BEFORE THE REGIONAL FORESTER,
REGION THREE OF THE UNITED STATES FOREST SERVICE

In Re: Objection of Perk-Grindstone	**)**
Fuels and Vegetation Project	**)**
Environmental Assessment on	**)**
the Lincoln National Forest	**)**
	)
	)
FOREST GUARDIANS, OBJECTOR	**)**
Bryan Bird, Forest Program Coordinator	**)**
312 Montezuma	**)**
Santa Fe, NM 87501	**)**
505.988.9126 x 157	**)**
	)
DATED this ____ day of August, 2005	**)**

To:

Reviewing Officer
Forest Service, Region 3
333 Broadway SE
Albuquerque, NM 87102

From:

Bryan Bird, Forest Program Coordinator
312 Montezuma
Santa Fe, NM 87501
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Introduction

NOTICE IS HEREBY GIVEN that Forest Guardians object pursuant to 36 CFR § 218.7 to the Regional Forester, Region Three of the United States Forest Service from the Environmental Assessment (EA) prepared for the Perk-Grindstone Fuels and Vegetation Hazard Reduction project, that is located on the Smokey Bear Ranger District of the Lincoln National Forest. Lincoln National Forest Supervisor Jose M. Martinez is the Responsible Official for this project. Legal Notice in the Newspaper of Record that states this EA is subject to Healthy Forests Restoration Act (HFRA) predecisional objection procedures (36 CFR § 218.4), and is not subject to Forest Service Appeal procedures was published in the Newspaper of Record on July 27, 2005.

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, Utah, and Arizona. Members of Forest Guardians frequently use and enjoy forest lands throughout the southwestern United States, including southern New Mexico, 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, HFRA, and NEPA. Forest Guardians, its staff, and its members have a substantial interest in continuing to use the area where the Perk-Grindstone project is planned and are adversely affected and aggrieved by the USFS's failure to protect the land and comply with the law.

Objector has participated in the comment process associated with this Perk-Grindstone project. Objector hereby incorporates all earlier comments that have been submitted in relation to this proposal. The LNF participated in a process in which a purported Community Wildfire Protection Plan was created that provided direction for where fuels reduction projects would be implemented around the village of Ruidoso. The scoping for the Perk-Grindstone project commenced after this CWPP was completed. If indeed this plan satisfies the requirements for a CWPP for each HFRA authorized fuels reduction project, it is not included in the record nor is there any effort made in the EA to place the project into the context of the CWPP.

Such a discussion is important and perhaps even required by the HFRA to understand the context of the proposal, how it complies with the collaborative provisions of the HFRA, and to determine the number of necessary alternatives considered in the EA.

Neither is it clear how the Perk-Grindstone project NEPA process differed in any respect from the traditional NEPA process. The HFRA requires a new "brand" of collaboration with stakeholders. The Webster's definition of collaborate is to "work jointly with others especially in an intellectual endeavor." However, there was nothing unusual about the way the LNF worked with the public on the Perk-Grindstone project: there was a public meeting, the LNF met with stakeholders, comment was taken on a proposal, and in the

end the LNF produced a project that was entirely its own creation, not a single concern or request of the Objector was honored or incorporated into the final EA. It is not clear that the LNF complied with the collaboration provisions of the HFRA.

Objector is objecting to this project on the grounds the decision is legally indefensible. Objector contends that with this project, Forest Supervisor Jose M. Martinez and the Lincoln National Forest (LNF) violate the National Environmental Policy Act (NEPA), the Appeals Reform Act (ARA), the Healthy Forests Restoration Act (HFRA) the Migratory Bird Treaty Act (MBTA), E.O. 13186, the National Forest Management Act (NFMA), its Forest Plan, as well as the Administrative Procedures Act (APA).

The Objector desires and will request relief in the form of:

- Instruction to select an alternative in the Decision Notice that does not violate the Mexican Spotted Owl recovery Plan, the Management Recommendation for the Northern Goshawk and the June 1996 LNF Plan Amendment (see Appendix E of the EA);

- Instruction to analyze an alternative that includes no new temporary road construction before a DN is signed; and,

- Instruction to gather MIS population trend data and actually analyze the impacts of the range of alternatives to the actual population trends before approving this project.

Statement of Facts

The Forest Supervisor of the Lincoln National Forest proposes to implement the Preferred Alternative which would treat 1,050 acres with thinning up to 9" dbh, thinning 3,765 acres greater than 9" dbh, performing prescribed burning on 4,339 acres, hand piling and burning 38 acres, and machine piling and burning or broadcast burning on 934 acres of National Forest lands to ostensibly reduce fuels, enhance fire-tolerant vegetation and provide fuel breaks. The stated purpose of the fuels treatments is to "increase the percent of the Ruidoso landscape in which treatments reduce fire risk and improve forest health." The net cost of the preferred alternative is $933 an acre or an estimated total cost of $5,331,162.

Forest Guardians provided substantive, written comments on January 7, 2005 in response to a scoping letter requesting public comment on December 6, 2004.

36 CFR§218.7(c) states that incorporation of documents by reference in predecisional objections is not allowed. In light of the fact that this objection references multiple documents including the Forest Plan, the Perk-Grindstone EA, emails, memos, and reports, these documents are incorporated into this objection with Attachment 1. (See CD-ROM included with this objection. The Forest Plan, EA and many supporting documents referenced and relied upon in this objection are located on the LNF website or in the administrative record.

