VIA ONLINE SUBMISSION

May 16, 2011

Forest Service Planning DEIS
c/o Bear West Company
132 E. 500 S.
Bountiful, UT 84010
http://www.govcomments.com/

**RE: Forest Service Notice of Proposed Rulemaking and Request for Comments Concerning National Forest System Land Management Planning**

Dear Sir/Madam:

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. The Forest Service requested public comment on the Proposed Rule and DPEIS. *See* 76 Fed. Reg. at 8480, 8483. The deadline for submitting comments is May 16, 2011. *Id.*

The following comments on the Proposed Rule and DPEIS are submitted to the Forest Service on behalf of the Public Lands Council, American Sheep Industry Association, National Cattlemen's Beef Association, Association of National Grasslands, and numerous affiliated livestock associations listed on the signature page (collectively, "Livestock Associations"). The Livestock Associations appreciate the opportunity to provide comments. Please consider these comments and include them in the administrative record for the Propose Rule and the DPEIS.

## I. Introduction

### A. The Livestock Associations

The Livestock Associations have thousands of members who are public land ranchers. 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. The Livestock Associations 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 Livestock Associations and their members provided comments on the Forest Service's Notice of Intent ("NOI") to prepare an environmental impact statement for the Proposed Rule. *See, e.g.*, Exhibit A, below. The Livestock Associations appreciate this additional opportunity to provide comments. The implications of a new planning rule are of critical importance to the Livestock Associations, as their members are involved in managing natural resources throughout the West every day.

The proposed rule is not consistent with the "Improving Regulation and Regulatory Review" Executive Order recently 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.

## B. Overview of Comments

**The 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 MUYSA 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 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.

The Livestock Associations 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 the Livestock Associations' members and result in decay of both private and public lands managed by those members. As a result, the Livestock Associations recommend that the Forest Service revise the Proposed Rule to address the issues presented in these comments.

## II. Comments

### A. 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 National Forest System 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. Other forest resources are not to be treated as a mere afterthought in managing the NFS. *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.

### B. 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).

The Forest Service has not provided any definitive standards upon which to measure species viability. As promulgated by the Forest Service, the definition of "viable population" is vague and the regulations concerning viability fail to identify any standards for measuring maintenance or restoration of viability. 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. Various state wildlife agencies have constitutional and statutory duties to manage species' populations and protect the viability of species such as Idaho, Montana and Wyoming. See Idaho Code § 36-103(a) ("All wildlife . . . within the state of Idaho . . . shall be preserved, protected, perpetuated, and managed."); Mont. Code Ann. § 87-1-301(1)(a) (The Fish, Wildlife and Parks Commission "shall set the policies for the protection, preservation, and propagation of the wildlife . . . of the state. . . ."); Wyo. Stat. § 23-1-103 ("It is the purpose of this act and policy of the state to provide an adequate and flexible system for control propagation, management, protection and regulation of all Wyoming wildlife."); see also Forest Service Manual § 2610.3 (It is the policy of the Forest Service to (1) "[r]ecognize the role of the States to manage wildlife and fish populations within their jurisdictions" and (2) "[r]ecognize the State fish and wildlife agencies as a public agency with management responsibilities for wildlife on the National Forests. . . ."). NFMA's requirements are more limited. Thus, 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.

### C. The Proposed Rule Should Give Meaning to the Phrase "Based on the Suitability and Capability of the Specific Land Area in order to Meet Overall Multiple-Use Objectives"

NFMA provides that Forest Service planning regulations shall include guidelines for land management plans which "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*. . . . 16 U.S.C. § 1604(g)(3)(B) (emphasis added). The Proposed Rule fails to give effect to the second part of NFMA's instruction—that the Forest Service provide for diversity "to meet overall multiple-use objectives." *See* 76 Fed. Reg. at 8518-19 (§ 219.9).

Instead, the Proposed Rule makes all other multiple use objectives subject to the requirement that the Forest Service provide for diversity of plant and animal communities. The Proposed Rule provides that "the plan must include plan components to maintain diversity of plant and animal communities." *Id.* at 8518 (§ 219.9). Only once that requirement is met, does the Proposed Rule provide for consideration of other multiple use objectives, such as consideration of range resources. *Id.* at 8519 (§ 219.10).

