Before the Forest Supervisor
Of the Black Hills National Forest
United States Department of Agriculture

Appeal of the Record of Decision
And Final Environmental Impact Statement
For the Norbeck Wildlife Project
On the Hell Canyon Ranger District
Of the Black Hills National Forest

Appellants:

*Friends of the Norbeck*, PO Box 2003, Rapid City, SD 57709
  Brian Brademeyer, Executive Director, Phone: 605-574-4152
*Native Ecosystems Council*
*Defenders of the Black Hills*
*Biodiversity Conservation Alliance*
*Prairie Hills Audubon Society of Western South Dakota*
*Black Hills Group – Sierra Club*
  Brian Brademeyer
  Eve Koevenig
  Christine Redden

Responsible Official:

Lynn D. Kolund, Hell Canyon District Ranger

Appeal No.___________________________

Notice of Appeal
Relief Requested
Statement of Reasons

Dated this 31\textsuperscript{st} Day of May 2010
Table of Contents

NOTICE OF APPEAL .................................................. 3
LIST OF APPELLANTS ............................................. 4
RELIEF REQUESTED .................................................. 8
NOTICE OF HAND-DELIVERY OF ATTACHMENTS .......... 9
BACKGROUND -- NORBECK WILDLIFE PRESERVE CHRONOLOGY 10

STATEMENT OF REASONS ........................................... 16

I. The Norbeck Wildlife Project Has No Underlying Programmatic Planning Document That Complies With The Norbeck Organic Act (NOA) and the Tenth Circuit Mandate. 16

II. The ROD/FEIS Fails to Amend the Forest Plan Standards and Guidelines for the Norbeck Preserve, to Bring Them into Compliance with the Norbeck Organic Act and the Tenth Circuit Mandate. 25

III. The Required Wilderness Review Has Never Been Completed for Expanding the Black Elk Wilderness within the Norbeck Wildlife Preserve; the 1997 Reason for Denying This Review Has Been Overturned by the Tenth Circuit Mandate. 33

IV. The 2009 Extension of the Memorandum of Understanding with SD Game, Fish and Parks Fails to Implement the ‘Protection’ and ‘Breeding Place’ Mandates of the NOA, is Arbitrary and Capricious is Selecting ‘Focus Species’ and Fails to Constrain Hunting and Trapping within the Norbeck Preserve Sufficiently to Comply with the Norbeck Organic Act and the Tenth Circuit Mandate. 35

V. The Proposed Actions are a Desecration of the Okawita Paha Sacred Landscape and Violate the Religious Freedom of Native Americans. 39

VI. The ROD/FEIS Fails to Disclose Existing Conditions of, and Direct Effects of Proposed Actions on, the ‘Protection’ and ‘Breeding Place’ Needs of Game Animals and Birds. 42

VII. The Alleged ‘Purpose and Need’ Has Not Been Demonstrated (NEPA), and Fails to Comply with the Norbeck Organic Act (NOA) and Tenth Circuit Mandate. 49

VIII. The MPB Assumptions in Appendix J are ‘Arbitrary and Capricious’ and Contrary to Best Available Scientific Evidence and Direct Local Experience. 52
IX. The Proposed Actions Fail to Provide for the Needs of Big Game Animals as Mandated in the NOA and Tenth Circuit Ruling, and Fail to Even Comply with the Deficient Forest Plan Direction.  63

X. The Proposed Actions Fail to Provide for the Needs of Birds as Mandated in the NOA and Tenth Circuit Ruling, and Fail to Even Comply with the Deficient Forest Plan Direction.  67

XI. The Proposed Actions Fail to Provide for the Needs of Small Game Animals as Mandated in the NOA and Tenth Circuit Ruling, and Fail to Even Comply with the Deficient Forest Plan Direction.  70

XII. The Proposed Actions Violate Forest Plan Soil Disturbance Standards (NFMA).  71

XIII. The Proposed Actions Violate Forest Plan Water Quality and Aquatic Habitat Standards (NFMA).  73

XIV. The Impacts of the Proposed Actions on Carbon Sequestration and Climate Change Have Not Been Adequately Assessed (NEPA).  75

XV. The ROD/FEIS Fail to Utilize Best Available Science (NEPA).  78

XVI. The ROD/FEIS Fail to Present a Reasonable Range of Alternatives (NEPA).  83

XVII. The ROD/FEIS Fail to Consider the ‘Breeding Place’ Role of the Norbeck Preserve for the Black Hills National Forest as a Whole (NEPA).  85

XVIII. The ROD/FEIS Fail to Meaningfully Respond to Substantive and Relevant Public Comments (NEPA).  86

ATTACHMENTS—Table of Contents  87
Notice of Appeal

On March 27, 2010, Hell Canyon District Ranger Lynn D. Kolund signed a Record of Decision (ROD) approving implementation of Alternative 4, as Modified, of the Norbeck Wildlife Project, outside the Black Elk Wilderness, on the Black Hills National Forest. The project is further described in the ROD as including: shrub enhancement (52 acres), spruce enhancement (78 acres), hardwood enhancement (629 acres), meadow enhancement (297 acres), large tree enhancement (901 acres), stand diversity enhancement (3,127 acres), forage enhancement (534 acres), and late succession enhancement (501 acres). Mechanical treatments are proposed on 4,944 acres followed by burning on 1279 acres, and standalone burning on 929 acres. Associated roadwork is described as: use of hiking trails (4.4 miles), road reconstruction (6.5 miles), spot reconstruction (1.2 miles), maintenance (9.5 miles), and new temporary roads (1.5 miles). Estimated timber volumes are: sawtimber (38,580 CCF) and products other than logs (10,000 CCF). The decision to use prescribe fire in the Black Elk Wilderness is deferred.

