I. PERSONAL ANALYSIS, REPORT AND COMMENT AS TO SECTION 219.4 OF THE 2011 PROPOSED FOREST SERVICE PLANNING RULES SUBMITTED BY SEAN CURTIS AND FRED KELLY GRANT:

Working coordinately, Sean Curtis, Natural Resource Analyst, who has helped Modoc County, California implement coordination, and Fred Kelly Grant have prepared and submit this report, analysis and comment regarding the text of Section 219.4 of the Proposed 2011 Planning Rules.

The contents reflect the experiences of the authors gained through two decades of work to establish a process by which the Forest Service and local governments can jointly and meaningfully participate in planning and policy development.

We urge reconsideration of the text of Section 219.4 of the Proposed 2011 Planning Rules. The Section alters dramatically the elements of mutual participation that make up the Congressional requirement that the Forest Service "coordinate" with local governments. We urge that Section 219.7 of the 1982 Planning Rules be substituted for the proposed Section 219.4. Section 219.7 complies with the Congressional mandate of coordination and definition of coordination.

II. LOCAL PLAN AND POLICY REGARDING THE COORDINATION PROCESS SUBMITTED BY SIGNATORY COUNTIES AND LOCAL GOVERNMENTS:

Many counties and local governments have signed on to our report, analysis and comment. The signatory counties and local governments submit this report as their "coordination protocol", their local plan and policy as to the protocol by which coordination is implemented, not as a mere comment such as those submitted by members of the general public.

The Secretary of Agriculture served Notice that the 2011 proposed Planning Rules would be prepared in accordance with the 1982 Planning Rules. Section 219.7 of the 1982 Planning Rules requires that the Forest Service "coordinate" development of the

1

Wherever Forest Service personnel are willing to comply with the Congressional mandate that the Service coordinate with local government, Section 219.7 presents a clear path to compliance. The proposed Section 219.4 DOES NOT. THE PROPOSED SECTION 219.4 DOES NOT PROVIDE A PROCESS THAT COMPLIES WITH THE CONGRESSIONAL MANDATE OF COORDINATION.

Make no mistake, as we demonstrate hereinafter, Congress has ordered that the Forest Service coordinate, in the true sense of that word, with local government. Section 219.7 of the 1982 Rules sets forth the definition of coordination that Congress has provided by statute. The proposed Section 219.4 DOES NOT. If the proposed Section 219.4 is adopted, the signatory counties and entities of local government will still insist on coordination as defined by Congress, not as set forth in 219.4. We will prevail, and the Service personnel will have no clear protocol in their own rules to follow.

We urge that the Secretary leave in place the provisions of Section 219.7 of the 1982 Planning Rules related to coordination with local governments.

The signatory counties and local governments insist that Section 219.7 of the 1982 Planning Rules, which constitutes their local plan and policy for coordination be substituted for Section 219.4 of the Proposed 2011 Planning Rules.

IV. PROPOSED LANGUAGE TO REPLACE SECTION 219.4 OF THE PROPOSED 2011 RULES:

Section 219.7, which should replace proposed Section 219.4, provides as follows:

Sec. 219.7 Coordination with other public planning efforts.

(a) The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes.

(b) The responsible line officer shall give notice of the preparation of a land and resource management plan, along with a general schedule of anticipated planning actions, to the official or agency so designated by the affected State (including the Commonwealth of Puerto Rico). The

Section 219.7 of the 1982 Planning Rules closely parallels the Congressional definition of "coordination" and "coordinate" contained in the Federal Land Policy Management Act. FLPMA was enacted one day prior to enactment of the National Forest Management Act which requires the Forest Service to engage in "coordination" with local governments.

Counties and other entities of local government throughout the west have utilized the coordination communication process with the Forest Service to the mutual benefit of local officials and Forest Service personnel. Where Forest Service personnel have followed the Secretary's process, management has progressed well without expensive, wasteful litigation.

Where Forest Service personnel have followed the Rules, section 219.7 very clearly identify when and how coordination takes place in the planning process. It makes it clear who is responsible for developing the coordination process, the role of the manner in which the planning documents should display and discuss local government plans and policies, and describes how the Forest Service should review local plans and policies to find inconsistencies or conflicts with federal plans and assist in resolving such conflicts.

The section is the very core of coordination. It sets in place the protocol through which local governments and the Service can find mutually beneficial resolution of conflicts. The Council on Environmental Quality, charged with oversight and control of NEPA planning processes, requires that NEPA processes be put in place "as early as possible" in the planning effort so that conflicts can be identified and resolved early, prior to issuance of a final document that must be challenged through litigation---administrative or judicial. Section 219.7 provides the means for the Service to comply with CEQ's regulations. If it is left in place, and the Service's personnel follow it, there will never be question as to whether the Service has complied with the law as set forth by NEPA and CEQ.

