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20 November 2018

Subject: Valid Existing Rights to be Considered in the upcoming revision and amendment of the Thunder Basin Land and Resource Management Plan.

To all Parties impacted by loss of Property Rights on the Thunder Basin National Grasslands.

Information for consideration from the following:

Medicine Bow National Forest
REVISED LAND AND RESOURCE
MANAGEMENT PLAN
December 2003

Abstract

This Revised Land and Resource Management Plan was prepared according to Department of Agriculture regulations (36 CFR 219) which are based on the Forest and Rangeland Renewable Resources Planning Act (RPA), as amended by the National Forest Management Act of 1976 (NFMA). This plan was also developed in accordance with regulations (40 CFR 1500) for implementing the National Environmental Policy Act of 1969 (NEPA).

Because this plan revision is considered a major federal action significantly affecting the environment, a detailed Final Environmental Impact Statement (FEIS) has been prepared as required by NEPA and 36 CFR 219. If any provision of this plan or its application to any person or circumstances is found to be invalid, the remainder of the plan and its applicability to other persons or circumstances will not be affected.

PREFACE
Understanding the Revised Plan

Background

The term "Forest Plan" used in this document refers to forest land and resource management plans in general. The term "1985 Plan" refers to the Medicine Bow National Forest Plan signed in 1985. The term "Revised Plan" refers to this document. Forest plans are prepared in accordance with the 1976 National Forest Management Act (NFMA), the 1969 National Environmental Policy Act (NEPA), and other laws and regulations. The Medicine Bow National Forest Land and Resource Management Plan (1985 Plan) was issued in October 1985. NFMA regulations state that a forest plan should ordinarily be revised on a 10-year cycle or at least every 15 years (39 CFR 219.10).

The Medicine Bow National Forest has prepared this Revised Plan and accompanying Final Environmental Impact Statement (FEIS). The public had 90 days to comment on the Draft

Revised Plan and DEIS. After the comments were evaluated and the necessary changes made, this Revised Plan, FEIS, and Record of Decision (ROD) were prepared and issued. With signature of the ROD, the Revised Plan replaces the 1985 Plan.

Purpose of the Revised Plan

A forest plan provides guidance for all resource management activities on a national forest. It establishes forest wide multiple-use goals and objectives (36 CFR 219.11(b)).

It establishes forest wide standards and guidelines to fulfill the requirements of 16 USC 1604 applying to future activities and resource integration requirements in 36 CFR 219.13 through 219.27.

It establishes management area direction (management area prescriptions) applying to future activities in a management area (resource integration and minimum specific management requirements) 36 CFR 219.11(c).

It designates land as suited or not suited for timber production (16 USC 1604(k)) and other resource management activities such as rangeland uses and recreation management (36 CFR 219.14, 219.15, 219.20, and 219.21). In addition, it identifies lands available for oil and gas leasing and the associated leasing stipulations (36 CFR 228.102). It establishes monitoring and evaluation requirements (36 CFR 219.11(d)). It recommends the establishment of wilderness, wild and scenic rivers, and other special designations to Congress, as appropriate.

Forest plans estimate future management activities, but the actual amount of activities accomplished is determined by annual budgets and site-specific project decisions. Because budgets rarely provide enough money to fully implement a forest plan, scheduled activities and actions must be adjusted to match available funds and Congressional intent of appropriations acts. While budget changes do not require forest plan amendments, the implications of the changes may require the agency to evaluate the need for amendments.

Valid outstanding Rights

The Revised Land and Resource Management Plan was prepared with the understanding by the Forest Service **that individuals and entities may have established valid rights, unknown to the Forest Service at this time, to occupy and use National Forest System lands under laws and authorities established by Congress.** See Sierra Club v. Hodel, 848 F 2d.1068 (10th Circuit, 1988). **This plan recognizes that such valid outstanding rights may exist and the Forest Service will honor such valid outstanding rights when it is subsequently determined that the specific facts surrounding any claim to such rights meet the criteria set forth in any respective statute granting such occupancy and use. Upon discovery of such valid outstanding rights, amendment or modification of the Forest Plan may be necessary.**

Resource plans and permits, contracts, cooperative agreements, and other instruments issued for the occupancy and use of National Forest System lands (hereafter "instruments") must be consistent with the Forest Plan, **subject to valid existing rights.**

§ 1604. National Forest System Land and Resource Management Plans

(a) **Development, maintenance, and revision by Secretary of Agriculture as part of program; coordination**
As a part of the Program provided for by section 1602 of this title, the Secretary of Agriculture shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, **coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.**

(i) Consistency of resource plans, permits, contracts, and other instruments with land management plans; revision

Resource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans. ------When land management plans are revised, resource plans and permits, contracts, and other instruments, when necessary, shall be revised as soon as practicable. ***Any revision in present or future permits, contracts, and other instruments made pursuant to this section shall be subject to valid existing rights.***

Excerpts from Sierra Club v. Hodel, 848 F 2d.1068 (10th Circuit, 1988).

