aesthetic, environmental, recreational or wildlife preservation purposes."

United States v. New Mexico, 438 U.S. 696, 707-8 (1978). (Emphasis added.) The Forest Service must respect its organic and multiple use statutes and the Supreme Court's interpretation of those statutes.

While the Forest Service is permitted under the MUSYA to prefer some uses over others based on relative resource values in particular areas, the Forest Service cannot, in a proposal that would impact the entire National Forest System, elevate one resource (i.e., environmental resources) over all others. In explaining the Act's multiple-use directive, the House Report discusses the "relative values" analysis as follows:

> One of the basic concepts of multiple use is that all of these resources in general are entitled to equal consideration, but in particular or localized areas relative values of the various resources will be recognized....
>
> In practice, the priority of resource use will vary locality by locality and case by case. In one locality timber use might dominate; in another locality use of the range by domestic livestock; in another outdoor recreation or wildlife might dominate. Thus, in particular localities the various resource uses might be given priorities because of particular circumstances. This

> is the meaning of the last sentence of section 2 of the bill. But no resource would be given a statutory priority over the others. The bill would neither upgrade nor downgrade any resource.

H.R. Rep. No. 1551, 86th Cong., 2d Sess. --- (1960), *reprinted in* 1960 U.S.C.C.A.N. 2377, 2379. Thus, the Forest Service may not "upgrade" one resource use, i.e. roadless areas, over all others.

7. *Describing Activities*. Are there specific activities that should be expressly prohibited or expressly allowed for in inventoried roadless areas through Forest Plan revisions or amendments?

First and foremost, the Forest Service must review its statutory authority as to whether it can prohibit any specific activities. For example, as discussed above in response to ANPR Question 5, the Forest Service has no statutory authority to prevent access to federal lands pursuant to the Mining Law of 1872. Therefore, arguably, roaded access for mineral development should be expressly allowed. In addition, as mentioned above in response to ANPR Question 6, the Forest Service should expressly prohibit using roadless areas as *de facto* wilderness areas through this rulemaking process or via local planning processes in the future.

8. *Designating Areas*. Should inventoried roadless areas selected for future roadless protection through the local forest plan revision process be proposed to Congress for wilderness designation, or should they be maintained under a specific designation for roadless area management under the forest plan?

The NEPA process provides an excellent format on which to develop ratings or designations of areas that truly justify designation as "roadless." Such a process will require careful inventory of assets, public input into values on each type asset, and consideration of the most practical and acceptable designation for various areas under consideration.

As discussed above in the response to ANPR Question 6, NWMA maintains that special additional protection for designated roadless areas is unnecessary given the intent and history of the Wilderness Act. Inventoried roadless areas selected for future protection should not routinely be proposed to Congress for wilderness designation. However, considering the vast area considered to be "roadless" under the January 12 Rule, there will undoubtedly be a few areas identified that truly deserve the high level of protection intended by the Wilderness Act. In addition, by proposing these carefully selected areas to Congress, the Forest Service will avoid allegations that it is attempting to create *de facto* wilderness areas in violation of the Wilderness Act.

9. *Competing Values and Limited Resources*. How can the Forest Service work effectively with individuals and groups with strongly competing views, values, and beliefs in evaluating and managing public lands and resources, recognizing that the agency cannot meet all of the desires of all of the parties?

Primary to balancing competing values is the mandate of the Forest Service to manage lands under its stewardship for multiple-use. The Forest Service should also avoid the temptation of trying to solve administrative problems through planning expediencies. For example, issues such as the inability of the Forest Service to maintain roads within an area should not be used as justification for declaring an area roadless. Financial capability is a matter of the congressional budgeting and appropriations process, not a land-use matter. We recognize the situation is complex, but believe shortcuts create more problems than they solve.

