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Comments: [External Email]FW: Lolo Proposed Action - WRH Comment

[attachment text pasted]

March 29, 2024

Via Email SM.FS.LNFRevision@usda.gov and electronically by CARA System

Lolo National Forest Supervisor[rsquo]s Office

c/o Amanda Milburn, Plan Revision 24 Fort

Missoula Rd. Missoula, MT 59804

RE: Comment re Proposed Action - Lolo National Forest Land Management Plan Revision #62960

Dear Ms. Milburn,

Federal Register Notice published by the Forest Service invited scoping comments in connection with the stated intent to prepare an environmental impact statement for proposed revisions to the 1986 Lolo National Forest Land Management Plan ([ldquo]1986 LMP[rdquo]) ([ldquo]Proposed Action[rdquo]).

This firm represents WRH Nevada Properties, LLC ([ldquo]WRH[rdquo]), which owns more than 820,000 acres of private mineral rights in Montana. WRH[rsquo]s deeded mineral holdings include significant tracts of outstanding mineral rights underlying areas subject to the Proposed Action to which these comments are directed. Included as an attachment to this comment letter are copies of several maps submitted during prior comment periods that show the approximate location for some of WRH[rsquo]s deeded mineral interests affected by the Proposed action.

The 2012 Planning Rules require [ldquo]an all-lands approach[rdquo] to ensure that social and economic sustainability are considered in the context of the larger landscape. [ldquo]Therefore, management efforts in the planning area are coordinated in partnership with public and private landowners and stakeholders.[rdquo] Proposed Action at 48.

In WRH[rsquo]s experience, efforts to coordinate with private landowners in the planning area have been poor to non-existent. The lack of coordination is reflected in the draft documents which does not adequately plan for the management based on the expected use of valid existing rights, including WRH[rsquo]s deeded mineral and associated easement rights.

On May 16, 2023, WRH commented on the need for detailed mapping to accurately identify private ownership (including ownership of the dominant mineral estate) in features being evaluated for eligibility to be designated as wilderness or as wild and scenic. In the context of the Proposed Action, the need to identify private ownership extends to the entire planning area. Doing so would be consistent with the existing 1986 LMP which summarizes the number of privately held mineral acres and identifies areas of mineral potential as part of the planning process. See 1986 LMP, Appendix M. As stated therein, mineral activities are not governed by the Forest Service [ldquo][h]ence, any allocation of land by the Forest Service to a use not compatible with mining activities would

be less than optimum. Allocations that reduce or limit the opportunity for mineral activity would result in the highest risk of conflicts to the Forest Plan.[rdquo] Id.

Coordinating with private property owners to identify the location and extent of private ownership is required by the 2012 Planning Rules, it is consistent with prior planning, and will facilitate management area designations that lessen the likelihood of conflict between the exercise of private property rights (such as access for exploration and development of deeded mineral rights) and the desired conditions and goals for respective designated management areas.

[ldquo]As required by the National Forest Management Act and the 2012 Planning Rule, subject to valid existing or statutory rights, all projects and activities authorized by the Forest Service after approval of this plan must be consistent with the applicable plan components (16 U.S.C. 1604(i)) as described at 36 CFR 219.15.[rdquo] Proposed Action at 10.

As drafted, the Proposed Action requires any project to explore or develop deeded mineral rights to demonstrate consistency with plan components. The quote above uses the term [ldquo]valid existing rights[rdquo] as follows:

mining claims have valid existing rights if a discovery of a valuable mineral was made on the claim prior to the date public lands were withdrawn from mineral entry. A mining claimant must make a discovery of a valuable mineral deposit. A Certified Mineral Examiner must examine the mining claim to make a determination of as to whether a valid claim creates an existing right (validity exam).

Proposed Action at 221.

By defining valid existing rights to mean only locatable deposits, the Proposed Action precludes project projects that do not involve the discovery of locatable minerals (i.e., the perfected right to mine minerals owned by the United States) from moving forward if they are not consistent with adopted plan components.