Pursuant to 36 CFR 215 and 5 USC 555(b), NOTICE IS HEREBY GIVEN that the above captioned groups and individuals listed as “Appellants” hereby appeal to the Forest Supervisor of the Black Hills National Forest of the United States Forest Service for relief from District Ranger Kolund’s decision to authorize modified Alternative 4 of the Norbeck Wildlife Project, outside the Black Elk Wilderness Area.
LIST OF APPELLANTS

Brian Brademeyer, for
Friends of the Norbeck, Inc.
Executive Director
PO Box 2003
Rapid City, SD 57709
(605) 574-4152
brademey@dishmail.net

Sara Jane Johnson, for
Native Ecosystems Council
Director
PO Box 125
Willow Creek, MT 59760
(406) 285-3611
sjjohnsonkoa@yahoo.com

Charmaine White Face, for
Defenders of the Black Hills, Inc.
Coordinator
PO Box 2003
Rapid City, SD 57709
(605) 399-1868
bhdefenders@msn.com

John Persell, for
Biodiversity Conservation Alliance
Conservation Law Director
PO Box 1512
Laramie, WY 82073
(307) 742-7978
john@voiceforthewild.org
Nancy Hilding, for  
*Prairie Hills Audubon Society of Western South Dakota*  
President  
PO Box 788  
Black Hawk, SD 57718  
(605) 787-6466  
nhilshat@rapidnet.com

Sam N. Clauson, for  
Black Hills Group – Sierra Club  
Chair  
PO Box 1624  
Rapid City, SD 57709  
(605) 343-5756  
snbclaus@rushmore.com

Brian Brademeyer  
PO Box 762  
Rapid City, SD 57709  
(605) 574-4152  
brademey@dishmail.net

Christine Redden  
PO Box 184  
Custer, SD 57730  
(605) 574-2239  
ccr326@hotmail.com

Eve Koevenig  
PO Box 55  
Hill City, SD 57745  
(605) 574-2239  
ekoevenig@msn.com
Appellant *Friends of the Norbeck* (FotN) is a South Dakota nonprofit corporation headquartered in Rapid City, SD. Formed in 2002, FotN is dedicated to protecting the public lands on the Black Hills National Forest, in general, and the Norbeck Wildlife Preserve and Black Elk Wilderness Area, in particular. FotN members regularly hike, photograph, and recreate in the Norbeck Project Area. FotN maintains a website to inform the public of proposed actions that threaten the wildlife habitat in the Norbeck Preserve, such as the Norbeck Wildlife Project. FotN submitted substantive and extensive comments on the Norbeck Wildlife Project DEIS.

Appellant *Native Ecosystems Council* (NEC) is a nonprofit, Montana-based organization headquartered in Three Forks, MT. NEC members enjoy recreational and scientific pursuits on national forest lands in the Northern Rockies bioregion, including the Black Hills National Forest. NEC has been actively participating in public lands management for 18 years with a focus on ensuring the viability of native wildlife species, particularly those that are vulnerable to Forest Service management activities that remove and/or degrade their habitat. NEC members regularly hike and recreate in the Norbeck Wildlife Preserve, which is the most special wildlife habitat on the entire Black Hills National Forest due to its large block of unfragmented old-growth ponderosa pine forest. NEC submitted substantive and extensive comments on the Norbeck Wildlife Project DEIS and the Black Hills Forest Plan Revision and ROD.

Appellant *Defenders of the Black Hills* (DoBH) is a group of volunteers, without racial or tribal boundaries, whose mission is to ensure that all of the provisions of the Fort Laramie Treaties of 1851 and 1868 are upheld by the federal government of the United States. In doing so, these volunteers are also upholding the Constitution of the United States that, in Article Six, proclaims "treaties are the Supreme Law of the land." Until the Treaties are upheld, the actions of the Defenders are to restore and protect the environment of the Black Hills and the surrounding Treaty Area to the best of their ability. Members of DoBH regularly return to the *Okawita Paha* sacred landscape (the greater Norbeck area) to pray and practice their traditional spirituality, including *Opahata’l* (Harney Peak). DoBH submitted extensive and substantial comments about the cultural and treaty violations in the proposed Norbeck Wildlife Project.

Appellant *Biodiversity Conservation Alliance* (BCA, formerly *Biodiversity Associates / Friends of the Bow*) is a non-profit environmental organization incorporated in Wyoming and founded specifically to prevent the loss of native species' diversity in the Rocky Mountains. BCA works to protect habitat and migration corridors for wildlife across state and ownership boundaries. The organization and its supporters have a vested interest in the adoption of visionary management plans that preserve and restore the long-term ecological functioning of public lands. BCA submitted substantial comments on the Norbeck Wildlife Project and the Black Hills Forest Plan Revision and ROD.

