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Forest Service Planning DEIS
c/o Bear West Company
132 E. 500 S.
Bountiful, UT 84010

Re: National Forest System Land Management Planning Proposed Rule - 76 Fed. Reg. 8480 (Feb. 14, 2011)

The Northwest Mining Association (NWMA) appreciates the opportunity to provide comments on the National Forest System Land Management Planning Proposed Rule. The Forest Service (USFS) is proposing a new planning rule that will consist of procedures for developing, amending, and revising land management plans. NWMA has several serious concerns with the proposed rule which we detail below.

INTRODUCTION

NWMA is a 116 year old, 2,000 member, non-profit, non-partisan trade association based in Spokane, Washington. NWMA members reside in 42 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

The proposed new planning rule will adversely affect NWMA members and many associated support industries. 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. National Forest System 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. As the attached U.S. Geological Survey (USGS) chart demonstrates, the U.S. is more than 50% import reliant for 43 critical minerals and 100% import reliant for 18 critical and strategic minerals despite being the third largest source of 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 jobs and support rural businesses found in or near National Forests. In fact, the indirect employment multiplier for the mining industry is twice the national average. Hardrock mining on USFS-administered land also provides substantial federal and state tax revenues. In addition to these important economic facts, there are issues affecting 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 the USFS to exercise extreme caution in the final development of the new planning rule to ensure that those citizens whose traditions and cultural heritage are directly tied to earning a living off the land may continue to do so. This is especially important in times like the present when National Forest lands can be a source of long-term, high paying jobs to help lead the country out of a recession.

THE FOREST SERVICE MUST ADHERE TO ITS STATUTORY MANDATE

The 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 and judicial mandate so that our communities and country remain healthy and vibrant.

Unfortunately, the proposed planning rule 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 new rule 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 law or 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.

An examination of geologic history reveals that climate change has occurred time and again as a natural phenomenon and the planning rule should recognize that a changing climate is not necessarily human caused. Attempting to adapt management plans to consider climate change in the future is speculative at best.

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*, 07-35000 (9th Cir. July 2, 2008), at page 44, the 9th circuit stated:

But 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. Council on Environmental Quality (CEQ) guidance and any USFS regulations requiring the consideration of climate change have not been approved by Congress and violate NEPA and NFMA.

THE PLANNING RULE SHOULD RECOGNIZE CONGRESS’ REPEATED LIMITATION OF THE FOREST SERVICE’S AUTHORITY OVER LOCATABLE MINERALS.

NWMA is concerned that the Forest Service, through this 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. To do so would constitute an illegal withdrawal.

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 AND THAT RECOGNITION SHOULD BE REFLECTED IN THE PLANNING RULE.

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 planning rules to locatable mineral resources, the rules should address the existence of locatable minerals within the National Forest System and plan for the development of these resources accordingly. The USFS should explain how these rules will require those responsible for Forest management plans to accommodate mineral development, particularly recognizing that economically viable mineral deposits are rare¹ and can only be mined where they are discovered and noting the statutory right to develop discoveries mentioned above.

The attached USGS chart demonstrates the Nation's dangerous reliance on foreign sources of minerals as the U.S. is more than 50% import reliant for 43 critical minerals and 100% import reliant for 18 critical and strategic minerals despite being the third largest source of mineral wealth in the world. Members of Congress, the Administration, the media and the public are

¹ In a 1999 report, the National Research Council of the National Academy of Sciences recognized just how rare economically viable mineral deposits are: "Only a very small portion of Earth's continental crust (less than 0.01%) contains economically viable mineral deposits. Thus, mines can only be located in those few places where economically viable deposits were formed and discovered." *Hardrock Mining on Federal Lands*, National Research Council, National Academy Press, 1999, p. 2-3.

acknowledging that the U.S. has become increasingly vulnerable and dependant on foreign sources of strategic and critical minerals and this vulnerability has serious national defense and economic consequences.

We also are entering a period of resource nationalism where many countries, led by China, are asserting control over natural resources located within their country. Unlike the Arab oil embargo of the early 70's, countries like China are using resource nationalism not to control the market or the market price for a given commodity, but to attract long term manufacturing jobs. Manufacturing require minerals. Manufacturing concerns require a stable and affordable supply of metals and minerals. In a nut shell, resource nationalism says "if you want our minerals, locate your manufacturing facility in our country." If the U.S. is going to compete in this global mineral environment fueled by resource nationalism, it must adopt policies that guarantee access to lands with mineral deposits in order to supply the strategic and base metals and materials necessary to create and sustain U.S. manufacturing jobs, a robust economy, and our standard of living.

Forest Plans should address the existence of minerals on NFS lands by ensuring plans do not contain management prescriptions that prohibit or unreasonably restrict mineral exploration and development. The USFS in its planning process could focus in particular on known mineralized areas, identified by the USGS, the former U.S. Bureau of Mines and private entities, where the USFS can reasonably expect future minerals activities. It is important to the Nation's economic future and national security that we conduct resource assessments so we know where our mineral resources are located and subsequently protect access to those minerals.