Arguments

The ensuing arguments will demonstrate the Lincoln National Forest (LNF) EA and/or associated determinations and decisions have (in some cases) and will (with signing of a DN) violate the National Environmental Policy Act (NEPA), the Appeals Reform Act (ARA), the Healthy Forests Restoration Act (HFRA), the Freedom of Information Act, the Migratory Bird Treaty Act (MBTA), E.O. 13186, the National Forest Management Act (NFMA), its Forest Plan, the U.S Constitution, as well as the Administrative Procedures Act (APA).

I. The Lincoln National Forest (LNF) is Acting in Violation of the Healthy Forests Restoration Act (HFRA)

1. HFRA violations

The Healthy Forest Restoration Act (HFRA; Pub. L. 108–148, § 2, Dec. 3, 2003, 117 Stat. 1888) provides the authority for the Perk-Grindstone project and is binding as a U.S. statute. Several of the provisions of the HFRA will be violated if the project is to proceed as described in the EA.

a. TES Recovery Plans

Simply stated, no HFRA authorized project can be carried out in violation of a Threatened or Endangered species recovery plan. The Act states unequivocally that the Secretary shall implement authorized hazardous fuels reduction projects on land that contain threatened and endangered species habitat **only if**, "the Secretary complies with any applicable guidelines specified in any management or recovery plan described in subparagraph (A)."[1]

The Perk-Grindstone project EA proposes to carry out this HFRA authorized project in violation of the Mexican Spotted Owl recovery plan as well as the Management Recommendations for the Northern Goshawk, and the June 1996 amendment of the LNF.

b. Annual Program of Work

There is no Annual Program of Work contained in or even referenced in the EA as was requested by Objector in scoping comments. The LNF has not prepared an applicable Annual Program of Work (APW), as mandated by the HFRA. HFRA Section 103(a) explains that the annual program of work is where the National Forests will list and describe the projects they intend to accomplish under the HFRA annually and give priority to protection of at-risk communities or watersheds, or projects that implement community wildfire protection plans. Because this has not been done, the project is not consistent with section 103(a) of the HFRA.

[1] HFRA Section 102(a)(5)(C).

c. Suitable Lands Under the HFRA

Lands on which hazardous fuel reduction projects may occur under the HFRA are limited to:

1) The wildland-urban interface areas of at-risk communities;[2]

2) All condition class 3 lands, as well as condition class 2 lands within fire regimes I, II or III, that are in such proximity to a municipal watershed or its feeder streams that a significant risk exists that a wildfire event will have adverse effects on the water quality of the municipal water supply or the maintenance of the system;[3]

3) Where windthrow or blowdown or the existence of an epidemic of disease or insects significantly threatens ecosystems or resources;[4]

4) Areas that have threatened and endangered species habitat, where the natural fire regimes are important for (or where wildfire poses a threat to) the species or their habitat and the fuel reduction project will enhance protection from catastrophic wildfire (and complies with applicable guidelines in management or recovery plans).[5]

The EA fails entirely to provide documentation supporting the suitability under HFRA for each acre proposed for treatments in the Perk-Grindstone area as was requested by Objector in scoping comments. Failure to document and analyze suitability in the EA is inconsistent with the above HFRA direction.

d. Range of Alternatives

The HFRA sets out new NEPA requirements for the range of alternatives to be considered in projects authorized under the Act:

1) Within 1½ miles of the boundary of an at-risk community, federal agencies are not required to analyze any alternative other than the proposed action unless it is different than the recommendations contained in the applicable community

[2] HFRA Section 102(a)(1). See footnote 6 for definition of at-risk community and footnote 7 for wildland-urban interface.

[3] HFRA Sections 102(a)(2) and (3). HFRA defines "municipal water supply system" as "the reservoirs, canals, ditches, flumes, laterals, pipes, pipelines, and other surface facilities and systems constructed or installed for the collection, impoundment, storage, transportation, or distribution of drinking water." (Section 101).

[4] HFRA Section 102(a)(4).

[5] HFRA Section 102(a)(5).

wildfire protection plan related to proposed locations and methods of treatment, in which case both alternatives must be described.[6]

2) For areas beyond 1½ miles of the boundary of an at-risk community, but that are within the Wildland Urban Interface ("WUI" as described in a community wildfire protection plan), federal agencies are not required to analyze more than the proposed agency action and one additional action alternative.[7]

3) For authorized projects in areas not encompassed by the previous two categories of land, the environmental analysis must describe the proposed action, a no action alternative, and an additional action alternative, if one is proposed during scoping or the collaborative process. This additional alternative must still meet the purpose and need of the project. If more than one additional alternative is proposed, the agency will select which one to consider and provide a written record describing the reasons for the selection.[8]

The Perk-Grindstone EA fails to provide any adequate supporting documentation for each acre in the Perk-Grindstone project area that prescribes which category of WUI those acres fall into (i.e. within 1.5 miles of the boundary of a community, outside of 1.5 miles but within the interface as defined by the CWPP, and areas outside of those) as was requested by Objector in scoping comments.

Congress was very specific in describing where HFRA projects were to be implemented, largely because of the potential to abuse the process. Failure to provide the public adequate documentation of the HFRA suitability of each acre outside of WUI for this project is in conflict with Congress' specific and constraining language regarding suitable areas for implementing authorized HFRA projects.

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[6] HFRA Sections 104(d)(2) and (3). HFRA defines an at-risk community as one:
(A) That is comprised of: (i) an interface community as defined in the notice entitled `Wildland Urban Interface Communities Within the Vicinity of Federal Lands That Are at High Risk From Wildfire' issued by the Secretary of Agriculture and the Secretary of the Interior in accordance with title IV of the Department of the Interior and Related Agencies Appropriations Act, 2001 (114 Stat. 1009) (66 Fed. Reg. 753, January 4, 2001); or (ii) a group of homes and other structures with basic infrastructure and services (such as utilities and collectively maintained transportation routes) within or adjacent to Federal land;
(B) In which conditions are conducive to a large-scale wildland fire disturbance event; and
(C) For which a significant threat to human life or property exists as a result of a wildland fire disturbance event.

