Issue Analysis:
Forest Service Plans and Protections for the Sedona Area

By Sandra Cosentino, M.S., Natural Resources Planning, September 21, 2015

A private group proposes turning the Sedona-Oak Creek planning area into the Sedona Verde Valley Red Rock National Monument because:

> *"We do not believe that the Coconino National Forest Management Plan provides the necessary level of protection since it is an administrative process subject to amendment with limited public participation."*

The above statement was made by Tom O'Halleran on behalf of Keep Sedona Beautiful in 2010 when they were seeking National Scenic Area legislation for the Amendment 12 planning area and again repeatedly in the past two months of presentations in support of the KSB proposed national monument. And in May, 2013 he stated: "The new Forest Plan limit the amount of Standards etc. and use the term "Desired Conditions" to identify how areas of the forest should be managed."

In support of this, Mr. O'Halleran sites two United States Supreme Court decisions that have affected the Forest Services Administrative process shown on left side of chart on page 3. On right side is information from legal analysis of these two decisions.

What absent from Mr. O'Halleran's analysis is **the court cases that rejected the weakening of the Forest Service Planning Rule during the Clinton and Bush administrations from 2000-2008.** The 2012 Planning Rule final regulations, just published in January, 2015 provide a modern strengthened, ecological science driven process for forest management to guide use and development decisions. It is this process that underpins the draft Coconino Forest Plan which is due to be finalized in 2016.

"The decision in SUWA (discussed below) has produced widespread ramifications: federal land managers have employed it to successfully insulate from judicial review a wide variety of federal actions as well as inactions. Moreover, the Bush Administration seized upon the decision as a justification for redefining national forest land plans as aspirational in nature, without making any binding commitments as to particular authorized activities or land suitability. The Administration also moved to eliminate environmental review of national forest plans, claiming that, under its redefinition, plans produce no environmental effects, an effort that was subsequently stalled by the courts."
Michael C. Blumm, Sherry L. Bosse, 2004

National Forest Management Act: Protecting Our Public Forests

"The Forest Service issued its first set of regulations in 1979, but they were not detailed enough, so in 1982 it adopted regulations that were far more comprehensive. It established limits on clearcutting. And it set up a system that ensured that the public would be meaningfully involved in how forest plans are developed and implemented.

In 2000, when the Bush administration came to power, it wanted to go even further than the Clinton revisions in opening the national forests to commercial activities. So in January 2005, the Bush administration adopted a wholly new regulation that literally cut out the heart of the 1982 Rule, and dropped any and all mandatory standards.

Ultimately, the court ruled against the Bush administration, and vacated the 2005 Rule, because the administration again failed to give the public an opportunity to comment about the environmental impacts of the changes, and failed to seek the opinions of wildlife agencies about how the new rule would harm fish and wildlife in our forests.

The Bush administration then issued yet another rule – the 2005 revisions dressed up as

a 2008 Rule, but this time accompanied the new rule with an empty analysis of the environmental effects of eviscerating the 1982 Rule. The court determined that the 2008 NFMA rule, like its predecessor, had been written without appropriate public notice and input, and without seeking the input of the agencies responsible for restoring endangered species on national forests.

After that victory, the Obama administration promulgated a new rule in March 2012. This rule is different than its predecessors and has language that indicates support for the principles of conservation biology.

4/30/2015: **The court ruled that the industry groups have no standing to challenge the 2012 Forest Rules.** Science and conservation biology will continue to be used by the U.S. Forest Service in creating forest plans." *Source: Western Law Center who was one of the plaintives in these cases.*

2012 Forest Planning Rule—(Regulations Final, January, 2015)

"The 2012 planning rule is expected to bring stability to planning. It will facilitate planning under modern methods and consistent with current science. This rule will help the Agency protect, reconnect, and restore national forests and grasslands for the benefit of human communities and natural resources.

We want the planning process to be informed by scientific information, and we believe that this will lead to better and more supportable decisions that will improve the Agency's ability to effectively manage NFS lands. The 2012 planning rule provides clarity and consistency regarding how to use scientific information during planning and clearly defines the process. Because the responsible official is required to document how the best available scientific information was used, we anticipate increased transparency and more supportable decision making across all Forest Service units."

