

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FOREST GUARDIANS and CARSON)
FOREST WATCH,)
)
Plaintiffs,)
)
vs.)
)
UNITED STATES FOREST SERVICE,)
)
Defendant.)
_____)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

I. STATEMENT OF THE CASE

1. This is a civil action for declaratory and injunctive relief arising from Defendant United States Forest Service’s decision to proceed with the Agua/Caballos timber sale project on the El Rito Ranger District of the Carson National Forest.
2. United States Forest Service (“USFS”) plans for the Agua/Caballos timber sale call for the cutting of 6.4 million board feet of timber on 3,884 acres of national forest lands. From a timber volume standpoint, the Agua/Caballos timber sale will be the largest “green tree” timber sale in New Mexico in many years.
3. Much of the timber cutting planned in connection with the Agua/Caballos timber sale will occur in rare climax ponderosa pine forest type, despite the fact that there is a deficiency of this forest type throughout the Carson National Forest. This forest type is characterized by clumps of mature large ponderosa pine trees with interlocking canopies.

4. The USFS has designated Abert's squirrel as the Management Indicator Species ("MIS") to represent that group of wildlife species that depends on the climax ponderosa pine forest habitat for its continued survival.
5. The USFS has collected two years of population data for the Abert's squirrel across the Carson National Forest (during the fields seasons of 2003 and 2004). This data shows that the population of Abert's squirrel is below the population that the USFS believe to be the minimum viable population for the species. Furthermore, the data shows that population levels of Abert's squirrel continue to decline across the Carson National Forest.
6. With respect to the Abert's squirrel and other MIS on the Carson National Forest, the USFS has failed to acquire population data that is sufficient to establish a trend as required by the Carson National Forest Land and Resource Management Plan ("Carson Forest Plan"), the National Forest Management Act ("NFMA"), 16 U.S.C. 1600 et seq., and NFMA's implementing regulations, 36 C.F.R. Part 219. This failure constitutes a breach of the USFS's procedural duties, and fatally flaws the USFS's decision to authorize the Agua/Caballos timber sale.
7. Furthermore, the Administrative Record in this case shows that the USFS is failing to assure that minimum viable populations of all MIS are maintained on the Carson National Forest, as required by the Carson Forest Plan, NFMA, and NFMA's implementing regulations. This failure constitutes a breach of the USFS's substantive duties, and fatally flaws the USFS's decision to authorize the Agua/Caballos timber sale.
8. Finally, the USFS's decision to authorize the Agua/Caballos timber sale violates the

National Environmental Policy Act (“NEPA”), 42 U.S.C. §4321 et seq., in at least two ways: (1) the NEPA analyses for the timber sale did not contain an adequate analysis of the sale’s impacts on watersheds including the watershed of the Rio Vallecitos, one of New Mexico’s high quality cold water fisheries, and (2) the USFS failed to supplement the NEPA analysis with significant new information concerning plunging populations of Abert’s squirrel on the Carson National Forest.

9. As relief for the Forest Service’s violations of NFMA and NEPA, Plaintiffs Forest Guardians and Carson Forest Watch seek an order directing the USFS to withdraw its decision to proceed with the Agua/Caballos timber sale, and ordering the USFS to comply with the mandatory provisions of the Carson Forest Plan, NFMA, and NFMA’s implementing regulations.

II. JURISDICTION AND VENUE

10. Jurisdiction of the NFMA and NEPA causes of action are based on 28 U.S.C. §1331 (federal question jurisdiction) and 5 U.S.C. §701 et seq. (APA).
11. Venue is proper in this judicial district pursuant to 28 U.S.C. §1391 because this is an action against an agency of the United States, because the cause of action arises in New Mexico, and because the plaintiffs to this action reside in New Mexico. Venue in this district is proper pursuant to 5 U.S.C. §522(a)(4)(B).