Appellant *Prairie Hills Audubon Society of Western South Dakota* (PHAS) is a not-for-profit organization with about 200 members. Its members live in Western South Dakota in the Black Hills and on the prairie encircling the Black Hills. PHAS is a chapter of the National Audubon Society. The members of National Audubon Society and PHAS use and enjoy the Black Hills National Forest and Norbeck Wildlife Preserve for, among other things, bird-watching, hiking, camping, photography, scenic enjoyment, scientific study, solitude, and spiritual renewal, among other uses. PHAS has been involved in National Forest planning processes in Wyoming and South Dakota and on the Black Hills National Forest since the organization's inception. The organization and its members individually have submitted comments on the Norbeck Wildlife Project and the Black Hills Forest Plan Revision.
Appellant Black Hills Group – Sierra Club (BHG) is a subdivision of the Sierra Club, a California corporation based in San Francisco, California. The Black Hills Group, covering the west-river part of South Dakota, has approximately 500 members. The Sierra Club is an environmental conservation organization that urges its members to explore, enjoy and preserve the wild places of the Earth. Sierra Club members are frequent users, both in the context of organized outings and as individuals, of National Forest lands, including the Black Hills National Forest, and especially the Norbeck Wildlife Preserve and Black Elk Wilderness Area. Long-time BHG chair Sam Clauson, on his own behalf and on behalf of the Black Hills Group, has participated in numerous planning decisions on the Norbeck Wildlife Preserve, including the 1991 Black Hills Wilderness Proposal that introduced the Black Elk Additions Proposed Wilderness Area. Sam was also the primary Plaintiff in the 1974 Clauson v Butz first Norbeck litigation, and principal appellant leading to the withdrawal of the 1986 Norbeck EIS. The BHG was also the lead Plaintiff in the 1994 Sierra Club v Forest Service litigation that led eventually to the Tenth Circuit Mandate of 2001 regarding management of the Norbeck Wildlife Preserve. The BHG submitted extensive and substantive comments on the Norbeck Wildlife Project DEIS and proposed prescribed burning of Black Elk Wilderness.

Appellants Brian Brademeyer, Christine Redden, and Eve Koevenig are private landowners with holdings inside the Norbeck Wildlife Preserve. Together, they comprise the Board of Directors of Friends of the Norbeck. They are concerned that Forest Service actions such as those proposed in the Norbeck Wildlife Project FEIS/ROD will exacerbate the wildfire risks to their property interests and to their “blue sky” interests in the surrounding Norbeck lands, and formed Friends of the Norbeck, in part, to protect their private property interests.

* * * * *

The Forest Service's failure to prepare a legally adequate and sound management plan for the Norbeck Wildlife Preserve, and to update the Revised Forest Plan to reflect the August 8, 2001, Mandate of the Tenth Circuit Court of Appeals, directly and adversely affects all Appellants', their staffs', and their members' use and enjoyment of the Norbeck Preserve and the larger forest. Additionally, all Appellants achieve their conservation objectives, in part, by reviewing, commenting upon, appealing, and, in some cases, challenging in court many Forest Service decisions. Appellants have strong, continuous interests in ensuring that Forest Service decisions are based on accurate, objective, and scientifically sound environmental information. Appellants' ability to assess, comment on and appeal the Norbeck Wildlife Project and its accompanying environmental impact statement has been and is impaired by the Forest Service's failure to properly and legally prepare these documents.

The Forest Service's failure to properly analyze the environmental impacts of its decisions has led to, and will continue to lead to, the Forest Service making uninformed decisions based on incomplete, inaccurate, and scientifically unsound analyses and conclusions. As a result of this uninformed decision-making, the Forest Service has undertaken or permitted, or will undertake or permit, activities on the Norbeck Wildlife Preserve that have, or will have, harmful environmental impacts that could be mitigated or avoided if the Forest Service properly analyzed the impacts of its project decisions and of the Forest Plan. These poor decisions will destroy aesthetic values, harm wildlife habitat and breeding places, degrade water quality, and diminish the recreational experiences of Appellants, Appellants' staffs, and Appellants' members who use and enjoy the Norbeck Wildlife Preserve, including the Black Elk Wilderness.

Appellants bring this Appeal on their own behalf and on behalf of their adversely affected members. Appellants' interests and those of their members are within the zone of interests protected by the statutes at issue in this Appeal and would be redressable in the federal courts.
Relief Requested

Due to the violations of the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Administrative Procedures Act (APA), and the Norbeck Organic Act (NOA), Appellants request the following:

1) a full remand of Ranger Kolund’s 3/27/10 decision to implement the Norbeck Wildlife Project on the Hell Canyon Ranger District of the Black Hills National Forest;

2) withdrawal of the Norbeck Wildlife Project FEIS, and cancelation of any plans for prescribed burning of much of the perimeter of the Black Elk Wilderness Area;

3) that no further actions be undertaken on the Norbeck Wildlife Preserve until a new programmatic Environmental Impact Statement has been prepared that manages the Preserve consistent with the specific “protection from trespass” of game animals and birds, and their breeding places, mandates of the Norbeck Organic Act, and all Norbeck / Black Elk Wilderness Forest Plan Standards and Guidelines have been brought into line with NOA direction; and

4) negotiation of a new Memorandum of Understanding with South Dakota Game, Fish and Parks Department to constrain hunting and trapping activities with the Norbeck Preserve consistent with the Norbeck Organic Act, by developing a Norbeck-specific licensing system for annual big game licenses within the Preserve.

