

Chapter 3 Legal Issues and Concerns

This chapter covers public comments on legal issues relating to the proposed rule. Section 3.1 covers General Legal Issues; Section 3.2 covers Federal Environmental Acts and Laws; Section 3.3 discusses Federal Land Management Acts and Laws; Section 3.4 deals with Mining Acts; Section 3.5 covers Proposed Legislation and Acts; and finally, Section 3.6 discusses Treaties and Tribal Laws.

3.1 General Legal Issues

This section deals with comments concerning the public's perceived failure of the Forest Service to comply with general laws. Constitutional Law is covered in Section 3.1.1. Section 3.1.2 covers Federal Law. Executive Orders are covered in Section 3.1.3. Section 3.1.4 deals with State and Local Laws. Section 3.1.5 concludes with Litigation Rulings.

3.1.1 U.S. Constitutional Law

Respondents' feelings about constitutional concerns tend to be intense. Many respondents argue that the proposed rule would violate the U.S. Constitution by granting the Forest Service a level of authority that would undermine rights constitutionally reserved for the people, the states, and Congress.

Some respondents argue that the proposed rule compromises constitutionally guaranteed civil liberties and property rights, that it violates the "Takings Clause" of the Fifth Amendment, and the First Amendment protection from government instituted religion. One individual further asserts that government land ownership is legally limited to only five percent of the land. Many respondents believe the proposed rule violates the Tenth Amendment of the Constitution by not honoring states' rights. Many state and county officials are concerned that the proposed rule does not allow them to adequately regulate and manage resources under their primary jurisdiction of the state. Concerns related to states' rights include regulation of air and water quality, wildlife, management of watersheds, transportation systems, and school trust lands, all of which are typically under primary jurisdiction of the state. Finally, many individuals assert the Forest Service lacks the authority to adopt the proposed rule because Congress has the only decision-making authority over federal lands pursuant to the property clause of the Constitution.

Public Concern: The proposed rule should protect civil liberties and constitutional property rights.

Mr. Dombeck's proposal is at its best unnecessary, and at its worst the end of civil liberties and Constitutional property rights for a vast area of this country. (Individual, Red Bluff, CA - #2341.52000)

Under Title 42 and 43, Sections 1983-1985 and 1986 of the Bill of Rights of the Constitution it states: If two or more people go upon the road to deprive another of his rights as secured by the Constitution, that person(s) shall be guilty of a crime and can be fined 8 thousand dollars or 8 years in prison or both. The law is very clear; no laws can be passed without due process; it borders on treason of our nation's laws. (Individual, No Address - #17928.52000)

Public Concern: The Forest Service should not violate the "Takings Clause" of the Fifth Amendment of the Constitution.

These same "two rut," "primitive" roads are also being used by Forest Service personnel for fire suppression, among other very valid uses. Forcibly closing these roads to all uses will also eliminate the man-made water sources that both livestock and wildlife depend on. These closings constitute a "Public Taking" of land and resources of the Public Domain without compensation. That is against the law and the 5th Amendment. (Individual, Tucson, AZ - #9413.52100)

Our National Forest System (NFS) was created to be managed under the "multiple use, sustained yield" idea of public land management. Declaring these lands to be prohibited from road building and stewardship timber harvesting abrogates public ownership property rights, and changes the relationship of the State to the individual. Individual property rights are the right an individual has to acquire, use, and dispose of his personal property as he sees fit. Public lands represent property held collectively by the public. How the State acts toward an individual (or the public at large) defines the basis for numerous laws. The State's actions should be predictable for its citizens. When the State changes the rules of property ownership, including from multiple use, sustained yield to satisfy an unproven need for increased biodiversity protection, its actions are no longer predictable for its citizens. The individual or the public will not know how the State will act in a given situation. Implementation of the DEIS and the Proposed Rule in its current form would do just that. (Individual, No Address - #28995.53100)

The preamble to the proposed rule states that the proposal has been "reviewed for its impact on private property rights under Executive Order 12630. It has been determined that this proposed rule does not pose a risk of taking Constitutionally-protected private property; in fact, the proposed rule honors access to private property pursuant to statute and to outstanding or reserved rights." 65 Fed. Reg. 30286. NvMA notes that if the proposal acts to deny or restrict access to valid existing mining claims or leasable minerals under contract, then the proposal does pose the risk of taking Constitutionally-protected property. In *FOSTER V. UNITED STATES*, 607 F.2d 943, (Ct. Cl. 1979), the court held that denial of any owner's access to mineral deposits on government property constituted a compensable taking within the Fifth amendment. (Mining/Oil Company or Organization, Reno, NV - #15907.52100)

The Supreme Court also has held that denial of access can constitute a taking. *UNITED STATES V. WELCH*, 217 U.S. 333 (1910). In *WELCH*, the United States condemned and paid for a parcel of land permanently flooded by the erection of a dam but refused to compensate the owners of a right of way that crossed the taken parcel. The Court found "that the same reasoning that allows for a taking of land by permanent occupation allows it for a right of way taken in the same manner." 217 U.S. at 339. (Mining/Oil Company or Organization, Spokane, WA - #16091.52100)

NMA [National Mining Association] notes that if the proposal acts to deny or restrict access to valid existing mining claims or leasable minerals under contract, or private mineral estates and reservations then the proposal does pose the risk of taking Constitutionally-protected property. (Mining/Oil Company or Organization, Washington, DC - #43583.52100)

Public Concern: The proposed rule should comply with the First Amendment.

The proposed rule constitutes the favoring of a religion, in violation of the First Amendment. (Individual, Albuquerque, NM - #16182.52000)

Public concern: The government should limit its land ownership to only five percent of the land.

America belongs to us, the average citizen. God made this land, not the Government. Government ownership is ILLEGAL, except for the mandated 5%!!! (Individual, Dayton, NV - #2916.42000)

Public Concern: The proposed rule should comply with the Tenth Amendment of the Constitution.

Your policy of closing roads is unconstitutional under the 10th Amendment and also under the commerce clause. We Americans are your employer and control your actions! (Individual, Dimondale, MI - #13406.52200)

Public Concern: The Forest Service should honor states' rights.

The Governor of Alaska, the Alaska Legislature and Senate, and all three of Alaska's congressional delegation are opposed to the roadless initiative in Alaska. Most of the States impacted by the initiative directly are against the initiative. What has happened to states' rights? At a minimum, how is it that Washington D.C. can ignore us and let bureaucrats and people that don't even live here make major decisions [which] significant impact our lives. It is like having us determine how the streets of New York should be cleaned up. We don't have a clue because we don't live there. We have a right to grow into a productive State and not be sentenced to become a huge wilderness area benefiting only the young. (Individual, Ketchikan, AK - #199.52200)

The proposed rule violates existing state land endowments with the federal government and constitutional states' rights. Federalism is arrogantly ignored and dismissed rather than meaningfully addressed. (Business, Wallace, ID - #17632.50000)

TO REGULATE AIR AND WATER QUALITY

The second part of the proposed regulation, Section 294.13, raises serious considerations about compliance with state primacy provisions under federal laws, and federalism concerns. The proposed regulation requires the local supervisor to evaluate the quality and importance of "soil, water and air" and "sources of public drinking water" when examining unroaded areas in future plan revisions. The proposed regulation does not contain any further criteria about this evaluation. This evaluation is then used to determine "management protections" and the "level of such protection" in the subsequent plan, such protections to further the conservation of roadless areas. The state is the entity given primacy, under the terms of the Clean Air and Clean Water Acts and a delegation from the EPA, for air and water quality. These laws provide for permits for any type of disturbance or other act which may cause a discharge into the air or waters of the state. The state is responsible for other air quality considerations, including haze. Many of the western states have agreed to the provisions of the Western Regional Air Partnership (WRAP), a regional effort to combat regional haze. The state cannot imagine how the local supervisor can make this evaluation without the expertise of the state personnel in air and water quality. The proposed regulation does not provide for any consultations, memoranda of understanding, or any communications as these evaluations are being considered. (State Elected Official, Salt Lake City, UT - #43918.50000)

TO REGULATE WILDLIFE

Further, because the state has primacy in the area of wildlife management, questions of federalism are raised when the proposed regulation purports to have the local managers' evaluations of wildlife habitat. Again, the proposed regulation does not provide for any consultations, memoranda of understanding, or other communications to insure that the state's primacy with wildlife issues is given full consideration. (State Elected Official, Salt Lake City, UT - #43918.50000)

TO MANAGE WATERSHEDS

The proposed rule and other Alternatives will not resolve the water management problems associated with these undefined roadless areas. In the first instant, water is under the primary jurisdiction of the State. The roadless area rule could impair and even abrogate the States' ability to manage its waters. For example, if a wildfire occurred, the denuded land could cause significant impacts upon the quality of the water. Of no less importance, the failure to maintain the appropriate amount of trees and undergrowth in these roadless areas can cause a significant reduction in the quantity of water. (County Agency, Glenwood, NM - #13909.53300)

TO MANAGE TRANSPORTATION SYSTEMS

In the second instant, roads allow for many management needs including, but not limited to, those under the primary jurisdiction of the State. Among other interests, roads provide necessary management access for fire control, search and rescue, other emergency services, management of fish and game, logging and thinning of timber, fuel wood control, grazing, and water quantity and quality management. There is no provision of law, rule or regulation that can be so construed as to prejudice the authority and claims of the State. (County Agency, Glenwood, NM - #13909.53300)

TO MANAGE SCHOOL TRUST LANDS

Authorities granted to local Forest Service officials under the Roadless Area Conservation DEIS do not take into consideration the fact that Idaho's right to manage "endowment lands" and "school trust lands" granted at a time of statehood admission are not to be subordinated to federal actions which violate the 10th Amendment of the United States Constitution. (State Elected Official, Albion, ID - #44351.52200)

Public Concern: Congress should have the only decision-making authority over federal lands pursuant to the property clause of the Constitution.

CONGRESS HAS ULTIMATE AUTHORITY OVER FEDERAL LANDS PURSUANT TO THE PROPERTY CLAUSE OF THE U.S. CONSTITUTION. SEE *KLEPPE V. NEW MEXICO*, 426 U.S. 529 (1976). To the extent that the Forest Service has authority to take nationwide actions, the RPA, 16 U.S.C. 1601-14, and the Contract with America Act, 5 U.S.C. 801-808, provide the mechanisms for informing Congress and obtaining its acquiescence before taking significant actions at the national level.

Congress exercised its authority over national-level decisions regarding the National Forest System in the RPA. The Forest Service, by not fully informing Congress in advance (in either the Assessment, the Program, the Program report replacement under the Government performance and Results Act, or the Statement of Policy) that a major roadless area initiative affecting 28% of the National Forest System would be proposed, has acted contrary to at least the spirit of 16 U.S.C. 1601, 1602, and 1606.

Further, the Contract with America Act requires a report to Congress on this rulemaking "before a rule can take effect." 5 U.S.C. 801(a). If the rulemaking is determined to be a "major rule," the rule does not take effect until 60 days after the report has been submitted to Congress, during which time Congress can disapprove the rule. ID. [sections] 801(a)(3), 802. Thus these provisions provide another opportunity for Congress to exercise its Property Clause powers over allowed uses of National Forest System lands. (Business, Washington, DC - #29962.52000)

The Siskiyou County Farm Bureau questions the Constitutionality of this initiative process. The USDA Forest Service is a creature of Congress, deriving its power solely from the delegation of authority by Congress. The U.S. Forest is acting beyond the scope of its authority in attempting to redefine its own management mission as applies to roads, preempting that which is established in law.

Under “separation of powers,” the Executive has not been Constitutionally delegated the authority to make law. That authority has been delegated by the people of the United States to Congress. An Administrative initiative, such as is proposed, could only be interpreted as advisory to Congress. The USDA has not the capacity to recognize an Executive initiative as a directive having the force of law. Neither does it have authority to act under its own initiative to promulgate regulations that supercede various Acts of Congress.

The duties and responsibilities of the Secretary, as executive of the department, are controlled by federal law and are subject to the supervision of Congress. The Administration may impose only duties of a purely political nature upon an executive office. [Kendall v. U.S. Ex Rel. Stokes, 37 U.S. 524 (1838).] The Department is empowered by Congressional Act to carry on governmental activities. That power is strictly circumscribed by the authority granted. [Stark v Wickard, 321 U.S. 288 at 309; Quaker Oats Co. v. Fed. Security Administrator, 129 F.2d 76, 80, 7th Cir., 1942; reversed on other grounds at 318 U.S. 218, 63 S.Ct. 589, 1943.] The Court echoed these principles in Soriano v. United States, 494 F.2d 681, 9th Cir., 1974: “An administrative agency is a creature of statute, having only those powers expressly granted to it by Congress or included by necessary implication from the Congressional grant,” 494 F.2d, at 683. (Business/Business Association, Yreka, CA - #43494.52000)

3.1.2 Federal laws

A large majority of respondents who cite federal laws do so in opposition to the proposed rule. Many of their comments are detailed and with some exceptions tend to emphasize procedural issues.

Many respondents are concerned with several alleged violations of the Administrative Procedures Act (APA). Alleged violations of APA include failure to provide consistency findings, disclose critical facts, present a full range of alternatives or even a fair and balanced assessment of the alternatives. Respondents also maintain that the public comment period was too short and that that fact, combined with the unavailability of documents, made public comment difficult. Several individuals further assert that the Forest Service did not provide critical facts or sufficient data for meaningful public comment. A few respondents warn that ignoring all of this evidence will render the Forest Service’s actions arbitrary and capricious. In addition, many respondents accuse the Forest Service of violating APA’s rules on ex-parte communication. Some respondents even claim these ex-parte communications occurred with “small select groups of environmentalists.” They state the rules on ex-parte communication were further violated when these communications were not included in the public record.

In addition to concerns about alleged violations of APA’s rules on ex-parte communication, many respondents are concerned with possible violations of the Federal Advisory Committee Act (FACA). These respondents state FACA was violated when the Forest Service used “unchartered” groups of environmentalists “to the exclusion of all others.” One remedy suggested by these individuals is for all communication with private parties that occurred within the last year to be included as an appendix in the final rule. A few other respondents suggest the Forest Service take advantage of its authority under FACA to charter an advisory committee that will provide “balanced representation of outside interest groups.”

One individual is concerned that the present legal “crazy quilt” of laws and regulations, coupled with the Equal Access to Justice Act, encourages “low-risk” lawsuits against the Forest Service. Such litigation imposes high costs in both time and money. This individual suggests mandatory arbitration before going to court. Many respondents are also concerned over alleged violations of the Freedom of Information Act (FOIA). A few individuals cite specific instances where they are still waiting for responses to FOIA requests made early in the comment period.

The proposed rule should avoid violations of the Civil Rights Act, some writers state, by extending the same considerations to “all generational rural cultures and peoples” as are extended to Native Americans. A few individuals express concern that the proposed rule will violate the Americans with Disabilities Act (ADA) by closing roads, thereby limiting access to people with disabilities. Some respondents even suggest building more roads and trails that accommodate wheel chairs. A January 2000 court ruling states “that the right to use National Forests for outdoor recreation ‘constitutes a legally protectible interest under the National Outdoor Recreation Act of 1963.’” A few individuals claim this must also protect OHV roads and trails that may be considered for closure under the proposed rule.

Several respondents encourage compliance with the Contract with America Act, which provides “another opportunity for Congress to exercise its Property Clause powers over the allowed uses of National Forest System lands.” This would require a report to Congress about the proposed rule “before a rule can take effect.” A few respondents also state that a failure to notify Congress of the proposed rule prior to adoption would violate the Government Performance and Results Act. One individual concerned with access feels the Forest Service would violate the Surface Transportation Assistance Act if the proposed rule denies “reasonable access” to inholders. A few individuals suggest the bulky documents of the Draft EIS do not comply with the Paperwork Reduction Act.

Section 3.1.2.1 covers concerns about federal laws that have specific economic significance. Many respondents assert that the proposed rule is in violation of the Regulatory Flexibility Act (RFA). These individuals cite many inadequacies in the Initial Regulatory Flexibility Analysis (IRFA), including absence of “a succinct statement of the objectives of, and legal basis for, the proposed action; a description of and, where feasible, an estimate of the number of small entities to which the proposed action will apply;” hard data or facts substantiating assumptions; and exhibits as well “blatant omissions.” A few respondents also claim the IRFA lacks an alternative that would “minimize any significant economic impact of the Proposed Rule on small entities.” One group claims the IRFA should include an analysis of the effects of the proposed rule on motorized recreation. Many other groups are concerned the proposed rule underestimates impacts on the timber and mining industries. Respondents who assert the proposed rule violates RFA agree the Forest Service should complete an economic impact analysis and honestly analyze “the impacts of their proposed rules on small entities,” rather than thinking of reasons “why they do not have to comply with RFA.” The economic impact analysis recommended by many respondents should include a comprehensive or cumulative impact analysis of the three pending Forest Service proposals. In addition, if the economic analysis determines a negative effect on small entities, the federal government should compensate rural communities for lost economic benefits, some respondents advocate. One federal agency asserts that all forest level decisions regarding the proposed rule should require a regulatory flexibility analysis.

The Regulatory Flexibility Act is closely related to the Small Business Regulatory Enforcement Fairness Act (SBREFA), and many of the cited violations of the two laws are similar. Many individuals feel the proposed rule violates SBREFA, which also “requires agencies to examine and mitigate for the impact a proposed rule will have on small entities.” Furthermore, a few respondents state that separating concurrent Forest Service proposals has prevented adequate documentation of the cumulative economic effects. A few individuals are concerned the proposed rule violates the Unfunded Mandates Reform Act, as the proposed policy is not “addressed in the FY 2001 Forest Service Proposed Budget.” One group suggests the proposed rule should either be “funded for implementation through appropriated funds” or removed.

Public Concern: The Forest Service should comply with the Administrative Procedures Act.

The undue influence that the Clinton administration and the Forest Service have granted to special interests has violated the Administrative Procedures Act. (Municipal Association, Price, UT - #85.55200)

In order to assure the responsible official and the public that all actions are consistent with the forest plan, a finding of consistency must be part of each decision document.” Forest Service Handbook 1909.12 -- Land and Resource Management Planning Handbook [section] 5.4.1 (“Planning Handbook”). Such a consistency determination also would be required by the Administrative Procedure Act (“APA”), so that a court can assess compliance with the NFMA. *MOTOR VEHICLE MFRS. ASS’N V. STATE FARM MUTUAL*, 463 U.S. 29, 48-49 (1983). The Forest Service’s failure to provide a consistency finding on the rulemaking also violates the NFMA and APA. *SIERRA CLUB V. MARTIN*, 168 F.3d 1, 4-5 (11th Cir. 1999). (Timber Company or Association, Eugene, OR - #15879.53800)

The DEIS violates the APA because it purposefully fails to disclose critical facts to the public, fails to present a full range of alternatives, and fails to present a fair and balanced assessment of alternatives thereby deceiving the public in violation of APA. (Individual, Whitefish, MT - #30417.55200)

Against this backdrop of political chicanery, the Companies must protest, in the strongest terms, the Forest Service’s decision to so hastily rush this roadless rule to conclusion, despite significant barriers to informed commentary resulting from vaguely defined and complicated boundaries of the areas affected by the rule. The short period allowed for public comment, combined with the general unavailability of the documents to most of the public, and the vagueness and complexity of boundaries of the areas to be covered, leaves many parties unnoticed, or at the very least not adequately noticed, of the potential effect of the proposed rule. Such flawed notice is in direct contravention of the Administrative Procedure Act (“APA”). The proposal is truly a case of “the devil is in the details.” The failure to adequately define the scope of the proposed rule and to provide sufficient time for analysis and comment, we think, also violates the fundamental notice provisions of the APA by precluding the informed and rigorous debate which lies at the very heart of the APA’s notice and comment requirement. (Mining/Oil Company or Organization, Washington, DC - #52224.55200)

There is just too much evidence for the Forest Service to ignore as it conducts its rulemaking procedure. A decision otherwise would be “arbitrary and capricious” and violate sections 501 of the Administrative Procedures Act which governs the agency’s rulemaking. (Individual, Bloomington, IN - #26023.50000)

BY PROVIDING SUFFICIENT DATA FOR MEANINGFUL PUBLIC COMMENT

THE AGENCY FAILED TO PROVIDE SUFFICIENT DATA TO PROVIDE OPPORTUNITY FOR MEANINGFUL PUBLIC COMMENT. Section 553 of the federal Administrative Procedures Act requires that an agency proposing a rule must provide an opportunity for interested parties to participate in the rule making through submission of written data, views, or arguments. In order to provide such comments, however, those parties must have access to sufficient information to determine how the proposal will impact their interests. (Mining/Oil Company or Organization, Denver, CO - #29952.55200)

BY FOLLOWING RULES ON EX-PARTE COMMUNICATION

The Forest Service Violated the Administrative Procedure Act Prohibition on Ex Parte Communications During the Development of its Roads Policy. . . . when an agency conducts a rule making with public hearings, the APA places a prohibition on “ex-parte communication relevant to the merits of the proceeds” between interested persons outside the agency and agency employees who are or may reasonably be expected to be involved in the decision (5 U.S. C. 557). Further, if such ex-parte communication occurs, agency employees must include in the public record “all such written communication; memoranda stating the substance of all such oral communications; and all written responses, and memoranda stating the substance of all oral responses.” ID. The prohibition on ex-parte communications “shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing” id. (Individual, Centerfield, UT - #28291.55200)

In conjunction with the roadless areas review, in early 1998 the Forest Service commenced two associated rule-makings: an advanced notice of proposed rule-making on a transportation plan and a proposed interim rule prohibiting road construction. In conjunction with these rule-makings, the Forest Service held meetings and otherwise solicited public comments on the proposals. The interim rule on roadless areas was finalized a year later and the transportation rule is still pending. However it is now clear that while the Forest Service was receiving written comments on its proposals and holding public meetings on its proposals, it was meeting - in secret - with a small, select group of environmentalists with a direct interest in the outcome of the roadless area review and transportation policy. Yet, the public record for the rule-makings does not show that these ex parte communications ever occurred. (Mining/Oil Company or Organization, Denver, CO - #29952.55200)

BY NOT BEING ARBITRARY

THE RULEMAKING UNLAWFULLY AND ARBITRARILY SETS A MANDATORY NATIONWIDE PRESCRIPTION. The ironclad rule that “all inventoried roadless areas must remain roadless in perpetuity” is contrary to the type of localized consideration required by MUSYA, the NFMA, and the APA. It is also contrary to the congressional consultation that the RPA requires before the Forest Service can take such a significant nationwide action.

A. THE PERSUASIVENESS OF WHETHER A PARTICULAR ROADLESS AREA SHOULD BE PRESERVED FOR PRIMITIVE RECREATION IS QUITE DIFFERENT BETWEEN: (1) A SITUATION WHERE A NATIONAL FOREST LOCATED NEAR AN URBANIZED AREA PROVIDES THE ONLY OPPORTUNITY FOR SOLITUDE AND PRIMITIVE RECREATION; AND (2) A SITUATION WHERE THERE ARE PLENTIFUL OPPORTUNITIES FOR PRIMITIVE RECREATION IN WILDERNESS AREAS AND OTHER AREAS IN A WESTERN NATIONAL FOREST AND ON SURROUNDING BLM LANDS. The ironclad rule that all roadless areas must be kept roadless in perpetuity is arbitrary because it fails to distinguish between these two different situations.

For example, the agency’s own DEIS states: “The appropriate balance between motorized and non-motorized dispersed recreation use is highly variable throughout the country and dependent on distinct social and environmental conditions; and, therefore is best decided at the local level.” DEIS at S-38. The national rulemaking arbitrarily ignores this sound advice, by treating all inventoried roadless areas the same. (Timber Company or Association, Eugene, OR - #15879.51000)

Public Concern: The Forest Service should comply with the Federal Advisory Committee Act.

These violations of FACA are especially noteworthy given the USFS's own regulations in 36CFR219 clearly specify an interdisciplinary approach to USFS resource and policy planning at the local level. (County Agency, Eureka, NV - #17268.53800)

THE FOREST SERVICE VIOLATED THE FEDERAL ADVISORY COMMITTEE ACT BY RELYING ON ADVICE FROM AN UNCHARTERED FEDERAL ADVISORY COMMITTEE. (Mining/Oil Company or Organization, Denver, CO - #29952.55000)

ECPLAC also notes that in a "Preliminary Staff Review" of the US House Committee on Resources, dated February 18, 2000, that the USFS appears to be in violation of the 1972 Federal Advisory Committee Act. As stated in the Preliminary Staff Review, a recent memorandum from the Chief of the USFS on Oct. 2, 1995 warns: "no group can become a preferred source of advice for the agency without sparking FACA concerns." The Preliminary Staff Review shows that the USFS did, in fact, prefer the counsel of a small select group of environmentalists to the exclusion of all other users of USFS lands. Further, the USFS gives ample evidence that the spirit and letter of FACA was not followed when the list of references for the CBA is examined. In a list of 50 references, only one cited source could be found that might reflect input from an affected industry or economic sector when there are no fewer than four extractive economic sectors which clearly have a large economic interest in this policy and several other groups of users of the USFS lands who were not consulted at all. Clearly, there has been little consultation or input sought from the spectrum and a preference for only one point of view has been exhibited, which is clearly in violation of FACA. (County Agency, Eureka, NV - #17568.55000)

Since there is some question as to the extent that the proposed roadless policy was drafted by a non-FACA chartered group, we request that all communications with private parties or other non-Forest Service agencies that have occurred within the past year be disclosed as an appendix to a supplemental environmental document. (County Agency, John Day, OR - #16087.55000)

I have read that the Blue Ribbon Commission and other ORV organizations as well as the State of California have been denied participation in the Forest Service roadless rulemaking effort. Chief Dombeck, how can you deny, as I hear you have, that you are in violation of FACA? (Individual, Annabella, UT - #43212.50000)

BY OBTAINING BALANCED REPRESENTATION FROM OUTSIDE INTEREST GROUPS

The Forest Service has violated the Federal Advisory Committee Act. The Forest Service should have availed itself of the authority to use the FACA and formally chartered an advisory committee which would have ensured balanced representation of outside interest groups and public notification of all proceedings. Instead you relied on the advice and recommendation of only representation of the environmental community provided behind closed doors. (County Agency, Manti, UT - #43551.55000)

It is clear that if the Administration wants to go through with this initiative they must start from scratch and not violate the law in doing so. If they want an advisory committee, then form one legally. . . . This does not mean meet in secret with members of only the environmental community, violating not only FACA, but internal policy as well. (Individual, Aztec, NM - #50004.50000)

Public Concern: The Forest Service should use other methods of dispute resolution.

One of the outgrowths of the "crazy quilt" of law, regulations issued pursuant to law, and case law coupled with the consequences of the Equal Access to Justice Act is a constant tattoo of legal actions aimed at FS actions. Paying litigants to sue certainly encourages legal action. Win or lose, these legal actions impose significant costs in time and money on the FS (i.e., the taxpayers). Conversely, when the litigants win, the issue is clarified and can guide future activities. In such cases, the litigants have done themselves, society--and the FS--a service. In such cases, the

litigants should be fully compensated for the costs of preparing and trying the case. The same principle should apply when the FS, faced with likely loss, “settles” a case with a litigant. However, when the litigants simply lose, they are sometimes compensated. And, most commonly, the litigants, when they lose, do not pay the FS for costs incurred in defense. Events (i.e., one can learn from past “mistakes” in judgment”) have produced a situation wherein the Forest Service is winning a higher and higher percentage of lawsuits. However, given the circumstances of low-risk lawsuits, the rate of lawsuits has not diminished. Why? First, the risk to those who litigate is low, and the chances of a “payday” are great. Second, there is significant “harassment value” in pursuing a litigation strategy that diverts agency resources away from other uses and, ordinarily, produces significant delay in the proposed management action. Third, there is always the chance that considering the monetary and time costs, the agency will both negotiate a solution and pay the litigants’ cost. Appeals and lawsuits are pursued in high numbers and are now considered as a routine cost of doing business. In fact for many, that is their business. This is simply too slow, too haphazard, and too expensive to be a satisfactory mechanism to produce solutions to disputes. I suggest that such disputes be taken to mandatory arbitration before it is possible to go to court. And, when cases go to court the loser should pay the costs of the winner. It seems likely that one or both...actions would dramatically reduce litigation. (Timber Association, Medford, OR 13658.50000)

Public Concern: The Forest Service should comply with the Freedom of Information Act.

I believe that the Forest Service proposed rule for roadless areas is invalid and should stop. Current procedures have not been followed including...The Freedom of Information Act...(Individual, Santa Fe, NM - #9442.50000)

Public Concern: The proposed rule should comply with the Civil Rights Act.

Page 3-202-203’s concern with Native American treaty tribes’ traditional use of National Forest Lands is laudable, but hypocritical in terms of excluding non-recognized Indian and mixed-European non-Indian rural minority rights and traditions from the same consideration. Paragraph 2 states, “Use of these sites may extend to people(s) who wish to exercise traditional activities, but who have relocated from their aboriginal areas due to circumstances or by personal choice. In some instances an Indian band may have so few surviving members that documenting continued use as required by National Historic Preservation Act may be problematic, and a contemporary use would be requested.” While such considerations are good, they must be extended to all generational rural cultures and peoples in order for this DEIS to be compliant with the Civil Rights Act. (Business/Business Association, No Address - #54308.55000)

Public Concern: The Forest Service should comply with the Americans with Disabilities Act.

You will be expected to comply with the Americans with Disabilities Act. (Individual, Flagstaff, AZ - #916.55100)

By closing this you are preventing people who are unable to walk from ever seeing or using this area. With the emphasis on the ADA I would believe as much area as possible should be left to development for less fortunate people who would like to see the country. Leaving this land available for recreation, resources, and use by the physically impaired seems like the proper use of the land. By building roads and trails that accommodate wheelchairs we open the land to everyone. (Business/Business Association, Neihart, MT - #3421.55100)

If forced out of the Alaskan forests by the phony Bill Clinton legacy, I plan to seek court action under the American Disabilities Act. (Individual, Chugiak, AK - #16590.55100)

Public Concern: The proposed rule should comply with the National Outdoor Recreation Act.

On January 18, 2000, Judge Conti ruled that the right to use National Forests for outdoor recreation “constitutes a legally protectible interest under the National Outdoor Recreation Act of 1963.”

Therefore an Off-Highway Vehicle user has a legally protectible right to use the National Forests and BLM lands for OHV recreation. And, if this right is legally protectible, so are the Off-Highway Trails which provide for that right. (Individual, Anaheim, CA - #16721.51000)

Public Concern: The Forest Service should comply with the Contract with America Act by providing a report to Congress.

The Contract with America Act requires a report to Congress on this rulemaking “before a rule can take effect.” 5 U.S.C. 801(a). If the rulemaking is determined to be a “major rule,” the rule does not take effect until 60 days after the report has been submitted to Congress, during which time Congress can disapprove the rule. ID. [sections] 801(a)(3), 802. Thus, these provisions provide another opportunity for Congress to exercise its Property Clause powers over allowed uses of National Forest System lands. (Timber Association, Medford, OR 13658.50000)

Public Concern: The proposed rule should comply with the Government Performance and Results Act.

The Forest Service, by not fully informing Congress in advance (in either the Assessment, the Program, the Program report replacement under the Government Performance and Results Act, or the Statement of Policy) that a major roadless area initiative affecting 28% of the National Forest System would be proposed, has acted contrary to at least the spirit of 16 U.S.C. 1601, 1602, and 1606. (Timber Association, Medford, OR 13658.50000)

Public Concern: The Forest Service should comply with the Surface Transportation Assistance Act of 1978 by granting access to inholders.

This Federal Regulation (36 CFR part 212) does more than merely authorize the Chief to grant access to National Forest lands, it states that he “shall” grant access to inholders. The Roadless Area Proposal would directly contradict the Surface Transportation Assistance Act of 1978 (23 U.S.C. 210, 205), which governs federal funds to be used for forest highway, forest development roads and trails, as inholders could be denied reasonable access to their lands. (County Agency, Duluth, MN - #17287.90310)

Public Concern: The proposed rule should comply with the Paperwork Reduction Act.

The DEIS and the associated proposed rules were published by the Forest Service for the general public to make comments to very important management alternatives that were to be analyzed in the DEIS. However, we find that these bulky documents are not in compliance with the Paperwork Reduction Act, as promulgated by the Clinton-Gore Administration, pursuant to their Reinvention of Government initiative. (Business/Business Association, Beaverton, OR - #52230.55300)

3.1.2.1 Economic Acts

Public Concern: The Forest Service should comply with the Regulatory Flexibility Act.

If the USFS proceeds to take final action under any of the referenced proposals without analyzing adequately the impacts on small entities, NWMA is prepared to challenge the final rule in court. (Business/Business Association, Beaverton, OR - #52230.50000)

The regulatory Flexibility Act (“RFA”) requires administrative agencies to consider the effect of their actions on small entities, including small businesses, small non-profit enterprises, and small local governments. See 5 U.S.C. [section] 601, et seq. The purpose of the RFA is to enhance agency sensitivity to the economic impact of rulemaking on small businesses and to ensure that alternative proposals receive serious consideration at the agency level.

Judicial review under the RFA was created precisely because of complaints that “agencies have given lip service at best to RFA.” See 142 Cong. Rec. S3242, S3245 (daily ed. Mar. 29, 1996). Yet, it is precisely that type of cavalier treatment of the requirements embodied in the RFA that the Forest Service exhibits in its analysis of the roadless area proposal. (Mining/Oil Company or Organization, Washington, DC - #52224.55400)

BY CORRECTING INADEQUACIES IN THE INITIAL REGULATORY FLEXIBILITY ANALYSIS

The IRFA is deficient in a number of other respects. The RFA requires “a succinct statement of the objectives of, and legal basis for, the proposed action; a description of and, where feasible, an estimate of the number of small entities to which the proposed action will apply.” The IRFA is devoid of any attempt to satisfy either of these statutory requirements. The IRFA does not contain a statement of the legal basis for the proposed action. **THE REASON IS SIMPLE: THE AGENCY LACKS STATUTORY AUTHORITY FOR THIS RULEMAKING AND IS FULLY AWARE OF THIS FACT.** (Business/Business Association, Beaverton, OR - #52230.55400)

Neither the Cost-Benefit analysis nor the Initial Regulatory Flexibility Analysis meet the letter or intent of the RFA. The IRFA is seriously flawed in many respects. The overall credibility of IRFA is seriously diminished by (1) the notable absence of hard data or facts substantiating the many assumptions used throughout this and the other related documents, and (2) blatant omissions.

The IRFA fails to consider mineral exploration and mining as distinctly different sectors of the mining industry. There is no meaningful discussion of probable economic impacts to prospectors, exploration geologists, grassroots exploration companies, junior exploration companies, and industrial mineral operations in either the IRFA or the Draft Environmental Impact Statement.

A regulatory climate that restricts exploration will ultimately bring about a significant downturn in future mineral production. The proposition that one can explore for minerals and develop a mine without roads for ingress and egress defies common sense. **A PROHIBITION ON ROAD BUILDING IS A PROHIBITION ON MINING.** Thus, the adverse economic impacts associated with the proposed rule have been substantially underestimated. (Mining/Oil Company or Organization, Spokane, WA - #16091.90010)

The RFA further requires a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. The Forest Service did not consider several other obvious alternatives that would accomplish the objectives of the proposed rule, but would have protected small entities. These are temporary roads; well-maintained roads; privately maintained roads; and recognizing RS 2477 roads. (Mining/Oil Company or Organization, Spokane, WA - #16091.55400)

Thus, the “trigger” mandating an initial regulatory flexibility analysis is not, as the USFS asserts, whether the proposed rule directly regulates small entities. Rather, the question becomes: is it a federal rule that requires public comment under the Administrative Procedure Act, Section 553 or any other provision of law, that will have a significant economic impact on a substantial number of small entities? The answer in this case is a resounding YES. (Business/Business Organization, Beaverton, OR - #52230.53400)

BY ANALYZING THE IMPACTS ON MOTORIZED RECREATION BUSINESSES

I [Public Lands Director of the Blue Ribbon Coalition] am focusing my comments on the failure of the agency to include in the draft an analysis of the impact of the proposed rule on small entities in the recreation related business sector, specifically motorized recreation. While the agency did do an Initial Regulatory Flexibility Analysis (IRFA), information from recreation and motorized recreation was missing. The agency should have been aware that this information was available. They did consult with the Office of Advocacy, Small Business Administration on including an IRFA in the draft. I provided Jennifer Smith of the Office of Advocacy, who was at that time a liaison with the agency, with some brief data in a fax on February 24, 2000 (enclosed). Following up, I asked if this was the kind of information that would be pertinent. She said it was. I stated that upon request, I could provide more. I heard nothing further. (Wise Use Organization, Idaho Falls, ID - #18654.55400)

VIOLATION OF THE REGULATORY FLEXIBILITY ACT

The DEIS and related FPR/RMR did not adequately analyze economic impacts to ORV/OSV dealerships and ORV/OSV related tourism (see exhibit B). According to testimony given by Adnea Cook, public lands director for the Coalition, the Forest Service simply issued a general disclaimer for the RMR that there is no economic impact. Cook's testimony clearly shows that most every Western state demonstrates well over \$100 million in economic activity from summer and winter ORV/OSV recreation. These figures clearly show that the collective negative economic impacts of the DEIS/FPR/RMR exceed [the] \$100 million dollar trigger that constitutes a MAJOR FEDERAL ACTION.