The Proposed Rule employs a flawed interpretation of NFMA Section 1604(g)(3)(B). The Forest Service is not required to place its objective to provide for species diversity above all other multiple use objectives. Rather, that objective is one of several, all of which are to be given equal consideration.

Further, species diversity is to be "based on the suitability and capability of the specific land area." 16 U.S.C. § 1604(g)(3)(B). This is another instruction ignored in the Proposed Rule. Species diversity is not required to be maintained everywhere on NFS lands, but only on those lands that are most suitable and capable for providing for diversity. Where lands are more suitable and capable for providing for other multiple use objectives, such as range resources, those lands should be used for that objective.

### D. 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.

### E. The Service's Focus on "Focal Species" is Misplaced

To determine whether a land management plan is meeting the requirement of the Proposed Rule to provide for ecosystem diversity, the Proposed Rule requires monitoring the status of "focal species." *See* 76 Fed. Reg. at 8520 (§ 219.12(a)(5)); *see also id.* at 8498 ("[t]he proposed requirement for monitoring questions that address the status of focal species is linked to the requirements of § 219.9 of the proposed rule to provide for ecosystem diversity"). However, the theory of monitoring focal species (also known as "management indicator species" or "MIS") to provide insight into the integrity of ecological systems and the status of other species has been discredited.

The Forest Service admits that "[t]he theory of MIS has been discredited since the 1982 rule." *Id.* at 8499. Supporting that admission, the Forest Service states:

> [e]ssentially, monitoring the population trend of one species should not be extrapolated to form conclusions regarding the status and trends of other species. In addition, population trends for most species are extremely difficult to determine within the 15-year life of a plan, as it may take decades to establish accurate trend data, and data may be needed for a broader area than an individual national forest or grassland. *Id.*

Because the theory of monitoring focal species has been discredited and does not provide reliable information on the integrity of ecological systems and the status of other species, the theory should not be employed as part of the Proposed Rule. Rather than concentrating on species populations, especially those of focal species, the Forest Service should concentrate on habitat diversity, which is more consistent with the Forest Service's requirement to provide for "diversity of plant and animal communities." 16 U.S.C. § 1604(g)(3)(B).

### F. The Forest Service Should Adopt the Approach to Provide for Diversity Among Plants and Animals Recognized in the 2008 Planning Rule

On April 21, 2008, the Forest Service issued a final rule and record of decision describing a new NFS land management planning framework. *See* 73 Fed. Reg. at 21468 (Apr. 21, 2008) (the "2008 Planning Rule"). The 2008 Planning Rule was challenged by environmental groups in *Citizens for Better Forestry v. U.S. Department of Agriculture*, 632 F. Supp. 2d 968 (N.D. Cal. 2009). The court held that the Forest Service failed to adhere to NEPA and Endangered Species Act ("ESA") procedures when promulgating the 2008 Planning Rule. *Id.* at 980-82. As a result, the court vacated the 2008 Planning Rule and remanded it to the Forest Service for further proceedings. *Id.* at 982.

Although the 2008 Planning Rule was challenged in *Citizens for Better Forestry* on procedural grounds under NEPA and ESA, the substance of the rule itself was not challenged. In particular, the Forest Service's approach to providing for diversity of plant and animal communities was not challenged under NFMA, and likewise, was not vacated by the court. Thus, the Forest Service's approach in the 2008 Planning Rule remains a workable approach to providing for diversity in accordance with NFMA. And, with regard to the Proposed Rule, the Forest Service has avoided the procedural flaws under NEPA and ESA that provided grounds for challenging the 2008 Planning Rule, so those same flaws should not be a concern in the Proposed Rule.

The 2008 Planning Rule correctly recognized that "NFMA does not mandate viability of species." *See* 73 Fed. Reg. at 21472; *see also id.* at 21494 ("NFMA does not mandate a specific degree of diversity nor does it mandate viability"). Rather, "species diversity appropriate to the area covered by a plan is NFMA's goal." *Id.* at 21472. These findings should be presented in the Proposed Rule.