III. PARTIES

12. Plaintiff Forest Guardians is a non-profit corporation with its principal office in Santa Fe, New Mexico. Forest Guardians has approximately 2,000 members, most of whom reside in New Mexico and Arizona. Members of Forest Guardians frequently use and enjoy

forest lands throughout the southwestern United States for recreational, aesthetic, and scientific activities. In pursuit of these activities, Forest Guardians members regularly observe and enjoy wildlife in its natural habitat. Forest Guardians and its members are committed to the protection of intact forest ecosystems throughout the Southwest. To achieve this protection, Forest Guardians works through administrative appeals, litigation, and otherwise to assure that all federal agencies fully comply with the provisions federal environmental laws, including NFMA and NEPA. Forest Guardians, its staff, and its members have a substantial interest in continuing to use the area where the Agua/Caballos timber sale is planned and are adversely affected and aggrieved by the USFS's failure to comply with NFMA and NEPA. Plaintiff Forest Guardians brings this action on behalf of itself and its adversely affected members.

13. Plaintiff Carson Forest Watch is a volunteer citizen group based in Peñasco, New Mexico that monitors forest management activities on the national forests of northern New Mexico and southern Colorado. Members of Carson Forest Watch regularly enjoy the natural resources of the Agua/Caballos timber sale planning area for nature study, wildlife viewing, photography and outdoor recreation. Carson Forest Watch has been participating in the public participation process for the Agua/Caballos timber sale since its initiation in the early 1990s. Carson Forest Watch and its members have a substantial interest in continuing to use the area where the Agua/Caballos timber sale is planned and are adversely affected and aggrieved by the USFS's failure to comply with NFMA and NEPA. Plaintiff Carson Forest Watch brings this action on behalf of itself and its

adversely affected members.

14. Defendant United States Forest Service is an agency of the United States Department of Agriculture. The United States Forest Service is responsible for administering and managing lands under its jurisdiction in compliance with all pertinent environmental law.

IV. FACTS

The Agua/Caballos timber sale

15. The Agua/Caballos Timber sale is planned for the El Rito Ranger District of the Carson National Forest.
16. Plans for the Agua/Caballos Timber sale call for timber cutting 6.4 million board feet of timber on 3,884 acres of national forest lands. From a timber volume standpoint, the Agua/Caballos Timber sale will be the largest “green tree” timber sale in New Mexico in many years.
17. The USFS first authorized the Agua/Caballos timber sale in June of 2002 when it issued a Final Environmental Impact Statement (“FEIS”), along with a Record of Decision (“ROD”) authorizing the timber sale.
18. The Plaintiffs filed a timely administrative appeal of the ROD, as allowed by USFS planning regulations.
19. In response to the Plaintiffs’ administrative appeal, the Appeal Deciding Officer reversed the USFS’s decision to authorize the Agua/Caballos timber sale, mainly on grounds that the timber sale planners and decision-makers failed to conduct the required analyses for MIS in the timber sale area.

20. In reversing the timber sale decision, the Appeal Deciding Officer directed the USFS to (1) prepare the required analyses of population trends of MIS in the project area, and the expected timber sale effects on MIS populations, and (2) circulate a supplement to the FEIS for public review and comment after completing the required analyses.
21. Following supplemental environmental analyses, as required by the Appeal Deciding Officer, the USFS issued a new decision for the Agua/Caballos Timber sale in April of 2004. This decision was administratively appealed by the Plaintiffs.
22. In a letter of September 2, 2004, the USFS's Appeal Deciding Officer rejected the Plaintiffs' administrative appeal.
23. The USFS states that the primary objectives for the Agua/Caballos Timber sale are to promote "forest growth and health."

The management indicator species for the Carson National Forest

24. The Carson National Forest Plan identifies eleven wildlife species and species groups as MIS to monitor the conditions of the various habitat types found on the forest. These designated MIS are considered to be representative for that group of species with similar life requirements and were determined to reflect the habitat needs for the majority of the forest's species.
25. In the Final Supplement to the Final Environmental Impact Statement for the Agua/Caballos Proposed Projects ("FSFEIS"), the USFS explains that the "MIS were selected because population changes [of the MIS] are believed to indicate the effects of management activities that occur on the Forest." (Emphasis added.)