The DEIS should be withdrawn until Congress is given a report on the economic impacts to ORV/OSV related businesses. The Forest Service must acknowledge that the Clinton/Gore forest legacy constitutes a major federal action. (Wise Use or Land Rights Organization, Oakley, CA - #16086.55400)

BY ANALYZING THE IMPACTS ON THE TIMBER INDUSTRY

What will happen to timber employment income generated by the Forest Service timber sale program? Once again the data suggests a terrible impact on local economies and small business. In 1992, when the Clinton Administration took over, the Forest Service reported it generated nearly \$4.2 billion worth of direct, indirect, and induced timber employment income from the sale of Forest Service timber. By 1997, the employment income activity had fallen to slightly over \$2.0 billion. FY 1999 harvest levels suggest employment income, driven by the Forest Service timber sale program, will fall to a little over \$1.8 billion. A 52% reduction in available suitable timber base would decrease the volume harvested in 2000 by 52% and that would decrease the direct, indirect, and induced timber employment generated through the sale of Forest Service timber from an estimated FY 1999 level of \$1.8 billion down to approximately \$658.4 million. Once again, this exceeds the \$100 million level needed to trigger a Regulatory Flexibility analysis. In conclusion, until the Forest Service produces maps that show where the unroaded areas (less than 1,000 acres in size) are located, and articulates whether those areas will be part of the available suitable timber base, a worst case analysis shows annual economic impacts of over \$1 billion to rural communities and to small business. As such, the SBA and Congress should demand a full detailed Regulatory Flexibility Analysis. Without the analysis, both the SBA and the Forest Service are exposed to legal challenge. (Timber Company or Association, Eugene, OR - #15879.55400)

Assuming a 52% reduction in the available suitable timber base will result in a 52% reduction in the ASQ, projections can be made regarding (1) future timber sale revenues, (2) the 25% Payments to Counties, and (3) employment income produced as a result of the Forest Service timber sale program. Given existing SBA data on the amount of federal timber purchased by small business entities, one can also project how the roadless policy will impact small business and trigger the need for a Regulatory Flexibility Analysis.

The Forest Service argues that their program should be analyzed based on the amount of timber they currently sell, rather than the amount allowed for in their existing plans. They argue that it is unrealistic to believe Congress will ever fully fund implementation of these forest plans. They argue the SBA and others should complete an analysis based on the recent history, rather than on historic averages or on what the forest plans allow to be harvested. However, the Forest Service has no right under regulation and law to assume the level of congressional funding that will be appropriated. Rather, they must perform their analysis based on their current forest plans. Those plans are the agency's compact with rural America, and rural America deserves to know how this roadless policy will impact them.

The Forest Service also argues that removing the RARE II and other lands from the suitable base will not impact future harvest levels because there is sufficient acreage left to support the Congressionally funded harvest levels. Again, the Forest Service and the SBA cannot presume to know what level of timber harvest a future Congress will, or will not, fund. (Timber Company or Association, Eugene, OR - #15879.55400)

The agency suggests a macro analysis that shows that other landowners may supply timber to the market to replace lost Forest Service timber, and suggests that reduced federal timber sale programs will not impact small businesses because the agency will have access to alternative sources. The agency also suggests that Canada will make up lost timber so that the impacts of their draconian policy proposal will not ripple through the home building industry. Such an analysis must be completed on a county-by-county basis to truly understand if alternative sources of timber are available. It must also analyze at what price the alternative timber supplies will become available. Then the agency would have to identify individual mills that are not likely to survive and assess the overall impact of each mill on the community and county it is located in. In states where the Forest Service is the majority supplier of timber, such analysis is critical. The SBA and Congress should understand that the current Canadian Lumber Agreement, which runs through March of 2001, precluded large amounts of Canadian lumber flowing into this country to replace lost Forest Service volumes. The penalties imposed on extra volumes from Canada are significant. Thus, the Forest Service proposed macro analysis in the Advance Notice of Rule Making is sophomoric at best, and downright evasive and illegal at worst. (Timber Company or Association, Eugene, OR - #15879.55400)

The volume numbers do not tell the complete story. During the last 7 years, the Forest Service has moved away from the sale of high quality saw timber to a program that offers less valuable small stem material through an increasingly complicated and expensive sale program that requires much more expensive logging systems and equipment. In 1992 the Forest Service generated almost \$4.2 billion dollars of timber receipts on a volume of 7.2 billion board feet - an average revenue of \$575.54/thousand board feet of timber sold. In FY 1999, the Forest Service timber sale program is estimated to have produced approximately \$297.20/thousand board feet in receipts to the federal government on a volume of 2.9 billion board feet. Thus the government has seen a 79% reduction in its timber-generated revenues from FY 1992. That 79% reduction in timber receipts has resulted in an \$830.5 million drop in 25% payments to counties. When put in the context of the forest plans, and a 52% reduction in the available suitable timber base, this loss would trigger a Regulatory Flexibility analysis. If the ASQ and timber sale program experiences a 52% reduction resulting from the roadless policy, Forest Service timber revenues could fall from \$577 million in FY 1997 to less than \$122 million in FY 2001. This would result in a loss of more than the \$455 million to the Federal government, which would translate into a \$114 million loss in 25% payments to counties and local governments. This alone should trigger a Regulatory Flexibility Analysis. (Timber Company or Association, Eugene, OR - #15879.55400)

BY ANALYZING THE IMPACTS ON THE MINING INDUSTRY

A substantial number of small mining entities will be affected by this rule. Based on the government's own data, 97% of the coal companies and 98% of the metal/non-metal mining companies are considered small under the Small Business Administration's definition of 500 employees or less. There is no dispute that many small entities currently mine on National Forest lands and will do so in the future. . . . It strains the agency's credibility to say that a rule of this nature will have no direct regulatory impact, particularly when it has generated over 119,000 comments. In addition, the agency's own draft environmental impact statement (DEIS) suggests that some substantial portion of 78 billion tons of coal reserves alone (not to mention other mineral resources) may be sterilized by this roadless proposal. (Mining/Oil Company or Organization, Reno, NV - #15907.54200)

As the U.S. District Court in Florida has keenly observed, agencies must be mindful that even commendable goals like preservation do not excuse violations of the RFA:

Although the preservation of Atlantic shark species is a benevolent, laudatory goal, conservation does not justify government lawlessness.

Southern Offshore Fishing Association v. Daley, 55 F. Supp. 2d 1336 (D.FL 1999)

D. Inadequate Analysis of Small Entities

Even though the RFA does not require mechanical exactitude, it does compel the Secretary to make a reasonable, good faith effort prior to issuance of a final rule to inform the public about potential adverse effects of his proposals and about less harmful alternatives. Such effort was not made on the IRFA. The FS starts with the presumption that it is not required to produce the IRFA under the RFA. This may explain some of the later observations in the IRFA,

which say the agency believes that “the impacts [on small entities] are somewhat unpredictable” and data on them is limited.” A proposal to effectively withdraw 42 million acres of public land from use (and possible millions of acres more in the near future) from mining and other industries will clearly have a significant economic impact. In addition, the agency fails to examine the impacts on other segments of our industry, including, for example, firms that do exploration work. The vast majority of these firms are small entities, and will be significantly harmed by the rule. Without road access, many of these firms will no longer be able to operate on National Forest lands. The failure to analyze impacts by the agency is error under the RFA. (Mining/Oil Company or Organization, Reno, NV - #15907.54200)

BY PROVIDING A COMPREHENSIVE OR CUMULATIVE IMPACT ANALYSIS

In Segmenting The Roadless Area Initiative Into Three Proposals, The Forest Service Has Not Provided The Comprehensive Or Cumulative Impact Analyses Required By The Regulatory Flexibility Act - As discussed above, the Forest Service’s failure to assess the cumulative socio-economic impacts of the three related rulemakings violates NEPA. Similarly, by artificially segmenting roadless area matters into three proposals for separate economic analyses, the Forest Service has also violated the Regulatory Flexibility Act (“RFA”), 5 U.S.C. [sections] 601-12, and the Unfunded Mandates Reform Act (“UMRA”), 2 U.S.C. [sections] 1501-71. Factually, the Forest Service prepared only a short cost-benefit analysis on the road management instructions, and concluded that the RFA does not apply to those instructions. 65 Fed. Reg. 11682, 11686-87. The Forest Service has also claimed an RFA exemption for the forest planning rules. 64 Fed. Reg. 54093. While the Forest Service has prepared an initial regulatory flexibility analysis on the roadless area rule, it does not address the cumulative impacts of the three proposals and the Forest Service has not prepared any UMRA analyses. 65 Fed. Reg. 30285-86. (Timber Company or Association, Eugene, OR - #15879.55400)

We believe that the Forest Service is in violation of the RFA and UMRA if it does not consider the cumulative economic effects of the three interrelated and simultaneously pending proposals. For example, the combination of the roadless area rulemaking’s constraints on road construction in uninventoried roadless areas from the time of forest plan revision forward, and the road management instruction’s constraints on road construction in the same areas before forest plan revision, will lead to fewer new roads in the future. Where road construction is denied, this has adverse economic impacts on those dependent on the timber, minerals, or other resources which would be accessed by the road. Even where a road can be constructed, the three proposals impose higher processing costs (e.g., the costs of an EIS, increased grounds for litigation) on the Forest Service and private sector. Thus, just as NEPA requires a fair picture of the totality of impacts created by these three proposals, RFA, and UMRA also require a “big picture” analysis of the economic impacts of all three proposals in combination. (Timber Company or Association, Eugene, OR - #15879.55400)

BY COMPLETING AN ECONOMIC IMPACT ANALYSIS

It is interesting to note that in each of the rulemaking initiatives mentioned above, the USFS has taken the position that either the RFA does not apply “Because the proposed rule does not directly regulate small entities,” or that the Forest Service is engaged in planning - not regulating, or that the proposed rule will not have a significant economic impact on a substantial number of small entities. It appears that the USFS has spent its time thinking of reasons why they do not have to comply with the RFA rather than honestly analyzing the impacts of their proposed rules on small entities. This very attitude raises serious questions about the USFS’s ability, or desire, to make a good-faith effort to inform the public about potential adverse impacts on small entities. It also is apparent from examining the IRFA that the USFS has made little or no effort to identify less harmful alternatives. The USFS either does not understand the requirements of the RFA and SBREFA, or is consciously ignoring those requirements. This is not surprising. (Business/Business Association, Beaverton, OR - #52230.55400)

In 1997, the USFS argued that an amendment to the Tongass National Forest Land and Resource Management Plan was not a “rule” that required an analysis under SBREFA. In a letter dated July 3, 1997..., the Comptroller General reached the conclusion that Land Resource Management Plans and amendments to those plans were “rules” under SBREFA because it prescribes the manner of the policy for managing the Tongass National Forest for the next 10-15 years, set out what type of activities may occur in various sections of the forest, was of general applicability, future effect, and that it implemented, interpreted and prescribed law and policy.

Thus, despite the USFS's assertions to the contrary, there is no question that the Proposed Rule meets this standard and that the USFS must prepare an initial regulatory flexibility analysis and a final regulatory flexibility analysis. (Business/Business Association, Beaverton, OR - #52230.55400)

The Forest Service will tell the SBA it cannot map where the non-RARE II acres are located, so they cannot access how the policy will impact the available suitable timber base, and therefore the likely economic impacts. They will argue they are implementing the policy in two phases and that the second phase will be implemented through local forest plans where local economic impacts can be assessed. They will argue the non-RARE II acres will only be temporarily put off limits until the final forest plan revisions are completed, therefore there is no need to complete a regulatory flexibility analysis.

RESPONSE - This is a slight of hand proposal designed to limit the impact of implementing each phase of the policy, in hopes of avoiding having to do a regulatory flexibility analysis. The bottom line is if the policy is interim, or permanent, the impact on small business will be the same. A short term lack of timber sales will result in the closure of additional small business mills and the economic impacts of the policy will have occurred before the interim policy is assessed in the revisions of the forest plans. It is a fundamentally dishonest approach designed to circumvent the law. (Business/Business Association, Beaverton, OR - #52230.55400)

The Forest Service further argues that they need to only examine the timber sale revenues lost as a result of the proposed roadless area protection policy, but the SBA and Congress should not accept the simple timber sale receipt analysis the agency is suggesting. A regulatory flexibility analysis must also consider the direct economic impacts on recreation, grazing, and mining as well as the indirect and induced impacts likely to result if two-thirds of the national forests are put off limits to motorized access. A risk analysis, which examines the likely increases in uncontrolled wildfire and the costs of fire suppression and property damage, must be included in such an analysis. It is unconscionable for the Forest Service to ignore employment income impacts when they've tracked this information in TSPIRS since 1987. (Timber Company or Association, Eugene, OR - #15879.55400)

BY COMPENSATING RURAL COMMUNITIES FOR LOST ECONOMIC BENEFITS

The Forest Service is avoiding the RFA mandated economic impact analysis because it knows that the impact to small businesses and rural communities will be large and devastating.

The proposed rule, coupled with the roads the Forest Service is proposing to close under related initiatives, will ensure that there is no road to a viable economic future for the hundreds of small rural communities in or near our National Forests. If the federal government wishes to turn its forests into parks, then the people paying the economic and personal price for this policy "about-face" should be made whole. We believe that the RFA and NEPA require that the Forest Service include the obligation to compensate these rural communities in the IRFA and Cost-Benefit analysis. (Mining Association, Spokane, WA - #16091.93730)

Public Concern: Forest level decisions regarding the proposed rule should require a Regulatory Flexibility Analysis.

Advocacy believes that FS should require local FS planners perform an RFA [Regulatory Flexibility Analysis] analysis in drafting future forest plans that implement this rulemaking to assure that the implementation minimizes the economic impact while achieving the goal of preserving the environment. (Federal Agency, Washington, DC, 54012.55400)

Public Concern: The proposed rule should comply with the Small Business Regulatory Enforcement Fairness Act.

The proposed rule is in violation of the Small Business Regulatory Enforcement Fairness Act of 1996, which requires agencies to examine and mitigate for the impact a proposed rule will have on small businesses, small cities and small towns. (County Elected Official, Republic, WA - #43726.50000)

The proposed rule is in violation of the Small Business Regulatory Enforcement Fairness Act of 1996. SBREFA requires agencies to examine and mitigate for the impact a proposed rule will have on small entities (small businesses, small cities, small towns). Under the law, federal agencies are required to determine whether a regulation has a SIGNIFICANT ECONOMIC IMPACT on a substantial number of small entities. Inventoried roadless areas comprise over 54 million acres, or 28% of National Forest system land. (Forest Service Roadless Area Conservation DEIS Volume 1 Page S-1). (County Agency, Republic, WA - #10120.55000)

BY NOT DIVIDING THE PROJECT INTO SMALLER SEGMENTS

Thus, it is our contention that the USFS has purposely divided this very significant action into several parts to avoid its legal responsibilities under the National Environmental Policy Act (NEPA) and the Regulatory Flexibility Act (RFA)/Small Business Regulatory Enforcement Fairness Act (SBREFA). By separating what is, DE FACTO, a single action into subparts and then refusing to properly document the resultant cumulative impacts in an adequately prepared Draft Environmental Impact Statement (DEIS), the USFS has made it impossible for the public to provide meaningful comments on either the overall proposal or any portion thereof. (Business/Business Association, Beaverton, OR - #52230.50000)

Public Concern: The proposed rule should comply with the Unfunded Mandates Reform Act.

The Forest Service has failed to invite the participation of local governments, counties, and conservation districts. This failure also violates the Unfunded Mandates Reform Act of 1995 which states that, "Each agency shall, to the extent permitted by law, develop an effective process to permit elected officers of State, local and tribal governments to provide meaningful and timely input in the development of regulatory proposals containing significant Federal intergovernmental mandates." (County Elected Official, Sheridan, WY - #51045.54100)

We further find the documents wrought with avoidance and violations of the Clinton-Gore Administration's Unfunded Mandates Executive Order of 1995. The implementation of the Preferred Alternative contained in this DEIS, the proposed Forest Service Planning Regulations, the proposed Forest Service Road and Transportation Policy, as well as the proposed amendment of 36 CFR, Part 294-Special Areas definitions, are all dependent on appropriation of funds. However, none of these proposed policies are addressed in the FY 2001 Forest Service Proposed Budget or in the present draft of the FY 2001 Interior and Related Agencies Appropriations. This DEIS and the associated proposed rule amendment violates the Forest Service Agency Directive that resulted from President Clinton's Unfunded Mandates Executive Order of 1995. All language in the DEIS that does not adequately address the availability of funds, and all changes in the Forest Plans that are to be revised and/or amended through the Decision resulting from the final EIS requiring additional funds, must be funded for implementation through appropriated funds. Otherwise, all such unfunded mandates must be removed from the documents in deference to this Order and subsequent Agency Directive. (Business/Business Association, Beaverton, OR - #52230.55500)

The Forest Service has determined that: "Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2USC 1531-1538),...This proposal does not compel the expenditure of \$100 million or more by any state, local, or tribal government, or anyone in the private sector. Therefore, a statement under section 202 of the Act is not required." I do not concur. (State Elected Official, Albion, ID - #44351.55500)

3.1.3 Executive Orders

Several respondents feel their private property within National Forest System Lands could be jeopardized by the proposed rule. These citizens insist, therefore, that the Forest Service withdraw the proposed rule until it has been subjected to analysis pursuant to Executive Order (E.O.) 12630, Government Actions and Interference with Constitutionally Protected Property Rights. “Subjecting the proposal to an honest appraisal and analysis with input from economists and property owners prior to the secretary’s conclusion that there is no risk of takings implications,” is one suggestion offered to ease property owners’ minds.

Other members of the public feel the Draft EIS alternatives violate E.O. 12612 on federalism, as “this rulemaking directly affects Receipts Act monies that are due to states and counties.” Furthermore, many respondents feel the proposed rule violates E.O. 12866, Regulatory Planning Review. They note that “the USFS evaluation does not standardize measures of costs and benefits using accepted economic practices” a requirement of E.O. 12866. Moreover, some individuals insist that the Forest Service correct previous violations by “providing an assessment of the potential cost and benefits of the proposed regulations on state, local, and tribal governments.”

Potential violations of E.O.12898, Environmental Justice, by the proposed rule are of particular concern for numerous citizens. These respondents contend that the Draft EIS fails to offer any alternatives other than the “no action” one that approaches conformance with that order. Others warn, “Any action taken by any Government Agency [must] show or prove a harmless or negligible economic effect on poor or minority communities. The Roadless Conservation area DEIS does not effectively address economic hardship in low income populations.” One individual goes even further to proclaim that the Draft EIS fails to recognize healthy economic areas.

Some citizens believe the Forest Service should comply with E.O.11644. They feel the Draft EIS should meet the requirements of this order by proposing alternatives that end OHV abuse in roadless areas. Moreover, the Forest Service’s seeming disregard for presidential executive orders has respondents worried that roadless areas will suffer the same riparian damage from OHV use that other areas have.

Several respondents charge that the Forest Service’s proposed revision of the Civil Justice Reform Act, which states: “preempts all state and local laws and regulations that are found to be in conflict with it that would impede its full implementation,” stretches the power of E.O. 12988, Civil Justice Reform, beyond its limitations. Other members of the public agree that the proposed rule should disclose the effects of the prohibition alternatives per E.O.11593, Protection and Enhancement of Cultural Environment. These individuals contend that “activities associated with road construction, reconstruction and timber harvest” are vital to the discovery of culturally significant sites.

Public Concern: The proposed rule should be withdrawn until it has been subjected to analysis pursuant to Executive Order 12630 and reviewed by Congress.

The contents of the proposal should specifically address the private property rights which exist in the national forest and the impact upon them if the intent of the proposed rule is implemented. Then, once such a new proposal is prepared, it should be subjected to an honest appraisal and analysis pursuant to E.O. 12630, with input as to the analysis from economists and the property owners. That analysis should be presented to Congress for review prior to the secretary's conclusion that there is no risk of takings implications. Until these steps are taken, the proposal should be withdrawn. (Individual, Las Vegas, NV - #15882.72210)

Public Concern: The forest Service should comply with Executive Order 12612.

The DEIS alternatives violate E.O. 12612 as this rulemaking directly effects Receipts Act monies that are due to states and counties. (Individual, Camino, CA - #28691.93740)

Public Concern: The proposed rule should comply with Executive Order 12866.

Furthermore, in this supplemental effort to comply with Executive Order 12866, the Forest Service should correct its other previous violations of this Executive Order and other obligations, including providing an assessment of the potential costs and benefits of the proposed regulations on state, local, and tribal governments. (Mining/Oil Company or Organization, Washington, DC - #52224.63000)

The USFS has not adequately assessed the cost and benefits of the proposed rule. There are no quantitative estimates of the benefits and costs of the proposed rule. Furthermore, the analysis does not include information on plausible alternatives to the proposed rule. By not including quantitative estimates or plausible alternatives it is impossible to evaluate the effects of the rule. THIS IS A FATAL FLAW IN THE PROCESS OF DEVELOPMENT OF THE PROPOSED RULE. The document states that "the benefits of the rule, as proposed, would outweigh the costs" but because no costs are given there is no basis for the statement. A conclusion is given that is not supported by the data. Furthermore, the USFS evaluation does not comply with Executive Order 12866 requirements to standardize measures of costs and benefits using accepted economic practice.

Qualitative Costs and Benefits of Proposed Rule - The basis for the qualitative assertions are unclear and not effectively defined. Mining/Oil Company or Organization, Anchorage, AK - #43215.93100)

Public Concern: The proposed rules should comply with Executive Order 12898, Environmental Justice.

Perhaps most significant the only alternative that approaches conformance to executive order #12898 (Federal Actions to Address Environmental Justices in Minority and Low Income Populations. 49 FED. REG. 7629-1994) is alternative #1. This Executive order mandates that any action taken by any Government Agency show or prove a harmless or negligible economic effect on poor or minority communities. The Roadless Conservation area DEIS does not effectively address economic hardship in low income populations, instead does not even recognize healthy saw mill activity in Gunnison, UT. and Wellsville, UT. (see table 3-54 page 3-213). The DEIS grossly understates the number of jobs directly affected, listing on table 3-44 page 3-218 that 17-28 jobs would be lost if logging ceased on the Manti-La Sal National Forest, while the saw mill in Gunnison Directly employs 42, and their logging operations on their contracts supply jobs to approximately 100 more. I believe this has purposely been left out by the administration to side step this Executive Order 12898. Sanpete County Utah has historically been included as one of this Nation's poorest counties. Presently Sanpete County has an unemployment rate of 6.5%. Well above the Utah average unemployment rate of 2.5% and above the National Average of 5.5%. (Individual, Centerfield, UT - #28291.54500)

Of all of the flaws in the DEIS, the most egregious is the failure to incorporate tenets of Environmental Justice into the planning process. Environmental Justice demands that impacts to minorities be included during the initial scoping period. Clearly, air pollution impacts to minority children and the elderly who are most effected by catastrophic wildfires caused by passive management must be included in the DEIS. (Wise Use or Land Rights Organization, Pocatello, ID - #16086.54500)

Public Concern: The Forest Service should adhere to Executive Order 11644 regarding off-road vehicle use, and should determine, at the national level, the appropriateness of such vehicles in roadless areas.

I want to EMPHASIZE THE RESTRICTION OF OFF-ROAD VEHICLES from current roadless areas. The Forest Service does not thoroughly manage ORV use as directed by Executive Order 11644 as amended by Executive Order 11989. The EIS for ORV/OHV use in Montana, North Dakota, and South Dakota illustrates the lack of thoroughness in properly planning for this type of use.

It fails to identify the similarities between continued ORV use in an area and building a road through that area. These similarities include impacts on vegetation, soil, water supplies, and wildlife.

The line between user-created trails and officially designated trails is blurry at best. At what point does the recreation user determine where a trail should be versus the agency making that determination? Your answers to this question are unsatisfactory. I have continually heard and read that you lack the resources to manage ORV use as directed by Executive Order 11644, restrict the areas where it is an acceptable activity.

Executive Order 11644 mandates that ORV use be managed to minimize impacts to soil, watershed, vegetation, harassment of wildlife, and conflicts with other users. The Forest Service has repeatedly failed to meet all of these requirements. For example, the EIS for MT, ND, and SD on page 73 states "None of the alternatives restrict use where OHV user-created trails have been established in riparian areas, areas of unusual erosivity, or areas of critical habitats." Therefore, the Forest Service violates EO 11644 and the corresponding CFR's by allowing the user to define the trails. Is this how these sensitive and precious roadless areas will be managed?

Local planning is not appropriate in this situation. A Montanan may not take comfort in knowing that the vast seas of pavement, cement, steel, and other man-made structures exist in Cleveland, but a Clevelander does take comfort in knowing that expanses of natural wild areas exist in Montana. Thus, I would not be comfortable with local planners deciding where and when ORV's could be used in these roadless areas. (Individual, Missoula, MT - #11290.91612)

The failure of the DEIS to analyze alternatives that would make immediate decisions on ORV abuse, mining, and other destructive activities in roadless areas is appalling. There is no excuse for not analyzing such an alternative. The agency, through executive orders, has ample authority to regulate and end ORV use. The agency has failed since the Nixon and Carter administrations to implement the executive orders and ORV abuse is rampant. (Individual, Moscow, ID - #43481.50000)

Many land managers have been unable to control damage done by Off Road Vehicles (ORVs). The preferred alternative does not address the ORV problem.

Executive orders 11644 (Feb. 9, 1972) and 11989 (May 25, 1977) calls for: MINIMIZE DAMAGE to soil, watershed, vegetation, or other resources on public land. MINIMIZE harassment of wildlife or significant desecration of wildlife habitat. MINIMIZE CONFLICTS between ORVs and other recreational use.

Executive Order 11989 went farther and stated that land managers must immediately close the area to ORVs when the criteria [are] not met.

However, these Executive Orders have been ignored by local land managers as too vague. Had these two orders been followed, the ORV problem would have been resolved at the local level. Therefore the DEIS must give guidelines to the meaning of: Minimize damage, minimize harassment of wildlife, and minimize conflicts must be part of the final DEIS. (Individual, Edmonds, WA - #15074.91612)

Public Concern: The proposed rule should comply with Executive Order 12988.

I emphatically object to that statement on page A24 of the DEIS “Civil Justice Reform Act” wherein it states, “This proposed rule revision has been reviewed under Executive order 12988, Civil Justice Reform. The proposed revision: (1) preempts ALL state and local laws and regulations that are found to be in conflict with it that would impede its full implementation...” Really! You’ve got to be kidding! What ever happened to the Constitution? (Individual, American Fork, UT – 43642.55000)

Public Concern: The proposed rule should disclose the effects of the prohibition alternatives per Executive Order 11593.

It has been well documented that a majority of culturally significant sites on National Forest lands have been discovered due to activities associated with road construction, reconstruction, and timber harvest. In response to Executive order 11593, charging federal agencies to inventory all lands for cultural properties, the effects of the prohibition alternatives must be disclosed.

RELIEF: The Forest Service must disclose the effects of the prohibition alternatives on Executive Order 11593. (County Elected Official, Basin, WY - #43980.51000)

3.1.4 State and Local Laws

Many state and county officials, wise use groups, and individuals are concerned with access to roads or lands within their boundaries. Some counties have adopted resolutions reserving the right to control road access, stating “access shall not be interfered with or impeded by any agency acting beyond its authority.” Other counties claim the right to establish or alter roads “rest[s] solely on the shoulders of the individual Board of County Commissioners,” according to state statutes. Similarly, the rights-of-way over the public domain are often codified in state laws, according to one state elected official. The 1905 New Mexico Territorial Act reserved control of roads to the state before the federal government created public lands, writes a county official. Another individual alleges the Forest Service continually encroaches on lands originating from Spanish Land Grants and that the proposed rule will violate the same laws. Along with the concerns about access to roads and lands listed above, some state officials are also concerned with states’ valid existing water rights. These officials suggest language should be added to the final proposed rule guaranteeing road access to maintain structures associated with these rights.

Public Concern: The proposed rule should maintain road access as defined by boards of county commissioners.

NOW, THEREFORE BE IT RESOLVED AS FOLLOWS:

1. THAT, the Board of Commissioners for Elko County, Nevada, by and through this Resolution is acting within its sovereign capacity in and for the County of Elko as the Legislative and Administrative body and this Resolution establishes the law and policy on road access within Elko County and that said right of road access shall not be interfered with or impeded by any agency acting beyond its authority.
2. THAT, this Board establishes herein and adopts that the maps filed in the office of the Elko County Recorder, in File#/Map Case 328522, Exhibits A-1 through T-1, Sheets 1-40, properly define the county roads of Elko County, Nevada in and for the benefit of its Citizens, and the public’s right of road access and the roads defined and set apart within said maps are not [to] be construed as all inclusive.

3. THAT, Elko County reserves its sovereign right under the law to amend said maps at any time in the future for road expansion when the facts present it is necessary to do such.

BE IT FUTHER RESOLVED, that a copy of this Resolution be transmitted to Elko County Recorder (for proper recording with herein identified maps), each member of the 1997 session of the Nevada Legislature, Governor for the State of Nevada, Nevada's Attorney General, each member of Nevada's delegation to the Congress of the United States, the President of the United States, the Secretary of the Agriculture, all State and Local agencies and local federal agencies.

Proposed by Commissioner Chapman. Seconded by Commissioner Skelton. Passed and adopted this 4th day of February, 1998. Vote: Ayes - R. Llee Chapman, Tony Lesperance, Mike Nannini, Roberta Skelton (County Elected Official, Elko, NV - #13984.57000)

Public Concern: The Forest Service should not usurp local authority to control the establishment or alteration of roads.

COUNTY AUTHORITY

According to Wyoming Statute 24-3-1010 (attached), the Board of County Commissioners may initiate the procedure for the establishment, vacation, or alteration of a county highway. The intent is that powers to vacate roads, maintained or not, rest solely on the shoulders of the individual Board of County Commissioners where applicable. This, notwithstanding the Federal Lands Policy and Management Act of October 1976 (as this issue will spill over to BLM lands), or the current federal Administrative rule concerning the new roads moratorium. However, the USFS and Department of Agriculture in the action to obliterate roads, paths or ways, is in essence, under the above conditions, usurping the authorized powers of locally elected government office. (Wise Use/Land Rights Organization, Rock Springs, WY - #2866.57000)

NOW, THEREFORE, BE IT RESOLVED THAT THE BOARD OF ELKO COUNTY COMMISSIONERS DOES HEREBY DECLARE ON THE 17TH DAY OF AUGUST, 1994, THAT:

1. All ways, pathways, trails, roads, county highways, stock trailways, and similar public travel corridors across public lands in Elko County, Nevada, whether passable by foot, beast of burden, carts or wagons, or motorized vehicles of each and every sort, whether currently passable or impassible, that were established in the past, present or may be established in the future on public lands in Elko County, excluding Interstate 80, United States Highways 40, 93 and 93A, and State Highways 225, 226, 227, 228, 229, 232, 233, 278, and 766, are hereby declared to be Elko County public Roads.
2. All rights-of-way to all ways, pathways, trails, roads, county highways, stock trailways, and similar public travel corridors across public lands that are declared to be Elko County Public Roads are the property of Elko County as trustee for the public users thereof and will consist of a 60 foot right-of-way or more if required to accommodate cuts and fills.
3. Elko County hereby ratifies historic practices in the County that public roads have been maintained either by usage or mechanical means and the County will continue this practice in the future. The County's decision not to mechanically maintain any pathway, trail, road, county highway or similar public travel corridor across public lands shall not terminate or affect in any way such road's status as an Elko County Public Road.
4. This resolution hereby incorporates by reference, NRS 405.192(2) which provides: No action may be brought against the county, its officers or employees for damage suffered by a person solely as a result of the unmaintained condition of a road made public pursuant to NRS 405.195.
6. Abandonment or road closure of any Elko County Public Road across Public Lands must follow procedure in accordance with Nevada Revised Statutes and only after public hearings. SEE NRS 405.195.
7. That a copy of this Resolution be forwarded to all interested parties and the Resolution shall be followed by an ordinance.

Proposed this 17th day of August, 1994 by Elko County Commissioner Skelton.

Passed and adopted this 17th day of August, 1994.

Vote: Ayes: Llee Chapman, Mike Nannini, Roberta Skelton, Barbara Wellington. (County Elected Official, Elko, NV - #13984.53500)

STATE AUTHORITY

Indeed, in 1866 Congress granted the state, including the State of South Dakota, rights-of-way over the public domain. The Territory of Dakota accepted that grant in the Highway Act of 1871. See Bird Bear V. McLean County, 513 F.2d 190,192 n.3 (8th cir. 1975). The successor to that law is now codified in South Dakota at SDCL 31-18-1. The grant to the states was “not in the nature of a license, revocable at the pleasure” of the United States, but rather, once the roads were established, “Became vested in the public, who had an absolute right to the use thereof which could not be revoked by the government. . .” Bird Bear (quoting Faxon v. Lallie Civil Township, 163 N.W. 531,533 (N.D. 1917).

It follows, under the foregoing analysis, that there can be no right to create a “roadless area” where there was no Indian reservation in existence in 1866. See Bennett County v, United States, 394 F.2d 8 (8th Cir. 1968); United Staes ex rel Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975) (undermining Bennett County in certain respects). The same is true with respect to areas in which an Indian reservation no longer exists and in which the land has been restored to the public domain. See Calhoon v. Sell, 71 F. Supp. 990, 1000 (D.S.D. 1998). See also Act of March 2, 1889, 21. In sum, there cannot be a right to create a “roadless area” consistent with the grant made under the 1866 Act. (State Elected Official, Pierre, SD - #27189.50000)

The lands involved were largely acquired during the 1930s. In South Dakota’s case, the laws establishing highways had already been in existence for over 60 years. Dak. Terr. Rev. Code ch. 29 1 (now codified at SDCL 31-18-1). Section line highways are “located by operation of law, except where some portion of the highway along such section line has been heretofore vacated or relocated by the lawful action of some authorized public officer, board, or tribunal.” *Id.* This law applies to every section line in the state. State v. Peters, 334 N.W.2d 217 (1983). Even if the highway has never been opened, improved, or traveled, the law applies. State v. Tracy, 539 N.W. 2d 327 (1995). (State Elected Official, Pierre, SD - #27189.50000)

Analysis of the right of the state to maintain rights-of-way on currently existing reservations requires a somewhat different analysis. First, we submit that the state has the right, under the 1866 Act, to create a right-of-way over any free land within a reservation. See generally Bird Bear, *supra*. Second, the state and local units of government have procured numerous rights-of-way over allotted and trust lands from tribes and from individual Indians on reservations utilizing the statutory procedures. See generally Bird Bear, 513 F.2d at 913. (State Elected Official, Pierre, SD - #27189.56000)

Public Concern: The proposed rule should comply with the 1905 New Mexico Territorial Act.