In addition, Appellants request the following interim direction be provided for management of the Norbeck Wildlife Preserve until such time when the new Programmatic Direction EIS and Forest Plan Standards and Guidelines updates have been completed:

1) Immediate notification to Hell Canyon District Ranger Kolund (and Mystic District Range Thompson) that livestock grazing is unsuitable on the Norbeck Wildlife Preserve;

2) Immediate designation of those Norbeck MA 5.4A lands within the Norbeck Scenic Byway as an Inventoried Roadless Area, wherein proposed actions are to be reviewed by the Secretary of Agriculture under the Roadless Rule, and managed in the interim as designated wilderness; and

3) Manage those Norbeck MA 5.4A lands outside the Norbeck Scenic Byway as motor-vehicle restricted area-closures, including year-long closure of FS 356.

Signed this 31st Day of May 2010

Brian Brademeyer, for Appellants
NOTICE OF HAND-DELIVERY OF ATTACHMENTS

Federal law (5 U.S.C. 6103) establishes Monday, May 31, 2010, as the Memorial Day public holiday for Federal employees. Due to the closure of Forest Service and Post Office buildings on May 31, 2010, the Attachments to our Appeal of the Norbeck Wildlife Project will be hand-delivered to the Supervisor’s Office on Tuesday, June 1, 2010, on a compact disc. A receipt of delivery will be requested.

We request that all files included on the hand-delivered compact disc be included in the Project File and Administrative Record for the Norbeck Wildlife Project.

We further request that all materials provided (or yet to be provided) as electronic copies in response to our Freedom of Information Act (FOIA) requests dated February 24, April 16, May 2, and May 8, 2010, be included in the Project File and Administrative Record for the Norbeck Wildlife Project.

And we again request that all attachments provided electronically with our comments on the Draft EIS be included in the Project File and Administrative Record for the Norbeck Wildlife Project.

Delivered on June 1, 2010

Received by

on behalf of Forest Service

Date

Time
BACKGROUND

NORBECK WILDLIFE PRESERVE CHRONOLOGY

June 5, 1920  The Congress authorizes designation of 30,000 acres of the Harney National Forest as the Custer State Park Game Sanctuary in the Black Hills of South Dakota. Congress commanded that the Preserve be managed "for the protection of game animals and birds and to be recognized as a breeding place therefor."

June 7, 1924  Congress authorizes enlargement of the Custer Game Sanctuary to 46,000 acres.

1927  The Forest Service prepares its first Master Plan for the Custer Game Sanctuary, permitting logging but only if it is consistent with the Sanctuary's mandate to serve as a wildlife preserve.

June 3, 1932  The Secretary of Agriculture designates the Pine Creek Natural Area as a Research Natural Area lying entirely within the existing Custer Game Sanctuary.

June 24, 1948  The western boundary of the Sanctuary north of Custer State Park was legally defined (PL 747, now 16 USC 678b) as being 300 feet northwest of the Horse Thief Lake Road (now Palmer Creek Road) and 300 feet west of US Highway 85A (now SD 87). Congress also opened certain portions of the Sanctuary for mining purposes, but still prohibited lands from being patented, and authorized the Secretary of Agriculture to withdraw portions of the Sanctuary from mining purposes (PL 747). Such authority was exercised in 1948, 1957, 1962 and 1963.

Oct. 6, 1949  Congress renames the Custer Game Sanctuary as the Norbeck Wildlife Preserve and changes the boundaries of the Preserve in the vicinity of Mount Rushmore National Memorial.

1973  The Forest Service initiated substantial commercial timber sale operations along Iron Creek in the Norbeck Wildlife Preserve.

1974  Litigation (CIV 74-5043) is initiated by five individuals connected with the Black Hills Sierra Club (Clauson vs. Butz). A temporary injunction against timber harvesting is granted because of the Forest Service's failure to prepare an Environmental Impact Statement.

Late 1970s  The management of the Norbeck Preserve is split among the Forest Service's Pactola, Harney, and Custer Ranger Districts, each of which begin planning future timber sales.

1979  In RARE II, the Forest Service recommends Beaver Park for wilderness designation, but not the Norbeck or Sand Creek Roadless Areas.

April 6, 1980  First Norbeck litigation (CIV 74-5043, Clauson vs. Butz) is dismissed after the Forest Service issues a new Norbeck Management Plan / EIS.

Dec. 22, 1980  The Black Elk Wilderness Area in the Norbeck Wildlife Preserve is created by the Colorado Wilderness Act (PL 96-560), the last bill signed by outgoing President Jimmy Carter. The Pine Creek Natural Area is entirely within the Black Elk Wilderness.

1986  The Forest Service again proposes timber sales in the Norbeck Preserve. District timber sales decisions are appealed by Black Hills Sierra Club members.

Oct. 14, 1986  Timber sales are again withdrawn, and the Forest Service agrees to prepare a new EIS for the Norbeck Preserve.
July 28, 1989  BHNF Supervisor Kenops signs the Record of Decision for the Norbeck Wildlife Preserve Final EIS

Sept. 11, 1989  The Norbeck FEIS is appealed by American Wildlands, Black Hills Sierra Club, Eugene and Eve Koevenig, and Norman Nelson. The appeal is denied by the Regional Forester on February 5, 1990. On review dated May 10, 1990, the Chief of the Forest Service required a supplement to the EIS providing additional information on non-game wildlife species and on wildlife habitat diversity.