[7] HFRA Section 104(d)(1). HFRA defines wildland-urban interface (Section 101) as an area within or adjacent to an at-risk community that has been identified by a community in its wildfire protection plan or, for areas that do not have such a plan, an area extending; 1) ½ mile from the boundary of an at-risk community, or 2) more than 1½ miles when other criteria are met e.g. a sustained steep slope or a geographic feature aiding in creating an effective firebreak or is condition class III land, or 3) is adjacent to an evacuation route.

[8] HFRA Section 104(c).

The failure to meet this HFRA suitability requirement in the EA could be rectified in a revised or supplemental EA that adequately addresses HFRA suitability, and is provided for public review and comment to be consistent with the intent of HFRA and NEPA.

d. Old Growth

The HFRA of 2003 contains old growth protection language that the Forest Service is required to follow. In several substantive ways the HFRA old growth protection requirements are more rigorous than that of the NFMA, the Forest Plan, and other laws.

The HFRA requires the Forest Service "to fully maintain, or contribute toward the restoration of the structure and composition of structurally complex old growth stands according to the pre-fire suppression old growth conditions characteristic of the forest type, while considering the contribution of the stand to landscape fire adaptation and watershed health, and retaining the large trees contributing to old growth structure."[9]

The HFRA provides that old growth protections contained in management plans established on or after December 15, 1993 are deemed to be sufficient to meet the requirements of the HFRA and will be used by agencies in carrying out hazardous fuels treatment projects under the Act.[10] The HFRA **does not** require resource management plans to be reviewed or amended if they were put in place between December 15, 1993 and December 3, 2003. The direction in such plans is deemed by HFRA to be sufficient to meet the Act's requirements. The LNF plan was amended to address old growth in 1996, but the Perk-Grindstone project violates the standards and guidelines in the amended plan and makes no effort to explain how the project will comply with the S&Gs. Such ambiguity was very recently found contrary to law, in particular NEPA and NFMA.[11] In NEC, the appellate court found the agencies' NEPA documents must disclose how projects comply with applicable substantive requirements, and if they leave something out or misconstrue one of those requirements, it is a violation of NEPA.[12]

Resource management plans amended or revised after enactment of HFRA (December 3, 2003) must meet the old growth requirements if authorized projects under HFRA are to occur under those plans.[13] This does not apply to this project because the Forest Plan predates HFRA.

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[9] HFRA Section 102(e)(2).

[10] *Id.*

[11] Native Ecosystems Council v. USFS. (9th Circuit August 11, 2005) http://www.ca9.uscourts.gov/ca9/newopinions.nsf/4F9C4F14AB81393E8825705A00003F26/$file/0435375.pdf

[12] *Id.*

[13] HFRA Section 102(e)(2).

Resource management plans that predate December 15, 1993 require a review if the agencies intend to implement projects under HFRA. For these plans, the old growth management direction can be used for up to two years or, if the plan is in the revision process, for up to three years. During that time, the older management direction is to be reviewed to determine the extent to which this direction: 1) reflects more recent relevant information, and 2) is consistent with the old growth requirements. Based on this review, the agencies will determine whether amended direction is needed. If this review (and subsequent amendment, if deemed necessary) is not completed within the specified time period (3 years), and if any member of the public provides "substantial supporting evidence" during scoping that an area within a proposed hazardous fuels treatment project contains old growth, that area must be dropped from the project.[14]

Objector commented that the proposed action was not consistent with the HFRA due to its impacts of the proposed action to old growth. Regardless, "substantial supporting evidence" of impacts to old growth as defined under HFRA was met and exceeded in objector comments. This triggers an additional NEPA and HFRA violation specific to old growth. All treatments that harvest trees over 24" dbh and create 1-2 acre canopy openings in VSS4-6 will negatively impact old growth stands across the project area and violate the LNF plan. Dropping any logging of trees over 9" dbh as well as the creation of openings in VSS 4-6 may rectify this HFRA violation.

The Lincoln NF has not yet successfully mapped old growth and potential old growth in the planning area as was requested by Objector in scoping and as required by HFRA and the Forest Plan. However, this will be required prior to any decision to comply both with the HFRA as well as the Forest Pan. The Lincoln NF should have tabulated this information and preferably mapped the old growth and potential old growth.

The LNF Plan standards require the Forest Service to "allocate no less than 20 percent of each forested ecosystem management area to old growth." USDA Forest Service, 1996. Record of Decision for Amendment of Forest Plans at 95. The agency is directed to "strive to create or sustain as much old growth . . . as possible over time at multiple area scales." *Id*. It is to "seek to develop or retain old growth function on at least 20 percent of the naturally forested area by forest type in any landscape." *Id.* Finally, old growth calculations are to be done at multiple scales, "one scale above and one scale below the ecosystem management areas."

The old growth requirements thus set forth a fairly simple three-step requirement: (1) the Forest Service must inventory its old growth based on the old-growth attributes found in the table, (2), the Forest Service must "allocate" the old growth, (which presumably means to geographically identify where it is and to determine what percentage of the ecosystem management area it comprises), and (3) the Forest Service must plan projects in such a manner as to "create or sustain as much . . . old growth as possible."

[14] HFRA Section 102(e)(4)(C).