(86). **** The conflict between FLPMA's savings provisions and the nonimpairment standard of Sec. 603(c) constitutes a latent ambiguity in the statute. "Where the statute is ambiguous, we must afford deference to the interpretation given the statute by the agency charged with its administration. The administrative interpretation need only be a reasonable one to be accepted, even though there may be another equally reasonable interpretation." Rocky Mountain, 696 F.2d at 745 (citing Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616 (1965), and Brennan v. Occupational Safety & Health Commission, 513 F.2d 553, 554 (10th Cir.1975)). ** Here, BLM, in its Interim Management Policies (IMP), reconciled FLPMA's express protection of **valid existing rights** with the conservation duties under Sec. 603(c) **by analogizing the valid existing rights to the grandfathered uses and affording them the same protections.** We **uphold this interpretation** as a reasonable one. **The accommodation reached in Sec. 603(c) for grandfathered uses reflects the common law of easements and profits.** The exemption from the nonimpairment standard ensures that the federal government's new uses of its servient estate--the creation of Wilderness Study Areas--**do not eviscerate the County's dominant estate. ****** At the same time, Sec. 603(c) proscribes uses of the dominant estate that unreasonably interfere with (i.e., unnecessarily or unduly degrade) the servient estate. **Valid existing rights such as R.S. 2477 rights-of-way also constitute preexisting easements and logically should be accorded treatment similar to grandfathered uses. We uphold the IMP's exemption of valid existing rights from the nonimpairment standard.** ****

FLPMA Sec. 603(c) provides in relevant part:

"(c) Status of lands during period of review and determination

During the period of review of such areas and until Congress has determined otherwise, the Secretary shall continue to manage such lands according to his authority under this Act and other applicable law in a manner so as not to impair the suitability of such areas for preservation as wilderness, **subject, however, to the continuation of existing mining and grazing uses and mineral leasing in the manner and degree in which the same was being conducted on October 21, 1976: Provided, That, in managing the public lands the Secretary shall by regulation or otherwise take any action required to prevent unnecessary or undue degradation of the lands and their resources or to afford environmental protection." 43 U.S.C. Sec. 1782(c).**

****** Without following the district court's approach, we adopt its result. The IMP and the Revised IMP manifestly permit the impairment of Wilderness Study Areas (WSAs) through the reasonable exercise of valid existing rights. The right to make reasonable and necessary improvements within the boundaries of the right-of-way is part of the County's valid existing rights in the Burr Trail. ******

The above spells out that the "valid existing rights" that we enjoy within our Ranch Units and within our grazing allotments that are to be and will be protected. The Land Utilization Projects and Executive Orders pertaining to the development of the remaining land (Public Domain Land) all acknowledged the existence of pre-existing rights of the livestock grazers in the area. There are five specific and independent property interests recognized and granted by the state to Wyoming Ranchers having grazing allotments. These include: 1) water rights, 2) livestock right of way, 3) range improvements, 4) grazing value/forage crops and 5). Patented (base or commensurate) land.

Note from MANAGEMENT OF THE NATIONAL GRASSLANDS by ELIZABETH HOWARD

(Footnote 198) Pub. L. No. 87-128, § 341, 75 Stat. 318 (1961). Arguably, the Secretary's 1960 regulations requiring the Forest Service to administer the national grasslands for outdoor recreation, range, timber, watershed, and wildlife and fish purposes could have modified the administration of the national grasslands. MUSYA, 36 C.F.R. § 213.1(c) (1960). ***However, the regulations only allowed development of multiple uses on the national grasslands if those uses promoted grassland agriculture. 36 C.F.R. § 213.1(d). This limiting factor suggests that the multiple uses, if developed at all, would have had to be secondary to the dominant use of grassland agriculture. More importantly, the regulations were adopted under the authority of Title III, not Title IV.***

Respectfully submitted, [redacted]