Sept. 4, 1990  Supervisor Kenops issues a DN approving livestock grazing in the North Custer Allotment within the Norbeck Wildlife Preserve.


June 1991  The Black Hills Sierra Club and fourteen other groups issue a modest Black Hills Wilderness Proposal recommending 4% of the BHNF as wilderness, including the Black Elk Additions, Beaver Park, Black Fox, Stagebarn Canyons, Pilger Mountain, and Sand Creek as wilderness areas.

Aug. 21, 1992  Forest Supervisor Moltzen signs a Record of Decision for the Supplement to the Norbeck EIS, upholding the 1989 decision of Supervisor Kenops with additional constraints. The decision did not authorize implementation of site-specific projects within the Preserve.

Dec. 1, 1992  The Norbeck Supplemental EIS decision is appealed by the Black Hills Sierra Club, Eugene and Eve Koevenig, Norman Nelson, and Brian Brademeyer. The appeals are again denied.

May 26, 1994  Supervisor Moltzen issues a Decision Notice and FONSI for the Needles Project Area within the Norbeck Wildlife Preserve, authorizing large-scale timber harvesting and associated road-building in the southwest comer of the Preserve “to provide a wider variety of habitats.” The Needles Project will harvest 6.774 million board feet of timber, and construct or reconstruct 18.3 miles of roads to facilitate the logging. The decision includes approval of Forest Plan Amendment #27 waiving big-game hiding cover standards in the Needles portion of the Preserve.

Oct. 4, 1994  Sierra Club, American Wildlands, and Biodiversity Associates file suit in US District Court for Colorado (94-D-2273), against the Needles Timber Sale, the North Custer Grazing Allotment, and the Norbeck FEIS and SEIS.

Sept. 8, 1995  Acting Supervisor Aus issues a Decision Notice and FONSI for the Grizzly Project Area, partly within the Norbeck Wildlife Preserve, authorizing large-scale timber harvesting and associated road-building in the northeast corner of the Preserve, to create a wider variety of habitats. The Grizzly Project will harvest 6.812 million board feet of timber from 2,004 acres and construct 14.6 miles of roads to facilitate the logging. The decision includes approval of Forest Plan Amendment #28 waiving big-game hiding cover standards in the Grizzly portion of the Preserve.

Oct. 30, 1995  The Grizzly Project Area decision is appealed by the Black Hills Sierra Club, the Yellowbark Society, Biodiversity Associates and Friends of the Bow, Norman Nelson, Brian Brademeyer, and Nancy Hilding.

April 8, 1996  Judge Daniel allows amended complaint of the Needles litigation (94-D-2273), adding a challenge to the Grizzly Timber Sale.
March 13, 1997  Regional Forester Estill signed a Record of Decision for the Revised Forest Plan for the Black Hills in South Dakota and Wyoming, selecting Alternative G with modifications listed in the Appendix of the ROD. As a result of failure to respond to public comments, the ROD is rescinded and a new ROD issued on June 24. Notice of the revised ROD was published in the Denver Post on July 2, 1997.

March 21, 1997  Custer/Elk Mountain District Ranger Michael Lloyd signed a Decision Notice and Finding of No Significant Impact approving livestock grazing on the North Custer Allotment, including portions of the Norbeck Wildlife Preserve. The Decision is appealed by Sierra Club—Black Hills Group and Biodiversity Associates / Friends of the Bow.

Sept. 30, 1997  Biodiversity Associates / Friends of the Bow and a coalition of environmental groups and Indian Tribes appeal the Record of Decision of the Revised Forest Plan for the Black Hills National Forest, challenging, among other things, the Forest Service’s failure to ensure the viability of wildlife on the Black Hills National Forest.

Aug. 3, 1999  District Court (94-D-2273) denies Sierra Club's claims against the Forest Service for failing to comply with the Norbeck Organic Act and failing to provide an adequate review under NEPA.

Oct. 12, 1999  Chief of the Forest Service issues decision on the Revised Forest Plan appeal by Biodiversity Associates et al., and finds that the Plan failed to properly determine that Forest actions would not jeopardize the viability of several species of wildlife on the Black Hills National Forest, placing all decisions made after Sept. 30, 1997, in legal limbo.

Nov. 9, 1999  Suit filed in US District Court for the District of Colorado, based on the fact that the Forest Service cannot rely upon an unlawful Forest Plan to justify project-level decisions. Forest Service withdraws the Veteran-Boulder Timber Sale.

Nov. 11, 1999  Forest Service issues notice of intent to undertake EIS to analyze beetle and fire response within the “Beaver Park Project Area (24,415 acres).”


Sept. 5, 2000  Settlement agreement filed in US District Court in Colorado, prohibiting logging and road-building within Beaver Park until such time as the Phase II Amendment to the Forest Plan is completed. Settlement also stated that the Forest Service would prepare an EIS “for actions to reduce the potential threat of mountain pine beetles and related fire hazard in and around the Beaver Park Project Area.” Forest Service cancels the Nov. 11, 1999, Notice of Intent “as a result of the settlement.”