Instead of [ldquo]valid existing rights[rdquo] the draft LMP characterizes WRH[rsquo]s deeded mineral rights as [ldquo]mineral encumbrances[rdquo] which is the term used to describe [ldquo]outstanding mineral rights, including reserved and outstanding private mineral rights, existing oil and gas leases and locatable mineral rights.[rdquo] Proposed Action at 200. [ldquo]Outstanding rights are those that were severed from the surface estate prior to its conveyance to the United States.[rdquo] Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, 243 (3d Cir. 2011), as amended (Mar. 7, 2012). Outstanding mineral rights are not an encumbrance, they are property rights that existed before the United States acquired title. In fact, The holders of a mineral estate have the dominant estate under Montana law. Hunter v. Rosebud County, 240 Mont. 194, 198, 783 P.2d 927 (1989) ([ldquo]Their assertion that the mineral estate and the remaining estate are of equal dignity is not correct. The general rule is that the owner of the mineral estate enjoys the dominant estate and the surface owner of the remaining estate holds the subservient estate. This theory is based upon the realities that accompany mineral exploration and development. Obviously, in order to fully utilize a mineral estate, one usually must have access to the surface.[rdquo]). See also Burlington Resources Oil & Gas Co., LP v. Lang and Sons Inc., 361 Mont. 407, 412, 259 P.3d 766 (2011).

Crow Tribe of Indians v. Peters, 835 F. Supp. 2d 985, 993 (D. Mont. 2011)

The United States acquired title to the surface estate subject to WRH[rsquo]s dominant outstanding mineral estate. The draft LMP should be revised to clarify that outstanding mineral rights are valid rights that cannot be made subject to subsequently adopted plan components including without limitation all management designations and the associated objectives, goals, desired conditions or guidelines.

[ldquo]The legacy road system on acquired lands does not degrade aquatic ecosystem, watershed function, or

ecosystem connectivity.[rdquo] Proposed Activity at 94.

The preceding quote is Desired Condition 01 for Acquired Land Restoration Emphasis Areas. It is cited as only one example to illustrate WRH[rsquo]s overall concern with transportation planning and its potential impact on access to WRH[rsquo]s outstanding mineral estate. The draft LMP states that the Forest Service [ldquo]works with State and federal agencies, Tribes, and other partners to support an all-lands approach on acquired lands including supporting mutual access needs, setting recreation expectations, and accomplishing restoration projects.[rdquo] Proposed Action at 94 (Goals 01). As noted above, in WRH[rsquo]s experience the Forest Service has not yet worked with private owners as partners on mutual access needs as part of this planning process to any appreciable extent.

There are several important points to note regarding access. First, WRH holds deeded access rights to most if not all of its outstanding mineral estate. Thus, any road closures or changes to the [ldquo]legacy road system[rdquo] implicates private property rights held by WRH. The current LMP specifically provides that [ldquo]Road closures will not preclude the use by holders of outstanding valid rights.[rdquo] 1986 LMP at II-20. It also explains that [ldquo]the most desirable situation would be where the least amount of roadless acreage would be allocated in areas with the highest mineral potential.[rdquo] Id. at M-3. The same can be said for areas of concentrated third party ownership of the mineral estate.

According to the 1986 LMP there were 60,989 acres of private mineral rights under federal surface ownership. Id. at M-3. The current draft LMP, says the Lolo NF has acquired over 200,000 acres of private land since 1986. Proposed Action at 8. Previous work on revisions to the LMP identified over 246,000 acres of outstanding mineral rights on the Lolo NF. See e.g., Draft Assessment at 289, June 2023; Revised Assessment at 303, Sept. 2023 (referencing figures A1-33 and A1-34). That means since 1986 approximately 90% of acquired lands are severed from the mineral estate. Inexplicably, that data does not appear in the Proposed Action, and WRH can find no evidence it was used in designating management areas for planning purposes.

Given the vast increase in outstanding mineral rights on federally owned land, it is important to carry forward planning approaches adopted in the 1986 LMP to accommodate outstanding rights and protect access for the avowed goal of protecting and promoting the social, cultural and economic benefit of mineral extraction. Not enough work has been done to identify private rights owned by third parties including access and mineral rights or to incorporate that information into the Proposed Action. The Forest Service should update work performed in preparation of the 1986 LMP that identifies private mineral acreage, mineral potential, and associated access rights. And should clearly set forth desired conditions and goals that recognize and protect the rights of private property owners as actual planning partners. Performance of the suggested work should be used to inform the ongoing planning revisions to minimize conflict between management designations and activities involving the exercise of mineral rights established by deed, location, or otherwise.

Thank you for the opportunity to comment. WRH is willing to meet at any mutually convenient time to address these and other associated issues.