Further, the 2008 Planning Rule acknowledged that "viability would place an impractical burden on the [Forest Service]." *Id.* Maintaining species viability was determined to be a technical impossibility because the cause of decline of some species is outside the Forest Service's control. *Id.*; *see also id.* at 21496 ("The [Forest Service] has learned that the

requirement to maintain viable native fish and wildlife species populations without recognizing the capability of the land is not practicable due to influences on many populations that are beyond agency control."). Further, maintaining species viability for all species was determined to be impractical because of the large number of species present on units of the NFS. *Id.* at 21472. The Forest Service determined that focus on viability diverted attention and resources away from an ecosystem approach to land management that, in the Forest Service's view, "is the most efficient and effective way to manage for the broadest range of species with the limited resources available for the task." *Id.*

As a result, in the 2008 Planning Rule, the Forest Service adopted an approach that met NFMA's diversity requirement by "establishing a goal of providing appropriate ecological conditions for plant and animal communities" and "requiring a framework for sustaining [those] conditions in plans, and giving the responsible official discretion to decide what plan components should be included in the plan for species." *Id.* at 21773-74. The 2008 Planning Rule required a framework "using the concepts of ecosystem diversity and species diversity." *Id.* at 21496; *see also id.* at 21509 (providing rule's diversity requirements).

Similar to the 2008 Planning Rule, the Forest Service's Proposed Rule should recognize the technical impossibility and impracticalities of managing for species viability on units of the NFS. The viability issues relevant when promulgating the 2008 Planning Rule, *see* 73 Fed. Reg. at 21472-73 and 21495-97, are still relevant for the Proposed Rule and should be addressed by the Forest Service. *See, for example*, DPEIS at 103 ("the Agency's ability to maintain or restore the necessary ecological conditions within a plan area needed to maintain the existing diversity and viability of all species native to those areas or contribute to viable populations of species whose populations extend beyond the plan area is uncertain"); *id.* at 106 ("[t]he uncertainty involved with relying solely on a fine-filter approach for maintaining the viability of all native species over a broad landscape is high"); *id.* at 107 ("[r]esources and current knowledge are inadequate for directly assessing the viability of all plant and animal species on a national forest or grassland"). At a minimum, the Forest Service must explain why its 2008 approach to diversity and viability is no longer viable itself, especially in light of statements in the DPEIS that support the 2008 approach to the issue.

The DPEIS recognizes that maintaining or restoring ecological conditions and maintaining plant and animal diversity "must be based on factors that are attainable within the authority and control of the [Forest Service] and within the inherent biophysical capability of the plan area, and not on stressors beyond Agency control." DPEIS at 110. The DPEIS also recognizes that "ecological conditions within a particular plan area might not fully address the viability for species whose range extends well beyond the plan area." *Id.* at 110-11. These factors should be discussed and addressed in the Proposed Rule as they limit the Forest Service's ability to manage diversity and attain species viability.

After addressing viability issues, the Forest Service should consider adopting the approach to providing for diversity supported in the 2008 Planning Rule. *See* 73 Fed. Reg. at 21509. Such approach is consistent with the Forest Service's authority under NFMA and provides a more workable approach to providing for diversity of plant and animal communities. Rather than focusing on management of individual species' populations, which has been shown to be burdensome and impractical, the 2008 Planning Rule focuses on management of species'

habitat. Focusing on habitat diversity, rather than focusing on species' populations, provides for a more workable management approach and allows the Forest Service to address those issues which it has the ability and authority to control.

### G. The Forest Service Should Consider the 2008 Planning Rule as an Alternative in the DPEIS

NEPA requires that as part of its preparation of an EIS, an agency must "study, develop, and describe appropriate alternatives to recommended courses of action," 42 U.S.C. § 4332(2)(E), and discuss alternatives that it has considered, 40 C.F.R. § 1508.9. An agency must consider and discuss the range of all reasonable alternatives to the proposed action, to "provid[e] a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. The Forest Service must "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a); *Ctr. for Biological Diversity v. Nat'l Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1218 (9th Cir. 2008). The alternatives section is the "heart" of an EIS. 40 C.F.R. § 1502.14; *'Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006); *NRDC v. U.S. Forest Serv.,* 421 F.3d 797, 813 (9th Cir. 2005).

NEPA mandates that federal agencies "provide legitimate consideration to alternatives that fall between the obvious extremes." *Colorado Envtl. Coalition v. Dombeck*, 185 F.3d 1162, 1175 (10th Cir. 1998). More specifically, NEPA is violated when an agency dismisses the consideration of an alternative "in a conclusory and perfunctory manner that [does] not support a conclusion that it was unreasonable to consider them as viable alternatives." *Davis v. Mineta*, 302 F.3d 1104, 1122 (10th Cir. 2002). "The existence of reasonable but unexamined alternatives renders an EIS inadequate." *'Ilio'ulaokalani Coalition*, 464 F.3d at 1095, 1101.