The Forest Service has failed every single step of this process with regard to the Perk-Grindstone project in violation of the HFRA and the NFMA.

e. Large Trees

The HFRA requires that covered projects outside of old growth focus "largely on small diameter trees, thinning, strategic fuel breaks, and prescribed fire to modify fire behavior, as measured by the projected reduction of uncharacteristically severe wildfire effects for the forest type;" and, maximize "the retention of large trees, as appropriate for the forest type, to the extent that the large trees promote fire-resilient stands."[15]

All 9" dbh plus treatments in the proposed action are in direct conflict with this HFRA requirement to retain large trees as is the proposal to take trees over 24".

II. The Disclosure of Information is Inadequate Under the National Environmental Policy Act (NEPA)

Public scrutiny of agency decision-making is key to helping public officials fulfill NEPA's purpose.[16] Thus "federal agencies shall to the fullest extent possible encourage and facilitate public involvement in decisions which affect the quality of the human environment" (emphasis added).[17] The phrase "to the fullest extent possible" is the broadest possible mandate, limited only by applicable law that "expressly prohibits or makes compliance impossible."[18]

"NEPA procedures must insure that environmental information is available to public officials **and citizens** before decisions are made and before actions are taken."[19]…"NEPA requires consideration of the potential impact of an action before the action takes place."[20]

NEPA mandates that when "there is incomplete or unavailable information, the agency shall always make clear that such information is lacking" (emphasis added).[21]

The Perk-Grindstone EA fails entirely to provide adequate site specific information and instead relies on generic narratives. For example on page 35 the EA states that "thinning

[15] HFRA Section 102(f).

[16] 40 C.F.R. § 1500.1(c).

[17] 40 C.F.R. § 1500.2(d).

[18] 40 C.F.R. § 1500.6.

[19] 40 C.F.R. 1500.1(b).

[20] City of Tenakee Springs v. Clough, 915 F.2d 1308, 1313.

[21] 40 C.F.R. § 1502.22.

and salvage …is desirable for visitors and wildlife alike," but provides no supporting evidence for such a wildly incorrect statement. The last time we reviewed the literature on snag-dependent species, it was apparent that many birds and mammals alike require dead standing and dead down trees in abundance.

On page 31, the EA states that "the values (for flame lengths) …are modeled in the year of treatment." But as any fuels specialist or amateur forest ecologist understands it is the subsequent 5-10 years in which the most flammable fuels will develop in thinned stands or fuelbreaks and that this is when fire risk is most acute unless maintenance activities are planned. The EA simply fails to use good information in presenting post-implementation fire risk and there is nothing in the EA that would indicate or ensure that desired fuel conditions in the treatment areas will be maintained over time.

The EA goes to great lengths to justify reducing SDI to less than 50% maximum and discusses the resulting improvement to overall stand and individual tree vigor which can lead to "better utilization of limited site resources (i.e. water). EA at 29. The Silvicultural Prescription and Fuels Report (Appendix B) states that that the "primary goal for the project area is consistent with the expectation to retain mycorrhizal fungi within the ecosystem and that is by reducing or eliminating uncharacteristically intense wildfire within the project area. Appendix B at 17. The problem with this naïve and over-simplified use of forest science is that the very mycorrhizal fungi that are so important in facilitating nutrient and water uptake in southwestern coniferous forests require closed canopy forests that create moist, cool conditions necessary for the fungi. (States 1985). The project will severely open the canopy leading to hot, dry conditions and greater exposure to wind; the very conditions most unfavorable to mycorrhizal fungi, thus off-setting and perceived benefits of reduced fire risk.[22] (States and Gaud, 1997, States 1985, Pederson et al. 1987, States et al 1988).

The Forest Service is required to use the best available information and consider even contrary information in its NEPA documentation which it has failed so clearly to do in the Perk-Grindstone EA.

All site-specific activities must comply with the governing forest plan. National Forest Management Act, 16 U.S.C. § 1604(i) (governing FS management of national forest lands); Federal Land Policy & Management Act, 43 U.S.C. § 1732(a) & 43 C.F.R. § 1610.5-3(a) (governing BLM lands). NEPA requires disclosure of information necessary to determine compliance with legal requirements such as the Endangered Species Act, Clean Water Act, National Forest Management Act, and applicable Forest Plan Standards & Guidelines. [23]

[22] The fire risk is extremely low as it is, though not disclosed in the EA, so this perceived benefit of risk reduction is near to non-existent.

[23] See 40 CFR 15087.27(b)(10) and NW Indian Cemetery Protective Association v. Peterson, 795 F2d 688 (9th Circ 1986). In this G-O Road case, the NEPA document described water quality changes resulting from a road project in terms of 7-day average changes, whereas the applicable WQ standard was defined by daily peak changes. The court found this to be a NEPA violation.

The Office of General Counsel agrees that project level analysis must document "Project Compliance with Other Laws." In addition to consistency with the LRMP each project must be in compliance with NEPA, CWA, CAA and other laws. Simply being consistent with the LRMP does not fulfill the site-specific requirements of Federal law. Project level analysis is to "determine findings for NFMA, to ensure compliance with NEPA, and to meet other appropriate laws and regulations."[24]

The Forest Service NEPA Handbook also requires that Decision Notices explain complete[ly] and comprehensive[ly] "how the NEPA decision complies with applicable legal requirements including the LRMP land allocations and Standards & Guidelines. FSH 1909.15 Chapter 40, 43.21 - Format and Content

Decision notices document the conclusions drawn and the decision(s) made based on the analysis in the EA. Decision notices should conform to the following format and content. While sections may be combined or rearranged in the interest of clarity and brevity, the information needs to be complete and comprehensive.

