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Written Testimony on

"Forest Service Regulatory Roadblocks to Productive Land Use and Recreation: Proposed Planning Rule, Special-use Permits, and Travel Management"

November 15, 2011

Before the

United States House of Representatives
Natural Resources Committee Subcommittee on National Parks, Forests and Public Lands

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Dear Chairman Bishop, Ranking Member Grijalva and Members of the Subcommittee:

The Public Lands Council (PLC) and American Sheep Industry Association (ASI) appreciate the opportunity to voice to the Subcommittee on National Parks, Forests and Public Lands our concerns regarding the United States Forest Service's proposed forest planning rule (*see* 76 Fed. Reg. at 8480 (Feb. 14, 2011)). To date, we have provided written comments to the Forest Service and participated in multiple public hearings so as to provide insights as to the impacts the proposed rule is likely to have on public lands grazing. Despite our concerns and calls from Congress to revise the proposed rule, indications from the administration are that they are committed to moving forward with a largely unchanged final rulemaking, some time within the next two months. This is a major rulemaking that, by the agency's own projection, will cost more than $100 million per year to implement, and will impose far-reaching regulatory burdens on businesses and rural communities. Such a rulemaking should not be made in haste, but rather given the oversight and deliberation of congressional review.

On February 14, 2011, the United States Forest Service published a notice of proposed rulemaking and request for comment in the Federal Register. *See* 76 Fed. Reg. at 8480 (Feb. 14, 2011). The Forest Service is proposing a new planning rule ("Proposed Rule") to guide land and resource management planning for all units of the National Forest System ("NFS") under the National Forest Management Act ("NFMA"). *Id.* at 8480. Along with the Proposed Rule, the

Forest Service released a draft programmatic environmental impact statement ("DPEIS") to analyze the effects of the Proposed Rule and other alternatives under the National Environmental Policy Act ("NEPA"). *See* Draft Programmatic Environmental Impact Statement, National Forest System Land Management Planning (Feb. 2011), available at http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5274118.pdf. PLC and ASI's comments are in regard to the Proposed Rule as well as the DPEIS. Please include this statement in the congressional record.

PLC and ASI have thousands of members who are public land ranchers and who are involved in managing natural resources throughout the West every day. Public land ranchers own over 100 million acres of the most productive private land in the West and manage vast areas of public land, accounting for critical wildlife habitat and a significant portion of the nation's natural resources. PLC and ASI work to maintain a stable business environment in which livestock producers can conserve the resources of the West while producing food and fiber for the nation and the world.

The proposed rule is not consistent with the "Improving Regulation and Regulatory Review" Executive Order issued on January 18, 2011 by President Obama, as well as previously existing requirements for cost-effective, less burdensome, and flexible regulations, such as the Regulatory Flexibility Act. The January 18, 2011 Executive Order requires that regulations be tailored to "impose the least burden on society, consistent with regulatory objectives" and that agencies are to review and change or eliminate rules that may be "outmoded, ineffective, insufficient, or excessively burdensome." Yet the Forest Service's own analysis of the proposed rule confirms that even under favorable assumptions, it will be only slightly less costly than the 1982 Planning Rule that has been identified as outmoded and overly burdensome—i.e. approximately $1.5 million less per year than the $104 million annual cost of the 1982 Rule. DPEIS at 43.

The DPEIS and accompanying analysis for the proposed rule confirm that there are readily available alternatives that are far less costly and burdensome, alternatives which still meet NFMA requirements and the agency's stated purpose and need for a new Planning Rule.

For example, Alternative C in the DPEIS would, according to the Forest Service analysis, cost nearly $24 million (24%) less to implement per year than the proposed rule. DPEIS at 43. As another example, the 2008 Planning Rule contains most of the same basic concepts as the proposed rule but is only half the length of the proposed rule (7 pages of Federal Register text compared to 14 pages for the proposed rule). The 2008 Rule has its flaws, but was enjoined by a federal district court only for procedural shortcomings in the EIS and Endangered Species Act Section 7 consultation completed for the rulemaking, and not for any inadequacy in meeting NFMA requirements. *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 632 F.Supp.2d 968 (N.D. Cal. 2009).