Here, the DPEIS fails to adequately study, develop and describe appropriate alternatives to the Proposed Rule. In particular, the DPEIS fails to consider the 2008 Planning Rule as an alternative. The DPEIS considers the planning rule from 1982, DPEIS at 23-24 (Alternative B), as well as the planning rule from 2000, DPEIS at 27-29 (Alternative F), but not the 2008 Planning Rule. Unlike the planning rule from 2000, the 2008 Planning Rule was not considered infeasible to implement or held substantively inadequate by a court. *See* DPEIS at 27-29 (discussing problems with planning rule from 2000). Thus, it represents a viable alternative. In fact, the Forest Service adopted the alternative as its preferred alternative in 2008. The DPEIS provides no explanation why the Forest Service's decision in 2008 to adopt the 2008 Planning Rule is not supportable now. Because the 2008 Planning Rule remains a viable, reasonable and supportable alternative, the Forest Service should consider it as an alternative in the DPEIS. For substantive reasons addressed in Section II(F), above, it should be chosen as the preferred alternative.

### H. 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 that the protections and assurances of the quality of scientific information used and distributed by federal agencies under the Federal Data Quality Act is sufficient to ensure that quality of scientific information being used by the Forest Service in the planning process and a requirement to identify the "most accurate" scientific information should not be a legal requirement in the planning rule itself.

### I. The "Public Engagement" Requirement Distances the Decision-making Process from the Local Area and Renders the Agency Vulnerable to More Litigation

The requirement that the Forest Service "shall provide" for public comment creates undue burden on the agency (§219.4). Rather than receiving comment from people who develop their own views, it risks putting the Forest Service employees in the position of telling people who have no views on the matter what to think. The responsible official "shall encourage" participation by youth, low-income populations, minority populations, private landowners, and Indian Tribes. This "shall encourage" language creates the same legal vulnerability as the use of the identical term referencing that the Forest Service "shall encourage" participation of scientists in the Assessments in §219.6. What must be done to meet the legal threshold of encouragement? Who will make the contacts and explain the forest plan? A seasonal employee, a botanist, a deputy Forest Supervisor?

### J. The Proposed Rule Weakens the Coordination Process Granted to Local Governments and Indian Tribes

The Proposed Rule weakens the requirement of the Forest Service to coordinate planning with state and local governments and Indian tribes. This process of coordination is mandated under NFMA (16 U.S.C. 1604), NEPA (42 U.S.C. (a)), and the MUSYA (16 U.S.C. 530), and is included in the 1982 Planning Rule.

The Proposed Rule fails to consider the plans of state and local government and Indian tribes in three ways. First, it combines "public participation" requirements with coordination requirements, two separate sections under the 1982 Planning Rule. The combining of the two concepts into one dilutes the importance of government-to-government public planning efforts. Second, within the newly combined single section (§219.4), the rule compels the Forest Service

to "encourage" public participation from all segments of the public except state and local governments and tribes. To these entities, the responsible official need only "provide opportunities" for participation (§219.4). Finally, whereas the 1982 Planning Rule, in §219.7, clearly required that "the responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes," the Proposed Rule, under §219.4, adds the equivocal phrase at the end of the sentence "to the extent practicable and appropriate." This changes coordination with state and local government and Indian tribe plans from a requirement to a discretionary decision of the forest supervisor. If increasing agency discretion is the objective, then the phrase "to the extent practicable and appropriate" should be used elsewhere in the Proposed Rule particularly with regard to species viability (§219.9) and consideration of the "best science" (§219.3).

### K. The Timeframe and Climate Change Focus for Monitoring Is Cumbersome and Outside Agency Authority

§219.5(a)(3) requires "biennial monitoring evaluation reports", a significant increase for many national forests, on which monitoring evaluation reports are currently produced every five yeas. We believe monitoring on a two-year cycle to be excessive, and that it will detract resources from important management activities.