The Perk-Grindstone project EA is in violation of NEPA because it fails to describe how the proposed activities will comply with the 1996 LRMP amendment in regards to old growth, MSO S&Gs, and northern goshawk guidelines.[25]

A further violation of NEPA occurs because the LNF has failed to disclose the assumptions and weaknesses of its Forest Vegetation Simulator model. The LNF relies heavily on this flawed model for its conclusions and findings in both the EA and the Silvicultural Prescription and Fuels Report (Appendix B). The only place in the EA where the LNF even hints at the models weaknesses is in Chapter 4, Environmental Consequences: "The FVS model is currently the best tool available to estimate tree growth, stand trends and to account for tree variability, *but it cannot predict situations in the field where clumpiness exists or is desired,* as is the case based upon field visits of the proposed treatment area*s*." (Emphasis Added) EA at 25.

This flaw underlies the entire analysis and its conclusions and was brought to the attention of the LNF by Objector in scoping. The Objector field a "citizen's alternative during scoping that proposed the LNF make use of natural clumpiness to design the most efficient alternative with the least environmental impacts. But the LNF ignored the citizen's alternative proposal and exposes the flaws in its own modeling here. The LNF is

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[24] Forest Service Land and Resource Management Planning, FSM 1920 and Forest Service Handbook 1909.12, 5.31. 53 Fed. Reg. 26807, 26836 (July 15, 1988). OGC, Forest Plan and Project Level Decisionmaking. Overview of Forest Planning and Project Level Decisionmaking.
http://www.fs.fed.us/forum/nepa/decisionm/p4.html#14
http://www.fs.fed.us/emc/nfma/includes/overview.pdf

[25] Native Ecosystems Council v. USFS. (9th Circuit August 11, 2005)
http://www.ca9.uscourts.gov/ca9/newopinions.nsf/4F9C4F14AB81393E8825705A00003F26/$file/0435375.pdf

required by NEPA to disclose such flaws and discuss how they affect the analysis and findings in the EA.[26]

The Lands Council court found:

> The Forest Service's heavy reliance on the WATSED model in this case does not meet the regulatory requirements because there was inadequate disclosure that the model's consideration of relevant variables is incomplete. Moreover, the Forest Service knew that WATSED had shortcomings, and yet did not disclose these shortcomings until the agency's decision was challenged on the administrative appeal. n16 We hold that this withholding of information violated NEPA, which requires up-front disclosures of relevant shortcomings in the data or models. See 40 C.F.R. § 1502.22; Lands Council v. Vaught, 198 F. Supp. 2d 1211, 1239 (E.D. Wash. 2002) (finding the same WATSED shortcomings and holding that the Environmental Impact Statement failed to disclose such shortcomings).[27]

III. The Response to Comments is non-existent in violation of NEPA

NEPA implementing regulations at § 1503.4 require all federal agencies to respond in writing to public comments submitted on a given project. This requirement forces agencies to consider public sentiment and knowledge with respect to the proposed action, and to respond to such comments or, if necessary, develop new alternatives or modify the proposed actions.

The LNF has failed entirely to respond to comments during scoping, and failed to respond directly to any comments on the proposed project. (See e-mail communication with Ron Hannan dated 08/23/05 on CD-ROM). This is an especially egregious violation as it is one more slice in the heart of democracy here at home. While we sacrifice in the Middle East to promote democracy, we lose it here at home in the most subtle but significant ways.

IV. The Cumulative Effects Analysis in the EIS is Inadequate under NEPA

NEPA mandates that EAs adequately disclose and provide an adequate analysis of the direct, indirect, and cumulative effects of the proposed action and alternatives. Objector argues here that the LNF failed to adequately disclose and analyze the direct and indirect effects of important aspects of the proposed action. Of particular concern is the fact that the direct and indirect effects of these aspects of proposed action on TES, MIS, protected migratory birds, soils, watershed, and aquatic habitat were not disclosed or analyzed in a meaningful way. Similarly, there is also a failure to account for the cumulative effects of these components of the proposed action combined with other past, present, and reasonably foreseeable actions.

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[26] Lands Council v. Powell, 395 F.3d 1019, 1032 (9th Cir. 2004).

[27] *Id*.

"Cumulative impact" is defined in NEPA as, "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future action regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."[28]

The Courts are clear on what they expect from agencies when preparing a legally sufficient cumulative effects analysis. A "meaningful" analysis of cumulative effects, "should identify (1) the area in which effects of the proposed project will be felt; (2) the impacts that are expected in the area from the proposed project; (3) other actions- past, proposed, and reasonably foreseeable – that have had or are expected to have impacts on the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate."[29]

"Significance" is defined by NEPA as an action that includes: "impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial,"[30] "Unique characteristics of the geographic area such as proximity to……ecologically critical areas,"[31] "The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks,"[32] "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment."[33] "Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment."[34]

This project lacks a meaningful analysis of the cumulative impacts by failing to disclose, list and describe how the effects of each past present and reasonably foreseeable project may or may not contribute to the current degree of effects that, cumulatively, may be significant. It also fails to adequately analyze whether the cumulative effects of aspects of the proposed action could threaten violation of Federal law and regulation. Furthermore, in Lands Council V. Powell the Court found that when the cumulative effects analysis:

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[28] 40 CFR 1508.7

[29] City of Carmel-By-The-Sea v. U.S. Department of Transportation, 95 F. 2d 892, 902 (9th Cir. 1996).

[30] 40 C.F.R. §1508.27(b)(1).

[31] 40 C.F.R. §1508.27(b)(3) .

[32] 40 C.F.R. §1508.27(b)(5) .

[33] 40 C.F.R. §1508.27(b)(7).

[34] 40 C.F.R. §1508.27(b)(10).