The overly detailed, burdensome rhetoric and mandates in the proposed rule can be eliminated without any loss of useful, nationwide programmatic guidance for national forest land management planning. Detail regarding basic concepts and requirements in the Planning Rule can and should be, instead, included in the Forest Service Manual and Handbook directive system ("FSM/FSH"), where it can guide and facilitate national forest planning rather than

burden the agency, national forest users, dependent communities, and taxpayers with unnecessary detailed, restrictive, and confusing regulatory mandates.

It is more consistent with the adaptive management approach incorporated in the proposed rule to include such details in the directive system, where content can more easily be clarified, refined and updated than when promulgated as a formal rule in the Code of Federal Regulations. The difficulty of updating overly burdensome published regulations is confirmed by the persistence of the 1982 Rule for nearly thirty years, despite several past attempts to replace it.

As an example of material that belongs in the FSM/FSH, most if not all of the content in the "sustainability" and "diversity of plant and animal communities" sections of the proposed rule is already included in substantially similar form in FSM ID No. 2020-2010-1, Ecological Restoration and Resilience, and FSH 1909.12-2000-5, Chapter 40—Science and Sustainability. Section 219.1(d) of the proposed rule already requires the Forest Service to establish procedures for Planning Rules in the FSM/FSH. Much of the detailed content in the proposed rule, with appropriate modifications to simplify and conform it to NFMA and Multiple Use Sustained Yield Act ("MUSYA") principles, can be moved to the FSM/FSH with ease.

The complexity of the rule and how it will increase confusion and cost is illustrated by its treatment of wildlife. The planning rule and its preamble include multiple categories of species: indicator, focal, keystone, ecological engineers, umbrella, link, species of concern, threatened, endangered, and "others." Some of the species are probably mutually exclusive but other species overlap, creating a planning nightmare. The forest planning rule should be focused on habitat, a factor over which it has some control.

The Proposed Rule Ignores the Appropriate Role of Multiple-Use:

Though occasionally referenced in the proposal, the Forest Service appears to be ignoring its multiple use mandate, a mandate imposed by Congress, codified in agency regulations and affirmed by the courts. This problem manifests itself in three ways. First, the proposal fails generally to acknowledge the multiple use mandate as a guiding principle of forest planning. Second, proposed provisions specifically conflict with the multiple use mandate. Third, the proposed definition of "ecosystem services" is so inclusive and vague that it dilutes the entire concept of multiple use.

Congress established the NFS through the Organic Administration Act of 1897, 30 Stat. 11 (June 4, 1987). By operation of the Transfer Act of 1905, 33 Stat. 628 (Feb. 1, 1905), stewardship of the national forests was transferred from the Department of the Interior to the Department of Agriculture. Over the next decades, Congress consistently and clearly specified through a number of enactments that stewardship over the national forests would be guided by the principles of multiple use and sustained yield. These statutes, all of which endorse multiple use and sustained yield, include the MUSYA, 16 U.S.C. §§528-31; the Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. §§1600-14; and NFMA, 16 U.S.C. §1600 *et seq.*

"Multiple use" is defined in Section 4 of the MUSYA as:

> the management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people; making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all of the resources; and harmonious and coordinated management of the various resources, each with the other, without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.

16 U.S.C. §531

The multiple use sustained yield statutory mandate is a viable and credible planning blueprint for managing forest lands. Although the Forest Service is required to ensure that multiple use remains on par with sustainability concepts, the overview of the proposed rule clearly prioritizes other areas of consideration that the rule must address, including climate change, forest restoration and conservation, wildlife conservation, and watershed protection, before so much as mentioning the need for the rule to meet the statutory requirements of the NFMA, MUSYA and other legal requirements. Additionally, the sustainability section expressly states that "sustainability is the fundamental principle that will guide land management planning." *See* 76 Fed. Reg. at 8490. Such statements clearly reflect a lack of acknowledgement on the part of the Forest Service of the important function multiple use must play in the land planning process.