Those counties and entities of local government that have engaged the Forest Service in coordination have proven that the process works to the advantage of both parties. Modoc County in California, Glen Lake Irrigation District in Montana, Custer County in Idaho, and Fremont County in Wyoming, among others, have utilized the 219.7 process to engage in discussions that have so far negated the need for litigation.

Wherever Forest Service personnel are willing to comply with the Congressional mandate that the Service coordinate with local government, Section 219.7 presents a clear path to compliance. The proposed Section 219.4 DOES NOT. THE PROPOSED SECTION 219.4 DOES NOT PROVIDE A PROCESS THAT COMPLIES WITH THE CONGRESSIONAL MANDATE OF COORDINATION.

Make no mistake, as we demonstrate hereinafter, Congress has ordered that the Forest Service coordinate, in the true sense of that word, with local government. Section 219.7 of the 1982 Rules sets forth the definition of coordination that Congress has provided by statute. The proposed Section 219.4 DOES NOT. If the proposed Section 219.4 is adopted, the signatory counties and entities of local government will still insist on coordination as defined by Congress, not as set forth in 219.4. We will prevail, and the Service personnel will have no clear protocol in their own rules to follow.

We urge that the Secretary leave in place the provisions of Section 219.7 of the 1982 Planning Rules related to coordination with local governments.

The signatory counties and local governments insist that Section 219.7 of the 1982 Planning Rules, which constitutes their local plan and policy for coordination be substituted for Section 219.4 of the Proposed 2011 Planning Rules.

IV. PROPOSED LANGUAGE TO REPLACE SECTION 219.4 OF THE PROPOSED 2011 RULES:

Section 219.7, which should replace proposed Section 219.4, provides as follows:

Sec. 219.7 Coordination with other public planning efforts.

(a) The responsible line officer shall coordinate regional and forest planning with the equivalent and related planning efforts of other Federal agencies, State and local governments, and Indian tribes.

(b) The responsible line officer shall give notice of the preparation of a land and resource management plan, along with a general schedule of anticipated planning actions, to the official or agency so designated by the affected State (including the Commonwealth of Puerto Rico). The

same notice shall be mailed to all Tribal or Alaska Native leaders whose tribal lands or treaty rights are expected to be impacted and to the heads of units of government for the counties involved. These notices shall be issued simultaneously with the publication of the notice of intent to prepare an environmental impact statement required by NEPA procedures (40 CFR 1501.7).

(c) The responsible line officer shall review the planning and land use policies of other Federal agencies, State and local governments, and Indian tribes. The results of this review shall be displayed in the environmental impact statement for the plan (40 CFR 1502.16(c), 1506.2). The review shall include--

(1) Consideration of the objectives of other Federal, State and local governments, and Indians tribes, as expressed in their plans and policies;

(2) An assessment of the interrelated impacts of these plans and policies;

(3) A determination of how each Forest Service plan should deal with the impacts identified; and,

(4) Where conflicts with Forest Service planning are identified, consideration of alternatives for their resolution.

(d) In developing land and resource management plans, the responsible line officer shall meet with the designated State official (or designee) and representatives of other Federal agencies, local governments, and Indian tribal governments at the beginning of the planning process to develop procedures for coordination. As a minimum, such conferences shall also be held after public issues and management concerns have been identified and prior to recommending the preferred alternative. Such conferences may be held in conjunction with other public participation activities, if the opportunity for government officials to participate in the planning process is not thereby reduced.

(e) In developing the forest plan, the responsible line officer shall seek input from other Federal, State and local governments, and universities to help resolve management concerns in the planning process and to identify areas where additional research is needed. This input should be included in the discussion of the research needs of the designated forest planning area.

(f) A program of monitoring and evaluation shall be conducted that includes consideration of the effects of National Forest management on land, resources, and communities adjacent to or near the National Forest being planned and the effects upon National Forest management of activities on nearby lands managed by other Federal or other government agencies or under the jurisdiction of local governments.

[47 FR 43037, Sept. 30, 1982, as amended at 48 FR 29122, June 24, 1983]

Section 219.7 was issued by the Secretary of Agriculture as compliance with Section 219.1 that set forth the principles to guide Forest Service planning. Those principles included the following:

(9) Coordination with the land and resource planning efforts of other Federal agencies, State and local governments, and Indian tribes;

(10) Use of a systematic, interdisciplinary approach to ensure coordination and integration of planning activities for multiple-use management

V. THE LANGUAGE OF SECTION 219.7 OF THE 1982 PLANNING RULES COMPLIES WITH THE CONGRESSIONAL MANDATE TO COORDINATION AND WITH THE CONGRESSIONAL DEFINITION OF COORDINATION.