We also believe the proposed monitoring focus of climate change to be misguided. The Proposed Rule compels a "monitoring program" "addressing . . . [m]easurable changes on the unit related to climate change and other stressors on the unit" (§219.12). Climate change is mentioned numerous times elsewhere in the regulation (§219.5, §219.8, and §219.18). The definition of "ecosystem services" includes "long term storage of carbon [and] climate regulation" (§219.18). However, we believe that the inconclusive science surrounding climate change, especially as it relates to human activity, makes its monitoring a weak aspect of the Proposed Rule, especially given the large timeframe and expansive geographic scale required to measure climate change.

While the regulation supposedly gives the responsible official the discretion to "set the scope and scale of the unit monitoring program", it significantly limits that discretion "subject to the requirements of paragraph §219.12(a)(5). We recommend amending §219.12(a)(5) to truly give discretion to the responsible official. Specifically, we recommend deleting requirements to monitor focal species status changes "related to climate change and other stressors", as well as "carbon stored in vegetation" (§219.12). We recommend adding requirements to monitor accomplishment of forest plan Objectives, plus progress toward achieving forest plan "desired conditions" (§219.12).

### L. It Is Helpful that Monitoring Methods and Protocols can be Changed without a Plan Amendment

Monitoring methods and protocols are highly technical and the Proposed Rule's explicit provision to permit changes without a plan amendment would encourage adaptive management.

## M. The Establishment of "Assessments" in Section §219.6 Is Not in Keeping with Statute

The Proposed Rule establishes a separate layer of planning called "Assessments" which will be prepared apart from the Forest Plan without NEPA analysis, which under the law, the Forest Service cannot do. Courts have repeatedly rejected the reliance of a plan or project on an earlier prepared assessment or an analysis that was not subject to NEPA. For example, in *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management,* 387 F.3d 989, 998 (9th Cir. 2004) the court explained "tiering to the Watershed Analysis cannot save the EAs, because the Watershed Analysis is not a NEPA document. A NEPA document cannot tier to a non-NEPA document." Citing *Kern v. BLM*, 284 F.3d 1062, 1073 (9th Cir. 2002) holding that "tiering to a document that has not itself been subject to NEPA review is not permitted"; *Muckleshoot Indian Tribe v. Forest Service*, 177 F.3d 800, 811 (9th Cir. 1999) stating, "The appellees also attempt to tier the Exchange EIS to the Green River Watershed Report to cure the deficiencies of the cumulative impact analysis of the Exchange EIS. Such reliance is impermissible under the NEPA regulations, which only permit tiering to prior EIS's."; See also League of *Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Service*, 549 F.3d 1211, 1213 (9th Cir. 2008), "Because the Final Supplemental Environmental Impact Statement (FSEIS) may not tier to a non-NEPA watershed analysis to consider adequately the aggregate cumulative effects of past timber sales, we reverse the district court's grant of summary judgment in favor of the Forest Service".

Assessments will presumably include non-federal scientists to help "inform" planning as well, which will require compliance with the Federal Advisory Committee Act (FACA). Thus, the Forest Service is placing the subsequently developed Forest Plans at risk by requiring a process to develop Assessments with public participation and non-federal scientists that "inform" decisions in the plan without going through the NEPA process or complying with FACA. One alternative is to make the Assessments subject to NEPA and FACA, but this will make the forest planning process unworkable. Another alternative is to have the planning rule categorically exclude the Assessments from NEPA and exempt the Assessment from FACA (the FACA exemption would require legislation). A better approach is to eliminate the Assessments section from the Proposed Rule entirely. This would eliminate the risk of NEPA (and FACA) claims challenging forest plans' reliance on Assessments.

Furthermore, the Assessment section creates its own fertile ground for litigation independent of NEPA and FACA by imposing new requirements that the Forest Service must follow to develop Assessments. The agency must "notify" and "encourage" "appropriate" "Federal agencies, States, local governments, other entities, and scientists" to "participate" in the Assessment process (§219.6). If the Forest Service did not "notify" and "encourage" plaintiffs' preferred scientists to participate, then the agency would presumably be in violation of the regulation. Other questions arise as well, such as as the extent to which responsible officials must "encourage" participation, or which agencies and scientists are "appropriate".