In New Mexico, the Territorial Legislature did this in 1905 by enacting Section 67-2-1 NMSA, 1978 Compilation. At that time the legislature knew the federal government was going to reserve the public lands in 1906 and thereby create federal lands, closing them to homesteading and assuming control over the roads. As a consequence of the 1905 territorial act the USFS cannot close New Mexico roads that predate the 1906 reservation of public lands to the federal government. Other state laws can also determine characteristics such as the width of the right of way. (County Elected Official, Reserve, NM - #43567.53300)

Public Concern: The proposed rule should adhere to the principles of the Treaty of Guadalupe Hidalgo and Article IV of the New Mexico State Constitution.

This proposed rule also violates the Treaty of Guadalupe Hidalgo and Article IV of the New Mexico State Constitution which recognizes all Spanish Land Grants within the state boundaries. Historically the Forest Service has encroached upon land and is in adverse possession of it with hostility. (Individual, Santa Fe, NM - #9442.50000)

Public Concern: The Forest Service should honor states' valid existing water rights.

While the proposed regulation does have an exemption to the general rule when a "...road is needed pursuant to reserved or outstanding rights..." (294.12-b-3), the state is deeply concerned that valid, existing, state-originated water rights do not fall under this definition. The DEIS only mentions hydrocarbon and mineral rights in its discussion of existing rights, and the supporting specialist report entitled Analysis of Effects For Non-Recreation Special Uses Management asserts that the above mentioned water rights "are not associated with a valid existing right." While some of these water rights predate the establishment of the national forests, most were established afterward and are covered by use permits issued by the Forest Service. These permits were issued, and renewed, in good faith to water right holders whose livelihood depends on the continued exercise of these rights. Under Utah law, a valid water right is classified as real property and entitled to the constitutional protection appurtenant thereto. ...Furthermore in the legislation which established the High Uintas Wilderness Area, similar water rights were specifically recognized as valid existing rights and the ability to perform maintenance activities guaranteed. The state engineer is of the opinion that valid, existing, state-originated water rights fall squarely within the definition of "outstanding rights", and the proposed regulation must clearly recognize them. The dams, head gates, pipelines, and canals, (structures) associated with these water rights have historically had land access since the time of their construction. The frequency of equipment access has been so low that the necessity for the access is sometimes forgotten. The above referenced specialist report seems to concur with this view, but reaches the erroneous conclusion that "so few non-recreation special uses are likely to be impacted under these alternatives, the economic effects on businesses, individuals or communities will be minimal." We do not consider the effect on 2390 points of diversion, rediversion, and return to be minimal. To prohibit road reconstruction for maintenance access of equipment to these existing structures in the proposed restrictive areas is contrary to the best interest of the public. When there is a need for access to repair and maintain these structures, the proposed regulation should allow for such, and be amended accordingly. Such a change to the proposed rule would be for the safety of the public, the protection of the outstanding rights of the structure owners, and the protection of the streambeds below the structures. While it is true that some of the smaller structures can be maintained without road access, the larger structures (which pose the greatest danger to public safety) require road access so maintenance can be done in a timely and effective manner. (State Elected Official, Salt Lake City, UT - #43918.90333)

3.1.5 Litigation Rulings

Respondents point to court rulings they believe are applicable to the proposed rule. One individual points to a 1978 decision by the Supreme Court in *United States v. New Mexico* as evidence that the only primary purposes of National Forest System lands are timber harvest and watershed protection. All other activities are secondary, according to this writer.

Another respondent discusses a lawsuit by the United Four Wheel Drive Association. This person claims that the Forest Service is legally prevented from using the terms roadless and unroaded.

Public Concern: The Forest Service should honor the Supreme Court decision on *United States v. New Mexico*.

The United States Supreme Court reiterated Congress' declaration in 1978 (*United States v. New Mexico*), ruling that timber production and watershed protection are the only primary purposes for national forests and that aesthetic, environmental, recreational and wildlife preservation purposes are "secondary purposes." (Business/Business Association, Glen Falls, NY - #2755.53000)

Public Concern: The Forest Service should comply with the court ruling from the United Four Wheel Drive Association lawsuit.

The United Four Wheel Drive Association has won a lawsuit which forces the Forest Service to not use the terms 'unroaded' and 'roadless'. This decision 1) points out the basic fallacy of the initiative and 2) is a harbinger of lawsuits to come. Does the Forest Service really have this kind of money to fritter away on what is basically illegal to begin with? (Individual, North Charleston, SC - #8277.50000)

3.2 Federal Environmental Acts/Laws

This section deals with public concerns that address the potential failure of the proposed rule to comply with federal environmental acts and laws. Section 3.2.1 covers National Environmental Policy Act (NEPA). Section 3.2.2 is titled Endangered Species Act. Lastly, Section 3.2.3 Other, concludes with comments regarding other federal environmental acts and laws.

3.2.1 National Environmental Policy Act

A large majority of opponents of the proposed rule are concerned with violations of the National Environmental Policy Act (NEPA); these alleged violations concern the adequacy of collaboration, cooperation and consultation, the accuracy and adequacy of information provided in the document, the quality of the document, and the adequacy of the alternatives. Some individuals point to flaws in the early scoping process, such as inadequate length of the scoping comment period and a paucity of information provided, as a reason why the proposed rule is invalid. Other respondents insist the "DEIS fails NEPA requirements by not addressing specific legal concerns" submitted during scoping.

Collaboration, cooperating agency status, and consultations are mandates within NEPA violated by the proposed rule, according to several county elected officials. These respondents feel the Forest Service did not adequately involve local stakeholders or consult with local and federal agencies. In addition, some respondents feel the DEIS was not adequately distributed to federal, state, and local agencies. Some respondents are concerned with the timeframe for this project, and feel that by rushing this process, the Forest Service is violating at least the intent of NEPA.

Accuracy of information is another topic relative to NEPA which concerns many respondents. A few individuals contend the Draft EIS contains "blatantly false" information, which is "highly unethical for a public agency" and thereby violates NEPA. The summary of the Draft EIS similarly portrays inaccurate and misleading information, according to a few respondents. Concerns about the adequacy of information include both the amount and quality of information provided. Many respondents are concerned the Draft EIS does not provide sufficient information for the public to "fully evaluate the effects of the proposal." Maps are one area of the Draft EIS found to be particularly lacking in adequate information and several respondents specifically request more detailed maps. One state official accuses the Forest Service of using unpublished data, which is not provided to the public, to develop the proposed rule. Many respondents request the Forest Service "revise the Draft EIS to account for the inadequacies" that "preclude meaningful analysis." Another reason to revise and recirculate the Draft EIS would be to

accommodate significant new information received through public comment, some respondents suggest.

Some respondents feel the Draft EIS fails to adequately describe the affected environment. One county elected official accuses the Forest Service of providing only a “qualitative” analysis that only subjectively describes the effects as “highly likely, slightly,” etc. A wide range of respondents feel the proposed rule does not provide “a full and fair discussion of significant environmental effects” of the proposed rule or even of the prohibition alternatives. Instead, they feel that the proposed rule was biased in its presentation of many topics, including road construction and development. One group even requests a risk assessment be completed. The Draft EIS also lacks a site-specific analysis which, according to several respondents, endangers the roadless proposal. They assert RAREII was invalidated largely because “that EIS failed to provide the ‘detailed site-specific analysis’ of the proposed action’s impacts on each roadless area,” and suggest the failure to provide that kind of analysis invalidates this proposal as well. Furthermore, site-specific analysis should include impacts on proposed recreational developments, such as ski areas. In addition, some note that the proposed rule does not include a cost/benefit analysis. A few respondents feel a cost/benefit analysis should be included because the proposed rule “will have a huge economic impact.”

The direct, indirect and cumulative effects sections of the Draft EIS also lack adequate information, according to some respondents. Several individuals agree that it lacks the “quantitative analysis necessary to determine direct and indirect effects.” Furthermore, since there are “no references to state and local land use plans or policies,” it would be impossible for the Draft EIS to adequately determine conflicts with state and local land use plans. In addition, other respondents say the proposed rule fails to address the effects on persons with disabilities or to disclose the effects of the alternatives. According to one county elected official, the “Forest Service does not even attempt to address” cumulative effects. Another respondent requests the Forest Service specifically examine the cumulative effects of activities on non-federally owned land in Alaska.

In addition, many respondents agree the Forest Service has “engaged in unlawful segmentation under NEPA” by artificially dividing what is essentially one proposal into three different segments. This creates “confusion in the mind of the public on the three proposals, which frustrates the ability to provide meaningful public comment.” Segmentation also eliminates discussion of “the cumulative environmental impacts” of all three proposals as required by NEPA. “NEPA regulations and case law likely require a single comprehensive EIS on the three interrelated actions,” and many respondents advocate that the Forest Service provide this.

Some respondents question the overall quality of the document. A few respondents request more quantitative information in the final rule. Respondents suggest, further, that the “document lacks scientific integrity” because “numerous assumptions were made without any scientific foundation.” Moreover, one group accuses the Forest Service of using “selective science” in its proposed rule. Several respondents question the adequacy of alternatives in the proposed rule. “The DEIS fails NEPA by not providing a full range of alternatives or accurately portraying alternative consequences” according to several respondents. In addition to providing an inadequate range of alternatives, several timber groups accuse the Forest Service of using an

“improper baseline” for comparison of alternatives by using a “hypothetical no action alternative.” Other respondents maintain that the “entire effort is pre-decisional and in total violation of NEPA.”

Closely related to the concerns about NEPA violations are concerns about violations of the Council on Environmental Quality regulations. Several respondents “question the Forest Service’s adherence” to the CEQ regulations which require “accurate scientific analysis” and scientific integrity. Respondents also suggest that “more quantitative information would have provided a much less verbose narrative,” and that the “excessively verbose sections” violate NEPA.

A few individuals assert that allowing motorized recreation on public land is a violation of the NEPA objective to “assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings.” One Environmental group would like the final rule to specify “that all decisions regarding roadless areas made at the project and forest planning level” be subject to a full (NEPA) review and comment. One individual recommends the Forest Service eliminate references to spiritual renewal from NEPA documents. Another respondent, a state elected official, urges the Forest Service to support legislation amending NEPA that would exempt small timber sales from environmental assessments and impact statements in an attempt to resolve the categorical exclusion issue. Finally, one county elected official declares the NEPA process is unconstitutional because it “does not provide for due process” and there are “no provisions for just compensation.”

Public Concern: The proposed rule should comply with the National Environmental Policy Act.

We are opposed to any action that does not meet the full requirements of NEPA. The proposal does not meet the purposes of the National Environmental Policy Act (NEPA) as defined in the Act.

- 1) To declare a national policy which will encourage productive and enjoyable harmony between man and his environment.
- 2) To promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. (County Elected Official, Reserve, NM - #43995.54100)

The DEIS does not even attempt to explain this or estimate the increased areas that will be impacted. Such omission is likely a violation of the National Environmental Policy Act (NEPA), and its administration via 40CFR 1500-08, which requires SPECIFIC beneficial or detrimental impacts.

The DEIS addressed this serious flaw by simply saying that local managers will define these areas at the next round of the local Forest Plan. Again, how can the public be asked to comment [when] impacts on the land have not been defined? (Professional Society, Park Falls, WI - #18662.54100)

THE DRAFT EIS CONTAINS NUMEROUS NEPA DEFICIENCIES.

Following is a list of areas in which the Draft EIS does not meet basic Council on Environmental Quality Regulations for NEPA: a) The NEPA process must be useful to decision-makers.

- b) Emphasize interagency cooperation including counties.
- c) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analysis.
- d) Study, develop and describe appropriate alternatives.
- e) Consult early with State and local agencies.
- f) Invite the participation of Federal, State and local agencies.

- g) Statements shall be concise, clear and to the point, and shall be supported by evidence.
- h) Statements shall be analytic rather than encyclopedic.
- i) Agencies shall not commit resources prejudicing selection of alternatives.
- j) Statements shall assess the environmental impacts, rather than justify decisions already made.
- k) Each statement shall contain a summary that adequately and accurately summarizes the statement.
- l) Rigorously identify, explore, and objectively evaluate all reasonable alternatives.
- m) Avoid useless bulk.
- n) Circulate the statement and request comments from Federal, State and local agencies authorized to develop and enforce environmental standards.
- o) Incorporate material by reference only when it is reasonably available.
- p) Ensure the scientific integrity of discussions. (County Agency, Burns, OR - #13552.54100)

The DEIS violates the National Environmental Policy Act (NEPA) and the implementing CEQ regulations (40 C.F.R. [sub-section] 1501 et seq.) in innumerable ways, including but not limited to the following: The DEIS is too broad and general to provide adequate environmental review as called for by NEPA and the CEQ regulations. The DEIS is based upon outdated information. The information relied upon in the DEIS is unreliable and does not provide full and fair discussion of significant environmental impacts. The information relied upon in the DEIS is internally inconsistent. The information provided in the DEIS, particularly the maps, is too general to provide adequate notice to the public regarding the nature of the proposal and its impacts. The DEIS violates the statutory mandates which must guide all actions of the USFS. The DEIS does not include appropriate, reasonable alternatives or present a meaningful range of alternatives for uses of available resources. The DEIS does not address the full range of impacts of the various alternatives, in particular the proposed action. The DEIS fails to adequately address cumulative impacts, including but not limited to past, present, and reasonably foreseeable future actions. The DEIS incorporates a number of unstated and unjustified assumptions which taint the entire analysis and render it invalid. The DEIS fails to utilize a systematic, interdisciplinary approach and does not provide for the integrated use of the natural and social sciences in connection with the proposed action. The DEIS fails to identify environmental effects and values in adequate detail so they can be compared to economic and technical analysis. The DEIS process has not allowed for circulation and review of related planning documents at the same time as the DEIS. The DEIS does not reflect the required professional integrity, including scientific integrity in its analysis. The DEIS fails to make explicit reference by footnote to the scientific and other sources relied upon for its conclusions. The DEIS is not supported by evidence that the agency has made the necessary, objective environmental analyses. (County Elected Official, St. George, UT - #15880.54100)

BY PROVIDING AN EARLY AND OPEN SCOPING PROCESS

The lack of a full range of alternatives can be attributed in large part to the flawed public scoping process implemented by the Forest Service under the NOI. The scoping period was of inadequate length and the paucity of information provided to the public during that process was totally insufficient to make objective decisions regarding formulation of alternatives. NEPA regulations require “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.” (40 C.F.R. 1501.7). (Individual, Anchorage, AK - #43199.54100)

THE SCOPING PROCESS FOR THE DEIS WAS FLAWED AND SHOULD BE REINITIATED. The scoping for preparation of the DEIS was inadequate under the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). Under binding NEPA regulations, there “shall be an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action” that will be addressed in the EIS. 40 C.F.R. 1501.7. The Forest Service failed to provide the public with adequate information on the roadless area initiative to allow informed public comment on the scope of issues to be addressed or on the significance of issues related to the proposed action. For example, during the scoping stage, the Forest Service could not provide information on the location and area of the national forest lands affected by this proposal. Indeed, as discussed above, the Forest Service is still unable to identify all the lands that will ultimately be impacted by this proposal. (Timber Company or Association, Eugene, OR - #15879.54100)

BY ADEQUATELY RESPONDING TO SCOPING COMMENTS

The DEIS fails NEPA requirements by not addressing specific legal concerns CAC and others put forth in written comments during the scoping period. There is no evidence in the DEIS that consideration was given to ANILCA Sections 101, 708, and 1326, which clearly prohibit the Forest Service from considering this roads prohibition in Alaska. (Wise Use or Land Rights Organization, Anchorage, AK - #43414.54100)

BY COLLABORATING WITH LOCAL STAKEHOLDERS

Information in the DEIS regarding the potential impacts to counties and local governments has not -- was not gathered from those same entities. The Forest Service totally bypassed the NEPA process when it excluded local stakeholders from participating meaningfully in the planning process. (County Elected Official, No Address - #22058.54100)

BY COOPERATING WITH LOCAL AGENCIES

Part 1501.6 Cooperating agencies. The purpose of this section is to emphasize agency cooperation early in the NEPA process. . . . (Note: Part 1508.5, definitions, states that "A State or local agency of similar qualifications or, when the effects are on a reservation, an Indian Tribe, may by agreement with the lead agency become a cooperating agency.")

FOREST SERVICE DRAFT EIS--The process did not include an invitation for local governments or counties to be cooperating agencies. The Draft EIS distribution list did not include local governments, counties, or conservation districts in the mailing. Local governments, counties, and conservation districts have special expertise in determining the effects and impacts of the proposed action on economies, fire, dependency, resiliency, noxious weeds, recreation and tourism, water, etc. (County Elected Official, Sheridan, WY - #51045.54100)

Part 1501.7 Scoping: As soon as practicable after its decision to prepare an environmental impact statement and before scoping process the lead agency shall publish a notice of intent.... (a) As part of the scoping process the lead agency shall:

(1) Invite the participation of affected Federal, State and local agencies...

FOREST SERVICE DRAFT EIS--The process did not include an invitation for local governments, counties, or conservation districts to participate in the process. The invitation is actually for involvement after this rule is finalized. In fact, the section on Local Involvement (Page 3-209) states that "National prohibitions will not have an effect on the local involvement process itself. They would narrow the scope of what is to be decided upon locally with regard to the management of inventoried roadless areas." The problem is that the scope of any remaining decision is strictly limited to further protection of roadless areas. (County Elected Official, Sheridan, WY - #51045.54100)

BY CONSULTING WITH FEDERAL AGENCIES

The proposal may violate NEPA because the DEIS was issued before consultation with the US Fish and Wildlife Service and National Marine Fisheries Service was completed. NEPA requires full disclosure of potential impacts. Without full consultation and acceptance from the regulatory agencies, there is no assurance that the DEIS or Proposed Rule will be acceptable to these agencies or if additional requirements will need to be added. In order for the public to understand the impacts of the different alternatives and their potential impact to the future management of our National Forests, the results of this consultation must then be incorporated into the DEIS. (University/Professional Society, Anchorage, AK - #43416.54100)

PART 1503--COMMENTING 1503.1 Inviting comments.

(1) Obtain comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

FOREST SERVICE DRAFT EIS--The Forest Service did not actively solicit comments from local governments, counties, or conservation districts who have some legal jurisdiction and special expertise. Therefore, it can be concluded that the Forest Service failed to meet the requirements of this part. (County Elected Official, Sheridan, WY - #51045.54100)

BY CIRCULATING THE DRAFT EIS ACCORDING TO COUNCIL ON ENVIRONMENTAL QUALITY (CEQ) REGULATIONS, PART 1502.19

Part 1502.19 Circulation of the environmental impact statement . . . the entire statement shall be furnished to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State, or local agency authorized to enforce environmental standards.

FOREST SERVICE DRAFT EIS--The document was not distributed to local governments, counties, or conservation districts. Instead, copies were placed in County and Municipal Libraries. Unless one had a copy of the Draft EIS, he/she would not be aware of this distribution. Therefore, the agency failed to meet this part of the CEQ Regulations governing NEPA. Local governments, counties, and conservation districts all have special expertise the Forest Service should have used in developing alternatives and conducting the analysis. (County Elected Official, Sheridan, WY - #51045.54100)

BY NOT RUSHING THIS PROCESS

During the USFS plan presentation for the Wasatch-Cache forest, held in Mountain View, Wyoming, on November 18, 1999, the Service stated that roads would not be an issue with their management plans. The reasoning behind this was that "roadless" areas had already been "inventoried" and there would be no site-specific discussion. Is this proper procedure for the USFS to maintain the stance of being "consistent" with all forests? Does the "fast track" method obscure the intent of the National Environmental Policy Act ((NEPA) Sec. 1503.4 (a) 5). (Wise Use/Land Rights Organization, Rock Springs, WY - #2866.54100)

While the process, however subverted it may be, has appeared to follow NEPA law (I am certain that even that will be questioned in Federal court), it certainly has not followed the INTENT. How in God's name can you even entertain the concept of completing a NATIONAL level NEPA EIS document in under a year, when in fact the FLMP on my last Forest took over 12 years to compete and receive a ROD? (Recreational Organization, Kneeland, CA - #7085.70000)

In conclusion, the scoping process and comment period for the Forest Service Roadless Area Conservation DEIS have been rushed to the point the NEPA process has [been] seriously compromised. As a minimum, the comment period for the DEIS should be extended another 120 days. A more reasoned approach would be to re-enter the scoping phase for proposed roadless area rules and to address the multitude of issues that remain unanswered, a few of which have been addressed in this writer's observations and comments. (State Elected Official, Albion, ID - #44351.54100)

BY NOT PRESENTING FALSE FACTS

We have already pointed out how Forest Plans already protect a majority of the roadless areas and only plan for roads on a small portion of the inventoried areas. Furthermore, the Agency has information on the specific proposals for road proposals for the next decade. The agency deceives the public by not disclosing the actual portions of roadless areas proposed for roads rather than portraying these plans as "...likely to significantly alter landscapes and cause landscape fragmentation on a national scale..." to give the impression that all these roadless areas are at risk of being roaded if no national action is taken. Such a blatantly false portrayal is highly unethical for a public agency and violates APA and NEPA. (Individual, Whitefish, MT - #30417.50000)

Consequences described for the no action alternative are also patently false. The statement that Alternative A (no action) results in the "greatest potential for loss of roadless characteristics and values, since they receive no special consideration" is wrong and inconsistent with current law. NEPA requires this type of analysis whenever roadless characteristic impacts are raised as an issue. The current planning regulations also have this requirement as 36 CFR 219.17 requires evaluation of roadless areas and roadless characteristics. (Individual, Anchorage, AK - #43199.54100)

BY PROVIDING AN ACCURATE SUMMARY

Part 1502.12 Summary Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement.

FOREST SERVICE DRAFT EIS--The document provides a summary that does not accurately summarize the Draft EIS. In fact, the description of alternatives and comparison of alternatives in the summary omits critical information that could lead to a misinterpretation of what the agency is proposing. For example, the summary describes the procedural proposed action as an option for local decision-makers on whether and how to protect roadless characteristics. The Draft EIS adds a sentence stating that local decision-makers could not authorize road construction or reconstruction. The summary gives broad discretion and the Draft EIS takes it away. This is not an accurate reflection of what the Draft EIS proposed action represents. Finally, the comparison of alternatives table in the summary omits many of the factors evaluated in the Draft EIS which appear to support the proposed action. (County Elected Officials, Sheridan, WY - #51045.54100)

BY PROVIDING SUFFICIENT INFORMATION FOR THE PUBLIC TO EVALUATE

It is a matter of NEPA law that environmental impact statements must contain sufficient information to allow the readers to fully evaluate the effects of the proposal. Although the DEIS states that the proposed regulation, if adopted, would cover more than 4.0 million acres in Utah, that acreage figure is calculated by adding the acreage of many, many smaller units. The DEIS does not state how many smaller units are proposed in the State of Utah. The state believes quite strongly that each of the proposed units must be examined on its own merits. NEPA requires that detailed on-the-ground information be given for each and every proposal. The fact that this is a nationwide proposal does not excuse this requirement. It is true that some nationwide proposals are made in programmatic style, but each of them is followed by localized NEPA studies. The current proposal is not styled as a programmatic EIS, but states instead that it will have immediate effect on-the-ground. Therefore, the state and citizens are entitled to enough detailed information to evaluate each and every area. (State Elected Official, Salt Lake City, UT - #43918.50000)

The Code of Federal Regulations (40 CFR 1502.8) directs that an EIS... "Be written in plain language and may use appropriate graphics so that decision makers can readily understand them." The vague maps that apply to our area, which were just recently obtained, do not meet this standard. The maps and definitions should be expanded and clarified in a revised proposed rule. (Town or Municipality/Municipal Association, No Address - #51128.54100)

Third, the state is aware of a decision by the supervisor of the Dixie National Forest two years ago to decommission 89 miles of roads in a portion of the Forest known as Boulder Top. Forty-two miles of road were left open, and designated part of the Forest Development Road System. This decision was upheld in federal district court in Utah, and we would expect the maps provided in the current proposal to reflect this. A casual look at the maps provided shows no roads at all, and the public might believe the entire area is roadless. When we enlarge the GIS maps provided--greatly enlarge them- we can start to discern road patterns. We cannot determine if these traces on a stylized map are in fact the roads left open by the court decision. Further, assuming the information is correct, the roads do define areas between them which are labeled as the proposed restrictive areas for this regulation. But the shapes of these areas do not match any of the shapes indicated on the mid 80s draft inventory that we do have. We can therefore only conclude first, the judicially approved roads are apparently not accurately represented, and second, some other source of information has been used to create the current restrictive unit shapes. We are not aware of a late '90s published draft inventory for the Dixie Forests, similar to that done in 1999 by the Uintah Forest. We are aware that initial roadless area inventory work was underway in both the Dixie and the Fishlake National Forests, as evidenced by a joint letter dated June 26, 1998 from the two Forest Supervisors. Therefore, we believe that the Forest Service is relying on unpublished work to establish a major policy initiative, and has not provided that work to the state or anyone else for review. This is an illegal violation of NEPA requirements. (State Elected Official, Salt Lake City, UT - #43918.50000)

BY ADDRESSING INADEQUACIES THAT PRECLUDE MEANINGFUL ANALYSIS

Revise the Draft EIS, as per CEQ Regulation 40 CFR 1502.9 (a), to address inadequacies that preclude meaningful analysis. (County Elected Official, Ely, NV - #44348.50000)

If the Proposed Rule and Draft EIS moves forward, the District would like to request that the Forest Service at a minimum, revise the Draft EIS to account for the inadequacies found and distribute it for public comment. CEQ Regulation 1502.9 states that "...if a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft..." (Town or Municipality/Municipal Association, No Address - #47907.50000)

We believe that the data on existing Forest Plan protection and management of roadless areas is so inadequately and poorly presented and so full of errors, that the DEIS fails a test of reasonable public disclosure required by APA and NEPA. It is clear that a supplemental DEIS must be issued correcting these deficiencies and providing accurate information to the public before a final EIS can be legally issued. (Individual, Whitefish, MT - #30417.54100)

BY ADDRESSING SIGNIFICANT NEW INFORMATION

Supplement this Draft EIS, as per CEQ Regulation 40 CFR 1502.9 (c)(ii), to address the significant new circumstances and information that is relevant to our environmental concern and bearing on the proposed action and its impacts. (County Elected Official, Ely, NV - #44348.50000)

Part 1502.9 Draft, final, and supplemental statement (a) . . . if a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and circulate a revised draft of the appropriate portion.

(c) Agencies:

(1) Shall prepare supplements to either draft or final environmental statements if:

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

FOREST SERVICE DRAFT EIS--The references in this part of the regulations requires Federal agencies to either revise or supplement statements that are inadequate. The Roadless Area Conservation document lacks adequacy, and comments submitted provide significant new circumstances. Therefore, the conclusion of the Forest Service should be to, as a minimum, revise and recirculate the draft. (County Elected Officials, Sheridan, WY - #51045.54100)

BY ADEQUATELY DESCRIBING THE AFFECTED ENVIRONMENT

AN EIS MUST "DESCRIBE THE ENVIRONMENT OF THE AREA(S) TO BE AFFECTED." 40 C.F.R. 1502.15. The DEIS violates this binding NEPA regulation by basing the acreages and locations of the roadless areas primarily on 21-year old maps done at a scale of 1:500,000 and by not describing the different forest health conditions, timber resources, need for primitive vs. roaded recreation, existence of listed species dependent on a particular habitat, etc. in each individual roadless area. (Timber Company or Association, Eugene, OR - #15879.7000)

FOREST SERVICE DRAFT EIS--The document fails to describe the environmental effects in adequate detail. The proposed rule documents the fact that most of the analysis was "qualitative" in nature. The subjective disclosure of effects (highly likely, slightly, small increments, most benefits, lowers the likelihood, increased incidence, slightly increasing, sharp reductions, minimizing, measurable, lower risk, etc.) cannot be effectively used to compare the economic and technical effects of the proposed action. (County Elected Official, Sheridan, WY - #51045.54100)

BY PROVIDING A FULL AND FAIR DISCUSSION OF SIGNIFICANT ENVIRONMENTAL IMPACTS

PART 1502--ENVIRONMENTAL IMPACT STATEMENT

Part 1502.1 Purpose. It (the EIS) shall provide full and fair discussion of significant environmental impacts and inform decision-makers and the public of the reasonable alternatives...Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses.

FOREST SERVICE DRAFT EIS--The document does not provide a full and fair discussion of significant environmental effects. Instead, many sections are extremely biased against road construction, reconstruction, and

timber harvest. The document does not inform the decision-makers and the public with reasonable alternatives (more on this later). The document is far from concise, clear, and to the point--many times repeating or continuing the affected environment discussions in sections that should disclose effects. Few of the assumptions are supported by evidence that the agency has conducted a complete environmental analysis. (County Elected Official, Sheridan, WY - #51045.54100)

Likewise, NEPA requires a balanced presentation of the effects from an action. While your DEIS is quick to point out that we're only dealing with about 2% of the lands in the United States (DEIS page S-1) it fails to tell that the proposal will affect about 25% of the all NF System lands. This is not multiple-use management. The DEIS also fails to disclose the positive benefits of road construction and development. The effects are so generalized they become meaningless. (Individual, Great Falls, MT - #28425.54100)

Finally, and most seriously from a NEPA standpoint, Chapter 2 (Table 202) fails to accurately and sufficiently disclose the effects of the Prohibition Alternatives. . . . In Table 2-2, under Proposed Action and Preferred Alternative (Alternative 2), for Watershed Resources, Air Resources, Biological Diversity, Threatened and Endangered and Proposed Species, and Hunting and Fishing Opportunity, there is no assessment of the cumulative and absolute, long-term effects of 22 million IRA acres at unmitigated risk of catastrophic fire. There is an assessment of the short-term effects of roads, but an assessment of the long-term effects of fire risk is lacking. **A RELATIVE RISK ASSESSMENT IS NEEDED; THAT IS, AN ASSESSMENT OF THE SHORT-TERM RISKS OF INACTIONS (UNMITIGATED FOR RISKS).** (Environmental/Preservation Organization, Missoula, MT - #43339.54100)

The DEIS discusses one of the many negative, ecological effects of mining, and none of the many negative, ecological and social effects of OHVs. These are serious deficiencies, and a violation of NEPA, which requires disclosure of all significant effects. (Individual, Olympia, WA - #25898.54100)

Directly related to the OHV issue are the impacts of unclassified roads in roadless and unroaded areas. The proposed new rule for the national forest road system admits that you are aware of at least 60,000 miles of unclassified roads and expect that "future inventories will verify the existence of substantially more miles of unclassified roads" (2000 Federal Register, p. 11678). These roads were created primarily by OHV use, much of it's unauthorized. They have all of the effects of permanent roads, but often worse, because they are not engineered to the same standards, nor do they receive maintenance. Yet the impacts of these roads are not disclosed in the DEIS, a violation of NEPA. (Individual, Olympia, WA - #25898.54100)

BY CONDUCTING AN AREA-BY-AREA EFFECTS ANALYSIS

The national Environmental Policy Act ("NEPA") also requires a roadless area-by-area analysis for the three reasons presented below. Yet, the DEIS does not provide any roadless area-by-area description of the existing environment--of the timber and other resource values in each roadless area. Nor does the DEIS provide any roadless area-by-area analysis of the impacts of the proposed road ban on forest health, on fire risks, on access to timber and minerals, etc. Instead of providing roadless area-specific resource information and impact assessment: (1) DEIS volume 1 merely provides a generalized guess on the impacts at the national level; and (2) DEIS volume 2 simply provides a map indicating the physical location of the roadless areas. This does not satisfy NEPA. NEPA requires a roadless area-by-area description of the resources potentially affected and a roadless area-by-area impact analysis, for the following reasons:

A. THE FOREST SERVICE'S LAST ATTEMPT TO DETERMINE THE FUTURE FATE OF ROADLESS AREAS AT THE NATIONAL LEVEL (RARE II) WAS INVALIDATED LARGELY BECAUSE THAT EIS FAILED TO PROVIDE THE "DETAILED SITE-SPECIFIC ANALYSIS" OF THE PROPOSED ACTION'S IMPACTS ON EACH ROADLESS AREA. STATE OF CALIFORNIA V. BLOCK, 690 F.2d 753, 765 (9th Cir. 1982). The DEIS on the roadless area rulemaking does not contain the roadless area-by-area analysis required by CALIFORNIA V. BLOCK. The Forest Service should either abandon the national rulemaking on roadless areas or prepare a DEIS providing adequate information on each affected roadless area, or the agency will repeat the sorry history of RARE II's demise in CALIFORNIA V. BLOCK. (Timber Company or Association, Eugene, OR - #15879.7000)

Since the roadless area rulemaking makes the “critical decision’ to commit these areas” to roadless uses, NEPA requires the Forest Service to assess the biological and socio-economic impacts of that decision on each roadless area. 690 F.2d at 763. The “Forest Service [must] compare for each area the potential benefits of non-wilderness management against the potential adverse environmental consequences.” 690 F.2d at 764. The CALIFORNIA V. BLOCK Court found that aggregating roadless area impacts for a macro analysis is not sufficient. “Having decided to allocate simultaneously millions of acres of land to non-wilderness use [here, roadless uses]. The Forest Service may not rely upon forecasting difficulties or the task’s magnitude to excuse the absence of a reasonably thorough site-specific analysis of the decision’s environmental consequences.” 690 F.2d at 765. The Forest Service simply has not provided the level of site-specific resource and impact information for each roadless area that the NFMA, MUSYA, and NEPA require before changing the forest plan’s direction for individual roadless areas. By not providing a roadless area-by-area analysis, the Forest Service is depriving the public of the information needed to comment that area X should retain its roadless status, but due to factors such as high timber value or forest health risks, roads should be allowed in roadless area Y. By not providing a roadless area-by-area analysis of the environmental and socio-economic impacts of permanent roadless designation, the Forest Service is depriving itself of the site-specific information needed to comply with NFMA and NEPA, and the information needed for sound decision-making. (Timber Company or Association, Eugene, OR - #15879.7000)

Due to the absence of site-specific information, the Forest Service and public are deprived of information that, for example, might support a decision that the fire risks or forest health risks in a certain set of roadless areas are too high to justify a rulemaking prohibiting road access to such areas. As the CALIFORNIA V. BLOCK Court found, the “Forest Service [must] compare for each area the potential benefits of nonwilderness management against the potential adverse environmental consequences.” 690 F.2d at 764. The DEIS fails to provide the type of individualized analysis of impacts to roadless area resources that are provided in the forest plan EIS, and which led to responsible decisions that roads should be allowed in 33.8 million acres of inventoried roadless areas. If the Forest Service wants to alter the forest plan’s balancing of multiple uses, it must provide an equivalent level of site-specific NEPA analysis in this EIS. (Timber Company or Association, Eugene, OR - #15879.7000)

Locally severe effects of prohibitions arbitrarily precluding long planned recreational developments such as ski areas are not disclosed in violation of NEPA. (Individual, Whitefish, MT - #30417.54100)

The same is true of potential environmental damage caused by roads. That is a discussion for the NEPA analysis at the project level. The potential harm of a road compared to the benefits that may exist from the existence of the road should be decided site specifically. (Business/Business Association, Altraus, CA - #29955.54100)

BY PROVIDING A COST/BENEFIT ANALYSIS

CEQ Reg Paragraph 1502.23 Cost-Benefit analysis requires that “If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aide in evaluating the environmental consequences.” No economic or cost-benefit analysis is included in the draft EIS. The proposed action will have a huge economic impact. (County Elected Official, Reserve, NM - #43995.54100)

Fire Effects on Watersheds, P. 3-41 to 3-43. This section minimally describes the adverse effects of fire on watersheds and the role of roadless areas in contributing to increased risk. Although the Forest Service admits that many domestic water supply watersheds have already been severely burned, inadequate disclosure of the true cost per acre (fire fighting, human injuries or loss of life, loss of property, cost of rehabilitation and water treatment) is in violation of APA and NEPA. (Individual, Whitefish, MT - #30417.54100)

BY DESCRIBING DIRECT AND INDIRECT EFFECTS AND CONFLICTS WITH OTHER PLANS

AN EIS MUST ADDRESS THE “ENVIRONMENTAL IMPACTS OF THE ALTERNATIVES,” INCLUDING “[D]IRECT EFFECTS AND THEIR SIGNIFICANCE,” “[I]NDIRECT EFFECTS AND THEIR SIGNIFICANCE,” AND “[P]OSSIBLE CONFLICTS BETWEEN THE PROPOSED ACTION AND THE OBJECTIVES OF FEDERAL, REGIONAL, STATE, AND LOCAL...LAND USE PLANS.” 40 C.F.R. 1502.16; SEE ID at [sections] 1502.14, 1508.8. The DEIS does not describe the different “ecological..., economic,” and “health” impacts of

precluding roads on each inventoried roadless area. 40 C.F.R. 1508.8. (Timber Company or Association, Eugene, OR - #15879.7000)

Part 1502.16 Environmental consequences. This section forms the scientific and analytic basis for the comparisons...It shall include discussions of:

(a) Direct effects and their significance

(b) Indirect effects and their significance

(c) Possible conflicts between the proposed action and the objectives of Federal, regional, State, and local land use plans, policies, and controls for the area.