Forest Plans can plan, provide for, and facilitate these future or current activities by considering, for example, where roads might be located to access a mineralized area; where major riparian zones, wetlands, archeological sites or other sensitive areas should be avoided; and how exploration activities might be allowed while protecting ESA species. As noted above, where NFS lands contain known mineralized areas, Forest Plans should avoid prohibitions on certain types of activities that may be reasonably necessary for mineral operations. The Planning Rule must recognize the importance of lessening our Nation's reliance on foreign sources of minerals and ensuring access to the minerals necessary to create and keep high paying, long term manufacturing jobs.

NWMA COMMENTS ON SPECIFIC SECTIONS OF THE PROPOSED RULE

Subpart A – National Forest System Land Management Planning

Section 219.1 Purpose and Applicability

(e) This part does not affect treaty rights or valid existing rights established by statute or legal instruments.

NWMA comment: Some terms in the rule are not well known or are poorly understood, such as "valid existing rights." To avoid confusion on the part of the public and land managers in

interpreting the reference to “valid existing rights,” we believe this phrase needs clarification and suggest it be amended to include the following example:

“For example, valid existing rights may include operations to access, enter, stake claims, prospect, explore, develop, and otherwise conduct activities reasonably incident to mineral operations on National Forest System lands open to mineral entry.”

Sec. 219.2(b)(3) Levels of Planning and Responsible Officials.

(3) The supervisor of the national forest, grassland, prairie, or other comparable administrative unit is the responsible official for development and approval of a plan, plan amendment, or plan revision for lands under the responsibility of the supervisor, unless a regional forester, the Chief, the UnderSecretary, or the Secretary acts as the responsible official.

NWMA comment: Mineral activities can be very technically and legally complex and involve investments of hundreds of millions to several billions of dollars. The activities can be perhaps among the most complex activities with which forest supervisors deal. Through many years of commenting on forest plans and working with forest supervisors and their staffs on plan implementation, NWMA and our members have found very few Forests with staff that has the required experience, knowledge, and training to adequately plan for mineral activities and address the technical and legal constraints involved. Thus, we are highly concerned about more authority being given to all forest supervisors to develop and issue plans that will vitally affect mineral operations.

We urge you to, at a minimum, amend the rule to require each forest supervisor to consult and coordinate with your minerals experts in the National Minerals and Geology Management Staff during the planning process as well as plan implementation. We note this would be consistent with other places in the proposed rule where you require coordination with other staff in the Agency, including the appropriate research station director.

Sec. 219.3 Role of Science in Planning

This proposed rule imposes a duty on the responsible official to review the available scientific information and determine which is the best, that is, the most accurate, reliable, and relevant information for the particular matter under consideration. The responsible official does not have unfettered discretion in making this determination, but must demonstrate and document how the determination was made.

NWMA comment: We believe you are creating an unprecedented and unnecessarily high standard in imposing such a highly subjective term as “best science.” Since the definition of “best science” is often highly contentious and subject to charges of bias, even among experts, this term will not improve the Forest Service planning process, rather it will only make it more vulnerable to delay and lawsuits. The enormous burden the rule places on a forest supervisor to 1) review all the available scientific information; 2) determine which information is the best,

most accurate, reliable, and relevant; and 3) demonstrate and document how the determination was made will unquestionably open the planning process to new areas of litigation.

The rule requires a forest supervisor to demonstrate and document he or she has reviewed all available scientific information. Litigants will always find their own experts and information to dispute this and produce information they will argue the supervisor should have considered.

Even more troubling is the requirement for a forest supervisor to demonstrate and document he/she was not arbitrary and capricious in determining which information is “best” and superior to all other information. This will require each supervisor to develop criteria and rate all available information as to its accuracy, reliability, and relevance. This process will be rife with controversy, confusion, and again fertile ground for litigation. The supervisor also will undoubtedly have to demonstrate that he/she or the forest staff are qualified, i.e., have the requisite knowledge, skills, and abilities, to judge which science is “best” above all other science.

This rule will worsen the current situation, leading to more spectacles of dueling experts in court proceedings and further delay in planning efforts, with judges ultimately being asked to decide which information is “best.” We urge you to drop this section and rely upon the standards for scientific evidence already established under the National Environmental Policy Act. At 40 CFR 1502.22 , those rules require, “...the agency shall include within the environmental impact statement... (3) a summary of **existing credible scientific evidence which is relevant** to evaluating the reasonably foreseeable significant adverse impacts...” (emphasis added).

We believe it is far more reasonable in the planning process to require a forest supervisor to review existing, credible, and relevant scientific evidence rather than require him or her to review all available scientific information and issue a decision on which is the “best.” Relying upon the CEQ regulations as the standard for scientific information has many advantages. The CEQ standard is well established and understood by all parties, and adopting it in the planning rule would further ensure the planning process is consistent with the NEPA process.