Finally, the Assessment section will also create a powerful new tool for plaintiffs to attack Forest Service analysis that resembles an Assessment but which was not developed according to the section's procedural requirements to notify the public, and encourage

appropriate scientists to participate in the development of the Assessment. For example, any resource analysis in the planning file arguably related to "ecological, economic, or social conditions, trends, and sustainability within the context of the broader landscape" will violate the planning rule if it was not prepared with public participation and the Forest Service failed to encourage appropriate scientists to be involved in its preparation.

### N. Budget Should Not Dictate Objectives

§219.7(d)(1)(ii) directs that "Objectives shall be based on reasonably foreseeable budgets". This is not a matter for the planning rule as it unduly constrains planning analysis. The sentence should be deleted.

### O. 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.

### P. 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)).

### Q. The Proposed Rule Should State that a Plan Amendment Is Permissible through a Project Level Analysis

We appreciate and support the Proposed Rule for recognizing that "the responsible official has the discretion to determine whether and how to amend the plan" (§219.13 (a)). Court decisions have affirmed this broad discretion involving plan amendments and have held that a site-specific analysis for a project can be used to support a plan amendment for a particular project area. The Proposed Rule does address project level consistency with a forest plan in §219.15, but should also do so in the plan amendment section, §219.13.

### R. The Proposed Rule Effectively Eliminates the Distinction between Guidelines and Legally Enforceable Standards

§219.15 (d)(3) of the Proposed Rule states that forest plans must "comply with applicable guidelines". This requirement negates the Forest Service's hard fought legal victories establishing that guidelines are not mandatory, but discretionary, and designed to provide management flexibility. The courts have had several occasions to review the distinction between forest plan standards and guidelines as they are currently defined under the existing regulations. The courts have ruled in favor of the Forest Service and repeatedly rejected plaintiffs' arguments that the agency was legally compelled to follow a forest plan guideline. For example, in *Wilderness Soc. v. Bosworth*, 118 F.Supp.2d 1082, 1096 (D.Mont.,2000), the Ninth Circuit rejected plaintiffs argument that all old growth stands had to be a minimum of 25 acres. The court concluded that "the 25 acre minimum size requirement in the Forest Plan is a guideline and is therefore discretionary rather than mandatory." *Id.* at 1096. Similarly, in *Greater Yellowstone Coalition, Inc. v. Servheen*, 672 F.Supp.2d 1105, 1114 (D.Mont.2009) the court noted that "[w]hen Forest Plans contain standards, the standards are 'mandatory requirements,' in contrast to guidelines, 'which are discretionary.'", citing *Miller v. U.S.*, 163 F.3d 591, 594, n. 1 (9th Cir.1998).

### S. A Project Should be Presumed Consistent with the Plan Unless the Plan Explicitly States It Is Not Consistent

The provision dealing with the consistency of "existing authorizations" (§219.15(a)) and previously approved projects with the Proposed Rule presumes that all projects are inconsistent with the plan unless the plan expressly singles out the project and states that it *is* consistent with the plan. A more efficient and less costly approach would be to assume that all existing authorizations and previously approved projects are consistent with the plan unless the plan explicitly states that those projects are inconsistent and must be modified to conform to the new plan. This would avoid disruptions of existing contracts and costly contract claims. The approach that the "existing authorizations" and approved projects are consistent with the Proposed Rule is supported by language in NFMA that states that plan approval is subject to valid existing rights. *See* 16 U.S.C. §§1600-6.

### T. The Provision that Allows Separate Resource Plans to Be Developed Violates NFMA

The Proposed Rule provides that there may be additional independent resource plans developed by the Forest Service. *See* 76 Fed. Reg. at 8522 §219.15 (e). NFMA was designed to eliminate separate resource management plans. NFMA required one integrated plan to eliminate

the *Balkanized* planning of a national forest. It requires that "[p]lans developed in accordance with this section shall "form one integrated plan for each unit of the National Forest System." 16 U.S.C. § 1604 (f)(1).

### U. 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.

### V. The Proposed Rule Defines Ecosystem Services Too Broadly and Improperly Elevates Ecosystem Services to the Same Level of Importance as Multiple Uses under the MUSYA

The Proposed Rule must provide for "ecosystem services" but the term is broadly defined, such that failure of a plan to provide one of the services will result in its violation the regulation. Ecosystem services are defined in the Proposed Rule as: "Benefits people obtain from ecosystems, including: (1) Provisioning services, such as clean air and fresh water, as well as energy, fuel, forage, fiber, and minerals; (2) Regulating services, such as long term storage of carbon; climate regulation; water filtration, purification, and storage; soil stabilization; flood control; and disease regulation; (3) Supporting services, such as pollination, seed dispersal, soil formation, and nutrient cycling; and (4) Cultural services, such as educational, aesthetic, spiritual, and cultural heritage values, as well as recreational experiences and tourism opportunities" (§219.19). The Proposed Rule states that "the plan must provide for multiple uses and ecosystem services" (§219.10). This requirement appears to trump the statutory multiple use mandates.