26. In the Analysis of the Management Situation (“AMS”), prepared by the USFS at the outset of the forest planning process for the Carson National Forest in the early 1980s, the USFS also explains the importance of monitoring population trends of designated MIS. That document explains that one of the “criteria for selection” of MIS is that “their populations changes are believed to indicate effects of management activities on other species of a major biological community or on water quality.” (Emphasis added.)
27. The USFS has determined that eight MIS on the Carson National Forest – six individual species and two species groups – are potentially affected by the Agua/Caballos timber sale. Those eight species are the plain titmouse, Abert’s squirrel, hairy woodpecker, red squirrel, Rocky Mountain elk, Merriam’s turkey, resident trout, and aquatic macroinvertebrates.
28. One commenter on the NEPA documentation for the Agua/Caballos timber sale questioned what efforts the USFS had made to monitor population trends of MIS in the project area. In its September 30, 2003 Response to Comments, the USFS disavowed responsibility to acquire population data at the project level, stating as follows: “The monitoring and documentation of trends of management indicator species habitat is done at a forest level – not at the project level – and is provided in the Forest-wide Management Indicator Species Assessment.”
29. Furthermore, in the September 30, 2003 Response to Comments the USFS admits that “[t]he Carson NF does have updated population monitoring data on small mammals, and migratory birds – species not typically monitored by other agencies.”

30. In the September 30, 2003 Response to Comments, the USFS notes its failure to acquire and monitor MIS population trend data and states that “[w]e are in the process of collecting more population data.”
31. Despite the fact that the Carson Forest Plan and pertinent USFS planning regulations require the USFS to acquire and monitor population data for designated MIS throughout the Carson National Forest and in the project area, the USFS has failed to acquire such data.
32. Prior to the field season of 2003, the USFS monitored habitat of MIS instead of acquiring population data as required by the Carson Forest Plan and pertinent USFS planning regulations. However, even the USFS acknowledges that this “proxy-on-proxy” approach is unreliable as an indicator of the effect of management activities on wildlife. In the FSFEIS, the USFS states: “From known relationships between species and habitat, trends in amount and condition of habitat over time may also reflect population trends. This is not necessarily the situation in all circumstances.”
33. Nonetheless, in the absence of reliable population trend data on the Carson National Forest, the USFS continues to rely on this proxy-on-proxy approach in an effort to comply with its substantive and procedural duties: “Taking into consideration forest-wide habitat conditions for a particular MIS, this analysis assumes that if habitat for a species is either maintained forest-wide, or on an upward trend, or planned actions improve habitat conditions, the activities proposed in the Agua/Caballos analysis area would not negatively affect species viability – site-specifically or forest-wide.”

Population levels of the Abert's squirrel – the management indicator species for climax ponderosa pine forest on the Carson National Forest – are below minimum viable levels determined by the USFS

34. One of the eleven MIS which the USFS designated to monitor the wildlife effects of management activities on the Carson National Forest is the Abert's squirrel. The key habitat component for the Abert's squirrel is climax ponderosa pine habitat with interlocking ponderosa pine canopy.
35. Abert's squirrel is an indicator for the presence of interlocking canopies in ponderosa pine. Abert's squirrel is a habitat specialist that depends on ponderosa pine for basically all its life necessities and requires diversity of age classes and tree densities. Pine twigs, pine cones, pine seeds, pine bark, as well as truffles are used by the Abert's squirrel.
36. Patches of interlocking pine canopies, which are associated with mature and undisturbed ponderosa pine forests, are an increasingly rare habitat element on the Carson National Forest. The FSFEIS states that “[l]arge ponderosa pines with interlocking canopies are a structural component not as prevalent as desired across the forest.”
37. In the AMS, the USFS estimated the amount of “essential habitat” needed for each MIS on the Carson National Forest. “Essential habitat” is defined by the USFS as “that part of the occupied habitat of any species which is essential, for any reason, to the continued survival of an individual or population of a species.” The USFS determined that the Abert's squirrel needs 77,000 acres of “essential habitat” to support a viable population of the species on the Carson National Forest.