US Forest Service, 2012 Planning Rule: *http://www.fs.usda.gov/detail/planningrule/faqs#2*

> A planning rule is a statutory requirement that outlines the procedures to amend, revise, and develop land management plans, and establishes minimum content requirements for these plans as required the National Forest Management Act of 1976.
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> A planning rule establishes requirements and constraints for land management planning and for land management plans. Each land management plan establishes a framework to guide all natural resource management activities on a forest or grassland. Individual land management plans establish requirements and constraints for on-the-ground management decisions within a plan area. http://www.fs.usda.gov/detail/planningrule/faqs#2

Plan components are the essence of the plan.

The plan components are the elements that guide future project and activity decision-making. They can apply to the entire plan area or to specific geographic or management areas, depending on what is specified in the plan. Desired conditions -- broad ecosystem based goals – are only the first step. In his analysis, Mr. O'Halleran did not mention that underneath that are: guidelines for intended actions, objectives, and specific standards such as in the Coconino Forest Plan stating there will no campfires in Oak Creek Canyon outside of designated areas or the restriction on land exchanges in the entire Sedona planning area. The plans also analyze suitability of lands in relation to the health of the ecosystem, public use and many, many more factors. A high level of public involvement is required at every step!

Court cases sited by Tom O'Halleran that weaken Forest Service plan protections	Legal Analysis of the cases
"The United States Supreme Court in Ohio Forestry Association v. Sierra Club, 523 U.S. 726,727 (1998) ruled that forest plans are generally not ripe for judicial review. In reference to forest plans the Court said such plans "... do not command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power, or authority; they do not subject anyone to any civil criminal liability; they create no legal rights or obligations." Additionally, in the United States Supreme Court decision in Norton V. Southern Utah Wilderness Association, 542 U.S. 55 (2004) rules that "...a land use plan is generally a statement of priorities; it guides and constrains actions, but does not prescribe them." *Quote from Tom O'Halleran article*	In Ohio Forestry, the Supreme Court held an environmental group's NFMA (National Forest Management Act) challenge to a Forest Service programmatic decision setting logging goals (but not authorizing actual timber harvest) was not ripe for judicial review. The Supreme Court applied a three-part test: "(1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented." In the fifteen years since the Supreme Court's decision in Ohio Forestry, environmental plaintiffs have been required to present their NFMA challenges to forest plans in suits challenging implementation of the forest plans through site-specific decisions; purely programmatic decisions have essentially been beyond shielded from judicial review under NFMA. *Richard Allan, 2013, Marten Law newsletter* Congress intended the LRMP's would have exactly the same effect as site-specific land-use planning; they were meant to be binding on future agency actions and enforceable in court. While the Court's interpretation of what constitutes final agency action at times seems to vary with the interest being protected, Forest Plans are final agency actions that cause concrete and identifiable injury because of the binding effect they have on the later actions of the Forest Service in regards to that particular forest. These issues are sufficiently developed to warrant judicial review. If access to the courts is restricted, then these Forest Plans may forever escape review, resulting in litigation for each site-specific project." *Chicago-Kent Law Review, April 2000*
This case challenged the Bureau of Land Management for not following though on ATV management and monitoring plan guidelines in the Henry Mountains. *(Sandra Cosentino)* "In the United States Supreme Court decision in Norton V. Southern Utah Wilderness Association, 542 U.S. 55 (2004) rules that "...a land use plan is generally a statement of priorities; it guides and constrains actions, but does not prescribe them." *Quote from Tom O'Halleran article*	Justice Scalia: "FLPMA (Federal Land Planning Management Act) describes land use plans as tools by which "present and future use is *projected*." 43 U.S.C. § 1701(a)(2). The implementing regulations make clear that land use plans are a preliminary step in the overall process of managing public lands– "designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses." 43 CFR § 1601.0—2 (2003). The statute and regulations confirm that a land use plan is not ordinarily the medium for affirmative decisions that implement the agency's "project[ions]."[4] Title 43 U.S.C. § 1712(e) provides that "[t]he Secretary may issue management decisions to implement land use plans"–the decisions, that is, are distinct from the plan itself. Picking up the same theme, the regulation defining a land use plan declares that a plan "is not a final implementation decision on actions which require further specific plans, process steps, or decisions under specific provisions of law and regulations." 43 CFR § 1601.0—5(k) (2003). Plans also receive a different agency review process from implementation decisions. Appeal to the Department's Board of Land Appeals is available for "a specific action being proposed to implement some portion of a resource management plan or amendment." 43 CFR § 1610.5—3(b). However, the Board, which reviews "decisions rendered by Departmental officials relating to … [t]he use and disposition of public lands and their resources," §4.1(b)(3)(i), does not review the approval of a plan, since it regards a plan as a policy determination, not an implementation decision.