FOREST SERVICE DRAFT EIS--Most of the sections in the document lack a quantitative analysis necessary to determine direct and indirect effects and conflicts with State and local land use plans and policies. In fact, there are no references to State and local land use plans or policies. Since the agency failed to consult with local governments, it could not possibly be aware of and analyze these conflicts. (County Elected Official, Sheridan, WY - #51045.54100)

This section [Civil Rights and Environmental Justice] adds little to the concerns expressed by many on the effects of the "Proposed Action" to persons with disabilities. Although this issue is mentioned in the Affected Environment, no disclosure is provided on the effects [of the alternatives]. Laws such as the Rehabilitation Act, as amended, and the American's with Disabilities Act must be addressed and evaluated. Also, reference is made to Native American, Hispanic, and Asian American cultural sites. These sites are not identified nor is information provided to adequately assess impacts. For example, "How many of these sites exist? Where are they located? What is the level of use?"

RELIEF: The Forest Service must address the effects on persons with disabilities in the Affected Environment section (Page 3-206, first paragraph) and disclose the effects of the alternatives as required by CEQ Regulation 1502.16. In addition, the questions presented about cultural sites must be answered. (County Elected Official, Basin, WY - #43980.51000)

BY INCLUDING A CUMULATIVE EFFECTS ANALYSIS

There is no cumulative analysis. The Forest Service does not even attempt to address past, present and reasonably foreseeable events. Instead the cumulative analysis section relies upon a discussion of two other pending rules. Clearly, the Forest Service has not met its obligations under 40CFR1508.7. (County Elected Official, Fallon, NV - #17290.53600)

TLMP and the Roadless EIS both fail to consider the cumulative effects of Native Corporation logging on the Tongass. The National Environmental Policy Act (NEPA) requires that these types of effects be studied. While the total land area in Southeast Alaska outside of federal ownership is small in comparison, the acreage of logging that has occurred on those lands is approaching a volume near what the Forest Service has sold. The Final EIS should study the true numbers and the effects, including the identification of abutting past and future timber sales between the two ownerships, as I believe they are significant. In addition, the negative logging impacts on Native Corporation lands are currently, both in law and in practice, more significant than on public lands and this also should be considered. (Individual, Bloomington, IN - #26023.54100)

BY CONSIDERING CUMULATIVE IMPACTS OF MULTIPLE PROPOSALS

In NEPA parlance, this artificial division of a whole project into smaller segments for less comprehensive analysis is called the unlawful "segmentation" of a project. SEE MANDELKER, NEPA LAW AND LITIGATION [section] 9.04 (West 2d ed. 1999). The results of segmentation here are: (1) an arbitrary division of the whole in violation of the APA; (2) confusion in the mind of the public on the three proposals, which frustrates the ability to provide meaningful public comment; (3) no discussion of the cumulative environmental impacts required by NEPA; and (4) no discussion of the cumulative economic impacts required under the Regulatory Flexibility Act and other law. (Timber Company or Association, Eugene, OR - #15879.54100)

The Supreme Court has held that section 102 (2)(c) of NEPA, may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time. *Kleppe v Sierra Club*, 427 U.S. 390 (1976). Congress intended this to be an "action forcing" provision serving as a directive to agencies "to assure consideration of the environmental impact of actions in decision-making" *Id* at 409. "When several proposals for

related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action” Id at 410. As Chief Dombeck has noted, the proposals in question are interrelated, there “will be some overlap as we pursue these two separate but closely related actions” (Testimony of Michael P. Dombeck before the Subcommittee on Forests and Public Lands Management, Committee on Energy and Natural Resources, United States Senate, November 2, 1999). All three proposals will affect to some extent “unroaded” areas, and geographically the areas are overlapping or identical in part...it is clear that if the Service continues with these proposals, the lands affected under ICBEMP, the Roadless and Road Management proposals will be focused upon and will impact identical regions in Montana. Therefore, the proposals are so closely tied together that one document is required under NEPA to avoid isolated consideration of the cumulative effect of the ‘similar actions’ in time and geography of the roadless and road management proposals. The two prongs of cumulative actions and similar actions are met by the Roadless and Road Management proposals, and to a lesser degree the ICBEMP proposal with foreseeable impacts in geography and time.

The Road Management proposal’s action is cumulative in conjunction with the Roadless proposal, as additional “unroaded” lands will be added to the Roadless proposal before the Roadless FEIS is completed. As acknowledged earlier, under the current Roads Strategy EA this will increase the total School Trust acres impacted from 20,961 to 41,403 in Northwestern Montana; clearly, a significant cumulative impact that should be discussed in the same impact statement. Additionally, the road management proposal is an action similar to the Roadless proposal as both are currently on similar timetables, with both expected to be done by next fall and covering the same general geography. (State Elected Official, Helena, MT - #19289.54100)

Under NEPA at 40 CFR 1502.4(b), EIS preparation should include a “statement on broad actions so that they are relevant to policy and are timed to coincide with meaningful points in agency planning and decision-making...including actions in the same general region geographically and with relevant similarities of timing, impacts and methods of implementation generically.” As already discussed, the Forest Service as an agency is planning a policy of “unroaded” lands in three proposals that are on similar times lines, impact similar roads and “Unroaded” lands (creating more “unroaded” lands in all three proposals through decommissioning) and in the same general region. The Forest Service’s approach of “merely announcing” impacts to the roadless proposal from the other proposals does nothing to address the inter-regional cumulative impacts as is required by law. See *Natural Resources Defense Council Inc. v. Hodel*, 865 F.2d 288,299 (D.D.Cir. 1988). The Road Management Strategy’s EA on page 5 states, “the effects of the road management strategy on roadless or other unroaded areas would be short term; long term effects of additional projections in roadless and often unroaded areas will be addressed with EIS for the proposed Roadless Area Protection Rule.” (State Elected Official, MT - #19289.54100)

Even if a comprehensive EIS is not required, the DEIS does not supply the “CUMULATIVE IMPACTS” ANALYSIS required by 40 C.F.R. [sections] 1502.16, 1508.7, 1508.8, 1508.25. The three sets of proposed regulations and guidance will have cumulative impacts. For example, with respect to uninventoried unroaded areas, the road management instructions would make it very difficult to build a road to provide forest health benefits (e.g., to limit a disease outbreak or to reduce fire risk) prior to revision of a forest plan. The requirement for an EIS in such circumstances (even when the forest plan had authorized road construction in the area and its impacts had been generally addressed in the plan EIS, to which a project-level EA could tier) and the other standards in the road management instructions seem calculated to preclude or minimize road construction in uninventoried unroaded areas. Then, the combination of the road management instructions/roadless area rules/forest planning rules would make it very difficult to build such a road after the time a forest plan has been revised. Thus, these three rulemakings largely predetermine that there will generally be no new roads in uninventoried unroaded areas. This has cumulative adverse environmental effects on forest health and other environmental values which must be addressed in an EIS, but which are not addressed in the DEIS.

As another example, the roadless area rule and the road transportation rule combine to make it more difficult to construct the roads needed to access timber anywhere in the National Forest System. This will have greater adverse cumulative effects on forest health (timber harvesting to reduce the risks of catastrophic fires and to contain disease outbreaks) and greater adverse socioeconomic effects (from a reduced timber supply).

Thus, the Forest Service has not provided either the comprehensive EIS or the cumulative impact discussion required by NEPA. To comply with NEPA, the agency should either: (1) abandon the proposals due to the NEPA and other deficiencies; or (2) issue a draft EIS for public review that contains the cumulative impact analyses required by NEPA. (Timber Company or Association, Eugene, OR - #15879.54100)

BY CREATING AN ANALYTIC DOCUMENT

Part 1502.2 Implementation (a) Environmental impact statements shall be analytic rather than encyclopedic. FOREST SERVICE DRAFT EIS--The document contains little quantitative information and uses an encyclopedic discussion that appears to repeatedly support the proposed action. (County Elected Official, Sheridan, WY - #51045.54100)

BY PROVIDING A DOCUMENT OF SCIENTIFIC INTEGRITY

Part 1502.24 Methodology and scientific accuracy. Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. FOREST SERVICE DRAFT EIS--The document lacks scientific integrity on the basis that numerous assumptions were made without any scientific foundation. Many assumptions appear to be based on the authors' values and biases. (County Elected Official, Sheridan, WY - #51045.54100)

BY NOT USING "SELECTIVE SCIENCE"

If the EIS justifies analyzing only logging and prescribed burning in various amounts without considering the Cutting, Chipping, and Scattering method, this action could be considered "selective science." If the EIS justifies logging, because the project team believes the use of mechanical methods to reduce fuel loading and/or modify hazard and risk are well documented in the literature, and cites particular literature, like Harrison (1975), Schimke (1965), Dell and Ward (1969), Tesch (1986), and Lysne (1983), to justify this position, this action could be considered using "selective science." Referencing these citations and ignoring the growing body of science that proves that logging is the major cause of forest problems, could confirm the Forest Service's reliance on "selective science" to promote logging. By negating or ignoring the results from hundreds of other studies referenced in the Sierra Nevada Science Review, the Sierra Nevada Ecosystem Project reports, and other scientific papers that show logging and road building as the major causes of loss of habitat and decline of species, the EIS would be using "selective science," which has been determined by U.S. District Court to be a violation of the National Environmental Policy Act (NEPA) and the National Forest Management Act (NFMA). (NFMA, 16 U.S.C. § 1600 et seq., and NEPA, 42 U.S.C. § 4321 et seq.) In his order, signed on September 25, 1998 in the United States District Court of the District of Colorado, US District Court Judge Lewis Babcock ruled (Civil Action 94-B-277 Colorado Environmental Coalition v. Daniel Glickman et. al.) against the Trout Mountain Timber Sale in the Rio Grande National Forest for using "selective science" by ignoring studies showing that timber sales are likely to harm declining bird species. (Environmental/Preservation Organization, Weldon, CA - #16041.54100)

BY PROVIDING AN ADEQUATE RANGE OF ALTERNATIVES

The DEIS fails NEPA by not providing a full range of alternatives or accurately portraying alternative consequences. with the exception of Alternative A, all alternatives prohibit road building in all roadless areas greater than 5000 acres. This all or nothing set of alternatives does not fulfill the full range of alternatives criteria required by NEPA. (Wise Use or Land Rights Organization, Anchorage, AK - #43414.54100)

Page 2-4 through 2-9--There are inherent problems with the range of procedural alternatives presented. First, they do not represent a full range as required by CEQ Regulations (also addressed under NEPA Deficiencies). Many of the alternatives address procedures currently required by Forest Service direction and policy, e.g., Alternatives A, C and D. The only difference Alternative B provides is the statement that prohibits local decision makers from authorizing road construction and reconstruction. RELIEF: The Forest Service must present a full range of alternatives that are distinctly different from each other. The alternatives must be able to display a meaningful disclosure of effects. (County Elected Official, Basin, WY - #43980.54000)

In our judgment, the DEIS is not in compliance with NEPA and must be withdrawn until consultation is completed for ALL alternatives. The results of this consultation must then be incorporated into the DEIS for the public to understand the true difference between alternatives and their potential impact to the future management of our National Forests and the potential impacts to local communities. (Individual, Colville, WA - #13519.54100)

The range of alternatives for the Roadless DEIS is not proper under NEPA because there is little opportunity to select between the No Action (Alt. A) and the Proposed Action (Alt. B). Alternatives C and D appear to be such middle ground but, in reality are not because, under these alternatives, all of the areas designated as roadless or unroaded would be managed as roadless without any official designation. (University/Professional Society, Laramie, WY - #25484.54100)

It fails to meet the requirements to use the NEPA process to identify and assess the reasonable alternatives to proposed actions that will avoid or minimize adverse effects of these actions upon the quality of the human environment (40CFR1500.2(3)). To address this deficiency, USFS needs to make a concerted effort to gather this information in an interim draft document for distribution and review by the public, prior to issuance of a final EIS. (Utility Group, Gillette, WY - #28925.54100)

BY USING A PROPER BASELINE FOR COMPARISON OF ALTERNATIVES

D. THE DEIS USES AN IMPROPER BASELINE FOR COMPARING ALTERNATIVES AGAINST THE “NO ACTION” ALTERNATIVE AND THUS SERIOUSLY UNDERESTIMATES THE ECONOMIC IMPACTS.

1. LEGAL DEFICIENCIES. The DEIS engages in misdirection which hides the true socioeconomic impacts of the substantial reduction in timber volume attributable to the rulemaking. The Council on Environmental Quality has stated that the impacts of the “no action” alternative (the baseline used for calculating the incremental impacts of the alternatives) in forest planning should be the projected impacts of continuing to implement the forest plan.

[Where a proposed action would] update a land management plan....”no action” is “no change” from current management direction or level of management intensity....Therefore, the “no action” alternative may be thought of in terms of continuing with the present course of action until that action is changed. Consequently, projected impacts of alternative management schemes would be compared in the EIS to those impacts projected for the current plan. 46 Fed. Reg. 18026, 18027 (March 1, 1981) (CEQ’s Answers to 40 Most Asked Questions on NEPA Regulations).

Yet, the DEIS does not compare the impacts of the roadless rulemaking to the “impacts projected for the current plan” if the full level of timber sales projected in the forest plan (the timber sale schedule level, SEE 36 C.F.R. 219.16) are conducted. Instead of using the timber sale schedule level prescribed by timber plans, the lower “timber volume in FYs 1996 to 1999 was used in developing the baseline for the No Action Alternative.” DEIS at 3-182. Since use of this baseline is contrary to CEQ’s direction, the correct baseline should be employed (or at least portrayed as an alternate basis for comparison) in the final EIS. (Timber Company or Association, Eugene, OR - #15879.54000)

The DEIS takes other unwarranted liberties to make the incremental impacts of the preferred alternative on timber sale level harvesting seem small. First, “the planned [timber sale] offer [level in roadless areas] was reduced downward by 30% to account for volume reductions between planned offer and volume offered for sale.” DEIS at 3-184. Second, this number was further reduced to address an alleged historical difference “between volume offered and volume sold”--even though one would expect acceptable bids on a higher percentage of timber if the Forest Service is providing a smaller supply. DEIS at 3-185. Through this mathematical sleight of hand, the DEIS manages to reduce an “annual planned offer...of 222 million board feet” in roadless areas down to an “adjust[ed]” level of “131 million board-feet.” DEIS at 3-185. Thus, by reducing the baseline of the planned timber offer level in roadless areas by over 40%, the agency has understated the expected socioeconomic impacts of the proposed alternative by the same 40%. This artificial manipulation of the baseline is improper under CEQ’s guidance and creates an EIS artificially biased towards the agency’s preferred alternative. (Timber Company or Association, Eugene, OR - #15879.54000)

The DEIS ILLEGALLY USES A HYPOTHETICAL NO ACTION ALTERNATIVE TO COMPARE THE ALTERNATIVE TO--the basis for comparing alternatives to the no action alternative must be the legally approved forest plans for each national forest [and] not projects and plans projected for the next five years. (Timber Company or Organization, Eugene, OR - #43862.54100)

BY PROVIDING OBJECTIVE ANALYSIS OF ALL REASONABLE ALTERNATIVES

Part 1502.2 Implementation (f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision.

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

FOREST SERVICE DRAFT EIS--the Chief, USDA Forest Service placed an eighteen-month moratorium on road construction and reconstruction in roadless areas before the draft rule was released. This provides evidence that the Draft EIS is prejudiced and much of the written text appears to justify the proposed action. After decades of managing roadless areas, it appears suspicious that a moratorium on these activities was necessary. In fact, the document discloses in many sections that road construction and timber harvest in roadless areas has declined significantly in the past decade. What is the urgency when projected development would equate to less than one half of one percent of all roadless acres in the United States during the eighteen-month period? (County Elected Official, Sheridan, WY - #51045)

Part 1502.13 Alternatives including the proposed action. This section is the heart of the environmental impact statement...it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision-maker and public. In this section, agencies shall:

(a) Rigorously explore and objectively evaluate all reasonable alternatives...

FOREST SERVICE DRAFT EIS--This requirement of NEPA assures that the analysis in the document leads to a clear basis for choice. However, the analysis must be objectively evaluated--which in this case it is not. The document is peppered with numerous subjective, biased, and prejudicial statements. (County Elected Official, Sheridan, WY - #51045.54100)

PART 1506--OTHER REQUIREMENTS OF NEPA 1506.1 Limitations on actions during NEPA process.

(a) Until an agency issues a record of decision, no action concerning the proposal shall be taken which would:

(2) Limit the choice of reasonable alternatives.

(c) While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

FOREST SERVICE DRAFT EIS--Refer to comments under Part 1502.2, Implementation. (County Elected Official, Sheridan, WY - #51045.54100)

This entire effort is pre-decisional and in total violation of NEPA. If the original direction wasn't evidence enough of this being a pre-decisional effort, Vice President Gore stated on Tuesday, May 30th, "And just so I'm crystal clear about it: No new road building and no timber sales in the roadless areas of our national forests" (The Spokesman-Review, Wednesday, May 31, 2000). IT IS VERY CLEAR THAT THE ADMINISTRATION HAS ALREADY DETERMINED WHAT THE OUTCOME OF THIS EFFORT WILL BE AND THAT DECISION IS "PRE-DECISIONAL" IN THE CONTEXT OF LAW. (Individual, Colville, WA - #13519.54100)

The DEIS fails NEPA by not providing a full disclosure of potential impacts to the public. Consultation with other agencies, states, and tribal governments was not complete prior to issuance of the DEIS. Benefits of the proposed rule are inflated based on subjective reasoning, costs of the proposed rule are extremely deflated and based on speculative reasoning. There is scant evidence in the DEIS that the Forest Service has truly done any analysis that objectively considers the long term impacts of this proposal. (Individual, Anchorage, AK - #43199.54100)

Public Concern: The Forest Service should comply with the Council on Environmental Quality regulations.

The next item that concerns us is the flagrant abuse of the law. This draft EIS fails to meet the basic Council on Environmental Quality Regulations concerning the National Environmental Policy Act. I could name sixteen to twenty violations and I would just be getting started. This will be addressed in our "White Paper. (County Agency, Lander, WY - #13193.54100)

BY PROVIDING ACCURATE SCIENTIFIC ANALYSIS

The regulations promulgated by the Council on Environmental Quality (CEQ) under NEPA call for "accurate scientific analysis" (40 C.F.R. [section] 1500.1(b)) and "scientific integrity" (40 C.F.R. [section]1502.24) in the analytical process. We question the Forest Service's adherence to these regulations. (Environmental/Preservation Organization, Plymouth, MN - #15909.82000)

Most of the environmental consequences discussions are merely a recitation or continuation of the Affected Environment. This creates a document without much substance on impacts and is considered "verbose" under CEQ Regulation 1502.15. In addition, the discussions are rarely supported by evidence to determine the magnitude of the effects. (County Elected Official, Sheridan, WY - #16187.82000)

The DEIS's statement (analysis of the alternatives' effects on Wilderness) provides no underlying data or scientific references for the assumption that "timber harvest allowed in inventoried roadless areas enhance vegetative health and reduce fuel loading, thereby providing protection from pest, disease, and catastrophic wildfires spreading into designated wilderness (3-139). In fact, this statement can be refuted in most scientific literature. (Environmental/Preservation Organization, Cave Junction, OR - #16188.82000)

BY NOT CREATING A "VERBOSE" DOCUMENT

Most of the environmental consequences discussions are merely a recitation or continuation of the Affected Environment. This creates a document without much substance on impacts and is considered "verbose" under CEQ Regulation 1502.15. (County Elected Official, Sheridan, WY - #51045.54100)

Part 1502.15 Affected environment. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

FOREST SERVICE DRAFT EIS--The document contains many verbose descriptions of the affected environment that lack substance and objectivity. More quantitative information would have provided a much less verbose narrative. Another problem is that much of the information included in the effects section of each alternative is merely a continuation of the descriptions in the affected environment. (County Elected Official, Sheridan, WY - #51045.54100)

These excessively verbose sections are theoretical and speculative in violation of NEPA. (Individual, Whitefish, MT - #30417.54100)

Public Concern: The Forest Service should comply with the environmental standards of the National Environmental Policy Act by restricting motorized recreation on public lands.

The National Environmental Policy Act calls for federal agencies to help achieve national objectives which include..."Assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings." It is a violation of NEPA to allow motorized recreation in public lands plain and simple insofar as the use of these technological consumer toys destroys the aesthetics of the public settings in which they are operated. The Forest Service (and BLM) have been saying for the past 20 years that motorized recreation is a "legitimate" form of recreation. Society is increasingly challenging that assertion. Where is the NEPA documentation that

brought the public land managing agencies to the finding that it is legitimate to allow so few to willfully damage the aesthetic experience of so many? It does not exist! (Individual, Murphys, CA - #2972.91610)

Public Concern: Forest level decisions regarding the proposed rule should be subject to National Environmental Policy Act review and comment.

And finally, it must also be made clear in the final rule that all decisions regarding roadless areas made at the project and forest planning level including decisions regarding the status of inventoried roadless areas and unroaded areas and their suitability as wilderness, will be subject to full National Environmental Policy Act (NEPA) review and comment. (Environmental/Preservation Organization, Grants Pass, OR - #29018.54100)

Public Concern: The Forest Service should eliminate references to spiritual renewal in National Environmental Policy Act documents.

You also make references to spiritual renewal, which is completely out of line in a NEPA document. One man's junk is another man's treasure. While one person may find spiritual renewal in hiking to a remote area, another, perhaps elderly or disabled person, may only be able to find personal renewal by being able to drive to a scenic spot to relax and meditate. You are catering to elitism. (Individual, Challis, ID - #8034.10213)

Public Concern: The Forest Service should support legislation amending the National Environmental Policy Act.

That the Legislature of the State of South Dakota strongly encourages the Congress of the United States to expeditiously pass legislation amending the "National Environmental Protection Act" to allow small timber sales of the scale previously allowed by the Forest Service under categorical exclusion to be exempted from environmental assessment and impact statements to which larger timber sales are subjected. (State Elected Official or Staff, Pierre, SD - #27189.54100)

Public Concern: The Forest Service should clarify whether the National Environmental Policy Act process is unconstitutional.

The NEPA process is unconstitutional based on the following data: The National Environmental Policy Act does not provide for due process and operates outside of the Constitution. There are no provisions for just compensation. If anything, it only provided color of law. Under the common law right of due process and the Constitution, a statute must be reasonably expected to correct the evil prescribed. *McInerney v Ervin* (Fla.) 46 So 839. There must always be an obvious and real connection between the actual provisions of a regulation and its avowed purpose. Under the process, any action must be based upon the findings of fact and conclusion of law. Under the NEPA process, the agencies are not required to base their decisions or actions on the finding of facts or conclusion of law. (County Elected Official, Elko, NV - #17274.54100)

3.2.2 Endangered Species Act

Several respondents contend the proposed rule compromises the legal requirements of the Endangered Species Act (ESA). These respondents charge that the term “action” under the ESA includes “the promulgation of regulations.” One individual claims the Forest Service failed to consult with other agencies over endangered species. “The Endangered Species Act requires federal agencies to formally consult with the National Marine Fisheries Service and the Fish and Wildlife Service if any action may affect listed species or critical habitat,” proclaims this individual.

Public Concern: The Forest Service should comply with the Endangered Species Act.

DOES NOT COMPLY WITH THE ENDANGERED SPECIES ACT

The ESA requires the Forest Service to complete formal consultation before the final rule is adopted. The Endangered Species Act requires federal agencies to formally consult with the National Marine Fisheries Service and the Fish and Wildlife Service if any action may affect listed species or critical habitat. 50 C.F.R. [SEC.] 402.14(a). “Action” includes the promulgation of regulations. 50 C.F.R. [SEC.] 402.02. Formal consultation is required because the proposed regulation prohibiting entry into roadless areas may adversely affect listed species or the critical habitat.

Several examples demonstrate the need for formal consultation. First, the Canadian lynx was recently listed under the Endangered Species Act. The snowshoe hare is a major part of the lynx’s diet. The snowshoe hare are abundant in early successional forests. Any limitation on timber harvest in roadless areas through direct prohibition or indirectly through limiting road construction will adversely affect the creation of habitat that favors production of food for lynx. In addition, the increased threat of wildfire and the erosion from catastrophic wildfires will affect listed fish species and may adversely affect critical habitat for red-cockaded woodpeckers and spotted owls in the Eastern slopes of the Cascades. Because the rule will adversely affect endangered species, formal consultation with NFMS and FWS must be completed before the final rule is adopted. (Timber Company or Association, Eugene, OR - #15879.54100)

3.2.3 Other

A few respondents advocate that the proposed rule should clarify whether state or federal governments have jurisdiction over environmental compliance of off-highway vehicle grants. These individuals assert that state/federal OHV collaboration inevitably ends with each agency claiming the other is responsible for compliance with environmental laws. Furthermore, asserts one individual, because many OHV projects are federal grantees, they claim exemption from environmental review, leaving enforcement of the federal environmental laws to legal action by local residents. In addition to the above concern, one mining group requests that the proposed rule consider interaction of Class I areas under the Clean Air Act.

Public Concern: The proposed rule should clarify whether state or federal governments have jurisdiction over environmental compliance of off-highway vehicle grants.

The state/federal OHV collaboration results in deliberate legal jurisdictional confusion. Federal agencies and the state each claim the other agency is responsible for compliance with state and federal environmental laws. Although all state-funded OHV projects are required to comply with the California Environmental Quality Act (CEQA), with rare exceptions, federal grantees claim their OHV grants are exempt from environmental review. As a result, compliance with the National Environmental Policy Act (NEPA) and California Environmental Quality Act (CEQA) may occur only when environmentalists or local residents threaten, or take, legal action. (Individual, Moreno Valley, CA - #13912.50000)

Public Concern: The Forest service should address the interaction of the proposed rule with Class 1 areas under the Clean Air Act.

The DEIS does not adequately address the interaction of Class I Areas under the Clean Air Act and the proposed rule. (Mining/Oil Company or Organization, Reno, NV - #15907.54200)

3.3 Federal Land Management Acts/Laws

This section deals with public concerns that address federal land management acts and laws. Concerns are broken down into the following subsections: Subsection 3.3.1 Federal Land Policy Management Act; Subsection 3.3.2 Multiple-Use and Organic Acts; Subsection 3.3.3 National Forest Management Act and Renewable Resources Planning Act; Subsection 3.3.4 Wilderness Acts; Subsection 3.3.5 Revised Statute 2477; Subsection 3.3.6 Alaska Concerns; Subsection 3.3.7 Other Acts; Subsection 3.3.8 Establish Review Panels.

3.3.1 Federal Land Policy Management Act

Many individuals are concerned that the proposed rule violates the Federal Land Policy and Management Act (FLPMA). These individuals state that the “Finding of No Significant Impact is ridiculous and absurd,” because the proposal constitutes a “withdrawal” and requires a “complete inventory and evaluation of the resources,” “an economic analysis,” and a description of “effects on state and local governments and on the local economy,” among other things. Furthermore, the withdrawal of more than 5,000 acres of land from public use requires the agency to “notify both Houses of Congress prior to withdrawal.” One county elected official requests the Forest Service consider the county’s general plan. In addition, a utility group requests the Forest Service consider utility corridors during planning in order to comply with FLPMA.

Public Concern: The Forest Service should address the proposed rule's violation of the Federal Land Policy and Management Act.

The Secretary of the Department of Agriculture and his staff violated the conditions of Chapter 35, Sec. 1714 of Title 24-Public Lands. This section of the Federal Land Policy and Management Act requires the Secretary to notify both Houses of Congress prior to withdrawal in aggregate, of more than 5,000 acres of land from public use. (Recreational Organization, Barre, VT - #9260.53300)

The Forest Service's Finding of no Significant Impact (FONSI) is ridiculous and absurd. This proposal is a withdrawal, and under the Federal Land Policy and Management Act (FLPMA of 1976), requires a complete report containing the following: a. Complete inventory and evaluation of the resources. b. Identification of present users and how they will be affected. c. An economic analysis. d. Effects on States, local governments, and local communities. e. A total mineral report, existing and future potential. (Individual, Cortez, CO - #15930.53300)

The proposed rule and other alternatives constitute a "withdrawal" under the FEDERAL LAND POLICY & MANAGEMENT ACT of 1976 (FLPMA), Section 204. A complete Section 204(c)(2) report will be required of USDA - Forest Service. The Draft EIS is wholly inadequate under the mandates of FLPMA Section 204(c)(2). Among other things the Draft EIS fails to provide a complete inventory and evaluation [204(c)(2)(2)]; the identification of present users and how they will be effected [204(c)(2)(3)]; an economic analysis [204(c)(2)(4)]; the consultations with other interested parties [204(c)(2)(7)]; a clear statement of the effects on State and local governments and on the local economy [204(c)(2)(8)]; and a report by a qualified mineral expert as to the general geology, known mineral deposits, past and present mineral production, mining claims, mineral leases, evaluation of future mineral potential, and present and potential market demands. Likewise, this same insufficiency leaves any comment in want of substantive information. Alternative 1 leaves the 54 million acres of undefined roadless areas in their status quo condition, and reduces the phenomenal expenditure of time and financial resources needed to complete and file the FLPMA 204(c)(2) report within the time period required by law. (Individual, Lakemont, GA - #14719.53300)

Public Concern: The proposed rule should comply with the Federal Land Policy and Management Act of 1976.

BY COORDINATING PLANS WITH OTHER AGENCIES, STATES, AND LOCAL GOVERNMENTS

The Federal Land Policy and Management Act of 1976 Sec. 202 requires the Secretary to coordinate the land use inventory, planning, and management of such lands with other agencies, States, and local governments. "Land use plans of the secretary under this section shall be consistent with State and local plans to the maximum extent he finds consistent with Federal law and the purposes of this Act." These laws are being ignored. Uintah County has a general plan, which has not been considered, by either the Bureau of Land Management nor the National Forest Service in recent decision-making processes. (County Elected Official, Vernal, UT - #43973.53300)

BY ESTABLISHING UTILITY PLANNING CORRIDORS

FLPMA requires consideration of designated utility corridors in forest planning. See FLPMA Section 503, 43 U.S.C. [section] 1763. In determining whether to designate utility planning corridors, FLPMA requires the Forest Service to consider such issues as national and state land use policies, environmental quality, economic efficiency, national security, safety, and good engineering and technological practices. Id. The rationale behind this statutory mandate is to "minimize adverse environmental impacts and the proliferation of separate rights-of-way" by establishing utility planning corridors on national forest system lands. Id. (Utility Group or Organization, No Address - #43981.53300)

3.3.2 Multiple-Use and Organic Acts

Several individuals claim the proposed rule violates the Multiple Use and Sustained Yield Act (MUSYA), which requires the secretary to “administer the land ‘without impairment of the productivity of the land.’” These individuals further attest that “it would make little sense for land to be productive when it is unaccessible.” One county agent supports a multiple use concept that includes “the sustained production of timber, watershed protection, fire protection, recreation and wildlife habitat.” A business group advocates MUSYA’s policy that considers “the relative values of the various resources in particular areas.” Several mining organizations denounce the proposed rule for taking the consideration of “the relative values of the various resources in particular areas” a step too far. These organizations believe the proposed rule elevates “one resource (i.e., environmental resources) over all others.” In contrast, recreational groups and environmental groups believe the non-impairment standard of MUSYA “requires that there be places where these resources [wildlife, fish habitat, water quality, recreation and wilderness] are preeminent.” Some respondents believe MUSYA requires an area-by-area analysis. Several other respondents agree that national forests should be managed for the original purpose for which they were formed: as stated in the Organic Act, national forests were established for the purpose of securing favorable conditions of water flows and to furnish a continuous supply of timber.

Public Concern: The Forest Service should comply with the Multiple Use and Sustained Yield Act.

The DEIS cites to the MUSYA and states that the Secretary is supposed to administer the land “without impairment of the productivity of the land.” A-7. This statement is arguably contradictory with the roadless initiative, as the purpose of the MUSYA is to ensure that the land remains productive. It would make little sense for land to be productive when it is unaccessible. The statute specifically calls for management of the resources, it would appear that management would be more difficult without roads. Multiple use and sustained yield would be almost impossible without roadways. (County Agency, Duluth, MN - #17287.53100)

The Vilas County Board of Supervisors supports forest management policies which assure the National Forests in Wisconsin and throughout the United States are managed under the concept of multiple use to provide the sustained production of timber, watershed protection, fire protection, recreation, and wildlife habitat as stated in the Organic Act of 1897, the Weeks Act of 1911, the Clark-McNary Act of 1924, the Multiple-Use Sustained Yield Act, and the National Forests Management Act. (County Agency, Eagle River, WI - #10679.50000)

This massive “lock-up” of resources is contrary to the multiple use and sustained yield mandate for the National Forest System. The rulemaking, by preventing the construction of roads needed to access timber, minerals, and grazing resources, essentially locks up 28% of the National Forest System for preservationist uses or non-uses. However, under the Multiple-Use Sustained-Yield Act of 1960 (“MUSYA”), the Secretary of Agriculture is “directed to develop and administer the renewable surface resources for the national forests for multiple use and sustained yield of the several products and services obtained therefrom.” 16 U.S.C. 529. MUSYA defines “sustained yield” as the “achievement...of a high-level annual or regular periodic output of the various renewable resources.” 16 U.S.C. 532. The NFMA did not alter this sustained-yield mandate, as it directs that the “Secretary shall...provide for multiple use and sustained yield of the products...in accordance with the Multiple-Use Sustained-Yield Act of 1960.” 16 U.S.C. 1604(e)(i); see id. Sec. 1604(m), 1607, 1611 (other NFMA provisions illustrating the timber production intent). (Timber Company or Association, Kalispell, MT - #53304.53100)

The Forest Service proposed to substitute sustainability as the guiding principal for management actions through these proposed planning regulations, yet we can find little reference to this concept in current law. While we believe

sustainability is the right goal for the national forests, we do not believe it is the purpose of the national forests. It is a goal to guide how we manage, not what we manage to achieve. As a nation, we have promised the international community that all of our forests, public and private, would be managed sustainably by the year 2000. This is not to say that they will all be managed for the same purpose. Industrial forests will be managed for very different purposes than Wilderness areas, but both will be managed sustainably. This is why we believe the purposes of the national forests and public lands should be clarified. As a nation we know we want all of our forests managed sustainably, but SAF believes that as a nation, we have not agreed on what we are managing for on the national forests and public lands.