> "[C]ontains only vague discussion of the general impact of prior timber harvesting, and no discussion of the environmental impact from past projects on an individual basis, which might have informed analysis about alternatives presented for the current project" it is, "inadequate" because the cumulative effects analysis, "Must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. ...Although the agency acknowledged broad environmental harms from prior harvesting, the data disclosed would not aid the public in assessing whether one form or another of harvest would assist the planned forest restoration with minimal environmental harm. For the public and agency personnel to adequately evaluate the cumulative effects of past timber harvests, the Final Environmental Impact Statement should have provided adequate data of the time, type, place, and scale of past timber harvests and should have explained in sufficient detail how different project plans and harvest methods affected the environment. The Forest Service did not do this, and NEPA requires otherwise."[35]

Objector argues that this EA suffers these very same fatal flaws the courts have been clear in striking down. The EA does offer a list of some past, present and reasonably foreseeable impacts, but miserably fails to describe and evaluate the cumulative effects of each of these other activities in a meaningful way such that NEPA is satisfied and a DN would be adequately supported.

V. The Lincoln National Forest will Violate the Migratory Bird Treaty Act (MBTA) and E.O. 13186 with the Proposed Action

The LNF is responsible under the Migratory Bird Treaty Act (MBTA) and Executive Order 13186 to protect all migratory birds. The MBTA prohibits the take, possession… [of] any migratory bird, their eggs, and nests, except as authorized under a valid permit.[36] 'Take' is defined in 50 CFR 10.12, and includes both "intentional" and "unintentional" take. "Unintentional take" means take that results from, but is not the purpose or, the activity in question. The Forest Service is directed "to support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions."[37]

The EA is miserably lacking in any analysis of impacts in NTMBs and any mitigations to avoid intentional or unintentional take. Instead, contrary to the large body of science, the EA considers only riparian vegetation as NTMB habitat to be protected. It is not clear to

[35] Lands Council V. Powell (No. 03-35640 C.C. No. CV-02-00517-EJL, 9th Cir, 2004).

[36] 50 CFR 21.11.

[37] E.O. 13186 §3(e).

Objector if the LNF knows that NTMBs use many more habitat types and particular habitat components than just riparian vegetation. Many NTMBs are upland habitat specialist and in many cases use snags or other cavity trees for nesting and breeding. Because the Perk-Grindstone project prescriptions focus inordinately on dead, dying (or even predicted to be dead trees), there is simply no way for the LNF to avoid take of NTMBs and thus is in violation of the MBTA.

This knowing taking will also constitute a failure to meet the requirements established in EO 13186 and the MBTA, "to support the conservation intent of the migratory bird conventions by integrating bird conservation principles, measures, and practices into agency activities and by avoiding or minimizing, to the extent practicable, adverse impacts on migratory bird resources when conducting agency actions."[38]

Finally, the LNF is not in compliance with the EO 13186 because it has not developed and entered into the Memorandum of Understanding (MOU) mandated by EO 13186. ("In coordination with affected Federal agencies, the Service shall develop a schedule for completion of the MOUs within 180 days of the date of this Order. The schedule shall give priority to completing the MOUs with agencies having the most substantive impacts on migratory birds.") Failure to ensure that such an MOU has actually been entered into so many years after the deadline established by EO 13186 constitutes violation of EO 13186 and the MBTA that would be ripe with the signing of a DN for the proposed action.

VI. The Lincoln National Forest (will) Violate the NFMA and the Forest Plan Requirements by Ignoring the 1996 Amendments for Owl and Goshawk

1. Goshawk guidelines

The Southwestern Region of the Forest Service designated the Northern Goshawk as a sensitive species in 1982 to meet its duty under NFMA to provide for the diversity of plant and animal communities.[39]

To better protect Goshawk habitat, every forest plan in the region was amended in 1996 with new Goshawk guidelines that, among other requirements, mandates 40 percent average canopy cover in all mid-aged, mature and old growth forests (VSS 4,5 and 6) outside of Mexican spotted owl restricted and protected habitat. Large trees, high tree densities and dense canopies have been demonstrated to be important components of Goshawk foraging habitat (Austin 1993; Bright-Smith and Mannan 1994; Hargis et al. 1994; Beier and Drennan 1997; Drennan and Beier 2003).

The fuels reduction regime described in the EA for this project is fundamentally in conflict with the Goshawk guidelines (Beier and Maschinski 2003:317) and therefore

[38] *Id.*

[39] 16 U.S.C. § 1604(g)(3).

inconsistent with the forest plan. Most of the forest in the planning area will be reduced to less than 50% of SDI and 1-2 acre openings will be created over the planning area. This will most certainly reduce tree canopies below the 40 percent average that must be maintained in mid-aged, mature and old growth forests in the project area and thus likely cause a decline in the goshawk population (Beier and Maschinski 2003:316). The EA fails to even disclose the distribution of VSS classes across the planning area, so it cannot know what the impacts from the proposed action will be nor can it even begin to assure that the goshawk guidelines and owl standards will be complied with. As discussed above in NEC v. USFS, it is a violation of NEPA to not explain how a project complies with the LRMP or to mislead in that regards. NFMA and Forest Service regulations require that site-specific projects be fully consistent with Forest Plans.[40] The courts have repeatedly affirmed this requirement.[41]

It is important to note that the Goshawk canopy closure requirement is a bare minimum. Arizona Game and Fish Department (1993) contend that a denser canopy closure is needed by non-hibernating, non-migratory prey species, such as Abert's squirrel that Goshawks utilize for winter prey. Managing for minimums, which are often treated as maximums by managers, is common practice despite being biologically unwarranted (Arizona Game and Fish Department, 1993:34).

Therefore, this project's proposal to drastically reduce canopy closure, reduce tree density, create openings, and cut trees over 24" dbh appear to be inconsistent with the LNF plan and contrary to NFMA's substantive duty to provide for the diversity of plant and animal communities.