As appropriately concluded by the U.S. Court of Appeals for the Seventh Circuit, the Forest Service does not have the discretion to ignore the multiple use mandate to focus solely on environmental and recreational resources. The court specifically held that "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). The Forest Service, through the planning rule, must actively promote this stewardship role delegated to it by Congress in legislation spanning more than a century and consistently upheld by the courts. The proposal fails to adequately do so.

The Proposed Rule Goes Beyond Statutory Authority with "Viability" of Species:

The Forest Service's Proposed Rule does not comply with NFMA and MUSYA, which provide the agency's land management planning authority. Neither of these statutes require the Forest Service to manage for species "viability" through land management planning. Rather, the Forest Service is tasked with providing for "diversity of plant and animal communities," along with providing for other multiple use objectives. And, the statutes are clear that providing for diversity does not take precedence over providing for other forest resources, such as range resources.

Managing for "diversity of plant and animal communities" under NFMA means managing for habitat diversity and does not include a requirement to maintain "viable"

populations of "species of conservation concern" or otherwise maintain and restore species' populations. Various state wildlife agencies have constitutional and statutory duties to protect the viability of species and manage species' populations. NFMA's diversity requirement is limited to protecting habitat and can be met by establishing a plan that provides appropriate ecological conditions for plant and animal communities. That should be the focus of the Forest Service's Proposed Rule.

PLC and ASI are concerned that the Forest Service's divergence from its authority under NFMA and the MUSYA will elevate the objective to provide for diversity of plant and animal communities above other objectives, particularly the objective to provide for range resources. Without revision, the Proposed Rule could limit grazing on public lands which would adversely affect the operations of our members and result in decay of both private and public lands managed by those members. As a result, PLC and ASI have recommended that the Forest Service revise the Proposed Rule to address the issues presented in these comments.

The Proposed Rule Must Comply with NFMA and the MUSYA:

The Forest Service's new planning rule must meet requirements under NFMA, 16 U.S.C. §§ 1600-1614, as well as allow the agency to meet its obligations under the MUSYA, 16 U.S.C. §§ 528-531. NFMA provides that "[i]n developing, maintaining, and revising plans for units of the National Forest System . . . the Secretary shall assure that such plans—(1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the [MUSYA], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish and wilderness. . . ." 16 U.S.C. § 1604(e). The MUSYA provides that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes." *Id.* § 528. In other words, the NFS is to be administered for "multiple use," which includes administration of range resources, along with administration of wildlife. *See id.* § 1604(e)(1); *id.* § 528; *id.* § 531(a) (defining "multiple use"). Wildlife has never been and should not become the Forest Service's only consideration when developing land management plans for NFS lands.

NFMA also provides that Forest Service planning regulations shall include guidelines for land management plans which:

> (A) insure consideration of the economic and environmental aspects of various systems of renewable resource management, including the related systems of silviculture and protection of forest resources, to provide for outdoor recreation (including wilderness), range, timber, watershed, wildlife, and fish; [and]
>
> (B) provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives. . . .

Id. § 1604(g)(3)(A)-(B).

Along with consideration of economic aspects of management, the Forest Service must provide for diversity of plant and animal communities to the extent a specific land area is suitable for and capable of such multiple use objective. *Id.*

Although NFMA and MUSYA require consideration of *multiple* use objectives, including consideration of range resources, the Proposed Rule is focused largely on maintenance and restoration of wildlife. *See* 76 Fed. Reg. at 8518-19 (§§ 219.8-219.10). This focus ignores the Forest Service's multiple use mandate. Administration of the NFS for range resources is not simply to be *considered* when administering the system for wildlife, *see id.* at 8519 (§ 219.10). Rather, administration of the System for range resources is an equally important purpose that the Forest Service must consider on equal footing with, not simply in addition to, wildlife. *See* 16 U.S.C. § 528. The Forest Service must insure that its management of the NFS provides for range resources. *Id.* § 1604(g)(3)(A).