Based on our belief that the Forest Service is changing its mission through regulatory action and misinterpreting legislative mandates, if the Forest Service adopts these rules, they might be in violation of the Organic Administration Act of 1897 (16 U.S.C. 475), the Multiple-Use Sustained-Yield Act of 1960 (16 U.S.C. 528-31), and the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 and other laws (16 U.S.C. 1600-14). *BOWEN V. GEORGETOWN HOSPITAL*, 488 U.S. 204, 208 (1988), *UNITED STATES V. LARIONOFF*, 43 (U.S. 864, 873 n.1 (1977) and other court cases ruled that an agency's power to promulgate regulations is limited to the authority delegated by Congress. The new mandate the Forest Service wishes to give itself is not within the authority delegated by Congress. (Mining/Oil Company or Organization, Denver, CO - #29952.53000)

[T]he initiative will better fulfill the Forest Service's mandates under the Multiple Use and Sustained Yield Act and the National Forest Management Act than the current regime does where too many areas are open to road building. This is because the initiative will insure that the many uses, values, and qualities associated with roadless and unroaded areas (including watershed protection and protection of ecological and forest diversity) will be protected, or at least considered. (Environmental/Preservation Organization, Logan, UT - #16941.53100)

BY CONSIDERING THE VALUES OF ALL RESOURCES

MUSYA REQUIRES THAT "CONSIDERATION SHALL BE GIVEN TO THE RELATIVE VALUES OF THE VARIOUS RESOURCES IN PARTICULAR AREAS." 16 U.S.C. 529. MUSYA's legislative history amplifies that, in particular or localized areas relative values of the various resources will be recognized....In practice, the priority of resource use will vary locality by locality and case by case. In one locality timber use might dominate; in another locality use of range by livestock; in another outdoor recreation or wildlife might dominate. Thus, in particular localities the various resource uses might be given priorities because of particular circumstances. This is the meaning of the last sentence of section 2 of the bill [16 U.S.C 529]. (Business, Washington, DC - #29962.53100)

BY NOT ELEVATING ONE RESOURCE OVER ANY OTHERS

While the Forest Service is permitted under the MUSYA to prefer some uses over others based on relative resource values in particular areas, the Forest Service cannot, in a proposal that would impact the entire National Forest System, elevate one resource (i.e., environmental resources) over all others. The Forest Service's proposal would do exactly what Congress determined not to do--"upgrade" one resource over all others. (Mining Association, Reno, NV - #15907.53100)

The Forest Service's proposal would do exactly what Congress determined must not be done--give priority to and upgrade one resource over all others. The Forest Service cannot defend the proposed action as passing muster under its multiple use mandate by asserting that the proposal merely prohibits roads, not activities, because the practical implication of the road prohibition is that mineral exploration and mining activities will not be able to go forward. (Mining/Oil Company or Organization, Washington, DC - #52224.53100)

BY MEETING THE NON-IMPAIRMENT STANDARD

It is hard to believe that the principle of sustained yield and the non-impairment standard of the Multiple Use Sustained Yield Act contemplated the cutting over of all forests lands and then starting over again! MUSYA clearly requires a multiple use approach which also values wildlife, fish habitat, water quality, recreation and wilderness. MUSYA also requires that there be places where these resources are preminent. The non-impairment standard of

MUSYA requires that these areas be maintained to retain these resources which are otherwise unavailable or threatened by timber harvest. (Recreational Organization, Missoula, MT - #17896.53100)

BY COMPLETING AN AREA-BY-AREA ANALYSIS

THE PROPOSED RULE AND DEIS VIOLATE REQUIREMENTS FOR ROADLESS AREA-BY-AREA ANALYSES. The NFMA and Multiple-Use Sustained-Yield Act (“MUSYA”) require a roadless area-by-area analysis of the impacts of permanent roadless area designation and an area-by-area analysis of whether this truly maximizes multiple use benefits. (Timber Association, Eugene, OR - #15879.53000)

Public Concern: The Forest Service should manage the forests for watershed and timber extraction, as mandated by the Organic Act.

On a national level, the 1897 Organic Administration Act states that “no national forest shall be established except...for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States.”

We are aware that later statutes added to the multiple uses for which national forests may be managed, and also directed that timber harvesting be done in an environmentally responsible way. Those statutes did not, however, alter the primary principles of watershed protection and timber production established by Congress.

(Business/Business Association, Glen Falls, NY - #2755.53200)

Comment: Page 1-2, 2nd paragraph--This paragraph is misleading. The first sentence states that “Watershed protection is one of the key reasons National Forests were created.” This is not true. The Organic Act of June 4, 1897 states “No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows...” Favorable conditions for water flows means water quantity, not quality. The Act further states that “All waters within the boundaries of national forests may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such national forests are situated.” The role of protecting watersheds came later with passage of other laws.

Relief: These statements need to be clarified to represent an accurate reflection of the laws governing creation of the national forests. (Municipal Association, Cheyenne, WY - #15902.53200)

As the United States Supreme Court has held:

The legislative debates surrounding the Organic Administration Act of 1897 and its predecessor bills demonstrate that Congress intended national forests to be reserved for two purposes--”to conserve water flows and to furnish a continuous supply of timber for the people . . . NATIONAL FORESTS WERE NOT RESERVED FOR AESTHETIC, ENVIRONMENTAL, RECREATIONAL OR WILDLIFE PRESERVATION PURPOSES.” UNITED STATES V. NEW MEXICO, 438 U.S. 696, 707-08 (1978) (emphasis added). Neither the proposed rule nor the accompanying DEIS discuss the conflicts between the proposed policy, the aforementioned statutory framework governing the Forest Service’s activities, and the Supreme Court’s interpretation of those statutes. (Business/Business Association, No Address - #43736.53200)

3.3.3 National Forest Management Act and Renewable Resources Planning Act

This section includes comments on the Transfer Act, the Renewable Resources Planning Act (RPA), the National Forest Management Act (NFMA), and the Planning Regulations. One individual claims the proposed rule violates the Transfer Act. Several respondents contend the proposed rule violates the “integrated planning process” of RPA. One professional society alleges it further violates RPA because revisions of Land and Resource Management Plans have not been coordinated with “the land and resource management planning process of state and local government.”

Many respondents declare the proposed rule violates NFMA by “attempting to usurp the authority of the NFMA planning process.” These respondents agree with congressional conclusions about NFMA that it is “‘unwise to legislate national prescriptions’ for all national forests because of the ‘wide range of climatic conditions, topography, geologic and soil types.’” In addition to concerns that the proposed rule tries to usurp local authority over forest planning, many respondents express concern that NFMA is being violated in other ways. Several respondents agree that general rulemaking authority does “not eliminate the more specific requirements of NFMA.” Furthermore, many respondents declare the proposed rule “violates the NFMA restriction that resource plans must be consistent with forest plans.” Moreover, these respondents accuse the Forest Service of violating “the NFMA requirement for one integrated plan . . . for each national forest which “incorporate[s] in one document . . . all of the features required by NFMA.”” A few respondents further attest that “NFMA requires long range planning” be completed on a national forest level.

Many people express concern that the proposed rule violates the consultation and coordination requirements of NFMA. A few respondents claim the Forest Service violated NFMA by not fully informing Congress of the proposed rule before it was released for comment. Several groups and individuals denounce the proposed rule for its lack of coordination with stakeholders, tribes and Native Alaskans, and with other public planning efforts as required by NFMA. Respondents claim the proposed rule violates the NFMA regulations which require the agency “to provide for meaningful public participation,” and “to give the public at least 30 days prior notice for all public participation activities.” One group claims the Forest Service prevented “meaningful public participation” by rural persons.

A few respondents claim the Forest Service violates NFMA by not securing the views of a Committee of Scientists. Several individuals assert the proposed rule constitutes a “significant change in planning direction for 28% of the National Forest System” and requires “compliance with NFMA procedures for ‘significant’ plan amendments.” Reduced timber harvest is one specific “significant” change mentioned by a few individuals.

Respondents express contrasting viewpoints on the environmental protection requirements of NFMA. Many timber industries believe that, per NFMA, the Forest Service has a “statutory duty” to “determine . . . harvesting levels,” and claim further that the proposed rule will reduce the “‘critical’ timber sale level promised by forest plans,” thereby violating NFMA. On the other hand many environmental organizations believe the Forest Service has “legal obligations to protect watersheds, provide for a diversity of plant and animal species, and maintain viable populations of species that are sensitive to human disturbance.” These respondents believe the roadless initiative will help the Forest Service meet these legal requirements. Respondents also express contrasting viewpoints relative to maintaining roadway standards. A few respondents feel “it is reasonable and necessary for the USFS to prohibit new road construction in the roadless areas,” inasmuch as continuing to build roads, without funding available to properly maintain them, would violate the agency’s obligation to properly manage National Forest System lands. Other respondents feel the Forest Service should “either comply with the existing law and/or reexamine road design standards” rather than limit multiple use management.

One group believes the NFMA planning process “must be followed to preserve a roadless area or recommend Wilderness designation.” Additionally, several respondents request that the proposed rule comply with the planning regulations by completing site-specific analysis, providing scientific analysis, and by consulting a committee of scientists. Finally, a few members of the public request the proposed rule use the current planning regulations’ criteria for evaluating roadless areas.

Public Concern: The proposed rule should comply with The Transfer Act.

Any other proposal [than the no action alternative] violates all laws passed by Congress for management of the National Forest System including: The Transfer Act. (Individual, Soda Springs, ID - #43484.50000)

Public Concern: The Forest Service should meet the requirements of the Renewable Resources Planning Act and its supporting regulations.

All of the alternatives, except for the non action alternative violate the Forest and Rangelands Renewable Resources Planning Act (RPA) and its supporting regulations. For example, Section 6 (a) of the Act requires that the Agency coordinate revisions of land and resource management plans with the land and resource management planning process of State and local governments. This has not been done. In addition, 36 CFR 219.7 (d) requires the Agency to meet with representatives of local governments “at the beginning of the planning process to develop procedures for coordination.” The Agency has been neglectful here, too. (Professional Society, No Address - #18172.44000)

The proposed rule violates the “integrated planning process” set forth in the Forest and Rangelands Renewable Resources Planning Act. (County Elected Official, Colusa, CA - #17259.53000)

The RPA provides that a Forest Plan may “be amended in any manner whatsoever after final adoption after public notice.” 16 U.S.C. [section] 1604(f)(4). Because the Proposed Rule precludes Forest Supervisors from reconsidering or setting aside the nationwide prohibition, it contravenes this general statutory standard governing periodic changes in forest planning. (Utility Group or Organization, No Address - #43981.53000)

Public Concern: The Forest Service should respect local planning processes, as mandated by the National Forest Management Act.

We believe a more professional approach would be to refer final decisions for roadless area management to NFMA, Forest Plan revisions, so that local input would be made for specific roadless areas that gives careful consideration to the management of all resource values. Under this plan many of the inventoried roadless areas would remain, but some areas would allow for the desired management of other resources with some temporary or low standard roads that could be “put to bed” if necessary. Resource values such as developed and dispersed recreation, access to back country and other property, travel management, timber management and stand sanitation, wildlife, range, watershed, diversity of biological communities with a range of vegetative age classes, fire control, etc., would be evaluated. (Recreational Organization, Bozeman, MT - #7512.41240)

We employees are skeptical of Washington bureaucrats’ attitude that they know what is best for the rest of us. We are concerned that the Roadless Area Initiative is not being processed as prescribed in the National Forest Management Act (NFMA) or the Wilderness Act. Many of the National Forests are in the process of revising their Forest Plans. This latest initiative has brought some local Forest planning teams to a halt. It appears that the Roadless Area Initiative is attempting to usurp the authority of the NFMA planning process. NFMA planning is based on the premise that decision-making for local areas should be made with site-specific, scientific information for that particular area. But the Roadless Area Initiative is a “one plan fits all” prescription

and lumps 54 million acres together that are obviously quite different, both in physical aspects and in social/cultural dimensions. (Professional Society, Park Falls, WI - #43991.53800)

The NFMA similarly recognizes the need to consider relative values and local conditions. In the NFMA, Congress concluded that it was “unwise to legislate national prescriptions” for all national forests because of the “wide range of climatic conditions, topography, geologic and soil types,” and different local perspectives on appropriate land uses in a particular national forest. (Timber Company or Association, Kalispell, MT - #53304.53800)

The NFMA gives the “resource manager the flexibility, through the planning process, to determine ‘how’ this direction can best be met on a specific land area with the opportunity to change or modify the management prescription based on new knowledge.” S. Rep. No. 94-8993, at 26, 1976 U.S.C.C.A.N. 6685. This flexibility to provide direction in an individual forest plan and to modify direction (as the public interest changes) through plan revisions and amendments is reflected throughout 16 U.S.C. 1604(a)-(k).

Contrary to the [subsection] 1604(f) and (f)(5) direction that perceived changes in net public benefits be addressed through plan amendments and revisions (which themselves can be amended over time), the rulemaking would establish a permanent roadless area policy. Since [subsection] 294.12(a) permanently dictates the future of 28% of the National Forest System, it is contrary to the NFMA’s design that each Forest Supervisor have the “flexibility, through the planning process, to determine” and alter multiple use direction over time. (Timber Company or Association, Kalispell, MT - #53304.53800)

Public Concern: The proposed rule should comply with the National Forest Management Act.

As explained elsewhere in NFA’s comments, the roadless rule fails to comply with the National Forest Management Act because it results in a significant amendment or revision to the Forest Plans. The Oregon and Washington Wilderness Acts lend further support to the NFMA violation because they specifically direct that management for the released roadless areas be determined through the NFMA Forest Plans. (Timber Company or Association, Eugene, OR - #15879.51000)

NFMA makes the land and resource management plan the focal point for management of each national forest. The roadless initiative makes a mockery of the NFMA. The initiative would override most of the 124 forest plans the agency has prepared at great public expense. (Timber Company or Association, Eugene, OR - #15879.53800)

I object to the President’s “roadless area” initiative, banning road construction or maintenance of existing roads, primarily because it is unconstitutional. Art. I sets forth that Congress only has the power to make laws, or to rescind laws, not the administrative branch. Therefore the President’s action is illegal for it changes, indeed nullifies 16 USC 1600 Sec. 6 (e)(i). (Individual, Hot Springs, SD - #18429.52000)

Contrary to the [section] 1604(f)(4) and (f)(5) direction that perceived changes in net public benefits be addressed through plan amendments and revisions (which themselves can be amended over time), the rulemaking would establish a permanent roadless area policy. Since [section] 294.12(a) permanently dictates that each Forest Supervisor have the “flexibility, through the planning process, to determine” and alter multiple use direction over time. (Timber Company or Association, Eugene, OR - #15879.53800)

BY RECOGNIZING THAT RULEMAKING AUTHORITY DOES NOT NEGATE NATIONAL FOREST MANAGEMENT ACT REQUIREMENTS

GENERAL RULEMAKING AUTHORITIES LIKE 16 U.S.C. 551 DO NOT ELIMINATE THE MORE SPECIFIC REQUIREMENTS OF THE NFMA. The Forest Service has proposed, “forest plan amendments would not be required when the final rule becomes effective.” 65 Fed. Reg. 30283. This is based on the rationale that existing “forest plan direction can be superseded by new laws and regulations.” ID. This rationale is mistaken for two reasons. 1) First, while the [section] 294.14 regulation might be able to supersede the forest planning regulations in 36 C.F.R. Part 219, a regulation cannot supersede or negate the NFMA’s STATUTORY requirements for consistency with forest plans, plan amendments with site-specific analysis and public review, etc. An “agency’s power to promulgate legislative regulations is limited to the authority delegated by Congress.” BOWEN V. GEORGETOWN UNIV. HOSPITAL, 488 U.S. 204, 208 (1988). “A regulation which...operates to create a rule out of harmony with the statute, is a mere nullity.” UNITED STATES V. LARIONOFF, 431 U.S. 864, 873 n.12 (1977). Thus, the roadless area rulemaking is a mere nullity unless the Forest Service complies with the NFMA and Statewide Wilderness Act requirements described above (e.g., by conducting a roadless area-by-area review before adopting any forest plan amendment). (Timber Company or Association, Eugene, OR - #15879.53200)

The NFMA is a “single, COMPREHENSIVE piece of legislation, which provides the “framework for the development and implementation of management plans developed through an interdisciplinary approach.” S. Rep. No. 94-893, at 10, 1976 U.S.C.C.A.N. 6671 (emphasis added). Since the NFMA provides comprehensive direction on the controlling nature of a forest plan and the consistency and plan amendment requirements, the more general rulemaking authorities do not authorize rules, which negate NFMA requirements. (Timber Company or Association, Eugene, OR - #15879.53200)

FAUSTO applies with persuasive force “where the scope of the earlier statute is broad but the subsequent statutes more specifically address the topic at hand.” FDA V. BROWN & WILLIAMSON, 120 S. Ct. at 1306. SEE ALSO AMERICAN PETROLEUM INST. V. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (“EPA cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of EPA in a particular area”). Here, though [section] 551 does not provide broad rulemaking authority in contexts not involving forest plans, the more specific NFMA remains controlling on forest plan consistency and plan amendment requirements. A third principle is that, where two “provisions cannot be reconciled,...the more specific will take precedence over the more general.” BUSIC V. UNITED STATES, 446 U.S. 398, 406 (1980). Thus, if there were a conflict between 16 U.S.C. 551 and 1604, the more specific NFMA duties on plan amendments take precedence and remain operative legal requirements. In sum, controlling statutory interpretation principles require compliance with BOTH [section] 551 and the NFMA/Statewide Wilderness Acts and other laws. While [section] 551 may allow rulemaking, it does not eliminate the NFMA/Statewide Wilderness Act duties to act consistently with forest plans or to complete a plan amendment before implementing a roadless area rule, which is inconsistent with a forest plan. (Timber Company or Association, Eugene, OR - #15879.53200)

BY MEETING CONSISTENCY REQUIREMENTS OF THE NATIONAL FOREST MANAGEMENT ACT

THE RULEMAKING VIOLATES THE NFMA RESTRICTION THAT RESOURCE PLANS MUST BE CONSISTENT WITH FOREST PLANS. The NFMA requires that, once the governing forest plan has been prepared at great public expense, all “resource plans...and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.” 16 U.S.C. 1604(i). The rulemaking is a “resource plan” within the meaning of [section] 1604(i) because it provides a long-term resource plan (no roads) for 54.3 million acres of inventoried roadless areas in the National Forest System. The rulemaking also is subject to the [section] 1604(i) “consistency” requirement because the rulemaking would control the “use and occupancy” of roadless areas. (Timber Company or Association, Eugene, OR - #15879.53800)

Since decisions on the future of each roadless area were made in each forest plan, any change in decisions regarding roadless areas must be made through the forest planning process (by a plan amendment or revision). The rulemaking would alter the multiple use allocations for over 17% of the National Forest System by precluding roads in areas where roads are permitted under the forest plan and by re-balancing multiple uses in favor of primitive recreation. Since this dramatic change in land use allocation and prescribed multiple uses is not consistent with the forest plans, adoption and immediate implementation of the rulemaking would violate the “consistency” requirement

of the NFMA. The “Forest Service cannot ignore the requirements of the Forest Plan” due to the “consistency” language in 16 U.S.C. 1604(i). (Timber Company or Association, Eugene, OR - #15879.53800)

Thus, under the plain language of 1604(i), the roadless area rulemaking could take effect immediately only where it is “consistent” with the 124 forest plans the Forest Service has formally adopted. The rulemaking is inconsistent with the governing forest plans because it would change management direction on “33.8 million acres of inventoried roadless areas” – the acreage where the existing forest plans allow “road building,” but where the rulemaking would override the plans by prohibiting roads and road-dependent multiple uses. 65 Fed. Reg. 30276. This makes the rulemaking inconsistent with forest plans... (Timber Company or Association, Eugene, Kalispell, MT - #53304.53800)

BY CREATING “ONE INTEGRATED PLAN” FOR EACH FOREST

THE PROPOSED RULE VIOLATES THE NFMA REQUIREMENT FOR “ONE INTEGRATED PLAN.” The Forest Service’s refusal to reflect the roadless area direction in the forest plans through plan amendments creates another NFMA violation. The NFMA requires that there be “one integrated plan for each” national forest which “incorporate[s] in one document...all of the features required” by the NFMA. 16 U.S.C. 1604(f)(1). Those features include the “multiple use” allocations between, for example, “timber” uses and “wilderness” (or roadless) experiences. (Timber Company or Association, Eugene, OR - #15879.53200)

The direction for roadless areas must be incorporated into the forest plans to comply with [section] 1604(f)(1). The rulemaking would violate this NFMA duty because the roadless area direction would not be included in any “amendment or revision of any” forest plan. 36 C.F.R. [section] 219.14(b). As a result of this violation, when the public consults the forest plan that is the controlling document under the NFMA, the public will have inaccurate information on the allowed uses on at least 33.8 million acres of the National Forest System. (Timber Company or Association, Eugene, OR - #15879.53800)

BY COMPLETING LONG RANGE FOREST PLANNING AT THE FOREST LEVEL

The DEIS proposal violates NFMA because NFMA was passed to correct the deficiencies found by the Courts from RARE II that functional, single issue decision-making on National Forests nationwide was inefficient and not in the public interest. NFMA requires long range planning to be done on a national Forest-by-National Forest basis using scientific state-of-the-art systematic integrated planning systems, social assessments, and design arts, none of which were applied in this DEIS. (Individual, Whitefish, MT - #30417.53800)

BY INFORMING CONGRESS OF THE ROADLESS INITIATIVE

The Forest Service, by not fully informing Congress in advance (in either the Assessment, the Program, the Program report replacement under the Government Performance and Results Act, or the Statement of Policy) that a major roadless area initiative affecting 28% of the National Forest System would be proposed, has acted contrary to at least the spirit of 16 U.S.C. 1601, 1602, and 1606. (Timber Association, Medford, OR 13658.50000)

BY COORDINATING WITH STAKEHOLDERS

The Forest Service must comply with the NFMA’s procedures for amending forest plans, which require, among other things, that planning activities be coordinated where practicable with owners of lands that are intermingled with or dependent for access upon National Forest System lands. 36 C.F.R. [section] 219.6(k). (Wise Use or Land Rights Organization, Anchorage, AK - #43414.53800)

BY COORDINATING PLANNING EFFORTS WITH TRIBES AND NATIVE ALASKANS

The Forest Service must comply with the NFMA’s procedures for amending forest plans, which require, among other things, that planning activities be coordinated where practicable with owners of lands that are intermingled with or dependent for access upon National Forest System lands. 36 C.F.R. 219.6(k). Coordination with related planning efforts of Indian tribes, which includes Alaska Native Corporations, is mandated by the NFMA’s implementing regulations in any event. SEE 36 C.F.R. [section] 219.7. This coordination includes reviewing

Native planning and land use policies, noting their objectives, impacts, and where they conflict with Forest Service planning, and developing alternatives for resolving such conflicts. ID. [sections] (c)(1)-(4). (Individual, Anchorage, AK - #43199.54100)

BY COORDINATING WITH OTHER PUBLIC PLANNING EFFORTS

Coordination with related planning efforts of Indian Tribes, which includes ALASKA Native Corporations, is mandated by the NFMA's implementing regulations in any event. SEE 36 C.F.R. [section] 219.7. This coordination includes reviewing Native planning and land use policies, noting their objectives, impacts, and where they conflict with Forest Service planning, and developing alternatives for resolving such conflicts. Id. [sub-section] (c)(1)-(4). (Wise Use or Land Rights Organization, Anchorage, AK - #43414.53800)

BY PROVIDING MEANINGFUL PUBLIC PARTICIPATION

The regulations also provide that the Forest Service must give the public at least 30 days' prior notice of all public participation activities conducted in connection with such plan amendments. 36 C.F.R. 219.6(g). (Individual, Anchorage, AK - #43199.54100)

NFMA regulations, developed under 16 U.S.C. [section] 1604(d), require the agency to provide for meaningful public participation in the development, review or revision of a forest plan. (36 C.F.R. 219.6). Contrary to both these regulations, the Forest Service has failed to provide adequate information to the public to meaningfully participate in the scoping process and to have any ability to help define the alternatives considered in the DEIS. (Individual, Anchorage, AK - #43199.54100)

Even if the Forest Service has the authority to amend forest plans by a national-level rulemaking, 36 C.F.R. 219.6(g) requires a 60-day scoping period prior to proposing to amend a regional plan. Since national-level planning is even more significant than regional planning, the Forest Service must provide a comparable scoping period. Accordingly, the scoping period should extend for 60 days from the time the Forest Service provided all the relevant information (e.g., 60 days from identification of the specific areas within each national forest that the Forest Service considers to be covered by the proposed rule.) (Timber Company or Association, Eugene, OR - #15879.53800)

This discrimination is further against rural people, persons without access to computers, persons in certain socio-economic strata and to persons of certain race. These are expensive documents to print, mail and to review. We believe that this situation is in fact part of the intent of the Clinton-Gore Administration. The informational meetings held regarding this DEIS were not in compliance with the legal requirements of NEPA and NFMA. Public involvement by rural persons has been deliberately discouraged with these discriminatory actions. (Business Association, Beaverton, OR - #52230.54500)

BY SECURING THE VIEWS OF A COMMITTEE OF SCIENTISTS

Since the roadless rule does implicate the NFMA and forest planning, the Forest Service also is violating 16 U.S.C. 1604(h) by not securing the views of a "committee of scientists" on this rulemaking. (Timber Company or Association, Eugene, OR - #15879.53800)

BY DEVELOPING AN AMENDMENT FOR SIGNIFICANT CHANGES

The significant change in planning direction for 28% of the National Forest System requires compliance with NFMA procedures for "significant" plan amendments. The NFMA requires more extensive analyses and public consideration before adopting a "significant" change in planning direction. Since this rulemaking would permanently affect the planning direction for 28% of the National Forest System (the prohibition of roads in inventoried roadless areas), the rulemaking clearly makes a significant change in planning direction. Congress has prescribed that, "if such amendment would result in a significant change in such plan, [there must be compliance] with the provisions of subsections (e) and (f) of this section and public involvement comparable to that required by subsection (d)." 16 U.S.C. 1604(f)(4). As 1604(e) and (F) provide, and 36 C.F.R. 219. 11 (f) and 219.12(a) and the Planning Handbook confirm, a proposed significant change in planning direction must first be

assessed through the same process required for developing a forest plan. (Timber Company or Association, Kalispell, MT - #53304.53800) (New Sub)

NFMA requires a significant Forest Plan amendment when Forest Plan outputs are substantially changed. The proposed rule will result in roadless lands becoming unavailable for timber harvest (DEIS, page 184). As a result the allowable sale quantities (ASQ) will be reduced on every Forest with roadless lands being affected by the proposed rule. The DEIS fails to address this requirement. In keeping with NEPA this effect must be displayed in the EIS for each unit (Forest). This information (ASQ by roaded and roadless lands) is readily available on each Forest. This is the real loss of timber opportunity, not some plucked out of the sky figure (DEIS, page 185). (Individual, Great Falls, MT - #28425.53800)

As [section] 1604(e) and (f) provide, and 36 C.F.R. 219.11(f) and 219.12(a) and the Planning Handbook confirm, a proposed significant change in planning direction must first be assessed through the same process required for developing a forest plan. This would include a ROADLESS AREA-BY-AREA ANALYSIS under 36 C.F.R. 219.17-.21 and in an environmental impact statement (“EIS”) to assess: (1) the biological and socio-economic impacts of the proposed change in planning direction on each roadless area (e.g., increased fire risk, loss of the 16 U.S.C. 500 timber revenues that many localities depend on for support of public schools); and (2) whether net public benefits are maximized by keeping a particular roadless area roadless or by allowing road-dependent multiple uses. This site-specific roadless area-by-area analysis is missing in the proposed rule and DEIS. Its absence violates the prescribed NFMA procedures for consideration of significant changes in planning direction. (Timber Company or Association, Eugene, OR - #15879.54000)

BY SETTING TIMBER HARVEST GOALS

The Forest Service can meet its statutory duty that a forest plan “shall...determine...harvesting levels” (16 U.S.C. 1604(e)(2)) only if the plan sets “logging goals” and not merely a ceiling. OHIO FORESTRY ASS’N V. SIERRA CLUB, 523 U.S. 726, 729 (1998). Obviously, a forest plan which merely states an ASQ ceiling amount that the agency does not intend to provide in practice would not permit the private sector to “plan their operations” and does not comply with RESOURCES LTD. (Timber Company or Association, Eugene, OR - #15879.53800)

The NFMA provides that a forest plan “shall...determine... harvesting levels.” 16 U.S.C. 1604(e)(2). The NFMA “assures that timber harvest levels are based on management plans” and are not set outside the context of publicly reviewed plans. S. Rep. No. 94-893, at 37 (1976), reprinted in 1976 U.S.C.C.A.N. 6696. Since only a forest plan can set a timber sale level, and change to a timber sale level requires a plan amendment. E.g., Friends of the Bow v. Thompson, 124 F. 3d 1210, 1214 (10th Cir. 1997) (“the ASQ [the timber sale level] may be modified, but only through a revision [or amendment] of a the forest plan, with full public participation”) (emphasis added): Sierra Club v. Cargill, 11 F.3d 1545, 1547-49 (10th Cir. 1993).

“Proper determination of the [expected level for timber sales], perhaps more than any other element of forest-wide planning, is critical in providing ‘long-term direction’” because portions of the timber industry “plan their operations” and investments in sawmill capacity, etc., based on the expected timber supply from a national forest. Resources Ltd. Inc. v. Robertson, 35 F.2d 1300, 1305 (9th Cir. 1993) Therefore, before the roadless area rulemaking could reduce the “critical” timber sale level promised by forest plans, the agency must consider the impacts of this reduction on local timber-dependent communities in forest plan amendments. Until that occurs, timber “[h]arvest levels are to be based on the currently approved plans.” S. Rep. No 94-893, at 37 (1976), reprinted in 1976 U.S.C.C.A.N. 6696. ((Timber Company or Association, Kalispell, MT - #53304.53800)

BY PROTECTING THE ENVIRONMENT

It is also within the USFS’s authority under the Organic Act and other laws to prohibit activities in roadless areas and other sensitive NFS lands in order to protect values and resources. Protecting roadless areas will help the USFS meet its legal obligations to protect watersheds (16 USC 1604(g)(3)(E)), provide for a diversity of plant and animal species (16 USC 1604(g)(3)(B)), and maintain viable populations of species (e.g., wolverine) that are sensitive to human disturbance (36 CFR 219.19). (Environmental/Preservation Organization, Laramie, WY - #43735.50000)

BY MAINTAINING ROADWAY STANDARDS

16 USC 1608(c) requires the USFS to ensure the transportation system throughout the NFS is properly maintained to ensure safety and minimum environmental impact. Since the USFS currently has an \$8-10 billion backlog of maintenance needs on existing roads, it is reasonable and necessary for the USFS to prohibit new road construction in the roadless areas; to continue building roads--when the agency knows it will not have funds to properly maintain those roads along with the existing roads--would violate the USFS's legal obligations under 16 USC 1608(c) as well as the agency's common-law stewardship obligations to properly manage the NFS lands. (Environmental/Preservation Organization, Laramie, WY - #43735.51000)

Under the NFMA, any new roads are required by law to have their vegetative cover reestablished within ten years after the termination of the contract, permit, or lease unless they are to become part of the permanent road system. (SEE 1976 U.S. Cong. & Adm. News 6662, 6678). The risks and impacts discussion in the proposed rule simply ignores the requirement that any road must be designed and revegetated in a manner that restores the area. If there are adverse impacts resulting from roads built since 1976, then the solution is for the Forest Service to either comply with existing law and/or reexamine road design standards--not to remove the lands from multiple use management. (County Agency, John Day, OR - #16087.53800)

BY FOLLOWING NATIONAL FOREST MANAGEMENT ACT PROCESSES IN DESIGNATING WILDERNESS AND ROADLESS AREAS

At the very least, the statutory language and legislative history reinforces that the "National Forest Management Act planning process" must be followed to preserve a roadless area or recommend Wilderness designation. The roadless area rulemaking does not do so.

Additionally, since Congress objected to even "Statewide" actions concerning the roadless areas passed over for Wilderness designation, the rulemaking's preemptive nationwide action with respect to all passed-over roadless areas is contrary to legislative direction and intent. Because Congress did not want any "RARE III" review, which merely recommended changes in the status of roadless areas, Congress certainly did not want any national rulemaking, which dictates the future status of 54.3 million acres of inventoried roadless areas. (Timber Company or Association, Eugene, OR - #15879.54000)

Public Concern: The proposed rule should comply with the planning regulations.

36 C.F.R. sec 219.7(a) The Forest Service is obligated to coordinate with equivalent and related planning efforts of local governments.

36 C.F.R. sec 219.7(d) The Forest Service's obligated to meet with local governments, to establish process for coordination. At a minimum, coordination and participation with local governments shall occur prior to Forest Service selection of the preferred alternative.

36 C.F.R. sec 219.7(c) The Forest Service is obligated, after review of the county plan, to display the results of its review in an environmental impact statement. See also C.F.R. sec 1502.16(c) and 1502.2.

36 C.F.R. sec 219.7 (c) (4) The Forest Service is obligated to consider alternatives to its proposed alternative if there are any conflicts with county land use plans.

36 C.F.R. sec 219.7(f) The Forest Service is required to implement monitoring programs to determine how the agency's land use plans affect communities adjacent to or near the national forest being planned. (Business/Business Association, No Address - #54308.50000)

Direction on the studies required during forest planning logically belongs in the forest planning rules of 36 C.F.R. Part 219. The proposed planning rules identify the types of evaluations required when revising a forest plan. SEE 64 Fed. Reg. 54100-01, 54107-08, proposed [sections] 219.9, 219.12-219.22, 219.27. Particularly because proposed [section] 219.27 specifies that "roadless areas" can be designated and additional Wilderness areas recommended during forest planning, the Part 219 rules are the logical place for identifying any studies required of roadless areas during forest planning. (Timber Company or Association, Eugene, OR - #15879.53800)

BY COMPLETING SITE SPECIFIC ANALYSIS

Lack of site-specific analysis. Other sections of the proposed planning rules require site-specific environmental and economic analysis in plan amendments before changing the direction of the forest plan. See 64 Fed. Reg. 54098-109 (Oct. 5, 1999), proposed Sec. 219.3-219.10, 219.20, 219.21, 219.30, 219.31. The lack of site-specific analysis of the effects of the roadless are rules on forest health and other resource values is another way in which the roadless area rulemaking is inconsistent with the Forest Service's own proposed planning rules. (Timber Company or Association, Kalispell, MT - #53304.53000)

BY PROVIDING SCIENTIFIC ANALYSIS

Lack of scientific analysis and justification. The agency's proposed planning rules emphasize the role of science and the need for detailed analyses before taking actions affecting the National Forest System. See 64 Fed. Reg. 54095-54112 (Oct. 5, 1999), particularly proposed Sec. 219.2, 219.8, 219.9, 219.19-219.24. Those sections emphasize the need for scientific "assessments," for "science consistency evaluations," and for a strong role of "scientists in planning."

Yet, the Forest Service is proposing permanent prescriptions for 54.3 million roadless acres without providing: (1) a convincing scientific explanation as to why each and every roadless acre must be kept roadless; or (2) a roadless area-by-area analysis of that prescription's impacts on issues such as protection of the forest against...disease, providing sufficient roaded recreation in the future, meeting future needs for timber and mineral resources, public desires for the use of each roadless area, etc. Thus, this rushed rulemaking on roadless areas is inconsistent with the study and analysis objectives in the contemporaneous planning rulemaking. (Timber Company or Association, Kalispell, MT - #53304.53000)

BY CONSULTING A COMMITTEE OF SCIENTISTS

Further, consistent with 16 U.S.C. Sec. 1604 (h), a Committee of Scientists helped to shape the proposed planning rules. See 64 Fed. Reg. 54075 (Oct. 5, 1999). A Committee of Scientists has not been consulted on the roadless area rules. The Forest Service should not proceed further with the roadless area rules until a Committee of Scientists reviews them: (1) to determine whether there is an objective biological need for a roadless area rulemaking of this magnitude; (2) to provide advice on whether broader exceptions from the roadless area policy should be allowed to protect forest health; and (3) to remove or minimize the conflicts between the roadless area and planning rules. (Timber Company or Association, Kalispell, MT, - #53304.53000)

Public Concern: The proposed rule should use the current planning regulations' criteria for evaluating roadless areas.

The regulations at 36 CFR 219.17 currently set forth important criteria for the "Evaluations of Roadless Areas." The USFS's proposed revision to the NFMA planning regulations at 36 CFR Part 219 would omit these important roadless evaluation criteria. Yet the agency is not proposing to include these criteria in the roadless area regulations at 36 CFR 294. The USFS's Roadless Area Conservation Rule must include the roadless criteria currently established in 36 CFR 219.17 if section 219.17 is to be deleted from the NFMA Planning Rules. (Environmental/Preservation Organization, Laramie, WY - #43735.72200)

3.3.4 Wilderness Acts

Many opponents of the proposed rule write to remind the Forest Service that it is legally bound to abide by the Wilderness Act of 1964, as well as state wilderness acts; and that under these acts the proposed rule is clearly illegal. Specific state wilderness acts mentioned are the California Wilderness Act of 1984, the Oregon and Washington Wilderness Acts, the Wyoming Wilderness Act, the Montana Wilderness Study Act, the Colorado Wilderness Act, the Utah Wilderness Act

of 1984, Idaho Wilderness Act, Michigan Wilderness Act, Nevada Wilderness Act, and the New Hampshire Wilderness Act of 1994.