### W. The New Requirement that the Plan Provide Opportunities for "Spiritual Sustenance" Is Unattainable and outside Agency Authority

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 dive into the arena of how Forest Plan decisions comport with spiritual sustenance.

### X. 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.

### Y. We Agree with the Designation of the Forest Supervisor as the Responsible Official for Forest Plans in §219.2(b)(3)

## III. Conclusion

The Livestock Associations 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. The Livestock Associations are also concerned with the Forest Service's focus on maintaining species viability, rather than providing for habitat diversity as is required by NFMA.

The Livestock Associations 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 have not had 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 FACA, 5 U.S.C. §§ 1-16.

Because of the concerns established in these comments, we request that the Forest Service 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, the Forest Service's ability to provide range resources and to manage for sustainable and healthy forest lands is integral to successful operations of the Livestock Associations' members.

Thank you for the opportunity to provide these comments on the Proposed Rule. 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,

American Sheep Industry Association
Association of National Grasslands
National Cattlemen's Beef Association
Public Lands Council

Arizona Cattle Growers' Association
Arizona Wool Producers Association
California Cattlemen's Association
California Wool Growers Association
Colorado Cattlemen's Association
Colorado Livestock Association
Colorado Wool Growers Association
Florida Cattlemen's Association
Georgia Cattlemen's Association
Idaho Cattle Association
Idaho Wool Growers Association
Kansas Livestock Association
Mississippi Cattlemen's Association
Montana Public Lands Council
Montana Stockgrowers Association
Montana Wool Growers Association
Nevada Cattlemen's Association
Nevada Woolgrowers Association
New Mexico Cattle Growers' Association
New Mexico Wool Growers Inc.
North Dakota Stockmen's Association
Oregon Cattlemen's Association
South Dakota Cattlemen's Association
Southern Arizona Cattlemen's Protective Association
Southeastern Livestock Network
Utah Cattlemen's Association
Utah Wool Growers Association
Virginia Cattlemen's Association
Washington Cattlemen's Association
Wyoming Stock Growers Association
Wyoming Wool Growers Association

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**EXHIBIT A**

February 16, 2010

Mr. Harris D. Sherman, Under Secretary
Natural Resources and Environment (NRE)
United States Department of Agriculture
1400 Independence Ave., SW
Washington, D.C. 20250
Submitted Via Electronic Transmission: fspr@contentanalysisgroup.com

**RE: Forest Service Notice of Intent to prepare an Environmental Impact Statement to develop a new planning rule for management of national forests and grasslands**
**Docket Identification Number: E9-30174**

Dear Mr. Sherman,

The Public Lands Council (PLC), an association of public lands ranchers including the National Cattlemen's Beef Association, the American Sheep Industry Association, the Association of National Grasslands and our affiliate member associations wish to comment on the U.S. Forest Service's (USFS) Notice of Intent (NOI) to prepare an Environmental Impact Statement (EIS) to develop a new planning rule for management of national forests and grasslands.

PLC has represented livestock ranchers who use public lands since 1968, preserving the natural resources and unique heritage of the West. Public land ranchers own nearly 120 million acres of the most productive private land and manage vast areas of public land, accounting for critical wildlife habitat and the nation's natural resources. PLC works to maintain a stable business environment in which livestock producers can conserve the West and feed the nation and world. Our members appreciate the opportunity to comment on this NOI. The implications of a new planning rule are of critical importance, as our members are involved in managing natural resources throughout the West every day.

The USFS states that a new planning rule must be responsive to the challenges of climate change; the need for forest restoration and conservation, watershed protection, and wildlife conservation; and the sustainable use of public lands to support vibrant communities. It must be clear, efficient, and effective, and must meet requirements under the National Forest Management Act (NFMA), as well as allow the Agency to meet its obligations under the Multiple Use Sustained Yield Act (MUSYA), the Endangered Species Act (ESA), and the Wilderness Act, as well as other legal requirements. It also states a need for a transparent, collaborative process that allows for effective public participation.