May 18, 2001  Regional Forester Cables issues a Decision Notice approving Alternative 2 as the Phase I Amendment to the Black Hills Revised Forest Plan, revising wildlife standards and guidelines and establishing Interim Wildlife Direction for the Black Hills until the Phase II Amendment is completed. The Phase I Amendment does not mention the Norbeck Wildlife Preserve.

Aug. 8, 2001  The Tenth Circuit Court of Appeals (99-1445) reverses the District Court Order (94-D-2273), stating that the Forest Service had not adequately considered the 1920 Norbeck Organic Act that established the Preserve. The Appeals Court rejected the Forest Service claim that "overall diversity" was an appropriate objective for Norbeck, and directed the agency to follow the specific Congressional mandates of the original law.
Future timber harvests must be justified by showing specifically that game animals and birds are protected.


Mar. 4, 2002 Order by Judge Daniel granting Joint Motion to suspend further proceedings (94-D-2273) pending settlement discussions, staying the case for a period of six months.

June 16, 2002 Black Hills Forest Supervisor Twiss testifies before the Subcommittee on Department Operations, Oversight, Nutrition, and Forestry of the US House Committee on Agriculture on “Public Safety Concerns and Forest Management Hurdles in the Black Hills National Forest.” Supervisor Twiss testified as follows:

Beaver Park specifically and the Norbeck Wildlife Preserve are two areas of the Black Hills National Forest that have been of great concern to me personally because they are overgrown in the case of the Norbeck, or infested with pine beetles, resulting in thousands of dead and dying trees. This condition and 3 years of drought, combined with the close proximity to communities, private property, municipal watersheds, has spurred the Forest Service to call all litigants together in an attempt to break the gridlock so vegetative treatments could take place. So far, we have not succeeded.

Aug. 2, 2002 Congress passes P.L. 107-206, “The 2002 Supplemental Appropriations Act for Further Recovery From and Response to Terrorist Attacks on the United States.” In Section 706 (a)(1), Congress found that “… forest health conditions within the Beaver Park Area and the Norbeck Wildlife Preserve within the Black Hills National Forest are deteriorating and immediate action to treat these areas is in the public interest.” Section 706 (f)(1) authorizes implementation of the Needles Timber Sale in the Norbeck Wildlife Preserve. Section 706 (g) authorizes implementation of the Grizzly Timber Sale in the Norbeck Wildlife Preserve. Section 706 (h) authorizes use of “the full spectrum of management tools including prescribed fire and silvicultural treatments” to meet the purposes of the Norbeck Organic Act.


Feb. 20, 2003 Order by Judge Wiley Daniel of US District Court in Colorado (94-D-2273) denying Plaintiffs Motion to declare P.L. 107-206 Section 706 unconstitutional.

Feb. 4, 2004 Ruling by Tenth Circuit Court of Appeals (357 F.3d 1152, No. 03-1002) affirms Judge Daniel’s denial of Plaintiffs Motion to declare the Section 706 Rider unconstitutional.

July 28, 2004 The 1989 Record of Decision for the Norbeck Wildlife Preserve Final EIS expires at age 15 (16 USC 1604 (f)(5)(A)).

October 2004 The US Supreme Court denies Plaintiffs request for a Writ of Certiorari on the constitutionality of P.L. 107-206 Section 706, ending the Needles/Grizzly litigation on the Norbeck Wildlife Preserve.

Oct. 31, 2005 Regional Forester Cables issues a Record of Decision for the Phase II Amendment to the Revised Black Hills Forest Plan. The Phase II Amendment does not address any issues regarding management of the Norbeck Wildlife Preserve.

March 27, 2010  District Ranger Lynn Kolund issues a Record of Decision, selecting Alternative 4, with Modifications, outside the Black Elk Wilderness for the Norbeck Wildlife Project on the Hell Canyon Ranger District. The ROD authorizes mechanical treatments on 4,944 acres followed by prescribed burning on 1,279 acres, prescribed burning on 929 non-treated acres, and maintenance, construction or temporary construction of 23.1 miles of roads, all to harvest 19.29 million board feet of timber and 5 million board feet of products other than logs. The decision to use prescribed burning in the Black Elk Wilderness Area is postponed.
Statement of Reasons

I. The Norbeck Wildlife Project Has No Underlying Programmatic Planning Document That Complies With The Norbeck Organic Act (NOA) and the Tenth Circuit Mandate.

The Norbeck Wildlife Project Final Environmental Impact Statement (hereinafter, “FEIS”) glosses over the Tenth Circuit Mandate of August 8, 2001 in the Needles/Grizzly litigation:

The Tenth Circuit focused on the roles of the Norbeck Organic Act (NOA) and the National Forest Management Act (NFMA) in the planning process for actions in Norbeck, and ruled that the mandate of NOA supersedes that of NFMA.

[FEIS at 2.] This one-sentence summary of the import of the Tenth Circuit Mandate was elaborated upon somewhat in response to public comments in Appendix I of the FEIS:

As stated by the court in Sierra Club – Black Hills Group v. U.S. Forest Service, “the Norbeck Organic Act governs the management of the Norbeck Preserve, and management plans must comply with its specific mandate.” 259 F.3d 1281, 1287. The court went on to state that the mandate of the Norbeck Organic Act is for the protection of game animals and birds. Id. at 1289. The purpose of the Norbeck Wildlife Project is stated in the DEIS as “meet[ing] habitat objectives for focus species, which is the list of specific game animals and birds…” DEIS pg 5. Consequently, the proposed actions comply with the Norbeck Organic Act and the 10th Circuit’s order in Sierra Club.