Additionally, one individual asks the Forest Service to disclose the legislative history that allowed 21 states to pass legislation increasing wilderness areas; another requests support for the proposed American Red Rock Wilderness Act.

Public Concern: The Forest Service should abide by the Wilderness Act of 1964.

Don't violate the Wilderness Act of 1964, which set the national policy that only Congress may designate wilderness. (Individual, Durango, CO - #745.41200)

Page 3-138, Alternative 1--This discussion states that the "...trend of shifting human patterns, increased resource management activity, and reduced ecological integrity in and around potential and designated wilderness will increase the threat to their wilderness character." The United States has had wilderness since the Wilderness Act of 1964 was passed by Congress. Why all of a sudden do we now have a problem?

RELIEF: The Forest Service must provide evidence where these so called threats have compromised the integrity of the wilderness preservation system since the inception of the Wilderness Act in 1964. (County Elected Official, Basin, WY - #53400.43980)

[D]EIS and proposed policy are inconsistent with the management direction for roadless areas in Idaho and Montana contained in the statute and legislative history of the following public laws:

Wilderness Act of 1964 (P.L. 88-577)--Which reserves to the Congress the authority to designate Wilderness Areas. This proposal is the equivalent of Wilderness designation for these areas.

Endangered American Wilderness Act of 1976 (P.L. 94-588)

Central Idaho wilderness Act of 1980 (P.L. 96-312)--Which identifies specific roadless areas to be managed for multiple uses including timber harvest and access.

Lee Metcalf (P.L. 98-140) and Rattlesnake (P.L. 96-476)--Which specifically release certain roadless lands in Montana for multiple-use purposes. (Timber Company or Association, Coeur d'Alene, ID - #15899.53000)

In table 2-2 under Impacts to designated or Potential Wilderness for the preferred alternative the following information is provided:

Maintaining inventoried roadless areas would sustain a low level of threat to wilderness values and protect land between Wilderness areas and developed land. Opportunities for recreation that require remote characteristics, but are of a less restrictive nature than wilderness, would be maintained.

The quote above implies inventoried roadless areas will provide a buffer between developed land and Wilderness.

This is a violation of FS policy. Forest Service Manual (FSM) 2320.3 states:

Because wilderness does not exist in a vacuum, consider activities on both sides of wilderness boundaries during planning and articulate management goals and the blending of diverse resources in forest plans. **DO NOT MAINTAIN BUFFER STRIPS OF UNDEVELOPED WILDLAND TO PROVIDE AN INFORMAL EXTENSION OF WILDERNESS.** Do not maintain internal buffer zones that degrade wilderness values. Use the recreation opportunity spectrum (FSM 2310) as a tool to plan adjacent land management. [emphasis added]

FSM 2320.3 could also be violated by creating an informal extension of wilderness, if inventoried roadless and other unroaded areas are managed "... to sustain their roadless characteristics, they are still the reservoir for future designated wilderness areas." Wilderness area management is more restrictive in the type of activities allowed. The New Mexico Department of Agriculture (NMDA) believes if inventoried roadless areas are managed to promote wilderness characteristics there will be further restrictions placed on livestock permittees and lessees of public land. (State Agency, Las Cruces, NM - #17624.64412)

Public Concern: The proposed rule should comply with state wilderness acts.

Since the Statewide Wilderness Acts also require that roadless areas be managed pursuant to forest plans, they also require plan amendments here and preclude taking action by a national rule alone. Designating lands for inclusion in the National Wilderness Preservation System and assessing whether to administratively retain currently-unroaded lands in roadless status are contentious public policy issues. People who depend on the national forests for economic multiple uses (such as loggers, ranchers, and miners) do not like to see large areas of their national forests effectively declared off-limits to their livelihoods due to absence of roads needed to access the natural resources. Additionally, many visitors to national forests prefer, or only have the physical ability or time to engage in, roaded recreation. This explains why, after Congress resolves Wilderness System issues in a Statewide Wilderness Act, it includes language “releasing” undesignated roadless areas for the multiple use management provided for in the forest plan. (Timber Company or Association, Kalispell, MT - #53304.57100)

The Forest Service needs to complete a legal analysis of why the preferred alternative is not in violation of several statewide wilderness acts. (University/Professional Society, Anchorage, AK - #43416.57100)

The roaded uses of previously inventoried (and passed over) roadless areas “authorized in the [forest] plan in effect can proceed until a new plan is implemented” after a plan amendment. The Forest Service cannot alter a forest plan’s provisions on multiple uses in roadless areas by a national rulemaking alone. Thus, by attempting to change allowed land uses for released roadless areas outside the forest planning process; this proposed rule is unlawful under the plain language and legislative intent of the Statewide Wilderness Acts. (Mining/Oil Company or Organization, Washington, DC - #52224.57100)

SINCE THE STATEWIDE WILDERNESS ACTS ALSO REQUIRE THAT ROADLESS AREAS BE MANAGED PURSUANT TO FOREST PLANS, THEY ALSO REQUIRE PLAN AMENDMENTS HERE AND PRECLUDE TAKING ACTION BY A NATIONAL RULE ALONE. (Timber Company or Association, Eugene, OR - #15879.54000)

The Forest Service cannot alter a forest plan’s provisions on multiple uses in roadless areas by a national rulemaking alone. This rulemaking, in attempting to change allowed land uses for released roadless areas outside the forest planning process, is unlawful under the plain language and legislative intent of the Statewide Wilderness Acts. (Timber Company or Association, Eugene, OR - #15879.54000)

CALIFORNIA WILDERNESS ACT OF 1984

The Colusa County Board of Supervisors is opposed to the Roadless Area Conservation Proposed Rule. This rule is a blatant violation of the language contained in the California Wilderness Act of 1984. (County Elected Official, Colusa, CA - #17259.53000)

I would point out that the Record of Decision for the Eldorado National Forest Land and Resource Management Plan was signed by the regional forester on January 6, 1989. Alternative A was selected as the basis for the forest plan which will be followed for the next 10-15 years. All roadless areas not recommended for further consideration for wilderness were released for various management options as they had been released under the 1984 California Wilderness Bill. Therefore, your consideration of them in this roadless area review is in violation of a Congressional act. Also, your project should have been carried out through the 1976 National Forest Management Act and not a separate disjointed, poorly evaluated and unsubstantiated paper. (Individual, Camino, CA - #28691.50000)

OREGON AND WASHINGTON WILDERNESS ACTS

VIOLATES THE OREGON AND WASHINGTON WILDERNESS ACTS
Oregon Wilderness Act (OWA) 1984, Pub. L. No. 98-328, 98 Stat. 272 (1984); Washington State Wilderness Act (WWA) 1984, Pub. L. No. 98-339, 98 Stat. 299 (1984). The Acts released roadless areas for multiple use management under forest plans, prohibited the consideration of the roadless areas for Wilderness until the plans are revised, prohibited the Forest Service from further statewide reviews of roadless areas or conducting a RARE III,

and prohibited making roadless areas buffer zones around existing Wilderness. The Chief's roadless rule violates all these provisions of the Oregon and Washington Wilderness Acts principally because the road prohibition prevents multiple use management leaving the roadless areas as de facto wilderness. First, the Acts were intended to "ensure that [released roadless areas] . . . be available for non-wilderness multiple uses." SEE OWA, WWA, Section 2(b). Most importantly, Congress directed that the released roadless areas "shall be managed for multiple use in accordance with land management plans." OWA, Sec. 7(b)(3); WWA, Sec. 5(b)(3). (Timber Company or Association, Eugene, OR - #15879.51000)

The Oregon and Washington Wilderness Acts emphasize that roadless areas "need not be managed for purposes of protecting their suitability for wilderness designation prior to or during revision of the initial land management plans." OWA, Sec. 7(b)(3); WWA, Sec. 5(b)(3). The roadless rule essentially is a means to protect the suitability of the roadless areas for wilderness designation until the next revisions of forest plans. Congress explicitly forbids the Forest Service from restricting activities in roadless areas merely to keep the areas available for wilderness consideration when the plans are revised. (Timber Company or Association, Eugene, OR - #15879.51000)

The Oregon and Washington Wilderness Acts prohibit the Department of Agriculture from conducting any further statewide roadless area reviews of lands for the purpose of determining their suitability as wilderness. OWA Sec. 7(b)(5); WWA Sec. 5(b)(5). (Timber Company or Association, Eugene, OR - #15879.51000)

The Chief, through the roadless rule, essentially reallocates the roadless areas to de facto wilderness and the nationwide review is in effect, a state-by-state review of the particular roadless areas of a RARE III in violation of OWA and WWA. SEE Appendix to EIS showing roadless areas by state. (Timber Company or Association, Eugene, OR - #15879.51000)

The Wilderness Acts preclude the creation of buffer zones by prohibiting activities in roadless areas adjacent to existing wilderness. OWA Sec. 6; WWA Sec. 9. The roadless rule violates this provision of the Wilderness Acts. (Timber Company or Association, Eugene, OR - #15879.51000)

WYOMING WILDERNESS ACT

One example is the Wyoming Wilderness Act of 1984 ("WWA"), 98 Stat. 2807. It designated nearly 1 million acres of Wilderness areas in Wyoming. As the QUID PRO QUO for allocating this acreage for Wilderness use, the WWA released remaining roadless areas in national forests in Wyoming for the multiple uses identified in the relevant forest plan. WWA [section] 401(b)(3), which is part of "Title IV--Release Of Lands For Multiple Use Management," states that:

(b) On the basis of such review, Congress hereby determines and directs that...

1) areas in the State of Wyoming reviewed in such final environmental impact statement or referred to in subsection (d) and not designated wilderness study upon enactment of this Act shall be managed for multiple use in accordance with land management plans pursuant to section 6 of the [RPA]....98 Stat. 2811-12. (Timber Company or Association, Eugene, OR - #15879.54000)

Since WWA [section] 401(b)(3) directs that the released roadless areas "shall be managed for multiple use in accordance with...[forest] plans," it only allows inventoried roadless areas to be managed as directed in a forest plan. Altering the forest plan's multiple use decisions regarding uses of roadless areas through a national rule, and without first amending the forest plans, would violate WWA [section] 401(b)(3) and the similar provisions in other Statewide Wilderness Acts. ACCORD Anderson & Moncrief, 76 DENV. U. L. REV. at 421 ("prior to or during revision of the NFMA plans, all RARE II areas that are not designated as wilderness or for special management in the legislation were to be managed IN ACCORDANCE WITH THE PLANS") (emphasis added). In effect, the Statewide Wilderness Acts prohibit changing a forest plan's direction on permissible multiple uses of released roadless areas through a national rulemaking alone. (Timber Company or Association, Eugene, OR - #15879.54000)

MONTANA WILDERNESS STUDY ACT

Moreover, Congress often includes explicit restrictions on development in legislation requiring study of potential wilderness areas. For example, Section 3(a) of the Montana Wilderness Study Act, Pub. L. 95-150, provides,

“Except as otherwise provided in this section and subject to existing private rights, the WILDERNESS STUDY AREAS designated by this Act shall, until Congress determines otherwise, be administered by the Secretary of Agriculture so as to maintain their presently existing wilderness character and potential for inclusion in the National Wilderness Preservation System.” (Emphasis added.) Absent such an explicit statutory restriction, however, the Wilderness Act provides no limitation on rights-of-ways or other multiple-use activities in areas not designated as wilderness areas. (Utility Group or Organization, No Address - #43981.53000)

COLORADO WILDERNESS ACT

Willsource Enterprise has particular concern with the impacts of the proposed rule on oil and gas leases which it owns in the White River National Forest. We believe that, to the extent that the proposed rule forbids uses requiring road construction or reconstruction in areas which were previously analyzed in the RARE II process, the rule will violate the intent of Congress expressed in the Colorado Wilderness Act adopted in 1980 (Public Law 96-560). That law included as one of its purposes to “ensure that certain other National forest system lands in the State of Colorado be available for non-wilderness multiple uses” #101(b)(2). To the extent that the Forest Service’s proposed rule will prevent multiple uses in these areas outside designated wilderness, the rule clearly contravenes congressional intent as established in the 1980 Colorado Wilderness Act. See also #107(b)(2) and (3) of that law. Moreover, to the extent that the proposed rule covers lands in Colorado, its adoption would constitute a violation of section 107(b)(4) of the Colorado Wilderness Act of 1980 which states as follows: “Unless expressly authorized by Congress the Department of Agriculture shall not conduct any further statewide roadless area review and evaluation of National Forest System lands in the State of Colorado for the purpose of determining their suitability for inclusion in the National Wilderness Preservation System.” (Individual, Denver, CO - #29016.57100)

UTAH WILDERNESS ACT OF 1984

Most of the recent state wilderness acts prohibit the establishment of buffers around federally-designated wilderness. Standard language precluding buffers is included in many wilderness acts. The language contained in section 303 of the Utah Wilderness act of 1984 (Public Law 98-428, 98 Stat. 1657) is typical. It reads: “Congress does not intend that designation of wilderness areas in the State of Utah lead to the creation of protective perimeters or buffer zones around any wilderness area. The fact that nonwilderness activities or uses can be seen or heard from areas within the wilderness shall not, of itself, preclude such activities or uses up to the boundary of the wilderness area.” As the growing trend is for congress to include language precluding the establishment of buffer zones in recent wilderness acts, it is obvious that Congress is reserving to itself the ability to create wilderness areas and prevent the blurring of the boundaries of such areas.

In addition, the Forest Service Manual on Recreation, Wilderness, and Related Resource Management explicitly forbids the maintenance of “buffer strips of undeveloped wildland to provide an informal extension of wilderness.” FSM section 2320.3(5). But that is exactly what the Forest Service is attempting by this rulemaking. The DEIS states: “A substantial number of inventoried roadless areas are near and in close proximity to designated wilderness areas...These areas serve as a natural transition between lands affected by resource management activities and lands affected substantially by natural processes. Maintaining the unroaded character of these transition areas will sustain existing levels of wilderness values.” DEIS at 3-137. (Mining/Oil Company or Organization, Washington, DC - #15877. 53400)

IDAHO WILDERNESS ACT

The Clearwater National Forest maps (see DEIS Volume 2, p. 63) are inaccurate with regard to whether the forest plan allows for road construction and what areas are recommended for wilderness. Under the settlement agreement on forest plan litigation brought against the Clearwater National Forest, the Clearwater National Forest agreed that all areas proposed by any member of the Idaho delegation for wilderness in legislation are to be managed as recommended wilderness (management category B2) until wilderness legislation is passed or the forest plan is amended. There are no exceptions. (see Civil No. 93-0043-S-HLR, Stipulations of Dismissal, The Wilderness Society et al. v. F. Dale Robertson et al.) The settlement agreement section II. a. states: “The Forest Service agrees, effective immediately, not to approve any timber sale or road construction project decisions within the area covered by the proposed ‘Idaho Wilderness, Sustainable Forest and Communities Act of 1993,’ H.R. 1570 and THAT SUCH LANDS WILL BE MANAGED ACCORDING TO FOREST PLAN STANDARDS AND GUIDELINES FOR RECOMMENDED WILDERNESS (MANAGEMENT AREA B2). The Forest Service further agrees to apply

these management prescriptions to any area(s) added by amendment to H.R. 1570, and to any area(s) included in any other Idaho wilderness proposal introduced in Congress by any member of the Idaho delegation.” (emphasis added.) The map does not reflect this reality. Additional lands fall into the category of no road building and/or recommended wilderness which were included in the above referenced legislation. (Environmental/Preservation Organization, Moscow, ID - #28913.50000)

MICHIGAN WILDERNESS ACT

The language in the Michigan Wilderness Act ([section] 6(a)(3), 101 Stat. 1276 (1987)) comparable to WWA [section] 401(b)(3) was described as meaning that national forest lands in Michigan “not designated wilderness on enactment of this bill **MUST BE MANAGED FOR MULTIPLE USE IN ACCORDANCE WITH THEIR RESPECTIVE LAND MANAGEMENT PLANS.**” S. Rep. No. 100-206, at 7 (1987) (emphasis added); SEE H.R. Rep. No. 100-29, Pt. 2, at 10 (1987) (areas “not designated wilderness on enactment of the bill must be managed for multiple use in accordance with land management plans under section 6” of the RPA, as amended by the NFMA). (Timber Company or Association, Eugene, OR - #15879.54000)

NEVADA WILDERNESS ACT

Congress intended that the comparable language in the Nevada Wilderness Act ([section] 5(b)(3), 103 Stat. 1786 (1989)) mean that “lands not included by Congress in a wilderness...area shall be managed for multiple-use values in accordance with forest plans.” S. Rep. No. 101-113, at 8 (1989). (Timber Company or Association, Eugene, OR - #15879.54000)

NEW HAMPSHIRE WILDERNESS ACT OF 1994

The NH Wilderness Act of 1994 (Public Law 98-323) makes the USFS roadless proposal illegal. (Business/Business Association, Gorham, NH - #9063.57100)

Public Concern: The Forest Service should disclose the legislative history that allowed 21 states to pass legislation increasing wilderness.

The Forest Service has done a disservice to the public by not disclosing in this DEIS the legislative history behind the “soft release” compromise reached in 1984 which allowed 21 states to pass legislation that increased wilderness. (Individual, Tollhouse, CA - #18642.10300)

Public Concern: The Forest Service should support the proposed American Red Rock Wilderness Act.

I urge you to support the proposed American Red Rock Wilderness Act, which has been submitted to Congress and already has 160 cosponsors. (Individual, Orem, UT - #3381.64350)

3.3.5 Revised Statute 2477

In the view of many respondents, Revised Statute (RS) 2477 claims for rights-of-way are a major stumbling block to the implementation of the Roadless Area Conservation Proposed Rule. Several state that the Forest Service must acknowledge RS 2477 right-of-way claims, or state that the agency cannot decommission these routes. Some cite the Department of Interior’s Omnibus Consolidated Appropriations Act, which also addresses RS 2477 claims. Others call for an analysis of existing routes to help establish which of them may be public rights-of-way

and therefore not under Forest Service jurisdiction. One states that language on page A-24 in the Draft EIS may allow the agency to attempt to supercede RS 2477 claims. In addition, some elected officials express particular concern about pending claims regarding existing RS 2477 routes that may be in roadless areas. A few ask for clarification of how RS 2477 claims will be addressed, sometimes expressing concern that these claims will be ignored.

Public Concern: The Forest Service should honor RS2477 rights-of-way.

We object to any designation of Roadless Areas that contain RS2477 trails, wagon roads, jeep roads, and other obvious historical use as mapped by GIS and Satellite. (Business/Business Association, Boise, ID - #75.53500)

The only areas I can comment on are the areas that I am familiar with, the Siskiyou National Forest. There are many RS2477 roads in this forest and the Forest Service is not authorized to decommission these roads. To do that would be illegal. (Individual, Grant Pass, OR - #2162.53500)

We find, in the Final Environmental Impact Statement for Open road and Open Motorized Trail Analysis, Appendix E--Targhee National Forest, Subject Code 6, RS2477, pages 64-72, the following USFS response to Idaho State Legislative bodies' and Counties' letter [regarding] concerns of RS2477 rights of way as recent as February 25, 1999, concerning page 64, second paragraph....The Service response to that paragraph: "Section 108 of the Department of Interior Omnibus Consolidated Appropriations Act restricts RS2477 right of way rules and regulations from becoming effective without an authorized Act of Congress." This was contrary to the intent of the U.S. Congress....The Service continues, "...we have also agreed with the counties to not decommission any asserted routes." Here, the Service acknowledges the rights of jurisdiction that the counties have. The Service then responds, "However, we maintain the right, in the interim to determine whether any route is open to motorized travel." Statements like the heretofore mentioned will have a direct impact on the "Roadless" scoping process. (Wise Use/Land Rights Organization, Rock Springs, WY - #2866.53500)

It is important that all existing routes within roadless areas that may qualify as a public right-of-way under RS 2477 even though no assertions have been made to date are identified and quantified. The EIS admits to the existence of roads on the roadless areas. There is a good possibility that many of these roads could qualify as public rights-of-way under RS 2477, it is important to identify these routes if a complete analysis of potential impacts is to be made. (Individual, Vanci, WA - #15246.53500)

On page A-24 of the Draft Environmental Impact Statement, SUMMARY and PROPOSED RULE, you will find a section called: CIVIL JUSTICE REFORM ACT. It reads "The proposed revision: (1) preempts all state and local laws and regulations that are found to be in conflict with or that would impede its full implementation." A side note is that this clause appears in all proposed revisions the USFS has made since September, 1999. My concern is that if this language is allowed to remain, RS 2477 will be impacted. Congressional action granted RS 2477 Right-of-Ways. This language, in my opinion would give the USFS license to bypass the law through administrative action. In addition, this language would allow the Federal Land Managers to ignore Public Access claims and close access routes without adhering to NEPA and existing use, condition, user group agreements (both formal and informal), RS 2477 protections, environmental impacts, and any and all other considerations which might reasonably impact a decision on future road maintenance and use. (Individual, Oakdale, CA - #43854.90320)

The May 2000 Roadless Area Conservation Draft DEIS (Summary and Proposed Rule) ignores the Omnibus Consolidation Act of 1997 (P.L. 104-208); specifically, "General Provisions," Title I, (Department of the Interior), Section 108., as presented above. The Forest Service edict by rule that no new roads, or reconstructed roads, will be allowed within "inventoried" Roadless Areas on National Forest System lands is a defacto decision to deny the validity of any legitimate "R.S. 2477" right-of-way validation by a state or subordinate unit of state government. (State Elected Official, Albion, ID - #44351.55000)

COUNTY RIGHTS-OF-WAY

[T]he DEIS apparently does not acknowledge the County's legitimate public right-of-way established under RS 2477. Alpine County has long argued its claim to public right of way on roads constructed at the time when federal lands were open to entry and appropriation. Some of these areas are now incorrectly identified as "roadless." (County Elected Official, Markleeville, CA - #16277.53500)

A controversy has arisen in a number of states as to the scope and extent of RS 2477 claims, specifically, what it takes to prove a claim existing as of 1976. While the proposal purports to recognize claims under RS 2477, it is unclear whether states or counties will be able to develop and maintain those roads through roadless areas under this proposal. If valid existing rights are truly recognized, such roads and highways should be able to be developed and maintained. (Business/Business Association, Park Ridge, IL - #25478.53500)

RS2477 in the original 1866 "Lode Act" was an offer to the public to establish rights of way over public lands. State law governs the acceptance of that offer. In the State of California, use by the public was enough to constitute acceptance. It was not required that the County assert an RS2477 claim. Extensive gold mining and grazing occurred in Siskiyou County for more than 50 years prior to the withdrawal of the National Forests from public lands. Many RS2477 claims exist on the Forests in right that are being ignored by these proposals. The definitions of "roadless" and "unroaded" areas do not acknowledge these claims pursuant to RS 2477.

This initiative process fails to take into consideration these conflicting jurisdictional issues. The process fails to recognize the necessary primacy of the fundamental "police powers" of local government in control over the transportation infrastructure serving local communities and real public health and safety issues regarding roads and access. Decisions to seek new roads, decommission old roads, or maintain existing roads should be made at the local level by those who are most impacted by the decisions. (Business/Business Association, Yreka, CA - #43494.52000)

Quoting from the Iron County General Plan, "ACCESS AND TRANSPORTATION, currently within Iron County are many roads, trails, and paths which are used for everything from access to traditional agricultural concerns and livestock movement to timber harvesting to recreation areas. Iron County is committed to maintaining the unrestricted use of those roads, paths, and trails for these and similar activities. These roads, paths, and trails have been identified by the county under the provisions of RS 2477....Again quoting from page 29 of the Iron County General Plan, GOAL LU8.0 "Maintain and improve the valid existing rights-of-way across public and private lands in accordance with appropriate safety standards and public need."

GOAL LU8.5 "IRON COUNTY SHALL ACTIVELY DEFEND the right to maintain and control all existing paths, roads, and trails, which traverse federal and state lands, as County Rights-of-Way under provision of RS 2477. (County Elected Official, Cedar City, UT - #13526.53500)

Public Concern: The Forest Service should resolve RS 2477 claims before the proposed rule is adopted.

The Forest Service appears to be ignoring or does not understand the RS2477 road right-of-way implications. It would be well if the Forest Service would refrain from an extensive road plan until the RS 2477 issues are resolved. Our records show that some RS 2477 roads and rights-of-way have been closed previously to this Forest Initiative. Duchesne County prefers an amenable resolution on these roads that existed before Forest designation in 1905. (County Elected Official, Duchesne, UT - #13525.53500)

It is possible that this roadless Area Conservation Rule may trigger an issue of such magnitude as to bring the Forest Service to its knees if it ignores the issue of RS2477 roads claimed by counties. There are literally thousands of RS 2477 claims awaiting resolution across the West and a significant portion of them are in "roadless" areas. Perhaps this is avoided by including them under "valid existing rights" but we doubt that you are making that concession. This initiative will tend to short-circuit the collaboration necessary for local governments to negotiate with the Forest Supervisor to resolve RS2477 issues. Some of this negotiation has already been going on and Iron County in Southern Utah is a good example. Iron County has relinquished some of its RS2477 claims where it made sense to do so and retained others. (County Elected Officials, Parowan, UT - #28911.53500)

Juab County and the State of Utah are currently partner's in a Quiet Title Legal Roads Action against the Federal Government. The U.S. Forest Service is a party to this Action. This action is for RS2477 Road Rights-of-Way given to the County for which the Forest Service also claims title to the same roads. This litigation is and will continue to be expensive to taxpayers at all levels in and of itself. Juab County therefore requests that no additional roads be closed by the Forest Service until the RS2477 Quiet Title Action has been settled. If the Forest Service closes a road it may well be later proven to be a County Road and the Forest Service could be held responsible for Financial Damages of various kinds for taking road closure actions on roads it may have no legal right nor authority to close. The prudent approach would be to allow this litigation to take its course prior to implementing this Roadless Rule. Closing roads without allowing this action to take its course will surely result in additional litigation and damage settlements which will further erode Forest Service budgets unnecessarily. (County Agency, Nephi, UT - #29957.53500)

3.3.6 Alaska Concerns

Respondents express a number of legal concerns regarding management of National Forest System lands in Alaska. Both individuals and environmental organizations ask the Forest Service to reevaluate the relationship between the Tongass Timber Reform Act and the proposed rule. Some specifically request that Section 101 of this act be amended to give conservation of the forest priority over timber yield. Conversely, a wise use group maintains that the Forest Service should comply with the Tongass Timber Reform Act.

A number of respondents, including individuals, state elected officials from Alaska, and timber and wise use organizations, maintain that the proposed rule should comply with the Alaska National Interest Land Conservation Act (ANILCA), with respect to subsistence lifestyles, by guaranteeing access to inholders on all national forests and by prohibiting single use studies. Respondents also feel the Forest Service should allow access across national forests in Alaska relative to provisions in the Alaska Native Claims Settlement and Alaska National Interest Conservation Acts. In contrast, one environmental organization claims it is unnecessary to except access to private inholdings "from the prohibition on road construction and reconstruction" because ANILCA gives the agency the authority to "determine adequate access on a case-by-case basis." Furthermore, one individual suggests the Forest Service address the effectiveness of the Alaska Forest Practices Act, saying the act has not prevented the squandering of resources by native corporations.

Finally, both individuals and tribal groups maintain that the proposed rule should adhere to the principles in the Tongass Land Management Plan, and that it should comply with both the Alaska Native Claims Settlement Act and the Alaska Statehood Act.

Public Concern: The Forest Service should reevaluate the relationship between the Tongass Timber Reform Act and the proposed rule.

I am a resident of southeast Alaska and I am offended that you would exclude the Tongass from the roadless policy on the basis of political pressure from our own Congressional delegation. You have completely misunderstood the market demand provision of the Tongass Timber Reform Act. It calls on the Forest Service to protect the environment and multiple use FIRST, and to seek to meet market demand only within that framework. Congress intended to end the era of timber-first management with this Act. You are defeating its purpose by using it as a basis

to exclude the Tongass from an important policy that should apply equally to all forests. (Individual, Juneau, AK - #3106.64251)

We reject the Forest Service's suggestion that the Tongass Timber Reform Act (TTRA) requires continued logging of the Tongass roadless areas. Section 101 of the TTRA directs the agency to "seek to provide a supply of timber from the Tongass National Forest which meets the annual market demand for timber from such forest...." However, this direction is subject to other applicable law and to providing for multiple use and sustained yield of all renewable forest resources. The courts have ruled that TTRA requires no set amount of logging. According to the Ninth Circuit Court of Appeals, "TTRA envisions not an inflexible harvest level, but a balancing of the market, the law, and other uses, including preservation." *Alaska Wilderness Rec. & Tourism Assn. v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995) (emphasis added). (Environmental/Preservation Organization, Great Falls, MT - #43338.53900)

Because the direction to "seek" to meet market demand is subject to all other applicable laws and multiple use, the Forest Service's first obligation remains to manage "all of 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." 16 U.S.C. (section) 531 (a) (Multiple-Use Sustained-Yield Act). Only after complying with this and other applicable laws should the Forest Service "seek" to meet market demand. If the combination of renewable resources that best meets the needs of the American people protects the roadless areas of the Tongass, as it clearly does, then the Tongass must be included in the roadless rule without regard to the market demand provision of the TTRA. (Environmental/Preservation Organization, Washington, DC - #43731.53900)

...the legal arguments alluded to in the DEIS as possible rationale for not affording roadless areas on the Tongass immediate protection from road building and logging simply have no merit. I believe that examination of your agency's own court arguments provide the appropriate interpretation of Section 101 of the Tongass Timber Reform Act. The Forest Service response memorandum of February 18 in *Southeast Alaska Conservation Council v. Lyons* demonstrates the misguided interpretation contained in the DEIS. In that case you argue that "[r]eliance on TTRA is misplaced because the TTRA directive is subject to numerous qualifications and because the Ninth Circuit has rejected the interpretation that the TTRA directive to seek to meet market demand is 'mandatory.'" A more accurate interpretation of the statute than is currently reflected in the DEIS. (Individual, Alexandria, VA - #43954.53900)

The Forest Service itself has advocated this more lenient and more accurate interpretation of the TTRA. In *AFA v. U.S.* the Forest Service argued "The use of the word "seek" necessarily implies a congressional recognition that the Forest Service may be in full compliance with Section 101's mandates, even though less than "market demand" is offered. (Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendants' Cross Motion for Summary Judgment 4/14/95, p.10.) In a case from this year, the Forest Service argued: "Reliance on the TTRA is misplaced because the TTRA directive is subject to numerous qualifications and because the Ninth Circuit has rejected the interpretation that the TTRA directive to seek to meet market demand is "mandatory". (*Southeast Alaska Conservation Council v. Lyons*. Defendants' Opposition to Plaintiffs' Brief on the Merits, 2/18/00.). (Environmental/Preservation Organization, No Address - #52238.53900)

AMEND SECTION 101

Amend section 101 of the Tongass Timber Reform Act to give conservation of the forest priority over timber yield. (Preservation/Conservation Organization, Chico, CA - #15065.72000)

Public Concern: The Forest Service should comply with the Tongass Timber Reform Act.

If the roadless proposal is applied to the Tongass, how will you meet the 'seek to meet market demand' requirements of the Tongass Timber Reform Act? (State Elected Official, Juneau, AK - #16030.53900)

THE FOREST SERVICE'S PROPOSAL AND DEIS AS PRESENTLY WRITTEN ALSO DIRECTLY VIOLATE ANILCA, MUSYA, TTRA, AND NEPA. BEFORE TAKING ANY ACTION ON THE PROPOSAL, OTHER

THAN WITHDRAWING IT, THE FOREST SERVICE MUST CONDUCT A FORMAL LEGAL REVIEW OF THE PROPOSED PROHIBITION ON THE TONGASS AND CHUGACH NATIONAL FORESTS WITH RESPECT TO ANILCA, MUSYA, TTRA, AND NEPA. (Wise Use or Land Rights Organization, Anchorage, AK - #43414.50000)

Public Concern: The proposed rule should comply with the Alaska National Interest Land Conservation Act.

ANILCA: The Alaska National Interest Conservation Act (ANILCA) of 1980 placed into law an agreement between Congress and the Carter White House that any further conservation unit decision in Alaska would fall under the sole purview of Congress. Hence, the meaning of several “no more” provisions of the Act. Any application to national forest in Alaska of the new roadless policy would violate the ANILCA agreement, creating DE FACTO wilderness without any congressional action. (State Elected Official, Anchorage, AK - #17254.53900)

Application of President Clinton’s proposed roadless policy to the Tongass and Chugach National Forests would designate significant additional acreage as administrative, de facto wilderness areas within Alaska. (State Elected Official, Juneau, AK - #16030.53900)

The Forest Service has chosen to ignore the fact that explicit language in the Alaska National Interest Lands Conservation Act of 1980 prohibits in Alaska the very kind of study represented by this EIS. Collectively referred to as No More Clauses of ANILCA, several sections set forth Congress’ position that the appropriate balance was established by ANILCA between preservation and protection in Alaska’s forest. Therefore, Congress prohibited the administration from performing another RARE analysis in Alaska or any study that would be similar in scope and purpose. Congress reserved...to itself alone the decision to increase the conservation of public lands in Alaska. If the Clinton Administration insists on including the Chugach and the Tongass in the Roadless Initiative, it will do so in defiance of federal law. (Timber Company or Association, Ketchikan, AK - #23887.53900)

ANILCA Section 101(d) specifically prohibits designation of new conservation system units, new national conservation areas, or new national recreation areas on federal lands in Alaska.

ANILCA Section 708(b)(4) specifically prohibits the Department of Agriculture from conducting any statewide roadless area review or study for the purpose of determining their suitability for inclusion in the National Wilderness Preservation system in Alaska.

ANILCA Section 1326(a) specifically prohibits administrative closures of more than 5,000 acres in Alaska unless approved by Congress, which approval has not been granted.

ANILCA Section 1326(b) specifically prohibits study of federal lands in Alaska for the single purpose of consideration for CSU’s or other similar designations unless specifically authorized to do so by Congress, which authorization has not been given. (Wise Use or Land Rights Organization, Anchorage, AK - #43414.53900)

WITH REGARD TO SUBSISTENCE LIFESTYLES

Is it in the spirit of ANILCA to ignore the requirements of the subsistence lifestyle in Alaska? The USFS just had an unfavorable ruling in the claims court on the claim brought by Alaska Pulp Corporation for \$1.2 billion dollars. This would not have happened if the Service had properly considered the legal ramifications of terminating the 50 year contract with APC before doing so. Now we taxpayers are stuck with the bill. The same thing is going to happen here in Alaska if the Service simply gets a “yes man” legal opinion without adequately considering legal impacts. (Individual, Ketchikan, AK - #199.53900)

This document is not in compliance with Federal Law. The DEIS-FS-Roadless Area Conservation-does not contain a Title VIII-ANILCA subsistence evaluation. The Title VIII subsistence evaluation requires Federal land managers to evaluate the impacts of federal proposed actions on subsistence uses and users within the region.

Pages - i to ii do not list a subsistence evaluation in the Table of Contents.

The Title VIII subsistence requirement applies to all Federal Public lands in Alaska--Please revise this document by including a Title VIII Subsistence Evaluation. (Individual, Eagle River, AK - #17701.90400)

BY GUARANTEEING ACCESS TO INHOLDERS ON ALL NATIONAL FORESTS

Alaska National Interest lands Conservation Act (ANILCA) (16 U.S.C. #3101-3233) “Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to non-federally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, That such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest system.” 16 U.S.C. #3210 (a). ANILCA provides a statutory right of access to inholders of property within all National Forests lands and not exclusively to those in Alaska. See *Montana Wilderness Ass’n v United States*, 655 F.2d 951, 957 (9th Cir. 1981) cert. denied, 455 US 989 (1982). (County Agency, Duluth, MN - #17287.53100)

In addition to this authority (applicable by its logic to road access to state trust inholdings in National Forests), the Trust lands Administration is entitled to road access to inheld trust lands by virtue of the Alaska National Interest Lands Act, 16 U.S. C. sec. 3210 (a), and may also be entitled to road access in specific situations by the common law doctrine of easements by necessity and by federal Revised Statute 2477. (State Elected Official, Salt Lake City, UT - #43918.55000)

BY PROHIBITING SINGLE USE STUDIES

ANILCA prohibits any single use study such as you are proposing on any federal lands in Alaska (Chugach and Tongass NF). Your proposal violates ANILCA by conducting a single use proposal (no roads). (Individual, Great Falls, MT - #28425.53900)

Public Concern: The Forest Service should allow access across national forests in Alaska relative to provisions in the Alaska Native Claims Settlement and Alaska National Interest Conservation Acts.