The Forest Service has an excellent system of Forest Management Plans providing management guidelines for the specific forest area for which they are prepared. These plans take into account what is practical, economically feasible and best for the particular area being managed, because local stakeholders have a meaningful chance to collaborate with each other, as well as the Forest Service. The Forest Service should use this approach to forest system management to determine the most appropriate uses of a particular forest and then manage in accordance with the resulting plan. Grandiose, national plans, should not take precedence over a tried-and-proven management approach represented by the individual Forest Management Plans and application of prudent adaptive management principles.

As discussed above in response to ANPR Question 2, the Forest Service has a proven tool for working with the public to make sure that all views are heard – NEPA. It is true that the Forest Service cannot ever meet all the desires of all interested parties but the Forest Service can ensure an open process, build an adequate record for decisions and provide reasoned explanations to avoid or minimize conflicts and litigation. In addition, even if it makes some groups unhappy, the Forest Service must be sure to work within the current statutory framework. However, consistent with legal and regulatory constraints, are opportunities for consensus building. Constructive dialogues at the Forest level of community involvement can help bridge differences and narrow the range of disagreement through mutual education. This is a proven approach, but the USFS must encourage line officers to engage in such processes, as many avoid it due to the intensity of the issue and staff resources that must be committed.

10. *Other Concerns*. What other concerns, comments, or interests relating to the protection and management of inventoried roadless areas are important?

Neither the Cost-Benefit Analysis nor the Initial Regulatory Flexibility Analysis (IRFA) met the letter or intent of the Regulatory Flexibility Act (RFA), the Small Business Regulatory Enforcement Fairness Act (SBREFA), and the Benefit-Cost Analysis/Unfunded Mandates Reform Act. While much of the IRFA is couched in the proper terms and tone expected of an objective analysis, a knowledgeable reviewer quickly perceives that the document is seriously flawed in many respects. The overall credibility of IRFA is seriously diminished by the notable absence of hard data or facts substantiating the many assumptions used throughout the Final EIS and the January 12 Rule. The full range of management alternatives cannot be determined without a proper IRFA or Cost-Benefit Analysis.

As a result, the USFS has failed to analyze adequately the impact of the January 12 Rule on small entities and did not fairly considered regulatory alternatives that would minimize significant economic impacts to small entities. As the U.S. District court in Florida has keenly

observed, **agencies must be mindful that even commendable goals like preservation do not excuse violations of the RFA**. "Although the preservation of Atlantic shark species is a **benevolent, laudatory goal**, conservation ***does not justify government lawlessness***." (emphasis added) *Southern Offshore Fishing Association v. Daley*, 55F. Supp. 2d 1336 (D. FL 1999).

The IRFA is deficient in a number of respects. The RFA requires "a succinct statement of the objectives of, and legal basis for, the proposed action; a description of and, where feasible, an estimate of the number of small entities to which the proposed action will apply." The IRFA was devoid of any attempt to satisfy either of these statutory requirements. The IRFA did not contain a statement of the legal basis for the proposed action. *The reason is simple: the agency lacked statutory authority for this rulemaking and was fully aware of this fact.*

The RFA further requires that each IRFA contain a description of any significant alternatives to the January 12 Rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the January 12 Rule on small entities. Again, the IRFA prepared by the USFS was devoid of any attempt to satisfy this requirement.

The alternatives discussed in the preamble to the January 12 Rule are not "alternatives that minimize any significant economic impact of the rule on small entities." Compliance with the RFA is not achieved by consideration of alternatives that do not meet the requirements of the Act. Accordingly, when the USFS considers alternatives that are more burdensome to small businesses, they are not valid for RFA purposes. In addition, the USFS did not consider several other obvious alternatives that would accomplish the objectives of the statute but would have protected small entities. These are temporary roads; well-maintained roads; privately maintained roads; and recognized RS 2477 roads.

One of the problems cited by the agency as a justification for this rule is the fact that the USFS does not have adequate resources to properly maintain existing roads. This problem also can be addressed by considering an alternative of requesting additional funding for roads from Congress, or allowing road maintenance by the private sector which use them for resource development. None of these alternatives were considered by the agency.