We appreciate the USFS's need to balance the multiple uses of the land; however, we are concerned that when the plans are developed, certain uses are not elevated above others and that

management decisions not be based on 'anticipated' rather than actual changes on the ground. Below, please find responses to some of the topics posed in the NOI.

## SUBSTANTIVE PRINCIPLES FOR A NEW RULE

### 1. Land management plans could address the need for restoration and conservation to enhance the resilience of ecosystems to a variety of threats.

Ecosystems vary widely across the west so it is very important that USFS plans are developed on a local basis with input from stakeholders in the area. A National plan for conservation and enhanced ecosystem resilience assumes a one-size-fits-all approach and will do little to target sensitive areas. Any goals of this effort must take into account measurable results in vegetative ecosystems, and local discussions are most appropriate for the goal-setting.

Across the west our members and their state organizations have been working with the forest managers in their local areas to implement range practices to enhance wildlife habitat and resource values. Giving more flexibility to local land managers to make decisions along with coordination with land owners and permittees should be integral in your development of management plans.

### 2. Plans could proactively address climate change monitoring, mitigation and adaptation, and could allow flexibility to adapt to changing conditions and incorporate new information.

We are very concerned about relying on the idea of climate change when promulgating rules that may affect management for years to come. The climate changes on natural cycles – warming, cooling, lengths of seasons etc. – and will continue fluctuating in the future. We strongly recommend the USFS develop management plans that allow local land managers the flexibility to make decisions based on the current conditions on the ground and in collaboration with livestock permittees, and state/local authorities.

Management planning should allow for adaptive management locally, and constant communication between permittees and the local offices to best protect the forest health and the commercial interest. We encourage the USFS to utilize the parameters of the National Environmental Policy Act (NEPA) process already in place that allow for categorical exclusions and streamlined local environmental assessments in case of changing conditions.

### 3. Land management plans could emphasize maintenance and restoration of watershed health, and could protect and enhance America's water resources.

Water continues to be the limiting factor across the west as urban demand continues to increase. Livestock ranchers work every day to protect this vital resource. Water quality management is not part of the mission of the USFS, but falls under the jurisdiction of other agencies and in some cases the states. The planning rule process should include local entities and stakeholders in

making decisions regarding availability and quality of water. The USFS must stay within the bounds of its own management jurisdiction, and continue to do the job that its employees do best: maintaining healthy forests and rangelands for the use of all Americans.

**4. Plans could provide for the diversity of species and wildlife habitat.**

Species and wildlife habitat plans must include grazing as part of the agencies multiple use mandate for managing public lands. The states have primary jurisdiction over non-ESA protected wildlife and therefore should be the entity that manages wildlife. The national EIS allows for coordination with the states through Memorandum of Understanding (MOUs); this should be the primary tool used for coordinating with local land managers and stakeholders.

As discussed above the idea of climate change should not be used for management decisions. Naturally changing conditions can and should be dealt with at the local level with the best available science and current conditions on the ground to provide optimal decisions for area-specific wildlife issues.

**5. Plans could foster sustainable NFS lands and their contribution to vibrant rural economies.**

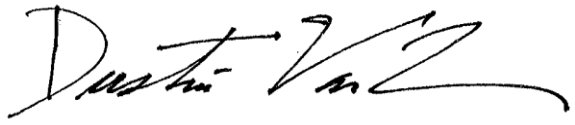
Sustainable and healthy forest lands are integral to the success of our members' operations. Sheep and cattle have grazed on western lands for many decades and are an important part of sustaining the multiple-use balance needed to continue vibrant rural economies in the west.

Any new plans must allow for commercial development of resources, as is part of the USFS multiple use mission. Grazing on our national forests must be at the forefront of any planning effort – not made to conform to other nebulous goals of conservation and restoration.

When developing the planning rule it is imperative to require decisions be made on sound and relevant science while ensuring that a stable economic environment is sustained to offer the greatest opportunity for our members to assist in the preservation of public lands.

On behalf of our members we thank you for the opportunity to comment on the NOI. We look forward to working with you as the planning rule is developed.

Sincerely,



Dustin Van Liew
Public Lands Council