Chugach Alaska Corporation CAC’s valid existing rights of access to its lands preclude the proposal’s application to Chugach National Forest lands across which CAC’s rights extend. Under the provisions of ANCSA, ANILCA, the 1982 CNI Settlement Agreement, and the common law, CAC has expressed and implied rights of access across federal lands administered by the Chugach National Forest that cannot be frustrated or diminished by the proposal. As currently addressed in the DEIS (30140), access “...need not be the most direct, economical, or convenient route for the landowner.” And further “adequate access may not be road access in all cases...” The DEIS must be modified to clarify this position with respect to CAC and the final rule, if passed must include language specific to ANCSA and ANILCA rights of access, which go well beyond the general definition of “valid and existing rights.”The DEIS must explicitly acknowledge and preserve CAC’s valid existing rights in all possible alternatives considered in the DEIS, leaving no room for interpretations that will frustrate CAC’s exercise of those vested rights across national forest lands and the fulfillment of the intent and purpose of ANCSA, ANILCA, and the 1982 CNI Settlement Agreement. (Wise Use or Land Rights Organization, Anchorage, AK - #43414.90300)

Public Concern: The Forest Service should exercise its statutory authority under Alaska National Interest Land Conservation Act to determine adequate access on a case-by-case basis.

8. ACCESS TO PRIVATE INHOLDING UNDER ANILCA SHOULD NOT BE GENERALLY EXCEPTED FROM THE PROHIBITION ON ROAD CONSTRUCTION AND RECONSTRUCTION.

As with the Mining Law, the Forest Service overstates the authority of the Alaska National Interest Land Conservation Act (hereafter ANILCA). At #294.12(b) (3)...the proposed rule gives a blanket authorization, if a valid right exists, to construct and reconstruction roads in inventoried roadless areas despite the fact that the statute itself gives the agency the authority to restrict access to non-motorized methods, to deny access across federal lands altogether, to determine adequate access on a case by case basis and to regulate access through rulemaking....The proposed rule gives a blanket authority to construct and reconstruct roads in inventoried roadless areas where none

exists under the statute. As with the Mining Law and the Organic Act, the Forest Service has again ignored the authority Congress has granted it to write rules specific to access to private inholdings in inventoried roadless areas and to require non-motorized access on a site specific basis.

...Federal Register, Vol. 63, No 91, Wednesday, May 10, 2000, p.30288.

...See generally Federal Register, Vol. 56, No . 115, Friday, June 14, 1991, pp 27410-27418.

(Environmental/Preservation Organization, Cave Junction, OR - #16188.53900)

While from the discussion of the proposed rules in the Federal Register Notice (FRN) the Forest Service appears to be excepting access to private inholdings from the general prohibition on road construction and reconstruction....the DEIS acknowledges that “adequate access may not be road access,” and that “reasonable access is currently determined on a case by case basis” (3-140). The proposed rule as now written actually weakens protection of inventoried roadless areas by generally exempting access to private inholdings from the general prohibition on road construction and reconstructions.

Section 3210 (a) of ANILCA states that: “Notwithstanding any other provision of law, and subject to such terms and conditions as the Secretary of Agriculture may prescribe, the Secretary shall provide such access to nonfederally owned land within the boundaries of the National Forest System as the Secretary deems adequate to secure to the owner the reasonable use and enjoyment thereof: Provided, that such owner comply with rules and regulations applicable to ingress and egress to or from the National Forest System (emphasis added). 16 USC # 3210 (a).

Sec. 3210 (a) of ANICLA clearly provides for the Secretary of Agriculture to prescribe rules and regulations for ingress and egress to private inholdings surrounded by national forest inventoried roadless areas and unroaded areas but it does not provide inholders with a blanket right to construct or reconstruct roads for that access. Further Sec. 3210 (a) does not specify that the Forest Service must provide access to private inholding by road or by motorized vehicles. While it may be questionable that any such roadless and unroaded area regulations as the secretary might provide would affect those rights-of-way that were legally established under provisions of earlier authorities, any new regulation from this rulemaking would be applicable to new or upgraded access routes to inholdings.

(Environmental/Preservation Organization, Cave Junction, OR - #16188.53900)

Public Concern: The Forest Service should address the effectiveness of the Alaska Forest Practices Act.

Under the ANCSA, 550,000 acres of the highest value timberlands remaining uncut after 20 years of high-grading by the two pulp companies was granted to S.E. Alaska Native Corporations from the Tongass N.F. Now 90% of these land grants have been clear-cut wastefully with other resources squandered by Native corporations under the toothless and ineffective Alaska Forest Practices Act. (Individual, Sitka, AK - #883.53900)

Public Concern: The proposed rule should adhere to the principles in the Tongass Land Management Plan.

No regulatory or statutory process exists for the Forest Service to unilaterally change the revised TLMP during the appeal process or otherwise. Any determinations that the Forest Service attempts to make during the TLMP appeal process must be limited to correcting what the Forest Service agrees were legal errors in the TLMP planning process. Any other changes (including changes to the Tongass roadless area policy) must be pursued as a plan amendment through the appropriate forest planning regulations. (Tribal, Juneau, AK - #44005.53900)

Public Concern: The proposed rule should comply with the Alaska Native Claims Settlement Act.

The Roadless Initiative must not supersede or abrogate the rights of Alaska Natives to achieve their entitlements granted under the 1971 Alaska Native Claims Settlement Act (ANCSA). The final rules must include unimpeded exercise of land selection rights and authority to use Native land and land selection entitlements to exchange for other public land that may include roadless areas. (Tribal, Juneau, AK - #44005.53900)

Public Concern: The proposed rule should comply with the Alaska Statehood Act.

This policy violates the RS 2477 and the Alaska Statehood Act. (Individual, Ketchikan, AK - #7014.53500)

3.3.7 Other Acts

In addition to the federal land management acts and laws discussed in previous sections, respondents reference a number of miscellaneous acts with which, they assert, the Forest Service is legally bound to comply. Several respondents maintain that the Forest Service should keep the promise made in the 1924 Clark-McNary Act, which “laid the groundwork for the National Forests with a clear goal of providing bountiful and sustainable timber harvests for years to come.” A number of writers also insist the proposed rule should comply with the intent of the Roads and Trails Act and Renewable Resources Planning Act, noting therewith the Forest Service’s obligation to maintain an adequate system of roads and trails to meet demands for timber, recreation, and other public uses.

Respondents also argue that the Forest Service should comply with special Use regulations in 36 CFR 251, under which, they maintain, the Forest Service must evaluate applications for new rights-of-way. In addition, one respondent insists that the Forest Service should comply with the purpose of the National Recovery Relief Act. According to this person, “the National Grasslands in McKensie County were purchased as agricultural projects under the authority of [this act]. This history and court orders make a roadless plan for the National Grasslands both illogical and illegal since roadless areas were not a purpose of the repurchase program.”

Other respondents state that the proposed rule should provide “community stability” as required by Timber Management Planning; that it should comply with the intent of the Weeks Act by obtaining the consent of the affected counties before implementing the proposed rule; and that the Forest Service should revise funding by repealing the Knutson-Vandenburg Act of 1930.

Public Concern: The Forest Service should keep the promise made in the 1924 Clark-McNary Act.

The current Roadless Initiative continues to erode local control and breaks the promise of the 1924 Clark-McNary Act that laid the groundwork for the National Forests with a clear goal of providing bountiful and sustainable timber harvests for years to come. The original Chequamegon and Nicolet National Forests, when formed in 1928, included lands that had been nearly clear-cut and mismanaged and were considered useless and tax delinquent. Through locally controlled forest management, what was once 500,000 acres of useless land is now over 1.5 million acres of productive forest land. (Individual, Kennan, WI - #18452.41240)

The WCA membership also contends that this initiative violates the intent of the Clark-McNary Act of 1924. The Clark-McNary Act created the National Forests in their current form with the priority of creating a sustainable source of timber. (Town or Municipality Elected Official.19964.53000)

Citing specifically the Clark-McNary Act of 1924, which authorized the purchase of National Forests when such lands would promote a future timber supply, the Wisconsin Legislature enacted legislation empowering the federal government to acquire land for the establishment of a National Forest.

It is precisely along these lines that the local communities agreed to sell land to the federal government. The purpose of the federal government in buying these lands was to restore them to a condition of maximum forest productivity by intensive management, planting, fire protection and to make them sources of permanent timber supply and bases for permanent wood-using industries and communities. (Federal Elected Official, Green Bay, WI - #18648.50000)

[D]on't forget the comment made by L.F. Kneipp, Ass't Chief Forester, at the Wisconsin Commercial Forestry Conference held at Milwaukee on March 28-29, 1928. These same comments were made to the county boards that were involved in the land sales to the Federal Government to create Wisconsin's National Forests. Kneipp stated, "The purpose of the United States in buying these lands is to restore them to a condition of maximum forest productivity by intense management, fire protection, planting, etc.; to make them sources of permanent timber supply and bases for permanent wood using industries and communities." The aforementioned conservation leaders have given you the direction that must be followed in your Ten-Year Management Plan to satisfy the commitment made to the State of Wisconsin when the Federal Government purchased land to establish the present National Forests under the 1924 Enabling legislation. (Individual, Wabeno, WI - #19358.53000)

Public Concern: The Proposed Rule should comply with the intent of the Roads and Trails Act and the Renewal Resources Planning Act.

We urge that these proposals be withdrawn. They are contrary to congressional intent as set forth in the Roads and Trails Act and the RPA. Transportation and recreation planning should be integrated in the land management planning process as clearly contemplated by Congress. (Individual, Klamath Falls, OR - #13672.53000)

THE ROADS AND TRAILS ACTS FURTHER EMPHASIZE THE USE OF NATIONAL FOREST RESOURCES. Congress has found "that the construction and maintenance of an adequate system of roads and trails within...the national forests...is essential if increasing demands for timber, recreation, and other uses of such lands are to be met." 16 U.S.C. 532. Contrary to this legislative policy, the Forest Service's roadless area initiatives would largely freeze the road network as it exists today. By preventing the future construction of roads on 28% of the National Forest System, the rulemaking will make it impossible to meet future "increasing demands for timber" and roaded "recreation" in new areas. (Timber Company or Association, Eugene, OR - #15879.53700)

It [proposed rule] ignores the United States Code, section 532 "Roads" in Title 16, chapter 2: "The Congress hereby finds and declares that the construction and maintenance of an adequate system of roads and trails within and near the National Forests...is essential if increasing demands for timber, recreation, and other uses of public land are to be met...and that such a system is essential to enable the Secretary of Agriculture to provide for intensive use, protection, development, and management of these lands under the principles of multiple-use and sustained yield of products and services." (Individual, Lander, WY - #13608.50000)

The National Forest Roads and Trails Act (NFRTA) (16 U.S. C. #532-538) clearly evidences Congress' intent in providing for roads to satisfy the nation's demand for timber. The statute also recognizes the need for protection, however, this is in the context of providing for the best way to harvest timber. Congress gives the Secretary the power to create roads through this statute, however, it does not give him or the Forest Service the power to prohibit roads. (County Agency, Duluth, MN - #17287.53100)

Public Concern: The proposed rule should comply with Special Use regulations in 36 Code of Federal Regulations (CFR) 251.

Newly proposed or reissued rights-of-way or special use permits must be evaluated consistent with 36 C.F.R. Part 251, Subpart B Special Use regulations. The inflexible nature of the proposed roadless policy conflicts with the criteria under which the Forest Service must evaluate applications for new rights-of-way. (Utility Group or Organization, No Address - #43981.90330)

Public Concern: The Forest Service should comply with the purpose of the National Recovery Relief Act.

U.S. owned historical documents, agencies' records and Federal District Court proceedings show that the National Grasslands in McKensie County were purchased as Agricultural projects under the authority of the 1933 National Recovery Relief Act.

This history and court orders make a roadless plan for the National Grasslands both illogical and illegal since roadless areas were not a purpose of the repurchase program. (Grazing Organization, Watford City, ND - #43989.10200)

Public Concern: The proposed rule should provide "community stability" as required by Timber Management Planning.

Forest service Regulations, 36 CFR sec 221.3(a)(3): The F.S. is obligated to consider and provide for "community stability" in this decision-making process. See also S. Rept. No. 105.22;30 Cong. Rec. 984 (1897); The Use Book at 17. "Community stability" is defined as a combination of local custom, culture and economic preservation as described by the Forest Service. (Business/Business Association, No Address - #54308.50000)

Public Concern: The proposed rule should comply with the intent of the Weeks Act.

The DEIS (3-13) notes that the Weeks Act of 1911 allowed the Forest Service to purchase lands in the Eastern United States, however we note that lands were also purchased in Oregon under the same authority. The Weeks Act is particularly relevant to this decision in that lands that were acquired under the Weeks Act were acquired only with the consent of the affected counties, which consent was given with the understanding these lands would be used for commodity production and in turn a 25% return to the counties. Prior to placing any of the Weeks Act lands into roadless or unroaded categories under this action the Forest Service should obtain the consent of the counties. (County Agency, John Day, OR - #16087.53000)

Public Concern: The Forest Service should revise funding by repealing the Knutson-Vandenberg Act of 1930.

Another disincentive was created by the Knutson-Vandenberg Act of 1930, which allowed the Forest Service to keep an unlimited share of timber receipts for reforestation and other sale area improvements. This encouraged managers to think of returns to the Treasury as "losses" because they lose control over them. As a result, they tended to choose cutting methods that required the most costly reforestation techniques and to find other ways to keep most timber receipts for themselves rather than compensating the Treasury for funds spent to arrange the timber sales.

The administration has proposed that Congress repeal this law. In its place, the administration wants Congress to provide a large fund that could be used for a wide range of activities. But Congress has historically directed that such appropriated funds be used for roads, timber sales, and other activities. Such a fund is not likely to result in significantly better incentives. (University/Professional Society, Arlington, VA - #43983.93644)

3.3.8 Establish Review Panels

Many respondents believe the government should establish review panels to settle disputes between land management and regulatory agencies. These respondents recommend each panel should consist of three people and be established in each region. One respondent notes that “their decisions provide case law that would evolve a better vision and consistency in application between management and regulatory agencies.” Other citizens suggest the Forest Service develop a modified Public Land Law Review Commission. According to one federally elected official, “the commission should be composed of real experts of proven competence” ultimately resulting in “draft legislation, perhaps in several forms.”

Public Concern: The U.S. Government should establish review panels to settle disputes between land management and regulatory agencies.

I believe that three-person review panels should be established in each region to settle disagreements over legitimate disputes between land management and regulatory agencies. These panels, by their decisions, provide “case law” that would evolve a better vision and more consistency in application of the evolving partnership between management and regulatory agencies. (Timber Association, Medford, OR - #13658.41400)

Public Concern: The Forest Service should develop a modified Public Land Law Review Commission.

Maybe it is time, once again, for the Public Land Law Review Commission--but perhaps with a twist. Perhaps, for once, such a commission might be composed of real experts of proven competence with no particular ax to grind. The key to success would be to pick the right leader and allow that leader to put together the team (with approval reserved to elected officials) suited to the task and develop the required budget. The task should be clearly described in consultation with the team leader. There should be a time certain for completion of the task. Following appropriate analysis, including public hearings, the ultimate outcome would be draft legislation, perhaps in several forms. (Federal Elected Official, Medford, OR - #13568.51000)

3.4 Mining Acts

This section deals with public concerns that address the various mining acts. Respondents’ concerns are divided into the following subsections: Subsection 3.4.1 1872 Mining Law; Subsection 3.4.2 Other Mining and Mineral Leasing Laws; Subsection 3.4.3 Mining Access; Subsection 3.4.4 Consistency Between the Proposed Rule and Existing Laws.

3.4.1 1872 Mining Law

A number of respondents voice their concerns about the effect the proposed rule would have on access to mineral exploration and development, and cite the protections for such exploration and development under the General Mining Act of 1872. Although some merely request clarification of the effects, many fear that the proposed rule would circumvent guarantees of access except by foot or horse. Some state that the Forest Service has no authority to deny access, and that any

attempt to do so would be in direct conflict with the General Mining Act. One respondent states that a variety of uses should be guaranteed under the General Mining Act, including OHV use and logging. In contrast, some also ask that the General Mining Act be revised or repealed.

Public Concern: The Forest Service should comply with the General Mining Law of 1872.

Under the General Mining Law of 1872, under Locatable Minerals: Valid existing rights to minerals would be exempted from Road Construction and Reconstruction Prohibitions under all of the prohibition alternatives. Thus construction and reconstruction of roads considered reasonable and necessary for locatable mineral exploration and development would be allowed as a right of access guaranteed by the General Mining Law of 1872. I assume a valid existing right simply means the rights of the General Mining Law of 1872. Or does the proposed plan attempt to supercede the mining law of 1872, by requiring existing claims or plans of operation, as existing rights? Therefore curtailing the right to prospect or explore the roadless areas, as will be implemented with leasable minerals by the expiration of lease and no further means of exploration. Unfortunately there's not too many prospectors using horse or ass to reach the minerals nowadays. The Forest Service must realize that the proposed alternatives excluding the no action will ultimately end natural resource harvest and development: particularly minerals and timber. By prohibition, or by economics, both resources will become unattainable on the 28% of N.F.S. land considered. Is this in violation of the General Mining Law of 1872? (Individual, Carson City, NV - #7463.53600)

The Forest Service has no authority to prevent access for mining exploration and development activities conducted under the Mining Law of 1872. The proposed rule and policy would significantly limit access to National Forest land for mineral exploration and development. This is directly contrary to the central provision of the Mining Law which declares that "all valuable mineral deposits in lands belonging to the United States...are...free and open to exploration and purchase, and the land in which [they] are found to occupation and purchase" by citizens of the United States. Congress has specified the procedures that must be followed by a land management agency that seeks to close or withdraw lands from entry and location under the general mining laws. The Forest Service proposal, to declare virtually all of its lands unavailable for mining by prohibiting the construction of necessary access roads, does not comply with those congressional procedures. (Mining/Oil Organization, Salt Lake City, UT - #6766.53600)

The roadless plan will effectively prevent a valid miner from actually mining those claims through the elimination of that right of entry for equipment etc., will make the patenting more difficult, if not impossible, and in affect is in direct conflict with both the mining law of 1872 and the intent of that law. (Individual, Maricopa, CA - #18909.53600)

Page 3-143 states, "THESE ALTERNATIVES COULD AFFECT A MORE LIBERAL USE OF SUDS AS A MANAGEMENT OPTION FOR LOCATABLE MINERAL ACTIVITIES IN INVENTORIED ROADLESS AREAS TO ASSURE THE HIGHEST DEGREE OF PROTECTION FOR ROADLESS CHARACTERISTICS." Again, this statement implies a degree of regulatory abuse and attempts to circumvent the Mining Law. (County Elected Official, Fallon, NV - #17290.53600)

I want the plan to declare these roadless areas open, under the 1872 mining law to all mining, off road vehicle use, oil and gas development as well as road building [and] logging. (Individual, Huntsville, AR - #18618.53600)

BY NOT ALLOWING RECREATIONAL PLACER MINING IN ROADLESS AREAS

The 1872 Mining Law does not include recreational placer mining so it should not be allowed in roadless areas, due to the negative impact on sensitive species, ground water, and wildlife habitat. (Individual, No Address - #10487.53600)

Public Concern: The Forest Service should repeal the 1872 Mining Act.

It's also time to end that old 1800 mining act that allows anyone to claim a "mine" on OUR land and mess it up at will, CHEAPLY. (Individual, No Address - #13332.93510)

Public Concern: The Forest Service should revise the 1872 Mining Act.

Mining is also compromising our beautiful lands. Use the updated 2000 mining moratorium of Wisconsin not 1872 law. (Individual, No Address - #6170.93500)

3.4.2 Other Mining and Mineral Leasing Laws

In addition to concerns over compliance with the General Mining Law of 1872, respondents cite concerns with respect to other mining acts and laws. According to one mining association, the Forest Service must comply with the National Materials Research and Development Act of 1980, an act designed to assure the availability of minerals for national security and to "promote and encourage private enterprise" in the development of sound domestic materials industries. Respondents argue further that the proposed rule conflicts with the Mining and Minerals Policy Act of 1970, the Leasing Reform Act, and the Federal Coal Management Program. One environmental group suggests that the Smith River National Recreation Area regulations should serve as a model of mining regulations, and another states that mining regulations should be revised and subject to review under NEPA. Finally, one mining organization maintains that the Forest Service must comply with its own Manual (FSM 2760 et. seq 6/1/90), which requires mineral exploration and extraction when that is the best use of the site.

Public Concern: The Proposed Rule should comply with the National Materials Research and Development Act of 1980.

The proposed RAC plan conflicts with the National Materials Research and Development Act of 1980 (P.L. 479) 94 Stat 2305-2310; this needs to be resolved. (Individual, Las Vegas, NV - #13910.51000)

The United States Congress has found in the National Materials and Minerals Policy, Research and Development Act of 1980 that "the availability of materials...is essential for national security, economic well-being, and industrial production." 30 U.S.C. [section] 1601(a)(1). Congress also declared it to be the policy of the United States that the President, through responsible departments and agencies shall "promote and encourage private enterprise in the development of economically sound and stable domestic materials industries." 30 U.S.C. [section] 1602(6). Congress directed "that the responsible departments and agencies identify, assist, and make recommendations for carrying out appropriate policies and programs to ensure adequate, stable, and economical material supplies essential to national security, economic well-being, and industrial production." 30 U.S.C [section] 1603(1). ...The term "materials" is defined as "substances, including minerals, of current or potential use that will be needed to supply the industrial, military and essential civilian needs of the United States." 30 U.S.C. [section] 1601(b).

Contrary to these policies, the Forest Service is considering prohibiting road construction in the inventoried roadless areas within the National Forest System. Obviously, the impact on the availability of minerals could be monumental unless clear exceptions are given for both locatable and leasable minerals. Modern American society depends critically on materials mined from the earth. Our nation depends on these minerals, but further development of these domestic resources is significantly hampered by restricted access to mineral deposits on federal lands. The federal government manages 632 million acres of public land in the United States, representing as much as 60 percent of the nation's hard rock mineral estate; however, less than half of that is open to mineral exploration and production. We can ill-afford any further reduction in the mineral estate. (Mining Association, Spokane, WA - #16091.93500)

Public Concern: The Proposed Rule should comply with the Mining and Minerals Policy Act of 1970.

The proposed RAC [Roadless Areas Conservation] plan conflicts with the Mining and Minerals Policy Act of 1970 (P.L. 91-631), 84 Stat 1876; this needs to be resolved. (Individual, Las Vegas, NV - #13910.51000)

Public Concern: The proposed rule should comply with the Leasing Reform Act.

The Forest Service's regulations implementing the Leasing Reform Act establish a detailed process for identifying those national forest lands which may be made available for oil and gas leasing. 36CFR #228.102 (c). The forests have spent considerable time and money preparing these analyses, yet that work would essentially be disregarded if the proposed rule were adopted. (Individual, Denver, CO - #29016.50000)

There appears to be no mention of leases (oil and gas, coal, etc.). 36 CFR 228.100 deals with oil and gas leasing. These Regulations were developed in response to the 1987 Leasing Reform Act. The Regulations say how and why we analyze leasing decisions. There is a statutory requirement to lease those lands that are found to be available through this analysis process. (Individual, Rifle, CO - #50095.53000)

In the context of oil and gas leasing and operations, the proposed rule ignores not only the decisions made in individual and resource management plans but also the leasing analyses prepared by the Forest Service in compliance with the Federal Onshore Oil and Gas Leasing Reform Act of 1987 and its implementing regulations (in particular, 36CFR. #228.102). The Leasing Reform Act prohibits oil and gas leasing on lands recommended for wilderness allocation by the surface managing agency and on lands allocated to wilderness or further planning during the RARE II process, unless those lands have been allocated to uses other than wilderness by a subsequent land and resource management plan. 30 U.S.C. #226-3(a). Congress could have, but did not, prohibit oil and gas leasing in all unroaded areas. Rather it specifically relied on the decisions made by the Forest Service and its land and resource management plans. Since roads are necessary to develop oil and gas leases, the proposed rule essentially precludes leasing in unroaded areas, even though Congress has already specifically addressed those roadless areas which shall not be available for lease. (Individual, Denver, CO - #29016.55000)

Public Concern: The Forest Service should comply with the Federal Coal Management Program regulations by completing an unsuitability analysis before withdrawing land from coal leasing activities.

In 1979, the Department of Interior formally implemented by regulation the Federal Coal Management Program (Program). The new Program was deemed necessary due to litigation over the existing program as well as three newly enacted statutes, FLPMA, the Federal Coal Leasing Amendments Act of 1976 (FCLAA) and the Surface Mining Control and Reclamation Act of 1977 (SMCRA). SEE Final Environmental Impact Statement for Federal Coal Management Program at pp. 1-15-1-17. FLPMA contains more general land use planning requirements while FCLAA contains more specific land use planning sections related to coal. SMCRA requires the Secretary of the Interior to review federal lands to determine whether they contain areas unsuitable for all or certain types of certain coal mining.

The Bureau of Land Management (BLM) is the lead agency for the Federal Coal Management Program. The first major part of the Program is mandatory comprehensive land use planning, prepared and continually updated by BLM or other surface management agency pursuant to FLPMA and FCLAA. The primary purpose of this land use planning is to identify those specific tracts for further leasing consideration. To respond to litigation and the unsuitability provisions of SMCRA, the Program regulations establish screening criteria for making such a determination including 20 unsuitability provisions. BLM initially screens unleased federal coal lands for unsuitability in a land use plan prepared pursuant to FLPMA and the land use planning sections of FCLAA. Under FCLAA, the Forest Service prepares appropriate land use plans for areas under the department of Agriculture's jurisdiction. 30 U.S.C. [section] 201(a)(3)(A)(i). Specifically, the Program regulations state that BLM or "the other surface managing agency conducting the land use planning SHALL, USING THE UNSUITABILITY CRITERIA and procedures set out in 3461 of this title, review federal lands to assess where there are areas unsuitable for all or certain stipulated methods of mining." 30 CFR [section] 3420.1-4(e)(2).

The USFS has no authority to ignore the Federal Coal Management Program regulations, or their statutory basis, by declaring vast amounts of public land off-limits to future coal leasing activities. To do so, would be to violate the legal requirement to use the unsuitability requirements to determine areas available for leasing or at a minimum is an attempt to insert a new suitability requirement into the mix without any analysis of its impact on the Program. The proposed rule and DEIS contain no analysis of the interaction of the proposed rule and the Program. (Mining Association, Spokane, WA - #16091.93510)

Public Concern: The Forest Service should use Smith River National Recreation Area regulations on mining as a model for roadless areas conservation.

The SRNRA regulations governing mining are more reflective of the Forest Service, the Courts and the Department of Interior's current implementation of the Mining Law and Organic Act than the more archaic 36 CFR 228 regulations and could be used [as] a model for roadless area conservation. (Environmental/Preservation Organization, Cave Junction, OR - #16188.53000)

Public Concern: The Forest Service mining regulations should be revised and subject to public review under the National Environmental Policy Act.

The direction in the DEIS and the proposed rule appears to absolve the Forest Service from all responsibility to regulate mining in roadless areas. First, the DEIS holds up the agency's general mining regulations at 36 CFR 228 as adequate to protect roadless areas stating that these assure "that exploration and development of locatable mineral are conducted in a manner that minimizes adverse environmental impacts to NFS surface resources (3-142). However, the 36 CFR 228 regulations are out of date and do not directly address the need to conserve roadless areas. The regulations were essentially promulgated in 1974 and do not reflect current scientific knowledge about the harmful effects of mining, road construction and reconstruction, the threat [to] non-native species and the values of roadless areas. Further the 36 CFR 228 regulations have never undergone public review under the National Environmental Policy Act (NEPA). (Environmental/Preservation Organization, Grants Pass, OR - #29018.53000)

Public Concern: The proposed rule should comply with the Forest Service Manual for mineral withdrawal.

Not only is the roadless proposal beyond statutory authority as a de facto withdrawal without the procedure required by law, it even violates the Forest Service's own Manual rules. For example, the Forest Service must comply with the withdrawal analysis outlined in its Forest Service Manual ("FSM") chapter on withdrawals. See FSM [section] 2760 et seq. (dated June 1, 1990). In evaluating the need for a withdrawal initiated by the Forest Service, the manual requires the encouragement of "mineral activity where mineral extraction is the best use of the site," Id. [section] 2761.02(4), and requires Forest Service officers to document new withdrawal of lands from alienation or entry under the mining laws by an assessment of mineral potential, an evaluation of alternatives and an analysis showing that the use or special features of the area cannot be adequately preserved or protected through other means.

Neither the encouragement of valuable mineral activity nor the procedural requirements have been honored in this roadless proposal. The Forest Service should conduct this type of detailed analysis prior to proceeding with this rulemaking process.

In another pertinent section, the Forest Service Manual notes that withdrawal from mineral leasing should be made rarely since existing public laws, federal regulations, and leasing stipulations provide substantial opportunities to accommodate both surface resources and recovery of leasable minerals. *Id.* Based on the foregoing, the Forest Service cannot proceed with the proposal until the specific requirements of FLPMA have been satisfied and public comment under that procedure supports the roadless proposal. Again, the Forest Service fails to heed the guidance of its own Manual. (Mining/Oil Company or Organization, Washington, DC - #52224.53000)

3.4.3 Mining Access

In spite of all the mining acts and laws that encourage mining exploration and development, the Forest Service does have the authority, some state, to restrict the mode of access to mining claims, and can deny motorized access altogether. Others point out that roadless areas can be protected by a determination of whether valid existing rights exist, and by requiring a claimant to demonstrate the existence of a statutory right. Several respondents also state that the Forest Service should ensure that mining claims under the General Mining Law also comply with other federal laws and recent court rulings requiring discovery of valuable mineral deposits before claiming a valid mining right. Others make the point that the General Mining Law does guarantee access, and that subsequent legal findings support the contention that access specifically includes road access for motorized vehicles for both exploration and development.

Public Concern: The Forest Service should exercise its statutory authority to restrict the mode of access to mining claims.

Notwithstanding the issue of whether the claimant has a valid right to mine there is no legally justifiable reason to exempt mining operations from the prohibition on new road construction or road construction in the final roadless area conservation rule. Recent court rulings have, in fact, found that the Forest Service does have the authority to regulate the means of access to mining claims on National Forest lands, to the point of denying motorized access altogether. See *Clouser v. Espy*, 42 F3d 1522 (9th Cir. 1994).

Rights of access to mining claims are not absolute. The proposed rule as now written attempts to do just that, however. The Forest Service has clear statutory authority to regulate the means of access to mining claims within the National Forests, even if it means requiring access to mining claims be restricted to pack animals or helicopters. Access to mining claims for the purposes of mineral exploration, prospecting, mining or processing operations on the National Forests can and should be limited to non-motorized methods or helicopter access (where necessary) in inventoried roadless areas or that overland access can and should be denied where it would impact other values such as those found in roadless areas.

As in *Clouser v. Espy*, mining claimants often taken the position that any regulation of their access constitutes a violation of the Mining Law's provision "not to ... materially interfere with prospecting, mining or processing operations or uses reasonable incidental to" 30 USC §612(b). However, the court in *Clouser* rejected this claim. "[T]he "materially interfere" standard of 30 USC § 612 does not apply to actions taken by the government to regulate mining-related activities that occur on national forest lands outside of the boundary of the mining claim." 43 F.3d 1552, 1539 (9th Cir. 1994). (Environmental/Preservation Organization, Washington, DC - #52802.53000)

Even less understandable, in light of the Forest Service's authority to regulate means of access to mining claims, is the statement, under the discussion of alternatives 2-4, that "construction and reconstruction of roads considered reasonable and necessary for locatable mineral exploration and development would be as a right of access guaranteed by the General Mining Law, as amended" (DEIS at 30-143). This attempt at legitimizing suspect statutory right, is untenable, especially given the purpose of the roadless area conservation rule described in

proposed #294.10 and the purpose described in the EIS of “immediately stopping activities that have the greatest likelihood of degrading desirable characteristics of inventoried roadless areas.” DEIS at 1-10.

There are no provisions in the General Mining Law that guarantees mining claimants the right of road access to their mining claims or the right to construct or reconstruct roads to these claims on public lands especially before determining if the statutory right to develop a mineral deposit is valid. Additionally, as stated by one leading federal court decision: “Moreover, the Mining law itself makes clear that rights of access to mining claims are not absolute. Such rights are subject to regulation under 30 USC #22.” *State of Utah v. Andrus*, 486 F. Supp. 995,1006 (D. Utah 1979). The Forest Service itself has used the provisions of 30 USC #22 to argue before a federal court that the Organic Act, in fact, gives the agency the statutory authority to regulate the means of access to mining claims in non-wilderness area national forest lands even when the regulation of access increases operating costs and affects claim validity. *Clouser v. Espy*, 42 F.3d, 1522, 1529, 1530 (9th Cir. 1994) (Environmental/Preservation Organization, Cave Junction, OR - #16188.53000)

THE PROPOSED REGULATIONS ARE NOT CONSISTENT WITH THE MINING LAW AND THE ORGANIC ACT.

The Organic Act’s mandate that the Secretary of Agriculture, “shall make provisions for the protection against destruction and depredations upon the public forests and national forests”...implies, in fact, that proposed roadless area conservation rules must provide for the regulation of mining in order to protect national forest roadless areas from destruction and depredation. The Organic Act further specified that person(s) entering the national forest for the purpose of exploiting mineral resources “must comply with the rules and regulations covering such national forests.” (Environmental/Preservation Organization, Cave Junction, OR - #16188.53200)

The proposed rule is also flawed because, as it is now written, it appears to give mining claimants carte blanche to construct or reconstruct roads to access mining claims in inventoried roadless areas--this despite the Forest Service’s unarguable authority under its Organic Act to regulate activities on the National Forests, including mineral development, exploration and road construction and reconstruction. In court, the Forest Service and Department of Justice have argued that the agency has the authority to restrict access to mining claims to non-motorized methods. Yet the proposed rule and the DEIS have ignored current court rulings, rulings of the Department of Interior and the basic tenet of the Mining Law itself that rights under the law are derivative of the discovery of a valuable mineral deposit. The DEIS has, however, explored a reasonable option which could, with some revision, be inserted into the final roadless area conservation rule so the rule is consistent with the Mining Law rights and with recent decisions by the Department of Interior and the Courts. In addition, the proposed rule excepting mining activities from the general prohibition on road construction and reconstruction in inventoried roadless areas must be amended to be consistent with the Mining Law. (Mining/Oil Company or Organization, Washington, DC - #52502.53600)

Public Concern: The Forest Service should evaluate various processes used to determine mining development rights.

The DEIS states that the liberal use of Surface Use Determinations (SUD) as a management option could be used to “assure the highest degree of protection for roadless characteristics.” DEIS at 3-143. While surface use determinations may afford roadless areas greater protection than under the status quo, which generally assumes the discovery of a valuable mineral deposit has been made if a claimant simply submits a plan of operations, valid existing rights determination and regulation of mining operations and means of access would provide the highest degree of protection for roadless areas. Further, reliance of SUD’s perpetuates the erroneous assumption that under the Mining Law there are “rights to develop” unpatented mining claims simply because an individual or corporation has filed a claim. (Environmental/Preservation Organization, Cave Junction, OR - #16188.53000)

The DEIS states that determining whether Mining Law rights exist is one option to protect roadless area values. Another option is to conduct a valid existing rights (VER) determination by a certified mineral examiner to verify the existence of statutory rights before conducting an environmental analysis of a plan of operations. DEIS p. 3-142. By amending this option to include the provision that the mining claimant must initially demonstrate the existence of a statutory right prior to being allowed to develop a locatable mineral deposit, the burden of proof at the outset is placed squarely where it should be, on the party proposing to exploit public resources. While the federal government would still make the final claim validity determination, through valid rights determination and contest

proceedings, requiring the claimant at the start to demonstrate “discovery” is likely to eliminate many speculative and spurious mining proposals in inventoried roadless and unroaded areas before a valid existing rights determination is required. (Environmental/Preservation Organization, Washington, DC - #52802.53600)

In short, merely only prohibiting road construction may not protect Roadless Areas from leasable and locatable mineral development. Therefore, all Roadless Areas must be withdrawn or segregated from mineral entry, subject to valid existing rights. (Environmental/Preservation Organization, Boulder, CO - #43734.53000)

Public Concern: The final rule should comply with federal laws governing mining by requiring that valid existing rights apply only to valuable mineral deposits.