The January 12 Rule could have been crafted so that temporary (non-paved) roads may be permitted on an as-needed basis. Such an alternative should have been considered and published for public comment.

Our members have asked, "Did the USFS avoid the RFA mandated economic impact analysis because it knew that the impact to small businesses and rural communities would be large and devastating?" The USFS use of an all-or-nothing approach in developing the January 12 Rule, when experience, the laws written by Congress, and just plain common sense, dictated a middle ground, make their question pertinent. We believe the courts would agree.

One purpose of the RFA is to make sure reasonable alternatives are considered that avoid economic dislocation to small entities, while still accomplishing the stated regulatory goal. The technical and management capabilities exist to provide for continued judicious use of both new and existing roads on those tracts of land that remain largely unroaded. Middle-ground

alternatives should have been considered, and their economic impacts evaluated and compared to January 12 Rule. This nation has the means to avoid adverse environmental impacts to the land without essentially having to stop all resource-based economic activities. Not only was the absence of other reasonable alternatives inconsistent with RFA, but NEPA requirements as well.

Improvements in managing the Forest Service road system, including how to logically determine where and how to build new roads, appear to be needed. But just saying "no" to all new roads is poor government policy and defies logic; unless, as we believe, the true purpose of USFS leadership during the Clinton administration was to expand the Wilderness system without the consent of Congress.

Governors Marc Racicot of Montana and John Kitzhaber of Oregon recently stated that they believe the federal government has a special responsibility, both moral and legal, to rural communities of the American West. They observed that the policies of the federal government for nearly 140 years encouraged development of this nation's natural resources. As a result, small towns sprang up and people put down deep roots that allowed them to weather market fluctuations and whims of nature. The one thing they thought they could depend on was continued access to the National Forests and other public lands that are the source of their livelihoods. Now, under the January 12 Rule, the federal government is poised to put an end to that possibility.

The January 12 Rule will ensure that there is no road to a viable economic future for the hundreds of small rural communities in or near our National Forests. If the federal government wishes to turn its forests into parks, then Governors Racicot and Kitzhaber believe that the people paying the economic and personal price for this policy "about-face" should be made whole. Are we, as a nation, prepared to fairly compensate these communities for pulling the economic rug out from under them? Or, are we going to just turn our back on them as the Clinton administration did with the January 12 Rule? We believe that the RFA and NEPA required the USFS to include the obligation to compensate these rural communities in the IRFA and Cost-Benefit Analysis for decisions that would devastate their economies.

As a part of the revised rulemaking process on the Roadless Area Conservation plan, the Forest Service *must* comply with regulations under the RFA, SBRFA and the Benefit-Cost Analysis/Unfunded Mandates Reform Act in promulgating the rules under this process. Failure to adequately comply with these laws could easily subject the rulemaking process to renewed challenge in the courts.

Conclusion:

The Forest Service must recognize that the rulemaking process that resulted in the January 12 Rule was seriously flawed and legally insufficient. The January 12 Rule is the subject of numerous lawsuits seeking to declare it null and void. One federal court, the United States District Court for the District of Idaho, has issued a preliminary injunction against the January 12 Rule after finding that the Forest Service violated the Administrative Procedures Act (APA) and failed to comply with NEPA in promulgating the January 12 Rule. NWMA agrees with the Idaho federal district court that the Forest Service violated the APA and NEPA, as well as the RFA,

SBREFA, the Cost-Benefit/Unfunded Mandates Act, and the Wilderness Act of 1964 in promulgating the January 12 Rule. For those reasons, and the reasons set forth in this comment letter, NWMA believes that the Forest Service must withdraw the January 12 Rule in its entirety.

No new national roadless rule should be proposed. Instead, the Forest Service should continue to rely on the local forest management process mandated by the NFMA utilizing site-specific analysis pursuant to NEPA for management of roadless areas.

Sincerely,

Laura Skaer
Executive Director

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