38. At the time that the AMS was prepared, the USFS determined that there was a deficit in the amount of essential habitat for Abert's squirrel on the Carson National Forest. The USFS determined that there was only 53,220 acres of essential habitat.
39. In the AMS, the USFS also determined that a viable population of Abert's squirrel would have a density of 6 to 16 individuals per acre.
40. While mature ponderosa pine forest with interlocking canopy is relatively rare in the Carson, this habitat type is found in the planning area for the Agua/Caballos timber sale. In the Agua/Caballos Analysis Area, "4,745 acres of ponderosa pine support this key habitat component with the canopy closure greater than 60 percent."
41. In connection with the Agua/Caballos timber sale, the USFS has authorized the destruction of 24% of the ponderosa pine forest in the Analysis Area that has an interlocking canopy closure of greater than 60%.
42. Despite the fact that the USFS acknowledges that interlocking canopy ponderosa pine forests are "not as prevalent as desired across the forest," and despite the fact that the USFS acknowledges that there is a deficit of "essential habitat" for Abert's squirrel, the USFS has been authorizing timber sales in this habitat type.
43. Between 1986 and 2000, the USFS authorized timber sales in approximately 7% of the Abert's squirrel potential habitat on the Carson National Forest. Of that 7%, approximately 65% was converted to early seral conditions, rendering the area unsuitable as Abert's squirrel habitat.
44. With specific reference to population data for the Abert's squirrel, the USFS

states in the September 30, 2003 Response to Comments that “[n]o trend data is yet available,” and that “[m]onitoring sites are random selection locations and are not specifically located by project area.”

45. The September 30, 2003 Response to Comments also states that “[f]orest-wide monitoring for the Abert’s squirrel was initiated during the 2003 field season.”
46. The USFS initiated its efforts to acquire population data for the Abert’s squirrel in 2003. Dr. Jennifer Frey was contracted by the USFS to perform field work during the 2003 field season, and to prepare a report on her work.
47. In her report of December of 2003, Dr. Frey estimated that Abert’s squirrel densities “ranged from 0 to 0.02 per acre (i.e., one squirrel per 50 acres) with an overall mean of 0.005 (i.e., one squirrel per 500 acres).” This population is far below the minimum viable population earlier estimated by the USFS.
48. 65% of Dr. Frey’s 31 monitoring plots on the Carson National Forest during the field season of 2003 “had a density estimate of zero Abert’s squirrel,” while 90% of Dr. Frey’s monitoring plots “exhibited evidence of Abert’s squirrel occurrence in the past.”
49. Upon information and belief, none of Dr. Frey’s 31 monitoring plots for the Abert’s squirrel are within the Agua/Caballos timber sale Area, despite the fact that the timber sale area contains a significant part of the Carson National Forest’s essential habitat for the Abert’s squirrel.
50. Dr. Frey’s 2003 report states that “[c]ompared to previous density estimates of Abert’s squirrel in high quality habitats in other geographic locations, Abert’s squirrel densities observed on Carson National Forest in 2003 were extremely

- low (e.g., one squirrel per 500 acres compared to one squirrel per 6 acres).”
51. In her report, Dr. Frey discusses the two possible causes for the low population of Abert’s squirrel on the Carson National Forest: drought and timber management activities.
 52. In connection with timber management activities, such as those at issue in this case, Dr. Frey stated in her 2003 report that “[p]oor seed production can result from logging that results in younger and typically denser trees” and that “logging can reduce canopy closure and tree basal area, which can result in a decrease in [truffles].”
 53. Dr. Frey states in her 2003 report that the extent of the decline in population levels of the Abert’s squirrel on the Carson National Forest cannot be assessed because of a lack of baseline population data. As to the causes of the decline, she states that “it remains unknown the extent to which the extremely low densities are a result of climate related factors,” and that “[i]t has been suggested that this decline has been primarily the result of logging which has altered the structure and function of ponderosa pine forests.”
 54. Dr. Frey continued her field work on Abert’s squirrel populations in the Carson National Forest during the 2004 field season.
 55. In her 2004 report, Dr. Frey states that populations of Abert’s squirrel on the Carson National Forest continue to decline, and that there is “an overall significantly lower density in 2004.”
 56. As in her 2003 report, Dr. Frey’s 2004 report states that the causes of population decline are likely to be drought and timber management activities, such as timber

sales. Dr. Frey states that “[f]ew species are as tightly linked to forest structure and function” as the Abert’s squirrel, and that “[a]s such, the use of this species as a management indicator species [for climax ponderosa pine ecosystems] is well founded.”