Errors and Omissions in the DEIS Regarding the Mining of Locatable Minerals: The DEIS states that the General Mining Law of 1872 affords United States citizens a right to prospect for, claim, and develop minerals on public lands which are subject to the Mining Law. DEIS at 3-142. What the DEIS fails to inform the public and decision-maker about is one of the basic tenets of the Mining Law. The right to develop mineral deposits on public lands is strictly derivative of the discovery of a valuable mineral deposit within the meaning of the law. In other words it is not without condition.

The DEIS goes on to say that exploration and development of a locatable mineral resource are non-discretionary activities, “meaning that the Forest Service cannot prohibit the claiming of or development of valuable deposits.” DEIS at 3-142. This is correct in part. The development of a locatable mineral resource is discretionary if the claimant has not discovered a valuable mineral deposit or fails to otherwise comply with the regulations or laws governing public lands. (Environmental/Preservation Organization, Washington, DC - #52802.53600)

Under existing federal law, the concept of multiple use does not apply to mining. If a miner files a claim on Forest Service land, no matter how special or important that land is to other resources, such as wildlife, recreation, watershed, the Forest Service has to let the miners mine a valuable mineral deposit. In the past, a miner could say he had found an economically viable mineral deposit, acquire the land as private by a patenting and take away the public right to multiple use. Currently, Congress has a one-year moratorium, which must be renewed, annually on such patenting. Many impacts from mining are wholly unnecessary because they take place on claims that do not support the discovery of a valuable mineral deposit and are, therefore, not valid or associated with access to mining operations on invalid claims. (Environmental/Preservation Organization, No Address - #22030.53600)

The General Mining Law of 1872 allows miners to secure exclusive rights to mine public lands through the location of valid mining claims. Valid mining claims require, among other things, the “discovery” of a “valuable mineral.” Contrary to current practices of the Forest Service and perpetuated in the proposed rule, the mere location of a mining claim does not give the presumption of discovery or a valid claim against the United States. It cannot be emphasized too much that mining claims on federal lands are “valid against the United States [only] if there has been a discovery of [a valuable] mineral and if other statutory requirements have been met.” In fact, the Forest Service’s and Department of Justice’s contention in *Clouser v. Espy*, was that “[u]nder the relevant statutes and regulations, the [agency] need not permit mining operations until it is satisfied that the operator possesses a valid claim.” . . . Adding to these are recent rulings from the Department of the Interior which hold, among other things, that “[r]ights to mine under the general mining law are derivative of a discovery of a valuable mineral deposit and absent such discovery, denial of a plan of operations is entirely appropriate.” *Great Basin Mine Watch*, 146 IBLA 248, 256 (1998). To paraphrase *Great Basin Mine Watch*, absent the discovery of a valuable mineral deposit, denial of road construction and reconstruction in inventoried roadless areas is entirely appropriate. (Environmental/Preservation Organization, Washington, DC - #52802.53600)

[T]he proposed rule and the DEIS do not address the issue of the need to ascertain whether an actual right to mine exists prior to permitting mining, road construction and reconstruction. The GREAT BASIN MINE WATCH opinion from the Department of Interior makes clear that this RESPONSIBILITY lies with the land managing agency.

Claim validity is determined by the ability of the claimant to show a profit can be made after accounting for the costs of compliance with all applicable laws, and, WHERE A CLAIMANT IS UNABLE TO DO SO, BLM MUST, INDEED, REJECT THE PLAN OF OPERATIONS AND TAKE AFFIRMATIVE STEPS TO INVALIDATE THE

CLAIM BY FILING A MINING CONTEST (emphasis added) GREAT BASIN MINE WATCH, 146 IBLA 248, 256 (1998).

Allowing mineral development on invalid claims--claims where there is no discovery of a valuable mineral deposit and therefore no right under the Mining Law--violates the public trust and the Forest Service's mandate under the Organic Act to make provision against the destruction of the national forests. 16 USC [section] 551.

So as now written, the proposed rule would seem to give mining claimants carte blanche to construct or reconstruct roads to access mining claims in inventoried roadless areas where none existed before--this despite the Forest Service's unarguable authority under its Organic Act to regulate activities on the National Forests, including mineral development, exploration and road construction and reconstruction. The proposed rule's failure to regulate mining activities is further not consistent with the Forest Service's own position in the most important mining case of the decade. In court, the Forest Service and Department of Justice argued that the agency has the authority to restrict access to mining claims to, even to non-motorized methods. Despite these current interpretations of the Mining Law from Department of Interior (DOI) and the courts, the proposed rule and the DEIS have ignored this basic tenet of the Law--that rights under the law are derivative of the discovery of a valuable mineral deposit.

(Environmental/Preservation Organization, Grants Pass, OR - #29018.51000)

MAKING THE FINAL RULE CONSISTENT WITH THE MINING LAW AND COURT RULINGS.

In order to make the final Roadless Area Conservation Rule consistent with the Mining Law, the Organic Act and recent legal decisions and other rulings, a section should be added to the final rule which states at a minimum that: The responsible official shall require information supporting the discovery of a valuable mineral deposit within the bounds of the mining claim before permitting the development of a locatable mineral deposit in inventoried roadless areas (Environmental/Preservation Organization, Cave Junction, OR - #16188.53000)

COURT RULINGS

More recently, the Supreme Court has supplemented this "prudent person" test with a "marketability test," which holds that profitability is a critical factor in determining if a mineral deposit is marketable. *United States v. Coleman*, 390 S.S. 599, 602 (1968). Factors considered in determining whether a discovery exists under either test include the costs of extraction, processing, and transporting the mineral, including labor and equipment costs, and the cost of satisfying environmental requirements of applicable federal, state, and local laws and regulations (citations omitted). The Forest Service's Manual also notes that: A claim unsupported by a discovery of a valuable mineral deposit is invalid from the time of location, and the only rights the claimant has are those belonging to anyone to enter and prospect on National Forest lands. (Mining/Oil Company or Organization, Washington, DC - #52502.53600)

Public Concern: The Forest Service should provide mining access.

The Mining Laws specifically contemplate roads as a protected means of access for the exercise of statutory mining exploration and development rights. As the 1872 Mining Law provides, all valuable mineral deposits in public lands are to be: free and open to exploration and purchase" and the lands in which they are found to "occupation and purchase." 30 U.S.C. & 22. As confirmed by a 1959 Interior Department Solicitor's Opinion, there is an implied grant to locators of mining claims of free access across the public lands. *Rights of Mining Claimants to Access Over Lands to Their Claims*, 66 Interior Dec. 361, 1959 WL 7972 (D.O.L.) (1959). As the Solicitor stated:

[L]egislation providing for the making of entries and location necessarily presupposes a right of passage as an incident to the other rights granted, and the general rule that free passage over the public lands has always been recognized

Id. at 363. The Solicitor continues:

As to such national forest lands, Congress in the act of June 4, 1897...expressly reserved the right of ingress and egress to settlers, and to others for "all proper and lawful purpose, including that of prospecting, locating, and developing the mineral resources thereof," subject to compliance with the rules and regulations covering such national forests.

Id. at 362-63. The Solicitor recognized that judicial precedents "obviously recognize the right of a mining claimant to construct roads across public lands for necessary use in mining operations." Id. at 364 (also recognizing that "Congress knew, when it enacted the mining laws, that miners necessarily would have to use public lands outside of

their claims for the running of tunnels and roads” and “roads are necessary as an adjunct to working a claim as a means toward removing the minerals”). Implied authority from Comments of the National Mining Association. Roadless Area Conservation July 14, 2000.

Congress gives a miner the right to build a road, *Id.* at 366. and although under some circumstances he may not be able to claim exclusive rights to that road. “His right to use it for mining purposes is as evident as his right to mine.” *Id.* Because “the grant of the minerals with all incidents thereunto pertaining is direct from Congress to the miner,” an agency may not step in the middle and obstruct the right of passage. *Id.* (Mining/Oil Company or Association, Washington, DC - #15877.53600)

[T]o the extent the Forest Service posits alternative exploration methods (such as pack-horses or helicopters), it has not considered that these methods are, for the vast majority of mineral deposits, economically infeasible. See Attached Statement of T S Ary, dated July 14, 2000. Requiring such economically prohibitive measures would violate rights of access guaranteed under the law. See *Utah v Andrus*, 486 F. Supp. 995, 1010-11 (D. Utah 1979) (discussing state rights of access to school trust lands granted by the federal government, and finding that where “it may be that requiring helicopter access... would be sufficiently expensive so as to render minerals...incapable of economic development...requiring such access and denying land access would violate” rights to access minerals). (Mining/Oil Company or Organization, Washington, DC - #52224.50000)

Prior to adoption of the proposed action, we suggest that legal review be conducted to determine if this administrative action can prohibit access to mining claims on the NFS lands (SEE DEIS 3-145). (County Agency, John Day, OR - #16087.53600)

Federal law provides significant statutory rights to mineral exploration, development, and production on the public lands. The roadless proposal seeks to prevent mining exploration, development, and production companies from building roads, and so it will fundamentally infringe these statutory rights. The Forest Service does not have the power to so interfere. As the U.S. Court of Appeals for the Ninth Circuit recently made clear: Despite much contemporary hostility to the Mining Law of 1872 and high level political pressure by influential individuals and organizations for its repeal, all repeal efforts have failed, and it remains the law. . . . [Miners] are not . . . mere social guests of the Department of the Interior to be shooed out the door when the Department chooses. . . . *SHUMWAY*, 199 F.3d at 1098-99. (Business/Business Association, No Address, - #43736.53200)

Permitting only aerial access or non-motorized access is a constructive denial of access. To reiterate previous comments, the Forest Service has no authority to prevent access for mineral activities under the Mining Law. As the United States Court of Appeals for Ninth Circuit has recently noted: “Congress has refused to repeal the Mining Law of 1872. Administrative agencies lack authority effectively to repeal the statute by regulations.” *UNITED STATES V. SHUMWAY*, 199 F.3d.1093, 1107, (9th Cir. 1999). In addition, denial or restriction of access may effect a taking under the Fifth Amendment. (Mining/Oil Company or Organization, Washington, DC - #43583.53600)

EXPLORATION ACCESS

Access to the Public Lands is critical to exploration and development of our domestic minerals resources. The Forest Service acknowledges this fact in its document titled ‘Forest Service Roads: A Synthesis of Scientific Information.’ That report stated that “Federal law and Forest Service policy clearly support exploration for and extraction of resources from public lands....Under the Mining Law of 1872, U.S. citizens and firms have the RIGHT to explore for and stake claims to selected minerals on ALL public domain lands NOT SPECIFICALLY WITHDRAWN from mineral entry,” and the “Forest Service cannot unilaterally deny exploration access to National Forest lands.” Regarding the use of roads for necessary access, the report explains that the Forest Service “can affect the location and design of roads built on National Forest lands to support energy and mineral activity. In addition, the agency can in some instances place stipulations on access, i.e., limiting road use to occupancy. Constraints that are unduly expensive to fulfill or so restrictive as to make an otherwise economic mineral deposit uneconomic, however, might well be perceived as denying reasonable access.”

In light of the clear legal provisions that provide for access to minerals on the public lands, the Forest Service must more thoroughly address how access for minerals will be provided for under the proposal. It is NOT enough to say that the agency will protect “valid existing rights.” The mining law guarantees access to public lands to search for

undiscovered and unclaimed mineral deposits--even if there are no pre-existing claims and no "valid existing rights." (Mining Company, Salt Lake City, UT - #6766.71220)

We [Kennecott Minerals Company] find the DEIS to be misleading. On page S-1, it is stated that the "...Forest Service is proposing to prohibit road construction and reconstruction in inventoried roadless areas within the NFS, UNLESS they are needed for public health and safety, FOR RESERVED OR OUTSTANDING RIGHTS, or for other specified reasons." The same statement appears in the last paragraph on page 2-13 where the preferred alternative is described.

However, on page 3-143 there is an ominous statement (Action Alternatives 2 through 4) whereby, "The level of approved activities may be limited under this range of alternatives." This includes the preferred alternative. Furthermore, we are told that the preferred alternative would likely reinforce the trend of decreasing interest in the exploration and development of domestic mineral resources. Kennecott finds it extraordinary that an agency of the United States government would attempt to limit economic endeavor authorized by Congress. (Mining Company, Salt Lake City, UT - #6766.93510)

[T]he regulations found at 36 C.F.R. Part 228 ("Part 228 regulations"), promulgated by the Forest Service in 1974, correctly set the boundaries of the Forest Service's limited authority over locatable mineral resources and mining activities. SEE 39 Fed. Reg. 31317 (Aug. 28, 1974). In the statement of purpose for the Part 228 regulations, the Forest Service recognized that there is a statutory right to enter public lands in search of minerals. Thus, the purpose of the regulations was to:

[S]et forth rules and procedures through which use of the surface of National Forest System lands in connection with operations authorized by the United States mining laws (30 U.S.C. 21-54), WHICH CONFER A STATUTORY RIGHT TO ENTER UPON THE PUBLIC LANDS TO SEARCH FOR MINERALS, shall be conducted so as to minimize adverse environmental impacts on National Forest System surface resources. It is not the purpose of these regulations to provide for the management of mineral resources; the responsibility for managing such resources is in the Secretary of the Interior.

36 C.F.R. [section] 228.1 (emphasis added).

Surely, the proposed restrictions on the construction of roads for mineral exploration and mine development and concomitant DE FACTO prohibition of mine development interferes with that statutory right. The Part 228 regulations, which remain in full force today, require mining claimants to obtain Forest Service approval of a notice of intent or plan of operations, and post necessary bonding to secure compliance with the plan of operation's reclamation requirements, but make no attempt to limit access in the manner contemplated in the proposed roadless rule. SEE E.G., 36 C.F.R. [section] [section] 228.4, 228.5. (Business/Business Association, No Address - #43736.53000)

3.4.4 Consistency Between the Proposed Rule and Existing Laws

In addition to the various mining laws and acts that respondents mention, several individuals and mining companies/organizations also comment on other land and resource management laws and policies that include mining and exploration activities in their directives. Some state that the Federal Land Policy and Management Act (FLPMA) directs the Forest Service to apply to the Secretary of the Interior for any withdrawals of land from mining exploration or development. Others say that the Organic Act either implicitly or explicitly protects mining activities or restricts mining activities. Some state that the Multiple Use Sustained Yield Act (MUSYA) has language designed to preclude any interference with mining operations, or maintain that the Forest Service is in violation of the Forest Service Regulations on Locatable Minerals. One respondent points out that even the language of the Wilderness Act of 1964 protects mining interests and access. Finally, another respondent argues that the Surface Resource and Multiple Use Act of 1955 specifically states that the federal government "shall not endanger or materially interfere with" mining operations.

Public Concern: The proposed rule should be consistent with existing laws as they relate to mining.

FEDERAL LAND POLICY AND MANAGEMENT ACT

The Federal Land Management and Policy Act (FLPMA) also does not provide authority for the Forest Service to deny access to mining claims on National Forest lands. FLPMA expressly preserved the mining claimant's right to access, subject only to the prevention of unnecessary and undue degradation of the lands. Section 302(b) of FLPMA provides "[i]n managing the public lands the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation." Section 302 also states that "except as provided...in the last sentence of this paragraph [the undue/unnecessary language], no provision of this section or any other section of this Act shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under the Act, INCLUDING, BUT NOT LIMITED TO, RIGHTS ON INGRESS AND EGRESS." (Mining Association, Spokane, WA - #16091.53300)

FLPMA makes it clear that only the secretary of Interior can withdraw "Federal lands" (both BLM-and Forest Service-managed public domain lands) from "location, or entry, under some or all of the general lands laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area..." 43 U.S.C. section 1702(j), defining "withdrawal," and used in 43 U.S.C. section 1744. (Mining/Oil Company or Organization, Washington, DC - #15877.53300)

THE PROPOSED RULE IS A DE FACTO MINERAL WITHDRAWAL.

The draft EIS acknowledges that "additional areas will be recommended for mineral withdrawal." DEIS S-42 (Effects on the Procedural Alternative-Human Uses) The process for initiating a withdrawal of lands from availability for certain activities is set forth in the Federal Land Policy and Management Act (FLPMA). 43 U.S.C. [section] 1714(a) (c) (d) and (h). The Secretary of Agriculture must apply to the Secretary of the Interior for withdrawal of Forest Service lands. Withdrawals aggregating 5000 acres or more require Congressional notification and public hearings must be held on identified parcels. A mineral withdrawal is defined under the Federal Land Policy and Management Act (FLPMA) as withholding an area of Federal land from settlement, sale, location, or entry under some or all of the general land laws, for the purpose of limiting activities under those laws in order to maintain other public values in the area. 43 U.S.C. [section] 1702(j). (Mining/Oil Company or Organization, Denver, CO - #29952.53300)

If the Forest Service is intent upon proceeding with this action, it must follow the withdrawal procedures mandated by FLPMA at 43 U.S.C. [section] 1714(a) (c) (d) and (h) and the procedures outlined in Forest Service Manual 2700 on Special Use Management--[C]hapter 2760 on Withdrawals. FLPMA section 204 (43 U.S.C. [section] 1714) gives the Secretary of Interior general authority to make withdrawals on public land. Other agency heads such as the head of Forest Service must apply to the Secretary of Interior for withdrawal actions on public lands under their administration. 43 U.S.C. [section] 1714 (c) requires congressional approval of all withdrawals aggregating five thousand acres or more. Even though withdrawals for less than 5000 acres do not have the same requirement for congressional approval, 1714(h) applies to all withdrawals, regardless of size, containing provisions for public hearings. Through this proposed moratorium, the Forest Service is attempting to accomplish the same result as a withdrawal but is circumventing the withdrawal procedures of FLPMA. At a minimum, the Forest Service is required to follow the procedures for Congressional approval for any suspension of road construction in roadless areas of 5000 or more acres.

Courts have determined that actions taken by federal land management agencies can constitute withdrawals necessitating compliance with the FLPMA withdrawal provision. For example, in MOUNTAIN STATES LEGAL FOUNDATION V. ANDRUS, 499 F. Supp. 383. (D. Wyo. 1980), the court found that delays by BLM and Forest Service in deciding whether to approve oil and gas lease applications amounted to an illegal "withdrawal of public land" without prior approval of Congress. The agencies admitted that even though the leases would have been located in non-wilderness portions of various national forests, the delay was necessary to allow the Forest Service time to evaluate those areas for possible inclusion in the wilderness system. In the meantime, the agencies argued they wanted to preserve the status quo of the involved lands. In that case, as under this proposed action, a subset of

public lands would have been put off limits to mining activities without compliance with the proper procedures for withdrawals. (Mining/Oil Company or Organization, Spokane, WA - #16091.53300)

ORGANIC ACT

The Organic Act's mandate that the Secretary of Agriculture, "shall make provisions for the protection against destruction and depredations upon the public forests and national forests"...implies, in fact, that proposed roadless area conservation rules must provide for the regulation of mining in order to protect national forest roadless areas from destruction and depredation. (Individual, Las Vegas, NV - #15882.53200)

Neither MUSYA or NFMA override 16 U.S.C. [section] 478 of the Forest Service Organic Act's express acknowledgment of the "statutory rights" of mining claimants, conferred by the Mining Act to conduct mining operations on public lands. (Mining Association, Reno, NV - #15907.53100)

Interpreting the Forest Service's Organic Act, the U.S. Court of Appeals for the Ninth Circuit recently stated: [T]he Forest Service may regulate use of National Forest lands by holders of unpatented mining claims,... but only to the extent that the regulations are "reasonable" and do not impermissibly encroach on legitimate uses incident to mining and mill site claims.

UNITED STATES V. SHUMWAY, 199 F.3d 1093, 1107 (9th Cir. 1999) (citing UNITED STATES V. WEISS, 642 F.2d 296, 299 (9th Cir. 1981)). ACCORD SHUMWAY, 199 F.3d at 1107 (right of the Forest Service to manage surface resources shall be such as not to endanger or materially interfere with prospecting, mining or processing operations "or uses reasonably incident thereto"). Roads are most certainly "legitimate uses incident to mining and mill site claims" and the prohibition of roads in inventoried areas would be a material interference with mining that is certainly an unreasonable and impermissible encroachment on legitimate uses. Moreover, if roads ostensibly are prohibited under this proposal in roadless areas, then all surface disturbance associated with legitimate mining ostensibly also would be prohibited, which also is an unreasonable and impermissible encroachment on legitimate uses of the nation's forests. (Business/Business Association, No Address - #43736.53200)

The Forest Service Roads document rightly notes that the USFS does not have the authority to deny access to explore or develop mining claims on National Forest lands. Certainly, the Forest Service's Organic Act does not provide such authority. In the pertinent section, the Act provides that: nor shall anything herein prohibit any person from entering upon such national forests for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof. Such persons must comply with the rules and regulations covering such national forests. 16 U.S.C. 478.

UNITED STATES V. WEISS, 642 F. 2d 296 (9th Cir. 1981), is the leading case on the Forest Service's authority under its Organic Act to regulate mining activities on National Forest Lands. The court upheld Forest Service regulations (36 CFR 228) relating to mining activities conducted under the 1872 Mining Law on National Forest Lands in the face of challenges that the agency had insufficient statutory authority under its Organic Act to promulgate surface use management regulations. The court noted that the pertinent section of the Organic Act provides: the Secretary of Agriculture shall make provisions for the protection against destruction by fire and depredations upon the public forests and national forests...and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forest thereon from destruction." While the court upheld the Secretary of Agriculture's authority to regulate mining operations on national forest land, the court read 16 U.S.C. 478 to mean that mining may not be prohibited or "so unreasonably circumscribed as to amount to a prohibition." WEISS 642 F.2D at 299. (Mining/Oil Company or Organization, Spokane, WA - #16091.52100)

MULTIPLE USE SUSTAINED YIELD ACT

MUSYA does not authorize the Forest Service to prohibit mining activities in the absence of formal withdrawal. MUSYA's declaration of policy states that nothing in the act shall be construed as affecting "the use or administration of the mineral resources of national forest lands..." Neither MUSYA OR NFMA override 16 U.S.C. [section] 478 of the Forest Service Organic Act's express acknowledgment of the "statutory rights" of mining claimants, conferred by the Mining Act to conduct mining operations on public lands. In FOUNDATION FOR NORTH AMERICAN WILD SHEEP V. UNITED STATES, 681 F 2d. 1172, 1182 n 48, (9th Cir. 1982) the court

noted that Forest Service authority under MUSYA “mandates that access to pre-existing mining claims be granted the owners of those claims.” (Mining/Oil Company or Organization, Spokane, WA - #16091.53100)

USFS REGULATIONS AND DIRECTIVES

This document ignores the USFS Regulations on Locatable Minerals. (Individual, Lander, WY - #13608.50000)

The range of alternatives except the “No Action” alternative conflict with a number of laws that permit and encourage mining including: USFS Regulations on Locatable Minerals
Road access is necessary for mineral exploration and development activities and CSVI believes that the USFS has neither authority to promulgate this ban on roads nor the statutory authority to prevent or restrict access under the Mining Law. (Mining Organization, No Address - #30435.50000)

Not only is the roadless proposal beyond statutory authority as a de facto withdrawal without the procedure required by law, it even violates the Forest Service’s own Manual rules. For example, the Forest Service must comply with the withdrawal analysis outlined in its Forest Service Manual (“FSM”) chapter on withdrawals. See FSM [section] 2760 et seq. (dated June 1, 1990). In evaluating the need for a withdrawal initiated by the Forest Service, the manual requires the encouragement of “mineral activity where mineral extraction is the best use of the site,” Id. [section] 2761.02(4), and requires Forest Service officers to document new withdrawal of lands from alienation or entry under the mining laws by an assessment of mineral potential, an evaluation of alternatives and an analysis showing that the use or special features of the area cannot be adequately preserved or protected through other means. Neither the encouragement of valuable mineral activity nor the procedural requirements have been honored in this roadless proposal. The Forest Service should conduct this type of detailed analysis prior to proceeding with this rulemaking process.

In another pertinent section, the Forest service Manual notes that withdrawal from mineral leasing should be made rarely since existing public laws, federal regulations, and leasing stipulations provide substantial opportunities to accommodate both surface resources and recovery of leasable minerals. Id. Based on the foregoing, the Forest Service cannot proceed with the proposal until the specific requirements of FLPMA have been satisfied and public comment under that procedure supports the roadless proposal. Again, the Forest Service fails to heed the guidance of its own Manual. (Mining/Oil Company or Organization, Washington, DC - #52224.53000)

WILDERNESS ACT

The Wilderness Act of 1964 specifically states that “in any case where valid mining claims or other valid occupancies are wholly within a designated national forest wilderness area, the Secretary of the Agriculture shall...permit ingress and egress to [claims] by means which have been or are being customarily enjoyed with respect to other such areas similarly situated.” 16 U.S.C. section 1134. (Mining/Oil Company or Organization, Washington, DC - #15877.53400)

Indeed, even within congressionally designated wilderness areas, Congress stated that nothing in the Act “shall prevent within national forest wilderness areas any activity, including prospecting, for the purpose of gathering information about mineral or other resources,” 16 U.S.C. [section] 1133(d)(2), and it stated that the Secretary of Agriculture “shall, by reasonable regulations consistent with the preservation of the area as wilderness, permit ingress and egress to [valid mining claims or other valid occupancies wholly within such an area] by means which have been or are customarily enjoyed with respect to other such areas similarly situated.” 16 U.S.C. [section] 1134(b). **THUS, EVEN IN WILDERNESS AREAS, CONGRESS CONTEMPLATED THE EXISTENCE OF ROADS FOR MINING EXPLORATION AND DEVELOPMENT.** (Mining/Oil Company or Organization, Washington, DC - #52224.53400)

This leads us back to a discussion of the legality of this entire Roadless Conservation Proposal. During studies to determine suitable lands for wilderness designation under the Wilderness Act of 1964, the US Geological Survey was mandated to do extensive mineral resource surveys and, as a result of that work, a number of areas were specifically EXCLUDED FROM WILDERNESS because of mineral resource potential. On page S-195, you specifically state that as a result of this USGS study there are potentially valuable mineral deposits within inventoried roadless areas. By prohibiting reasonable access through road construction and reconstruction, you have circumvented the law. (Individual, Challis, ID - #8034.53400)

SURFACE RESOURCE AND MULTIPLE USE ACT OF 1955

The Surface Resources and Multiple Use Act of 1955 restricted the use of surface resources for unpatented mining claims. It mandated that hereafter located claims could not be used for any purposes not reasonably related to mining. It also reserved to the United States the use of the surface and surface resources. Despite these dramatic changes, the act provides that the right of the United States to manage the surface resources “shall not endanger or materially interfere with” mining operations. 30 U.S.C. [section] 612. The suspension of road construction prevents reasonable access and materially interferes with mining operations. (Mining Association, Spokane, WA - #16091.53000)

3.5 Proposed Legislation/Acts

Some respondents urge the Forest Service to take a stand on, or act in accordance with, a variety of pending, proposed or suggested federal laws. According to these various respondents, the Forest Service should complete hydrocarbon inventories that would be required by the proposed National Energy Security Act; oppose the Conservation and Reinvestment Act; support the Sequoia Ecosystem and Recreation Preserve Act, the Northern Rockies Ecosystem Protection Act, and the National Forest Protection and Restoration Act; and compensate for the loss of school funding from decreased timber harvest by supporting the Secure Rural Schools and Community Self Determination Act. One respondent urges Congress to pass legislation that would prohibit the use of polluting off-road vehicles.

Public Concern: The Forest Service should complete hydrocarbon inventories required by the proposed National Energy Security Act.

COGA asserts that the Draft Roadless Area EIS should be withdrawn unless and until a national inventory of public lands hydrocarbon potential has been completed and incorporated into the analysis, including the impact of current access restrictions. Such an inventory would be required under S. 2557, the National Energy Security Act, pending in Congress. (Business/Business Association, Denver, CO - #52419.55000)

Public Concern: The Forest Service should oppose the Conservation And Reinvestment Act.

I am...asking that you send me a letter stating that you OPPOSE CARA and that you will oppose it when it comes to the floor of the House or Senate. (Individual, Bourg, LA - #3606.34400)

Public Concern: The Forest Service should support the Sequoia Ecosystem and Recreation Preserve Act.

The Giant Sequoias of California are some of our greatest natural wonders...and they must be preserved for future generations. That’s why I’m urging you to support the Sequoia Ecosystem and Recreation Preserve Act...and issue a complete moratorium on all road building and logging in all remaining national forest roadless areas. It’s important that we preserve these and other vital wild places across the country. (Individual, Washington, DC - #4848.64140)

Public Concern: The Forest Service should support the enactment of the Northern Rockies Ecosystem Protection act.

A far better approach to our current plight would be to enact the Northern Rockies Ecosystem Protection Act and use it as a template for realistic ecosystem protection to be applied throughout our nation. (Individual, Seattle, WA - #1723.22000)

Public Concern: The Forest Service should support the National Forest Protection and Restoration Act.

The U.S. Forest Service as an agency should support and begin preparations in anticipation of the passage of H.R. 1396, the “National Forest Protection and Restoration Act of 1999”, which would end all commercial logging on federal public lands. This important bi-partisan legislation is nearing 100 co-sponsors in the U.S. House of Representatives, and would afford the greatest protection to all remaining roadless areas in the National Forest System upon becoming law. (Environmental/Preservation Organization, Clarion, PA - #8413.53000)

Koehler referred to a current bill in Congress, the National Forest Protection and Restoration Act (HR 1396), which would protect national forests from commercial logging while investing money in worker retraining, ecological restoration, alternative fiber research and community assistance. “The National Forest Protection and Restoration Act would provide \$500 million annually to put people in rural communities to work restoring the damage caused by over a century of logging in national forests,” explained Koehler. “Our future economy does not depend on the exploitation of our national forests, rather it depends on protecting and restoring our national forests.” (Individual, Choteau, MT - #6025.54000)

THE PRESIDENT AND CONGRESS SHOULD HEED THE MAJORITY OF AMERICANS WHO DON'T WANT ANY COMMERCIAL LOGGING IN OUR NATIONAL FORESTS. CONGRESS SHOULD PROTECT OUR PUBLIC LANDS BY ENDORSING THE BILL, HR 1396, THE NATIONAL FOREST PROTECTION AND RESTORATION ACT, WHICH ENDS THE HARMFUL LOGGING PROGRAM. (Individual, Kane, PA - #7841.93340)

The National Forest Protection and Restoration Act (HR 1396) addresses the long-term health of National Forests and surrounding communities by redirecting the timber subsidy to create a scientifically-based ecological restoration program for National Forests. Displaced timber workers are given a hiring preference. In addition, the HR 1396 allocates funds for retraining of these workers to build the skills to conduct restoration activities. (Individual, Bradford, PA - #7842.93700)

I would like to point out some myths and facts of logging our National Forests as my Comments on [the] National Forest Roadless Initiative. They are as follows:

MYTH: NATIONAL FOREST LOGGING GENERATES SCARCE PUBLIC REVENUES, WHICH SUPPORT SCHOOLS, ROADS, AND OTHER PUBLIC WORKS.

FACT: National Forest logging is a net loser from an economic standpoint, and costs federal, state, and county governments far more than the revenues it generates. The federal logging program operates at a net loss of over \$1 billion each year. These financial losses, however, are just the tip of the iceberg. The National Forest logging program generates many billions more in “externalized” costs that are passed on to businesses, communities and individuals when National Forests are logged. These include costs incurred by municipal water providers when rivers are polluted by logging as well as jobs and revenue lost by businesses that support recreation and tourism. In addition, heavily logged National Forests are scenic eyesores, diminishing property values and thwarting the ability of communities to attract businesses and residents to enjoy high quality environments. The National Forest Protection and Restoration Act (HR 1396) will end the subsidized federal logging program, saving government at all levels billions each year. In addition, HR 1396 provides funding to replace [the] 25% timber sale revenue sharing payments to States, for Counties, and local governments. (Individual, Bradford, PA - #7842.93640)

Public Concern: The Forest Service should compensate for the loss of school funding from decreased timber harvest by supporting the Secure Rural Schools and Community Self Determination Act.

The road prohibition would set in motion another chain of events. Logging results in payments to forest counties. That funding supports local schools. The joint powers board that Pennington County belongs to, the NCLUCB, is asking the Senate to pass, without amendment, the Secure Rural Schools and Community Self Determination Act. This Act provides stable payments for forest counties to support their schools with a percentage going into a fund to restart long neglected projects on the National Forests. (Individual, Thief River Falls, MN - #7501.93740)

Public Concern: Congress should pass legislation to prohibit the use of polluting off-road vehicles.

I would like to propose that Congress pass legislation that prohibits the use of obnoxious & polluting off road vehicles. In my opinion these types of vehicles totally disrupt & disturb the wildlife population while at the same time causing an extreme amount of noise and emission pollution. The noise & smells that they emit ruin the serenity of the forestlands. (Individual, India Hills, CO - #8443)

3.6 Treaties/Tribal Laws

Some respondents urge the Forest Service to honor the United States' treaty obligations with Native American peoples. One tribal representative states that the proposed rule's allowance for road building under existing treaty rights should be revised to specifically include tribal treaty rights. Another respondent, however argues that in other instances the proposed rule can best honor tribal treaty rights by denying access to roadless areas.

Public Concern: The Forest Service should honor the United States' treaty obligations with Native American peoples.

My concern grows out of an awareness of the sacredness Native American peoples, particularly the Lakota Nation, have for the Black Hills region. It is time the United States began living up to its treaty obligations with Native American peoples from whom we took the land. And at the least, we need to respect Native American feelings about the sacredness of the region. (Individual, Freeman, SD - #3414.40300)

It might also violate or impair treaties with Indian Nations and the rights of indigenous people. (Individual, Douglasville, GA - #18185.50000)

The Tribal Committees are requesting that the following items be considered when adopting the Rule: Continue to acknowledge the rights and historical uses of The Native American Tribes in the proposed Roadless Areas. (Tribal, Grand Ronde, OR - #29958.56000)

By virtue of the Treaty of 1855, the Nez Perce Tribe maintains treaty-reserved rights to hunt, fish, gather, and pasture cattle and horses within "open and unclaimed lands." These treaty lands include vast areas encompassed in the National Forests of northeastern Oregon, Southwestern Washington, and Idaho. The Tribe believes that the protections provided for by this rule would be consistent with the treaty and trust responsibilities of the United States to preserve, protect, and enhance tribal treaty rights and treaty-reserved resources. Further, this rule appears to be consistent with the salmon recovery plan adopted by four of the Columbia River treaty Tribes, including the Nez Perce Tribe. *Wy-Kan-Ush-Mi Wa-Kis-Wit: Spirit of the Salmon* calls for, amongst

other actions, a decrease in roaded miles in managed watersheds, as well as improved drainage and decreased sediment delivery from roads that will not be obliterated or relocated. (Tribal, Lapwai, ID - #19309.56000)

Public Concern: The Forest Service should revise the exemptions for road building to include tribal treaty rights.

The proposed rule provides that roads may be constructed or reconstructed if “(a) road is necessary pursuant to reserved or outstanding rights as provided for by statute or treaty.” This exception should be revised to explicitly state that road construction and reconstruction may occur to ensure exercise of tribal treaty-reserved rights. (Tribal, Lapwai, ID - #19309.56000)

Public Concern: The proposed rule should deny access to roadless areas in order to honor treaty rights.

The 294.22(b)(3) allows access to honor existing treaty rights. Please also discuss the issue of denying access to roadless areas in order to honor treaty rights. For example the Lakota claim ownership of the Black Hills, what if they don't want a road in a roadless area? (Environmental/Preservation Organization, Rapid City, SD - #52237.56000)