The Proposed Rule provides an entire section (§ 219.9) to implement NFMA Section 1604(g)(3)(B) concerning wildlife, but ignores NFMA Section 1604(g)(3)(A) concerning other forest resources. To properly implement Section 1604(g)(3)(A), the Forest Service must give equal treatment to other forest resources in the Proposed Rule. *See* 76 Fed. Reg. at 8519 (mentioning consideration of other forest resources in § 219.10). Accordingly, the Forest Service should revise the Proposed Rule to adequately consider and provide for all of the Forest Service's multiple use objectives, including the consideration and provision of range resources.

The "Viable Population" Requirement Should Not Be Included as Part of the Proposed Rule:

Neither NFMA nor MUSYA require the Forest Service to manage for wildlife "viability" when developing plans for the NFS. Certainly, there is no statutory requirement for the Forest Service to "maintain" species viability, or manage for species viability to the detriment of other multiple use objectives.

Although NFMA and the MUSYA do not require the Forest Service to manage for species viability, the Proposed Rule provides that land management plans "must provide for the maintenance or restoration of ecological conditions in the plan area to . . . [m]aintain viable populations of species of conservation concern within the plan area." *See* 76 Fed. Reg. at 8518 (§ 219.9(b)(3)). Further, the Proposed Rule states: "[w]here it is beyond the authority of the Forest Service or the inherent capability of the plan area to do so, the plan components must provide for the maintenance or restoration of ecological conditions to contribute to the extent practicable to maintaining a viable population of a species within its range." *Id.*

Because maintenance of "viable populations of species" is not a requirement under NFMA or MUSYA, the Forest Service is exceeding its authority under those statutes by making it a requirement under the Proposed Rule. Likewise, the Forest Service is exceeding its authority under those statutes by requiring "restoration" of ecological conditions for species viability. To be consistent with its authority under NFMA and MUSYA, the Proposed Rule should be revised to eliminate the concept of species viability as a management requirement.

Besides lacking statutory authority, the concept of species viability is itself impermissibly vague. Scientists often disagree on when, and on what level, a population is considered "viable." There is additional disagreement on how species viability is to be "maintained" or "restored." How can the Forest Service measure and prove that it is "maintaining" or "restoring" species viability? Although the Proposed Rule defines the term "viable population," the definition provides little in the way of hard-and-fast standards to measure species viability. *Id.* at 8525 (§ 219.19). Laws must provide explicit standards to the regulated community for the community to know what is prohibited, so that it may act accordingly, and to prevent arbitrary and discriminatory enforcement. *See Grayned v. Rockford*, 408 U.S. 104, 108 (1972); *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984). The Forest Service's regulations on species viability in the Proposed Rule fail to meet these standards.

Use of the concept of species viability is likely to subject the Forest Service to litigation over the agency's authority to utilize the concept and over the meanings of "viability," "maintenance" and "restoration." These issues have been the source of considerable litigation in the past. *See, for example, Lands Council v. Cottrell*, 731 F. Supp. 2d 1028 (D. Idaho 2010); *Oregon Natural Resources Council Fund v. Goodman*, 382 F. Supp. 2d 1201 (D. Or. 2004), *affirmed* 110 Fed. Appx. 31; *Utah Environmental Congress v. Bosworth*, 370 F. Supp. 2d 1157 (D. Utah 2005), *affirmed* 443 F.3d 732; *The Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008), *rehearing en banc denied*.

In order to act within its authority under NFMA and MUSYA and avoid potential litigation, the Forest Service should remove the "viable population" requirement from the Proposed Rule. Measuring species' populations is not required by NFMA or MUSYA and should not be the focus of the Proposed Rule. Establishing means to accurately inventory thousands of species populations is an untenable proposition. The Forest Service should leave wildlife management to the various state wildlife agencies that have constitutional and statutory duties to manage species' populations and protect the viability of species. The Proposed Rule should concentrate on providing for habitat diversity, which would better meet NFMA's requirement to "provide for diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(B). And, the Proposed Rule should focus on providing habitat diversity as one component of the Forest Service's multiple use management approach, not the only component.