Refer to Chapter 1, Background section, which discusses the primacy of the NOA over the NFMA. The purpose and need for action is also discussed in Chapter 1.

[FEIS at I-107 to I-108, Response 30a.] When we follow the reference to the Background section of Chapter I of the FEIS, all we find as “discussion” of the primacy of NOA over NFMA is the single sentence cited before [FEIS at 2]. Given that the Tenth Circuit specifically rejected the equating of habitat objectives with the specific wildlife mandates of the NOA, this is not an adequate response to these substantive comments under NEPA. 40 C.F.R. 1503.4.

The Tenth Circuit Court Mandate was much broader than claimed in the FEIS, ruling that in tiering to the 1983 Black Hills Land and Resource Management Plan, the 1989 Norbeck Management Plan went beyond the bounds of the Norbeck Act:

Accordingly, the 1983 Plan overtly effectuates the NFMA mandate to optimize overall wildlife, fish, and vegetative habitat diversity. See 1604(g)(3)(B); 36 C.F.R. 219.27(g). Consequently, under the 1983 plan, the management emphasis for the Norbeck Preserve became the optimization of overall habitat capability, thus extending management decisions beyond the parameters of the Norbeck Organic Act. See Aplee. Supp. App. at 14 (1983 Plan).

[Tenth Circuit at paragraph 5.] The Circuit Court further rejected the Forest Service’s argument that the “Court need not decide the relationship between the NFMA and the Norbeck Act” in this case:
We disagree. The agency's consistent recitation and reliance upon "overall diversity" and other terms extraneous to the Norbeck Act make clear that the agency itself did not rely solely on the Norbeck Act in approving the commercial timber harvest plans. Appellees remark that "[t]his is not a case in which the Forest Service is balancing competing habitat needs of 'game animals and birds' on the one hand, against habitat needs of other wildlife species on the other." Id. Again, we disagree. The agency's record leaves no doubt that this is precisely that kind of balancing case.

[Tenth Circuit at paragraph 10.] The Circuit Court ruled that the Black Hills National Forest must give primacy to the Norbeck Organic Act’s specific mandates in managing the Norbeck Wildlife Preserve:

These preserves comprise less than .05 percent of the National Forest System. In this limited context, we cannot apply the NFMA mandate in a way that effectively abolishes the specific statutory mandates Congress has established. That is the law even if reason and equity support a different conclusion. See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978). Accordingly, we hold that the Norbeck Organic Act governs the management of the Norbeck Preserve, and management plans must comply with its specific mandate.

[Tenth Circuit at paragraph 15, emphasis added.] The Court continued:

The Forest Service can continue to establish management plans under both the Norbeck Act and the NFMA, but the NFMA mandate must be supplemental and may not diminish (through balancing) the more specific mandate of the Norbeck Act.

[Tenth Circuit at paragraph 18, emphasis added.] The Court Mandate unequivocally establishes that, within the Norbeck Wildlife Preserve, management actions must protect game animals and birds, and retain the area's breeding place characteristics, in compliance with the specific mandate of the Norbeck Organic Act.

A. The 7/89 Norbeck EIS and 8/92 SEIS Were Struck Down by the Tenth Circuit for Failure to Comply with NOA.

The Tenth Circuit Mandate struck down the 7/89 Norbeck EIS (hereinafter “NEIS”) that was the underlying document of the Needles and Grizzly Timber Sales, for tiering to the NFMA rather than implementing the specific mandate of the Norbeck Organic Act:

We find this record inadequate because the agency justified its plans against a standard that authorizes management practices that would not be authorized by the controlling Norbeck Act. Contrary to Appellees' assertion, we hold that as a matter of law the NFMA is supplemental or subordinate to the specific mandate of the Norbeck Act.

[Tenth Circuit at paragraph 19.] The NEIS did not adequately address the requirements of the unambiguous statutory language in the Norbeck Organic Act. The Forest Service relied heavily on the NEIS and Record of Decision to justify the Needles and Grizzly sales. The NEIS Record of Decision is the document that justifies the development of a significant commercial logging program -- 100 million board feet of timber over the next century as well as the development of a significant road system to facilitate the harvest. The NEIS is long on explaining the details of the commercial harvest program, but
short on measuring the need for the new logging program against the mandate Congress provided for the Norbeck Preserve.

For example, one searches in vain throughout the NEIS Record of Decision for an explanation of how harvesting 100 million board feet of timber furthers the breeding needs of game animals and birds. In fact, aside from parroting the statutory language in the first page of the Record of Decision, the Forest Service does not even address the breeding needs of game animals or birds. The Record of Decision touches upon the issue of protecting game animals by acknowledging that logging and road construction will disturb wildlife.

