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February 16, 2010

Forest Service Planning NOI
C/O Bear West Company
172 E. 500 S.
Bountiful, UT 84010

Re: Notice of Intent to Prepare and Environmental Impact Statement Associated with a National Forest System Land Management Planning Rule - 74 Fed. Reg. 67165 (Dec. 18, 2009)

The Northwest Mining Association (NWMA) appreciates the opportunity to provide comments on the Notice of Intent (NOI) to Prepare and Environmental Impact Statement (EIS) to analyze and disclose potential environmental consequences associated with a National Forest System land management planning rule. The Forest Service (USFS) is proposing the development of a new planning rule that will consist of procedures for developing, amending, and revising land management plans.

INTRODUCTION

NWMA is a 115 year old, 1,750 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 40 states and are actively involved in prospecting, exploring, mining, and reclamation closure activities 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 junior and large mining companies. More than 90% of our members are small businesses or work for small businesses. Most of our members are individual citizens.

MEMBER INTERESTS AFFECTED

A new planning rule based upon the principles outlined in the NOI would adversely affect NWMA members. A significant number of our members have made substantial investments in mineral related activities occurring within the National Forest System. Their future business interests would be directly and irreparably harmed under the USFS proposal.

It is well known that development of hardrock minerals creates new wealth, which is distributed throughout the U.S. economy and benefits all levels of our society. The public lands provide a major source of domestic mineral production and allows the U.S. to be less dependent on

uncertain foreign sources of raw materials. As the attached USGS chart demonstrates, the U.S. is more than 50% import reliant on 38 critical minerals and 100% import reliant on 19 critical and strategic minerals despite having the third largest mineral wealth in the world.

Mining on USFS administered lands also provides the Nation's highest paid non-supervisory wage jobs. These jobs are one of the cornerstones of rural economies in many parts of the West. They also are the foundation for the creation of many non-mining service and support rural businesses found in or near National Forests. Hardrock mining on USFS-administered land also provides substantial federal and state tax revenues. In addition to these important economic facts, 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. Mining is a temporary use of the land and today's stringent environmental laws and regulations, combined with robust financial assurance requirements, ensure the environment will be protected and the land reclaimed.

NWMA urges that extreme caution be exercised as the complete range of alternatives are developed to ensure that those citizens whose traditions and cultural heritage is directly tied to earning a living off the land may continue to do so. This is especially important in times like the present when the nation's National Forest lands can be a source of long-term, high paying jobs to help lead the country out of a recession. The psychological and emotional well-being that is derived from feelings of self-sufficiency and independence is, in fact, the very basis of liberty as described in the Declaration of Independence.

THE FOREST SERVICE MUST ADHERE TO ITS STATUTORY MANDATE

The Forest Service (USFS) has a long history of developing planning rules that are, in their own words, "costly, complex, and procedurally burdensome" (74 Fed. Reg. 67167). NWMA has serious concerns that the current proposal does not serve long-term national interests nor is it responsive to the needs of our members. The substantive and process principles outlined in the proposal are inconsistent with Congressional intent and relevant statutory language. Thus, a new planning rule based on these principles would be very vulnerable to legal challenge.

The National Forest Management Act of 1976 (NFMA) requires the Secretary of Agriculture to assess Forest lands, develop a management program based on multiple-use, sustained-yield principles, and implement the plan on each unit of the National Forest System. The plans must be in accordance with the *National Environmental Policy Act of 1969* and must consider economic and environmental factors. In fact, it is incumbent on the agency, when balancing the environmental analysis, to give equal consideration to the social and economic factors and not presume that environmental harm will outweigh all other considerations. Accordingly, the ninth circuit court of appeals in *Lands Council v. McNair*, 537 F.3d 981 (9th cir. en banc 2008), stated: "Our law does not...allow us to abandon a balance of harms analysis just because an environmental injury is at issue." Given the current state of the U.S. economy, it is more important than ever to adhere to that statutory mandate so that our communities remain healthy and vibrant.

Unfortunately, the NOI advances the concept of “ecological sustainability” above multiple-use, contrary to clear statutory language of the NFMA of 1976. We believe the proposed concepts in the new planning rule ignore the multiple-use mandate, and the resulting land use plan revisions and amendments will adversely affect livestock grazing, timber production, mining, recreation and other multiple-uses in the national forests.

Furthermore, the focus on “climate change” in the NOI is wholly inappropriate, especially in view of the continuing stream of evidence of fraud and manipulation of data by the Climate Research Unit (CRU) at East Anglia University. There is no congressional mandate to consider climate change in forest planning, and doing so would add requirements that are not based on science. Forest plans already contain flexibility and adaptive management processes to deal with the natural variables and inevitable changes in ecosystems. After all, in dealing with natural ecosystems, the only constant is change.