A. The Provisions of the Forest and Rangeland Renewable Resources Act, the Federal Land Policy Management Act and the National Forest Management Act, and the Legislative History of Said Acts Makes It Patently Clear That Congress Defined "Coordination" In Terms That Require a Process Such as That Set Forth in Section 219.7 of the 1982 Planning Rules.

The language of Section 219.7 was intended to, and did, implement the mandate by Congress that Forest planning be performed in "coordination" with local governments. The legislative history of the various Forest Management Acts, beginning with the Multiple Use Sustained Yield Act of 1960 demonstrates that Congress intends that "coordination" be a principle by which Forest planning is conducted----not "cooperation", not "collaboration", but "coordination.

1. The Legislative History Shows Intent of Congress

The Multiple Use Sustained Yield Act of 1960 was enacted June 12, 1960. It was enacted to be "supplemental" to the Organic Act of 1897 (16 U.S.C. 475) by which the National Forests were established.

6

One of the "supplements" to the Organic Act was the requirement stated in Section 3 of the Multiple Use Sustained Yield Act that the Secretary could "cooperate", not "coordinate", but "cooperate" with local governments. The actual language of Section 3 is as follows:

"In the effectuation of this Act, the Secretary of Agriculture is authorized to **cooperate** with interested State and local governmental agencies and others in the development and management of the National Forests." (16 U.S.C. 530)

The Multiple Use Sustained Yield Act of 1960 remained the law until the Forest and Rangeland Renewable Resources Act was enacted on August 17, 1974. Section 6 of the new Act made a substantial and significant change to the "cooperation" language of the Multiple Use Act. In Section 6 for the first time Congress directed the Secretary of Agriculture to engage in " coordination".

The provisions of Section 6 (16 U.S.C. 1604) provided:

"(a) As a part of the program provided for by Section 4 of this Act, 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."

Congress thus changed the Secretary's duty to "cooperate" with local governments to a duty of seeking "coordinated" planning with local governments.

The fact that the change from "cooperate" to "coordination" occurred in 1974 becomes very significant, given the action by the Congress in that year in developing in earnest the Federal Land Policy Management Act as the organic act for management of the western rangelands by the Bureau of Land Management.

Passage of the Forest and Rangeland Renewable Resources Act occurred during a flurry of Congressional action resulting from an increased public awareness of environmental concerns as well as the Report issued by the Public Land Review Commission established by Congress. Environmental concerns had led the Nixon administration to spearhead passage of the National Environmental Policy Act of 1970 (NEPA).

In passing NEPA, Congress emphasized the importance of involving local government in federal land and resource planning. In 42 U.S.C. 4331 (a) Congress made it clear that national policy called for "cooperation" with local

governments by using "all practicable means" to "improve and **coordinate**" federal plans. Use of the term "coordinate" here was the first time that Congress had introduced the commonly used term relating to land use, natural resource use and environmental protection.

Congressional use of the terms "cooperation" and "coordinate" in the same section of NEPA makes it clear that it intended to distinguish between the two. The dictionary definitions of the two terms emphasize the unique characteristics of "coordinate" as implying a basis of equality in participating in the process.

After "coordinate" made its entry into law in NEPA in 1970, Congress changed "cooperate" to "coordinate" in the 1974 Forest and Rangeland Renewable Resources Act. Pretty clearly, it knew what it was doing.

In the year following passage of the Forest and Rangeland Renewable Resources Act, as Congress considered the rangelands organic act, FLPMA, Senator Packwood of Oregon introduced the requirement that the federal agency "coordinate" with local government. The Forest and Rangeland Renewable Resources Act had not defined the term "coordinate", so Congress remedied that by including the Packwood definition in FLPMA.

The Packwood language, which is today 43 U.S.C. 1712, included the obligation of the Secretary of Agriculture to "coordinate" Forest plans with the planning and management programs of the Indian Tribes. It then proceeded to define the term "coordinate" for the first time. Packwood's provision, which today is 43 U.S.C. 1712, defined the term as follows:

"The Secretary shall, with public involvement and consistent with the terms and conditions of this Act, develop, maintain, and, when appropriate, revise land use plans which provide by tracts or areas for the use of the public lands. Land use plans shall be developed for the public lands regardless of whether such lands previously have been classified, withdrawn, set aside, or otherwise designated for one or more uses.