2. Mexican Spotted Owl Standards and Guidelines

The Perk-Grindstone project as proposed (both action alternatives) will violate the 1996 LNF plan amendments. In particular, the standards for restricted areas (mixed conifer, pine-oak, and riparian forests) will be violated. Within Protected Activity Centers (PACs) and protected habitat (mixed conifer and pine-oak forest with slopes greater than 40% where timber harvest has not occurred in the last 120 years) no trees larger 9" are to be cut and pre- and post treatment monitoring should occur. (EA at Appendix E). In restricted areas the LNF is required to "save all trees greater than 24 inches dbh." (Appendix E).

As discussed above the LNF is required by NEPA and NFMA to comply with the forest plan and to demonstrate to a sufficient degree exactly how the proposed alternatives will meet the LRMP.

[40] NFMA at 16 U.S.C. § 1604(i); regulations at 36 C.F.R. § 219.10 (e), (i).

[41] Neighbors of Cuddy Mountain v. USFS, 137 F.3d 1372, 1377-78 (9th Cir. 1998); Pacific Rivers Council v. Thomas, 30 F.3d 1052 (9th Cir. 1994); Idaho Conservation League v. Mumma, 956 F.2d 1512 (9th Cir. 1992).

VII. The Lincoln National Forest (will) violate the NFMA and the Forest Plan Requirements to Monitor the Populations of MIS and Maintain Viable Populations of those MIS

The regulations implementing NFMA and the Forest Plan were or will be violated by the Forest's failure to gather quantitative Management Indicator Species (MIS) population trend data and establish relationships to habitat changes from management activities implementing the Forest Plan. The LNF plan clearly requires that population data be collected for MIS prior to project implementation.[42]

The requirement to collect population data has again been affirmed this summer in the 10th circuit in Utah Envtl. Cong. v. Bosworth, No. 03-4251, 2005 U.S. App. LEXIS 17619, at *1 (10th Cir. Aug. 19, 2005). The LNF has not amended its forest plan to relieve it of the duty to collect population data for MIS. The UEC v. Bosworth court found the interpretive rule and transitional rule for planning issued by the Department of Agriculture to be non-binding legally. Thus the LNF is still bound to collect population data for its MIS before embarking on projects that might impact the viability of those species in the planning area and on the forest.

In another recent 10th Circuit ruling in Utah Environmental Congress v. Dale Bosworth, this Circuit Court ruled that the NFMA regulations at 36 CFR§219.19 and §219.26 apply to forest management activities implementing the Forest Plan, and that actual use of hard quantitative MIS population trend data is mandated in the analysis:

> "In keeping with the reasoning of the Eleventh Circuit and the district courts of this circuit, we conclude that § 219.19 requires the Forest Service to use actual, quantitative population data to effectuate its MIS monitoring obligations. Section 219.19 mandates that as part of forest planning, "[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired nonnative vertebrate species." Further, forest management "[p]lanning alternatives shall be stated and evaluated in terms of both amount and quality of habitat and of animal population trends of the management indicator species," § 219.19(a)(2); similarly, "[p]opulation trends of the management indicator species will be monitored and relationships to habitat changes determined," §219.19(a)(6). Plainly the regulations require that the Forest Service monitor population trends of the MIS in order to evaluate the effects of forest management activities on the MIS and the viability of desired fish and wildlife populations in the forest more generally."
>
> "Our reading of the requirements of § 219.19 is strengthened by § 219.26, which provides that to ensure diversity of plant and animals in forest planning inventories which "include quantitative data making possible the evaluation of diversity in terms of its prior and present condition" shall be taken. We agree with

[42] Lincoln National Forest Plan at 168.

the Eleventh Circuit in Martin that these two sections of regulation 219 "are harmonious when read together."[43]

Because,

> "MIS are proxies used to measure the effects of management strategies on Forest diversity . . . [and because §] 219.26 requires the Forest Service to use quantitative inventory data to assess the Forest Plan's effects on diversity. . . . then, taken together, the two regulations require the Forest Service to gather quantitative data on MIS and use it to measure the impact of habitat changes on the Forest's diversity."[44]

"Similarly, the court in Forest Guardians reasoned that the language of § 219.19 required the Forest Service **"**to acquire and analyze hard population data of its selected management indicator species" before approving a timber sale, because these regulations clearly preclude reliance "solely on habitat trend data as a proxy for population data or to extrapolate population trends."[45]

Likewise, we agree that a reading of § 219.19 as requiring only habitat analysis is "inconsistent with the regulation's plain meaning," Yuetter, 994 F.2d at 738. Accordingly, we conclude that in order to effectuate its MIS monitoring duties under the language of its regulations, the Forest Service must gather quantitative data on actual MIS populations that allows it to estimate the effects of any forest management activities on the animal population trends, and determine the relationship between management activities and population trend changes."[46]

The LNF Forest Plan, as amended, identifies 9 MIS. They are:

Elk	Mixed conifer
Hairy Woodpecker	Mixed conifer (aspen and aspen snags)
Juniper (Plain) titmouse	Piñon-juniper woodland
Meadowlark	Gramma Galleta grassland
Mexican vole	Mixed conifer (Mesic mountain meadow)
Mule deer	Piñon-juniper woodland
Pygmy nuthatch	Ponderosa pine
Red squirrel	Engleman spruce/mixed conifer
Rufous crowned sparrow	Desert shrub

[43] Martin, 168 F.3d at 7.

[44] *Id*

[45] 180 F. Supp. 2d at 1281.

[46] Utah Environmental Congress v. Bosworth, 2004 U.S. App. LEXIS 12441 (10th Cir. 2004). (Emphasis added).