There is much uncertainty regarding climate change, and to incorporate that uncertainty in the forest planning effort would unduly burden the Forest Service. For example, in *Lands Council v. McNair*, the ninth circuit stated:

“...none of NEPA’s statutory provisions or regulations requires the Forest Service to affirmatively present every uncertainty in its EIS. After all, to require the Forest Service to affirmatively present every uncertainty in its EIS would be an onerous requirement, given that experts in every scientific field routinely disagree; such a requirement might inadvertently prevent the Forest Service from acting due to the burden it would impose.”

For that reason, it is unreasonable to attempt to consider climate change issues as part of a forest plan.

CONGRESS HAS REPEATEDLY LIMITED THE FOREST SERVICE’S AUTHORITY OVER LOCATABLE MINERALS.

NWMA is concerned that the Forest Service, through a new planning rule, may seek to exercise broad discretionary planning authority over locatable mineral resources on National Forest System lands. That would exceed the Forest Service’s regulatory authority over locatable minerals. While the Forest Service does have the authority to regulate the surface use of locatable mineral activities to ensure compliance with all applicable environmental laws and regulations, the Forest may not prohibit locatable mineral activities that comply with the applicable laws and regulations.

The General Mining Law allows for “free and open exploration and purchase” of “[a]ll valuable mineral deposits in lands belonging to the United States.” 30 U.S.C. § 22. Congress established the National Forests through the *Organic Administration Act of 1897*, 30 Stat. 11 (Jun. 4, 1897), with administrative authority originally vested in the Department of the Interior.

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 warns: “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 9th Circuit 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, No. 96-16480, 1999 WL 1256285 (9th Cir. Dec. 28, 1999) (citing *United States v. Weiss*, 642 F.2d 296, 299 (9th Cir. 1981)). *Accord, Shumway*, 1999 WL 1256285 at *11 (The 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.”). Thus the Forest Service cannot exercise discretionary planning authority to prevent the exploration, development, and mining of mineral resources on National Forest lands.

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 principle 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, and instead:

“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, 1960 U.S.C.C.A.N. 2377 (Apr. 25, 1960).

THE FOREST SERVICE HAS RECOGNIZED ITS LIMITED AUTHORITY OVER LOCATABLE MINERALS.

The regulations found at 36 C.F.R. Part 228 promulgated by the Forest Service in 1974 set the boundaries of Forest Service authority over locatable mineral resources and mining activities. The statement of purpose for the Part 228 regulations allows the Forest Service 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). 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 financial assurance to secure compliance with the plan of operation's reclamation requirements, but make no mention of discretionary planning requirements. *See, e.g.*, 36 C.F.R. §§ 228.4, 228.5. Any new final planning rule must recognize these limitations in the text of the final rule and the preamble language.

Despite the fact that the Forest Service lacks the authority to apply the proposed land and resource management rules to locatable mineral resources, it should address the existence of locatable minerals within the National Forest System and plan for the development of these resources accordingly.

USFS SHOULD PROVIDE A POST-DECISIONAL APPEAL PROCESS

When discussing the process principles for a new rule in the NOI, the USFS solicits comments about what kind of administrative review process should be offered to the public. Specifically, the agency wants to know if there should be a pre-decisional objection or a post-decisional appeal process.

NWMA believes there should be a post-decisional appeal process for the new planning rule. A pre-decisional objection process is appropriate for individual projects such as those proposed under the *Healthy Forests Restoration Act*. However, the new planning rule is significant in that it will set the framework for all National Forest System land management planning, and as such the public must have the ability to appeal the new rule.

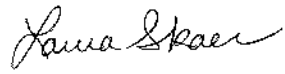
CONCLUSION

As the USFS once again embarks on the development of a new planning rule, it is imperative that the agency strictly adhere to its' statutory mandate. In order to be effective, forest planners need specific rules with well-defined terms to avoid the complexity problems of previous planning rules. Unfortunately, the ill-defined terms and principles found in the NOI gives a new planning rule the potential to be even more costly, cumbersome and ineffective than previous rules.

Thank you for the opportunity to comment. NWMA believes a planning rule strictly bound by the framework of the law can result in a positive outcome for miners, local communities and the environment.

NWMA trusts these comments provided on behalf of our members will be accepted by the USFS in the same constructive spirit in which they are offered. We look forward to what we hope will be a cooperative process that includes meaningful opportunities for our members to comment.

Sincerely,

A handwritten signature in cursive script that reads "Laura Skaer".

Laura Skaer
Executive Director