The Proposed Rule Should Better Define "Species of Conservation Concern":

The Proposed Rule's "viable population" requirement applies to "species of conservation concern." *See* 76 Fed. Reg. at 8518 (§ 219.9(b)(3)). "Species of conservation concern" are defined as "[s]pecies other than federally listed threatened or endangered species or candidate species, for which the responsible official has determined that there is evidence demonstrating significant concern about its capability to persist over the long-term in the plan area." *Id.* at 8525 (§ 219.19).

By eliminating the "viable population" requirement from the Proposed Rule, the definition of "species of conservation concern" may be unnecessary. However, if the definition remains part of the Proposed Rule, it should be revised. This definition does not provide a science-based standard for determining species of conservation concern. Instead, the definition relies solely on the opinion of the responsible official to determine which species should be

designated as a species of conservation concern. As it stands, the definition is likely to lead to arbitrary and capricious decision-making.

The definition of "species of conservation concern" should be revised to provide science-based evidentiary standards for determining when a species is a "species of conservation concern." The definition should indicate what "evidence" is required for such determination and define what is meant by "significant concern." The "evidence" and "significant concern" should be based on credible scientific information available to the Forest Service and not simply on the opinion on the responsible official.

Further, the need and authority for the Forest Service to designate species of conservation concern should be adequately discussed if the Forest Service decides to retain the designation in its planning rule. Additionally, the Forest Service should explain in the rule whether or not the designation applies to all species of wildlife and plants, or a more limited subset of species, such as vertebrate species. The DPEIS suggests that the designation applies to all species of wildlife and plants. *See* DPEIS at 109 ("the focus for maintaining viable populations is extended to all native plant and animal species, not just vertebrate species"). Expanding the designation to encompass all species of wildlife and plants would apply the regulation to species that may not have been previously covered. This would likely increase litigation, since instead of applying to vertebrate species like the current planning rule, plan requirements would apply to a host of additional species, including invertebrates such as fungi, slugs, and insects. The Proposed Rule should be revised to discuss the authority for such expansion and the DPEIS should analyze the effects of the additional protections, including effects on other forest resources and Forest Service staffing and budgets.

Finally, the DPEIS suggests that the viability requirement would be extended to "at-risk species" on national forests and grasslands. DPEIS at 110 (plans would "include additional species-specific plan components needed to maintain viability of at-risk species on national forests and grasslands"). This extension of the viability requirement is not mentioned in the Proposed Rule, but should be if the Forest Service intends for it to be part of the rule. As with "species of conservation concern," the Forest Service should discuss its authority for extending protections to "at-risk species," define the term in the rule and analyze the effects of the additional protections in the DPEIS. Because "at-risk species" are not discussed in the Proposed Rule or adequately analyzed in the DPEIS, the Forest Service should either entirely eliminate the term and associated protections from the rule and DPEIS or revise the rule and DPEIS to discuss the term, how "at-risk" would be objectively determined, and associated protections.

Requiring the Use of the "Best Available Scientific Information" Will Make Decision-making Time Consuming and Vulnerable to Litigation:

Sound science has an important role in Forest Service planning and management. However, decisions should be made based on agency expertise and available, relevant science, rather than on the "best available science" as referenced in §219.3. Which science is "best," as illustrated in ESA litigation as well as NFMA and other disputes, can be extremely subjective and highly politicized.

NFMA does not use or require use of the term "best available science" or "best available scientific information." Neither does NEPA. The Ninth Circuit Court of Appeals has affirmed that these statutes do not require a determination of whether national forest planning or project-level NEPA documents are based on "best" available science or methodology; that disagreements among scientists are routine; and that requiring the Forest Service to resolve or present every such disagreement could impose an unworkable burden that would prevent the needed or beneficial management. *Lands Council v. McNair*, 537 F.3d 981, 991 (9th Cir. 2008)(en banc); *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1359 (9th Cir. 1994).

The Proposed Rule's procedures will create new legal claims centered on the requirement that the Forest Service consider the "best available science" and demonstrate that the "most accurate, reliable, and relevant information" was considered and how it "informed" the development of the forest plan (§219.3). In *Lands Council*, a unanimous en banc panel of the Ninth Circuit gave the Forest Service more leeway and flexibility regarding scientific analysis. The Court emphasized that, "[t]o 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." *McNair*, 537 F.3d at 1001.