57. Dr. Frey’s 2004 report states that “[w]idespread, intensive thinning is thought to be especially adverse for Abert’s squirrel populations” and that “[a]dditional habitat studies are needed to better understand the relationships between habitat, management, and Abert’s squirrel biology.”
58. The Appeal Deciding Officer’s decision on the Plaintiffs’ second administrative appeal is based on a clear factual error. Despite all the empirical evidence in the Administrative Record that Abert’s squirrel populations on the Carson National Forest are below minimum viable population levels and in decline, the decision states that “[t]he wildlife biologist concluded from this data that Abert’s squirrel population trend on the Forest is stable and would not noticeably decline as a result of the proposed project.” There is absolutely no evidentiary basis in the Administrative record for the Agua/Caballos timber sale for this so-called “conclusion.”

The USFS also failed to acquire population trend data for other management indicator species on the Carson National Forest

59. Likewise, in connection with other MIS such as the red squirrel, the hairy woodpecker, Merriam’s turkey, resident trout, and aquatic macroinvertebrates, the Appeal Deciding Officer’s decision on the Plaintiffs’ second administrative appeal makes so-called “conclusions” regarding population trends without any evidentiary basis for such

conclusions.

60. On the Carson National Forest, the USFS has designated resident trout as the MIS for quality perennial streams and riparian vegetation, and aquatic macroinvertebrates as the MIS for high quality water.
61. The USFS acknowledges that it does not have population trend data for resident trout and aquatic macroinvertebrates. In fact, the USFS states that “[p]opulation surveys have not been done over enough time to indicate trend,” and further states that “it will likely take many years to determine actual trends.”
62. Despite the failure of the USFS to acquire population trend data for the aquatic MIS on the Carson National Forest, and despite the USFS’s failure to analyze the effects of the Agua/Caballos timber sale project on the Rio Vallecitos – one of New Mexico’s high quality cold water fishery streams – the USFS asserts on the basis of anecdotal and subjective observations that the “Carson National Forest is sustaining viable populations of resident trout and aquatic macroinvertebrates.”
63. The hairy woodpecker is an indicator species for the presence of downed logs and snags. On the Carson National Forest, the species is observed throughout the ponderosa pine and mixed conifer habitat types.
64. In connection with hairy woodpeckers, the USFS admits the inadequacy of the population data that it has collected. The USFS did not begin to collect population data for the hairy woodpecker on the National Forest until 2003. The USFS states that the “Carson National Forest is currently conducting surveys to collect additional bird population data, which should provide population trends for the hairy woodpecker after three years of gathering field data. It is expected that

we will have the data analyzed for use by the beginning of 2006.”

65. In the absence of the required population trend data throughout the Carson National Forest and in the project area, the USFS is relying on anecdotal and subjective observations in lieu of the required analyses. It states: “Taking into account the condition and trend of the bird’s habitat on the forest and existing data from nearby habitat, the hairy woodpecker population on the Carson National Forest is stable.”
66. Likewise, with respect to Merriam’s turkey, the designated MIS for old growth pine habitat, the USFS states that the Breeding Bird Survey data that the USFS uses in project planning instead of actual population data “will not provide population trend for the Merriam’s turkey.”
67. The designated MIS for the mixed conifer habitat type on the Carson National Forest is the red squirrel.
68. The USFS has not collected population trend data for the red squirrel. Instead of acquiring and monitoring population trend data, the USFS is currently relying on anecdotal and subjective observations of red squirrel abundance. The USFS states: “Taking into account the condition and trend of the squirrel’s habitat on the forest, existing data and field observations, the Carson is supporting stable populations red squirrel and viable populations are being sustained.”

The USFS’s NEPA documentation for the Agua/Caballos timber sale is fatally flawed

69. According to the FEIS for the Agua/Caballos timber sale, the sale area comprises

about 45% of the watershed for the Rio Vallecitos, a stream that has been designated by the New Mexico Environment Department (“NMED”) as a high quality cold water fishery because of its outstanding resource potential.