Sec. 219.7 New plan development or plan revision. (d)(1) (v)

Suitability of lands. Specific lands within a plan area may be identified as suitable for various multiple uses or activities based on the desired conditions applicable to that area. The plan may also identify lands within the plan area as not suitable for uses that are not compatible with desired conditions for those lands.

NWMA comment: The Suitability of lands section is a very poorly conceived rule that will undoubtedly be subject to misinterpretation and abuse. Under this section, forest supervisors could declare National Forest lands unsuitable for mineral operations, even though those lands might presently be open to mineral entry. As described earlier in detail, there is absolutely no authority in the National Forest Management Act or any other applicable law upon which the Forest Service relies that supports such an overreach of authority. This rule appears to be an unlawful and unnecessary attempt to use the planning process as a means to *de facto* withdraw vast tracts of National Forests from use and entry under the Mining Laws. It is a clear violation

of several U.S. laws including, but not limited to, the 1976 Federal Land Policy and Management Act and the 1872 Mining Law. It should be removed from the proposed rule.

Sec. 219.10 Multiple Uses.

(a) Integrated resource management. When developing plan components for integrated resource management, to the extent relevant to the plan area and the public participation process and the requirements of §§ 219.7, 219.8, 219.9, and 219.11, the responsible official shall consider:

(2) Renewable and nonrenewable energy and mineral resources;

NWMA comment: The concerns we expressed regarding establishment in Sec. 219.7 of an unlawful *de facto* withdrawal process through an unsuitability designation are further reinforced by this section. Paragraph (a) above removes all doubt that the unsuitability requirements are intended to apply to energy and mineral resources. Again, the Forest Service has no authority to use the planning process as a means of removing National Forest lands from operations authorized under the various mining laws.

We are very disappointed that the Forest Service has chosen not to take a positive approach toward dealing with mineral operations. We encourage you to amend this section to provide for a pro-active positive "suitability" and "desired condition" for mineral resources in forest plans. It should require the identification of highly mineralized areas and provide for environmentally sound exploration and development operations in those areas.

§ 219.15 Project and activity consistency with the plan.

NWMA comment: This section reinforces our concerns stated above regarding the potential for forest supervisors to misinterpret and illegally restrict the meaning of "valid existing rights," and abuse the application of suitability criteria and consistency determinations. We are concerned forest supervisors will use this as a punitive tool to interfere with reasonable and lawful existing or proposed mineral operations by finding them not consistent with forest plans and thus further delay or attempt to prohibit such operations. Therefore, we fear this rule will only create another hurdle and further difficulties for mineral operators on National Forests. Operators will likely be confronted with conflicting and confusing interpretations of whether their operations are consistent with forest plans, are defined as "suitable uses", and/or constitute "valid existing rights."

In addition, the rule indicates in paragraph (2), one means of "resolving the inconsistency" is, "... to reject the proposal or terminate the project or activity." From this statement, it appears the Forest Service intends to use this rule to enforce operations' consistency with the forest plan. Thus, it appears this is an attempt to implicitly amend or replace existing regulations and enforcement procedures for mineral operations and other multiple uses. If so, we find no authority for such an action in the authority cited in Section 219.1(a).

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 multiple-use and sustained yield mandate. In order to be effective, forest planners need specific rules with well-defined terms to avoid the complexity problems of previous planning rules. However, the ill-defined terms and principles found in the proposed planning rule gives it the potential to be even more costly, cumbersome and ineffective than previous rules.

In reading the DEIS, we were very discouraged to see no discussion of the effects these new planning rules will unquestionably have on mineral resources and mineral operations. In fact, there were only a few passing mentions of “minerals” in the entire document. For example, in Chapter 3, p. 135, the DEIS states:

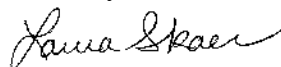
While the Agency does not manage subsurface minerals, mineral exploration and development does occur on NFS lands.

This is the only statement we could find in the entire DEIS document. It implies the Forest Service only has a minor role in managing mineral activities. If that is the view of the Forest Service’s national headquarters, it’s certainly news to thousands of mineral operators who have had to deal with extensive and protracted regulatory procedures to get plans of operations approved. Many of the problems our members have experienced have resulted from poorly written or confusing Forest plans that create, instead of addressing and resolving, potential conflicts. Thus, this statement in Chapter 3 grossly understates and misrepresents the Forest Service’s important role and broad authority under 16 U.S.C. §478 and 30 U.S.C. §612 to regulate and thus to a large extent manage (although not prohibit) reasonable legitimate mineral activities.

In *Chapter 4 Consultation and Coordination*, we observed that neither the ID team members nor those with whom they consulted appeared to have any expertise regarding minerals. We suggest you supplement your ID team with experts on mineral resources and activities. By doing so you create a better planning rule as well as a defensible DEIS.

NWMA believes a planning rule strictly bound by the framework of the law can result in a positive outcome for miners, local communities, the environment and our Nation. Unfortunately, the proposed planning rule falls far short of the mark.

Sincerely,



Laura Skaer
Executive Director