The Perk-Grindstone Wildlife Report (Appendix C) identifies 5 of the 9 MIS as present in the planning area: Mexican vole, pygmy nuthatch, red squirrel, elk, and mule deer. Appendix C at 2. However, the LNF readily admits that it does not have any populatin trend information for several of these MIS. For example, the forest uses habitat information as its baseline for the pygmy nuthatch and even states clearly that "data specific to the Lincoln National Forest is not available at this time" for the red squirrel. Appendix C at 14.

The LNF has failed to meet its mandate under NFMA to collect required quantitative population trend data and determine relationships between management activities or habitat changes and population trend changes.

NFMA imparts on the Forest Service a substantive duty to provide for the diversity of plant and animal communities on national forests.[47] (Emphasis added). To achieve this goal, the regulations implementing NFMA specify that the agency will provide ecological conditions needed to support ecosystem diversity.[48]

Abert's squirrel (*Sciurus aberti*) is an obligate species of ponderosa pine forests such as occur in the project area. Squirrels play a key role in supporting the sustainability and diversity of the ponderosa pine ecosystem by facilitating essential symbiotic interactions of mycorrhizal fungi with ponderosa pine through consumption of fruiting bodies and dispersal of spores (States and Gaud 1997, States and Wettstein 1998). Recent population surveys on the Carson National Forest found only one squirrel per 500 acres (Frey, 2004), one of the lowest densities ever recorded and far below the 6 to 16 squirrels per acre (USDA Forest Service, 1984:H-3) needed to support the sustainability and diversity of the ponderosa pine ecosystem.

Intensive mechanical treatments associated with forest restoration and fuels reduction that reduce canopy closure, tree density, diversity and patchiness are similar to even-aged logging practices that have been shown to be detrimental to Abert's squirrel (Dodd et al., 2003). These intensive treatments alter microhabitats where hypogenous fungi grow, reducing fungi production (States and Gaud, 1997) and potentially disrupting the relationship between fungi, pines and squirrels (States 1985, Pederson et al. 1987, States et al 1988).

To ensure ecological condition are present to maintain squirrel populations, Dodd et al. (1998) recommends that surveys be done before treatment to identify and preserve high quality source areas and maintain the larger VSS 4 and 5 trees throughout the project area. In treated areas Dodd et al. (1998) recommends that a minimum of 9 patches per acre of clumps of five or more interlocking canopy trees greater than 6 inches in diameter with canopies less than 5 feet apart be retained. These measures will ensure that a sufficient number of interlocking canopy trees are preserved for squirrel recruitment. Failure to incorporate these reasonable recommendations into the project's design will

[47] 16 U.S.C. § 1604(g)(3).

[48] 36 C.F.R. 219.10(b).

contribute to declines in the Abert's squirrel population, threatening the sustainability of the ponderosa pine ecosystem and violating NFMA's diversity mandate.

VIII. The HFRA Violates the U.S. Constitution

HFRA, including its' §106 restrictions on judicial review violate the U.S. Constitution, and its separation of powers.

IX. The Lincoln National Forest EA Action Alternatives Would Violate NEPA, its Forest Plan and NFMA by Failing to Ensure Soils will not be Irreversibly Damaged

Under NFMA, Forest Plans must, "insure that timber will be harvested from National Forest System lands only where ... soil, slope, or other watershed conditions will not be irreversibly damaged.."[49] The courts have found that this section "contemplates that timber harvesting may be carried out even though such harvesting may cause temporary or short-term damage to soil and watershed conditions. (This section) goes no further than to charge the Secretary with the duty of promulgating regulations to insure that soil, slope and watershed conditions will not be irreversibly damaged as a result of timber harvesting."[50]

The proposed action in this EA would violate NFMA and the Forest Plan because detrimental soil loss will cumulatively exceed the 15% Forest Plan standard, which is also a requirement in the FSM and NFMA. This would be in violation of 16 U.S.C. 1604(g)(3)(E)(i). Furthermore, the soil modeling used in the EA is inadequate because it was designed only to compare alternatives. More detailed and accurate soil modeling is needed to adequately disclose and analyze this issue.

X. The Lincoln National Forest Proposed Action in this EA Would Violate the Administrative Procedures Act.

The APA requires all agency actions to conform to general standards of regularity and rationality. The courts will overturn agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."[51] The Supreme Court has held:

> "Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to

[49] 16 U.S.C. 1604(g)(3)(E)(i).

[50] Citizens for Environmental Quality v. U.S. 731 F.Supp. 970, 984 (D. Colo. 1989).

[51] 5 U.S.C. 706.

> consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[52]

Failures to comply with the Forest Plan, the NFMA, the MBTA and E.O. 13186, HFRA, the US Constitution, and NEPA by implementing the proposed action as is would all be in violation of the APA because that decision would be arbitrary, capricious, or otherwise not in accordance with the law.

The 2002 Responsible Official determination to not analyze the DFS only alternative in violation of HFRA and NEPA that was carried into the 2005 EA is a violation of the APA.

[52] Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983).

Request for Relief

Due to the violations of federal law and regulation cited above that have occurred or that are pending, the objector requests relief in the form of instruction to the Forest:

- to select an alternative in the Decision Notice that does not violate the Mexican Spotted Owl Recovery Plan, the Management Recommendations for the Northern Goshawk and the June 1996 LNF Plan Amendment (see Appendix E of the EA);

- to analyze an alternative that includes no new temporary road construction before a DN is signed; and,

- to gather MIS population trend data and actually analyze the impacts of the range of alternatives to the actual population trends before approving this project.

Objector invites the Agency to a meeting to resolve this objection.

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