70. While the FEIS states that “[t]here are approximately 120 miles of perennial stream or intermittent stream channels within the analysis area,” the USFS admits in the FEIS that it does not even know how many of those 120 stream miles “are actually perennial or intermittent.”
71. Already, the riverine habitat in and along the Rio Vallecitos is impaired. The NMED has determined that the high quality cold water fishery designation is not being attained in the stream. In a related finding, the USFS has determined that streamside riparian areas in the timber sale area are not in proper functioning condition because of sediment choking the stream bottom, and that “roads or up slope activities might be the sources” of the sediment.
72. In the FEIS, the USFS states that overall riparian condition in the timber sale area “is considered to be fair to poor.”
73. The USFS acknowledges that there is a severe risk of erosion in a significant portion of the timber sale area.
74. Despite the facts that (1) the NMED has determined that the Rio Vallecitos does not currently support its designated use as a high quality cold water fishery, (2) the USFS has determined that riparian condition in the sale area is “fair to poor,” and (3) there is a severe risk of erosion in the project area, the FEIS for the Agua/Caballos timber sale does not contain any meaningful analysis of the water quality and watershed impacts associated with the timber sale.

75. In a comment letter to the USFS, the NMED commented that the USFS's analysis of the water quality impacts associated with the Agua /Caballos Timber sale is inadequate.
76. In this regard, the NMED stated in a comment letter of July 23, 2003 as follows: "The Canada del Borracho (which may be ephemeral) is mentioned many more times in the document [the SFEIS] than the Rio Vallecitos, suggesting that the potential impacts to the Rio Vallecitos were not considered in depth. Nor was the status of the fishery (species present, reliability of water, habitat quality) of the Rio Vallecitos specifically described. The Rio Vallecitos is of special interest to NMED . . . because it is recognized . . . as not meeting its designated use as a high quality cold water fishery . . . [A] large forest restoration or logging project in its watershed could negatively affect the Rio Vallecitos."
77. Furthermore, the USFS has not supplemented its NEPA analysis for the Agua/Caballos timber sale project to take into account the significant new information concerning the precipitous drop in Abert's squirrel populations on the Carson National Forest.

The Carson Forest Plan imposes substantive and procedural duties in connection with designated MIS

78. As discussed above, the Carson Forest Plan imposes both substantive and procedural duties in connection with designated MIS.
79. Substantively, the Carson Forest Plan contains the following requirement: "Populations of all management indicator species, with the possible exception of certain rare animals, will be managed at levels greatly exceeding minimum viable

populations.”

80. Procedurally, the Carson Forest Plan contains a Monitoring Plan that imposes specific monitoring requirements on the USFS. Specifically, the Carson Forest Plan requires the USFS to monitor “[p]opulation and habitat trends of management indicator species” and details the specific monitoring methods to be used in the acquisition of population trend data. Furthermore, the Carson Forest Plan also specifies the monitoring frequency – five years of inventories to establish baseline population data for all MIS, and then subsequent monitoring on an annual or biennial basis (depending on the MIS).
81. All site-specific projects implemented by the USFS on the Carson National Forest – such as the Agua/Caballos Timber sale – must be consistent with the Carson Forest Plan. 16 U.S.C. §1604(i).

The NFMA, and its implementing regulations, imposes substantive and procedural duties in connection with designated MIS

82. The National Forest Management Act requires the USFS to “provide for diversity of plant and animal communities.” 16 U.S.C. §1604(g)(3)(B).
83. The USFS planning regulations that the USFS applied in the planning and decision-making processes for the Agua/Caballos timber sale require the USFS to maintain viable populations of all wildlife species on the forest, and to acquire and maintain population data for designated MIS, both throughout the forest and at the project level.
84. In pertinent part, those planning regulations state as follows: “Fish and wildlife habitat shall be managed to maintain viable populations of existing native and

desired non-native vertebrate species in the planning area. For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area. In order to insure that viable populations will be maintained, habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.”

36 C.F.R. §219.19.

85. With specific reference to the requirement that the USFS monitor population trends of MIS, the pertinent planning regulations state: “In order to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species and the reasons for their selection will be stated. These species shall be selected because their population changes are believed to indicate the effects of management activities.” 36 C.F.R. §219.19(a)(1).
“Population trends of the management indicator species will be monitored and relationships to habitat changes determined.” 36 C.F.R. §219.19(a)(6).
86. In the FSFEIS for the Agua/Caballos timber sale, the USFS indicates that the 1982 planning regulations governed the planning and decision-making in this case. Citing to the 1982 planning regulations, the USFS states that “[i]t is the mandate of the Forest Service to manage fish and wildlife habitat ‘to maintain viable populations of existing native and desired non-native vertebrate species . . . (36 CFR 219.19).”