(b) Coordination of plans for National Forest System lands with Indian land use planning and management programs for purposes of development and revision
In the development and revision of land use plans, the Secretary of Agriculture shall coordinate land use plans for lands in the National Forest System with the land use planning and management programs of and for Indian tribes by, among other things, considering the policies of approved tribal land resource management programs.

(c) Criteria for development and revision
In the development and revision of land use plans, the Secretary shall—
(1) use and observe the principles of multiple use and sustained yield set forth in this and other applicable law;

(2) use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences;
(3) give priority to the designation and protection of areas of critical environmental concern;
(4) rely, to the extent it is available, on the inventory of the public lands, their resources, and other values;
(5) consider present and potential uses of the public lands;
(6) consider the relative scarcity of the values involved and the availability of alternative means (including recycling) and sites for realization of those values;
(7) weigh long-term benefits to the public against short-term benefits;
(8) provide for compliance with applicable pollution control laws, including State and Federal air, water, noise, or other pollution standards or implementation plans; and
(9) to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning, and management activities of or for such lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located, including, but not limited to, the statewide outdoor recreation plans developed under the Act of September 3, 1964 (78 Stat. 897), as amended [16 U.S.C. 460l-4 et seq.], and of or for Indian tribes by, among other things, considering the policies of approved State and tribal land resource management programs.

In implementing this directive, the Secretary shall, to the extent he finds practical, keep apprised of State, local, and tribal land use plans; assure that consideration is given to those State, local, and tribal plans that are germane in the development of land use plans for public lands; assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands, including early public notice of proposed decisions which may have a significant impact on non-Federal lands. Such officials in each State are authorized to furnish advice to the Secretary with respect to the development and revision of land use plans, land use guidelines, land use rules, and land use regulations for the public lands within such State and with respect to such other land use matters as may be referred to them by him. 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."

At least the Bureau of Land Management opposed enactment of the "coordination" requirement and definition on the grounds that it would make their job of management more difficult. Obviously Congress believed that if coordination with local government made the management job more difficult, so be it. The coordination requirement and definition became law.

FLPMA, with the coordination requirement and definition in place **was enacted on October 21, 1976.**

9

On the very next day, October 22, 1976, the National Forest Management Act (NFMA) was passed as legislation amending the Forest and Rangeland Renewable Resources Act. The NFMA left intact the requirement that the Secretary of Agriculture "develop, maintain, and, as appropriate, revise land and resource management plans. . .**coordinated** with the land and resource management planning processes of State and local governments and other federal agencies."

As already noted, the coordination requirement is contained in 16 U.S.C. 1604. The National Forest Management Act amended Section 1604, with amendments replacing language that immediately followed the coordination requirement. Leaving the coordination requirement intact, and beginning the amendments immediately following the requirement makes it obvious to anyone that Congress intended to continue the requirement of coordination.

It would be totally disingenuous to contend that when Congress defined "coordination" in a land and natural resource statute on October 21, 1976, it did not intend that same definition to apply in a land and natural resource statute enacted the very next day---on October 22, 1976.

This legislative history makes obvious why the Courts have ruled hundreds of times that statutes which are "in para materia" must be read consistently. The most noted expert on statutory construction, Professor Sutherland stated in his "Statutory Construction" that statutes are "in para materia" when they relate to "the same class of persons or things, or have the same purpose and object." He points out that the courts have clearly held that such statutes must "be construed together". Section 5202, "Statutory Construction".

FLPMA and NFMA are patently such statutes. They both deal with protective and productive management of the nation's public lands: the rangelands and the National Forests. They were both passed at a time when Congressional attention was focused on newly created management principles to govern multiple uses of the nation's lands in a manner that protects a sound environment. All aspects of the environmental concerns displayed in FLPMA were and are present in NFMA.

It would be ludicrous to think that Congress did not intend the definition of "coordination" contained in FLPMA passed on October 21 to apply to the use of "coordination" in NFMA passed on October 22. To believe that Congress defined "coordination"

on October 21, then used the term on October 22 but intended a different, unstated, meaning, would not only be ludicrous, it would violate historically and traditionally established "canons of statutory interpretation".

Courts in all states, and in the federal districts, have held that statutes must be interpreted in a way that "avoids an absurd result the Legislature did not intend." **Bruce v. Gregory**, 65 Cal. 2d 666, 673 (1967). It would certainly be "absurd" to argue that Congress intended two different definitions for the term "coordination" in statutes enacted one day apart.

The Secretary of Agriculture made it patently clear that he so understood the Congressional intent when he defined "coordination" in Section 219.7 of the 1982 Planning Rules. This was the first and only definition of "coordination" styled by the Secretary after enactment of FLPMA and NFMA. The definition set forth hereinabove closely follows the Congressional definition of "coordination" contained in FLPMA.