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## Comments

See Attachments

## Individual(s)

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# Holsinger Law, LLC

lands, wildlife and water law

March 16, 2011  
Forest Service Planning DEIS  
c/o Bear West Company  
132 E 500 S  
Bountiful, UT 84010  
Via Public Participation Portal at <http://www.govcomments.com>  
**RE: Proposed Forest Service Planning Rule**

## To Whom It May Concern:

On behalf of the New Red Top Valley Ditch Company, we provide the following comments on the U.S. Forest Service's Proposed Forest Service Planning Rule and Draft Environmental Impact Statement ("Proposed Rule") as announced in the Federal Register (76 Fed. Reg. 8480 (Feb. 14, 2011)). We first provided comments on the Proposed Rule on February 15, 2010. Thank you for the opportunity to comment further on this matter. The New Red Top Valley Ditch Company has a right to use, operate and maintain its Red Top Ditch on National Forest System lands, specifically on the Sulphur Ranger District of the Arapaho & Roosevelt National Forests and Pawnee National Grassland, pursuant to the Act of July 26, 1866 (RS 2339).

### **Water and Watersheds**

As the Proposed Rule recognizes, National forests provide an integral source of water in the West. In addition, many water structures sit on or traverse National forest lands which facilitate the delivery of such a valuable resource. Without access to these water facilities, water providers would not be able to deliver water. Yet, the Proposed Rule appears to ignore the importance of providing access to these structures in its discussion of the planning process. The U.S. Forest Service must not ignore its Organic Act of 1897 which provided for the reservation of lands for the purpose of securing favorable conditions of water flows and furnishing a continuous supply of timber. Protecting and enhancing water resources should mean protecting and enhancing the ability to access, maintain and operate water facilities and structures that originate on or cross forest lands.

Riparian areas should not include those areas adjacent to ditches, canals and reservoirs. The primary purpose of areas adjacent to these water facilities should be to provide for the maintenance and operation of said structures.

Watershed health is amorphous and not readily definable. The Proposed Rule does not provide sufficient guidance and as such we do not believe it should be included.

### **Valid Existing Rights**

The Proposed Rule offers only one provision that recognizes it may not affect treaty rights or valid existing rights, and that plans must comply with all applicable laws and regulations. However, when discussing the fundamental principles that will guide land management planning, the Proposed Rule wrongfully ignores the obligation to valid existing rights.

### **Threats to forests and grasslands**

Access and active management of forests and grasslands is critical to their health. Active management, through prescribed fire and selective cutting, is key to forest health and species diversity. "Restoration" should not be defined to limit access to, or

management of, forests and grasslands.

### **Species Diversity and Wildlife Habitat**

It is important to note that the Endangered Species Act (“ESA”) does not amend or override an agency’s statutory mission. *See National Association of Home Builders v. Defenders of Wildlife* 127 S. Ct. 2518 (2007).

The Proposed Rule provides that the land management plan must “maintain viable populations of species of conservation concern within the plan area.” There is no such requirement under the National Forest Management Act (“NFMA”) or any other U.S. Forest Service statutory authority. Such a requirement places a legal burden on the U.S. Forest Service to identify, survey, and maintain “a viable population.”

The Proposed Rule creates a new obligation to “conserve” fish and wildlife species that are “candidates” for listing under the ESA. This would likely create an expectation that U.S. Forest Service will develop recovery plans even though such plans are not required under the ESA.

### **Wilderness**

The Proposed Rule gives equal status to “protection” of recommended wilderness areas as to “protection” of congressionally designated wilderness. The U.S. Forest Service lacks the authority to elevate the status of recommended wilderness areas.

### **Statutory Authority**

We continue to question what the U.S. Forest Service means by “sustainable delivery of ecosystem services” and believe there is no statutory authority for implementing such a term. While the Proposed Rule attempts to define the phrase, the definition is too broad and improperly elevates ecosystem services to the same level of importance as multiple uses as defined in the Multiple Use Sustained Yield Act (“MUSYA”).

The Proposed Rule provides that “[t]he management of the multiple uses described by the MUSYA of 1960 (outdoor recreation, range, timber, watershed and wildlife) has broader application in today’s context.” It appears that that U.S. Forest Service is attempting to broaden those multiple uses enumerated by the MUSYA. U.S. Forest Service authorizing statutes should set the sideboards for any new planning rule, not the proposed rule.

The Proposed Rule establishes a binding requirement for ecological sustainability above the requirement the plan “contribute” to social and economic stability. There is no statutory authority to support such hierarchy.

The Proposed Rule calls for regular “assessments” which are prepared separate from the land management planning process without NEPA compliance. Not only do these assessments reflect that U.S. Forest Service land management plans will be consumed by endless planning which creates a lack of certainty for users of the National forest lands, it is contrary to law.

### **Local Public Participation**

The Proposed Rule would allow for both “national perspectives” and “native knowledge” be taken into account in the planning process. While the Proposed Rule discusses the importance of the local community, it fails to place greater importance on those communities and individuals who are directly affected by land management planning. The Proposed Rule should do so.

Furthermore, we question the statutory authority which allows the U.S. Forest Service to provide that land management planning must reflect “the range of values, needs, and preferences of society.”

### **Permitting**

We urge the U.S. Forest Service to streamline permitting requirements in its new planning rules. For example, categorical exclusions should be more broadly interpreted and implemented for action necessary to maintain roads and rights of way and to protect against falling dead timber and erosion.

**Objections**

The U.S. Forest Service seeks to limit those who may file a formal objection to only those who submitted formal comments related to a plan, plan amendment or plan revision during public participation opportunities provided in the planning process. The U.S. Forest Service seeks to further narrow objections to only the content contained in the objector's previous formal comments. Instead, the proposed rule should provide a mechanism for a party with a valid existing right or other vested interest to object to the plan, plan amendment or plan revision at any point in the process.

Thank you again for the opportunity to comment.

Sincerely,

Kent Holsinger

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