87. Thus, in the FSFEIS the USFS acknowledges that it has substantive and procedural duties, pursuant to NFMA and its implementing regulations, to maintain viable populations of all wildlife species throughout the Carson National Forest and in the project area, and to monitor population trends of MIS throughout the Carson National Forest and in the project area.

V. CLAIMS FOR RELIEF

First Claim for Relief

Violation of NFMA's consistency requirement – 16 U.S.C. 1604(i)

88. All preceding paragraphs are incorporated as if fully set out herein.
89. NFMA requires that all site-specific projects be consistent with the Carson Forest Plan. 16 U.S.C. §1604(i). The Carson Forest Plan requires the USFS to maintain minimum viable populations of all MIS, and to monitor the population trends of all MIS pursuant to prescribed monitoring protocols.
90. The USFS has failed to comply with both its substantive and its procedural duties under the Carson Forest Plan.
91. Accordingly, the USFS's decision to authorize the Agua/Caballos timber sale is arbitrary and capricious and constitutes a violation of NFMA.

Second Claim for Relief

Violation of NFMA's statutory substantive duty – 16 U.S.C. (g)(3)(B)

92. All preceding paragraphs are incorporated as if fully set out herein.
93. The National Forest Management Act requires the USFS to “provide for diversity of plant and animal communities.” 16 U.S.C. §1604(g)(3)(B).
94. The USFS is violating its substantive statutory duty in connection with the

Agua/Caballos timber sale, because the timber sale authorizes cutting in essential habitat for the Abert's squirrel, an MIS whose population is already below minimum viable population levels on the forest.

95. The decision to proceed with the Agua/Caballos timber sale under such circumstances is arbitrary and capricious.

Third Claim for Relief

Violation of NFMA's regulatory substantive and procedural duties – 36 C.F.R. Part 219

96. All preceding paragraphs are incorporated as if fully set out herein.
97. The planning regulations that the USFS used in the planning and decision-making processes for the Agua/Caballos timber sale impose substantive and procedural duties on the USFS, including maintaining minimum viable population levels of all wildlife species, and monitoring population trends of MIS throughout the forest and in a site-specific project area.
98. In connection with the Agua/Caballos timber sale, the USFS is violating its substantive and procedural duties by failing to assure the existence of a minimum viable population of Abert's squirrel and by failing to acquire population trend data for all MIS in the project area before authorizing the timber sale. The USFS's violation of these duties is arbitrary and capricious.

Fourth Claim for Relief

Violation of NEPA's procedural duties – 42 U.S.C. §4321 et seq.

99. All preceding paragraphs are incorporated as if fully set out herein.
100. In this case, the USFS failed to analyze adequately the effects of the Agua/Caballos timber sale on watersheds and water quality including the quality

of the Rio Vallecitos, one of New Mexico's high quality coldwater fisheries.

101. Furthermore, the USFS failed to prepare supplemental NEPA analyses to account for the significant new information provided by Dr. Frey regarding perilously low Abert's squirrel populations on the Carson National Forest.
102. Both of the above referenced failures are arbitrary and capricious, and fatally flaw the USFS's decision to authorize the Agua/Caballos timber sale.

VI. PRAYER FOR RELIEF

WHEREFORE, plaintiffs pray that this Court issue:

- a. A judicial declaration that the USFS's decision to proceed with the Agua/Caballos timber sale violates the Carson Forest Plan, NFMA, NFMA's implementing regulations, and NEPA;
- b. An order requiring the USFS to withdraw its decision to proceed with the Agua/Caballos timber sale;
- c. An order requiring the USFS to bring itself into compliance with the Carson Forest Plan, NFMA, NFMA's implementing regulations, and NEPA;
- d. Any necessary interim injunctive relief, including preliminary injunctive relief;
- e. An order awarding plaintiffs their attorney's fees and costs of litigation; and
- f. Such additional relief as the Court deems just and proper.

Respectfully submitted, this ____ day of April, 2005.

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