Second, the Proposed Rule is written in a way that puts the burden on the Forest Service to prove that it identified the best science, "appropriately" interpreted it, and explain how it informed the decision (§219.3). This places the burden of proof on the agency, whereas we believe that the burden to prove that the Forest Service was arbitrary and capricious in its decision-making should remain with plaintiff.

Third, the science-dominated Proposed Rule undermines the principle, supported by case law, that the agency can make natural resource management decisions based on its discretion in weighing various multiple use objectives. In *Seattle Audubon Society v. Moseley*, 830 F.3d 1401, 1404 (9th Cir. 1996), the court upheld selection of an alternative in the Northwest Forest Plan that provided an 80% rather than 100% probability of maintaining the viability of the spotted owl because "the selection of an alternative with a higher likelihood of viability would preclude any multiple use compromises contrary to the overall mandate of the NFMA." The Ninth Circuit in the *Mission Brush* case finally recognized that "[c]ongress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands. Indeed, since Congress' early regulation of the national forests, it has never been the case that 'the national forests were . . . to be set aside for non-use'." *McNair*, 537 F.3d at 990.

Fourth, sound national forest planning and management that complies with NFMA, the MUSYA, and other applicable laws must reflect more than "western" or European culture academic science and scientist opinion. Native American and other traditional local knowledge, along with other practical expertise, collaborative consensus reached through the planning process regarding application of science, and other considerations are critical to environmentally, economically, and socially sound forest planning and plan implementation.

Thus, the Proposed Rule must not require the Forest Service to do more than take into account available, relevant scientific information along with other factors in the development, amendment, or revision of national forest plans, without reference to which information is "best" (§219.3). §219.3 should be deleted or greatly abbreviated and corrected accordingly, along with any other references to "best available scientific information" in the Proposed Rule.

The use and dissemination of scientific information by federal agencies is addressed by the Federal Data Quality Act (44 U.S.C. § 3516) and subsequent guidelines from the Office of Management and Budget (http://www.whitehouse.gov/omb/fedreg_reproducible). We believe the protections and assurances provided by the Federal Data Quality Act are sufficient to ensure the quality of the data used and distributed by the Forest Service in the planning process. A requirement to identify the "most accurate" or "best available" scientific information should not be a legal requirement in the planning rule itself.

The Proposed Rule Makes Overly Broad Requirements for Riparian Area Protection:

PLC and ASI find infeasible the provision that requires that each plan "must include components to maintain, protect, or restore riparian areas." (§219.8(a)(3)). Every plan "must establish a default width"—in other words, an arbitrary buffer zone—around "all lakes, perennial or intermittent streams, and open water wetlands." (§219.8(a)(3)). The example given in the preamble of the draft rule calls for a buffer zone of 300 feet on each side of a perennial stream. Limitations such as this have the strong potential not only to greatly reduce livestock forage and watering access, it also threatens our members' adjudicated water rights.

The Proposed Rule Wrongly Elevates Ecological Sustainability over Social and Economic Concerns:

In the explanation of the Proposed Rule, the Forest Service states that "[t]he proposed rule considered the ecological, social, and economic systems as interdependent systems, which cannot be ranked in order of importance." *See* 76 Fed. Reg. at 8491. However, in the same section of the Proposed Rule explanation, the Forest Service goes on to state that "the agency has more influence over the factors that impact ecological sustainability on NFS lands (ecological diversity, forest health, road system management, etc.) than it does over factors that impact social and economic sustainability (employment, income, community well-being, culture, etc.)." *Id.*

The Proposed Rule goes on in §219.8 to give disparate treatment to environmental systems versus social and economic systems. It requires forest plan components to "*maintain or restore* the structure, function, composition, and connectivity of healthy and resilient terrestrial and aquatic ecosystems and watersheds in the plan area …." (emphasis added) while requiring only that the plan include components "*to guide the unit's contribution* to social and economic sustainability …." (emphasis added) (§219.8(a),(b)). We support the initial assertion of the agency that social, environmental and economic considerations are not competing values, and believe that, by practicing active forest management, the Forest Service is in a position to have a substantial impact on all elements of sustainability—ecological, social and economic. We request that the Proposed Rule recognize this influence.

The Proposed Rule Inappropriately Gives "Protection" Status to Recommended Wilderness:

Only Congress can create Wilderness (16 U.S.C §§ 1131-1136, *Id*. § 1132(b)). The Forest Service should not create *de facto* wilderness by requiring, as would the Proposed Rule, that any area "recommended for wilderness" be "protected" (§219.10 (b)(iv)).

Nothing in the Proposed Rule Explicitly States that the Forest Service May Continue to Operate under Existing Plans until the New Plans Are Completed and Survive Any Legal Challenges:

NFMA explicitly provides that "[u]ntil such time as a unit of the National Forest System is managed under plans developed in accordance with this Act, the management of such unit may continue under existing land and resource management plans." 16 U.S.C. 1604(c). To avoid disruption of existing contracts, account for the inevitable legal challenges, and to be consistent with NFMA, the Proposed Rule should provide that the Forest Service operate under existing plans until all challenges to the new plans are resolved.

The New Requirement that the Plan Provide Opportunities for "Spiritual Sustenance" Is Unattainable and outside AgencyAuthority:

In the Proposed Rule, "ecosystem services" are defined to include "[c]ultural services such as . . . spiritual . . . opportunities." *See* 76 Fed. Reg. at 8523 §219.19. "Plans will guide management of NFS lands so that they . . . provide . . . opportunities . . . for . . . spiritual . . . sustenance." *See* 76 Fed. Reg. at 8514 §219.1(c). The plan "must provide for multiple uses, including ecosystem services." *See* 76 Fed. Reg. at 8519 §219.10. The First Amendment of the Constitution prohibits the making of any law "respecting an establishment of religion" and the Forest Service should not delve into the arena of how Forest Plan decisions comport with spiritual sustenance.

A Pre-decisional Objection Process Is a Superior Approach for Challenge to a Forest Plan to the Administrative Appeals Process:

§219.52 of the Proposed Rule appropriately calls for objections to a draft plan to be made before the final plan is released. This requirement would allow the agency to take issues into account and make appropriate changes so as to avoid litigation. Under the current appeals system, those who just want to stop a project are not required to participate in pre-decisional planning, and may simply sue once a final decision is made.

Conclusion

PLC and ASI appreciate the Forest Service's need to balance multiple uses of NFS lands; however, we are concerned that the Forest Service is elevating the objective to provide for diversity of plant and animal communities above other multiple use objectives, particularly, the objective to provide for range resources. PLC and ASI are also concerned with the Forest

Service's focus on maintaining species viability, rather than providing for habitat diversity as is required by NFMA.

We would also like to express concern regarding *The Science Review of the United States Forest Service Draft Environmental Impact Statement for National Forest System Land Management,* which the Forest Service posted to the Planning Rule Website on April 27th. This information was provided more than two-thirds of the way through the comment period and thus we did not have adequate time to review and analyze the report. It is unclear how the panel was selected and to what extent the information provided in the report will be used to shape the final planning rule. We are concerned that the panel was not convened in a manner compliant with the Federal Advisory Committee Act (FACA), 5 U.S.C. §§ 1-16.

In similar comments submitted to the Forest Service on their Proposed Rule and DEIS, we have requested that they revise the Proposed Rule to be consistent with its authority under NFMA and MUSYA and to appropriately consider its multiple use objective to provide for range resources. Providing for range resources is an important objective of the Forest Service's multiple use and sustained yield mandate and is necessary to sustain the yields (food and fiber) from sheep and cattle grazing on NFS lands. The secondary beneficiaries of the Forest Service's compliance with its statutory mandates are the many rural economies in the West. Lastly, PLC and ASI submit that the Forest Service's ability to provide range resources and to manage for sustainable and healthy forest lands is integral to successful operations of our members.

Again, we thank you for the opportunity to provide these comments to the Subcommittee. If you have any questions concerning these comments or need further information, you may contact Dustin Van Liew at the Public Lands Council as our point of contact.

Sincerely,

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