There is considerable evidence, including studies generated by the Forest Service, that road systems are harmful to game animals, especially elk. Yet the agency concludes that "[N]evertheless, roads are a necessary tool for commercial harvest." NEIS ROD at p. 9. By constructing roads that will hinder wildlife protection, even with mitigating measures, the Forest Service has prioritized commercial timber harvest over the protection of game animals and birds. The Tenth Circuit struck down such balancing actions as unlawful unless the specific mandate of the Norbeck Organic Act is met:

> It is clear to us that the agency approved the harvest plan because it fulfilled the NFMA goal of overall diversity. Certain bird species, some of them already rare, might have dropped out in that analysis. For the harvest plans to be consistent with law, they must, nonetheless, satisfy the Norbeck mandate. We cannot assume that to be true simply because overall diversity has been optimized. On remand, the agency must justify the proposed timber harvests not by showing that optimal diversity is served generally, but by showing specifically that game animals and birds are protected.

[Tenth Circuit at paragraph 20.] It is noteworthy that the Forest Service focused its entire argument in the Tenth Circuit case on why the word "protection" is ambiguous and therefore subject to agency interpretation. The Forest Service has continually ignored the second half of the mandate, that the Norbeck Preserve be recognized as a breeding place. The Forest Service has never offered any explanation as to why the statutory term "breeding place" is ambiguous. The Forest Service has offered no facts to show how logging operations promote Norbeck's role as a breeding place.

The Forest Service response to these substantive comments on the failure of the underlying NEIS and 1992 Supplemental EIS to comply with the NOA are once again totally inadequate responses under NEPA. Rather than responding to the lack of an underlying programmatic document to the Norbeck Wildlife Project process, the Forest Service offers diversions and irrelevancies:

> The analysis completed for the Norbeck Wildlife Project, and documented in this FEIS, was prepared under and is consistent with the Forest Plan and the Phase II amendment.

> The Norbeck Wildlife Project implements Forest Plan direction. Any concerns over the Phase II Amendment represent a Forest-level planning issue and are outside the scope of the Norbeck Wildlife Project.

> Section 706 (h) of the August 2, 2002, P.L. 107-206 states: the Forest Service”…is authorized to use the full spectrum of management tools including prescribed fire and silvicultural treatments to benefit game animal and bird habitat in meeting the purposes of the Norbeck Organic Act”.

[FEIS at I-109, Response 30b.] Being consistent with an unlawful Forest Plan does not meet NEPA direction to obey all public laws and regulations. The Phase II Amendment FEIS does not mention the
Norbeck Wildlife Preserve, and did not provide any programmatic direction for the Norbeck Preserve. And we are unsure what claims the Forest Service is making as to the programmatic direction contained in P.L. 107-206 Section 706 (h). These “responses” are repeated verbatim again and again in response to public comments, completely failing to provide any meaningful responses.

The NOA is a simple and straightforward law, whose meaning is clear and unambiguous on its face. After declaring that the Preserve “be set aside for the protection of game animals and birds and be recognized as a breeding place therefore,” the NOA goes on to elaborate precisely what is meant by “protection:”

*That it is the purpose of this Act to protect from trespass the public lands of the United States and the game animals and birds which may be thereon, and not to interfere with the operation of the local game laws as affecting private or State lands. [NOA Sec. 3, emphasis added]*

Thus, the meaning of “protection” is clearly meant as “protection from humans”, since game animals and birds are by definition not capable of “trespass.” This is made more than clear in that the above language protects both the “public lands … and the game animals and birds which may be thereon” from this human trespass. And equally clearly, the protection applies to wildlife which currently “may be thereon,” i.e., current individuals, not to habitat or future populations.

That the Congress is serious about excluding trespass from the Preserve is further made evident by declaring that the “hunting, trapping, killing, or capturing of game animals and birds” in the Preserve “shall be unlawful”, with a misdemeanor fine not to exceed $1000.00 [NOA Sec. 2]. In 1920, this amount would be between the cost of an automobile and a house, so it was certainly not a minor fine.

Congress further indicated its intention that the Preserve be protected from trespass by authorizing the State of South Dakota to erect and maintain “a good substantial fence” [NOA Sec. 4]. This was clearly not intended to fence the game animals and birds inside the Preserve, but rather to limit access to the Preserve from those who might trespass in violation of the Act.

Together, the fines, fence, and elaboration of “protection” as “protection from trespass” clearly indicate that the primary Congressional objective for the Preserve was control of unauthorized human activities, in the service of wildlife sanctuary and breeding place concerns. The Forest Service must adopt this clear Congressional intention as the guiding direction for the Norbeck Preserve in formulating any further management alternatives.

In addition, the “and be recognized as a breeding place therefore” is as about as clear a direction for passive management as the Congress could establish. There is no call for extensive habitat manipulation, certainly no mention of “providing forage” for game animals. Congress was establishing a “hands off” management policy for the Preserve as far as non-human factors are concerned. The Forest Service must adopt this stance in its development of future management alternatives for the Norbeck Preserve, including management tolerance for natural processes, such as insect outbreaks and lightning-caused wildfires.

* * * *

The Tenth Circuit gave the Forest Service another bite at the apple, a second chance to rehabilitate the NEIS and the Needles / Grizzly Timber Sales by showing they actually did comply with the Norbeck Organic Act. The Forest Service was to present its “Further Explanation of the Administrative Record” to the District Court of Colorado on March 1, 2002, but never did so. The process was interrupted by negotiations leading to enactment of Section 706 of P.L. 107-206 (hereinafter “706 Rider”).
We are not aware of the Forest Service expressing any opposition to passage of the 706 Rider, even though this Rider denied them the opportunity to rehabilitate the NEIS as consistent with the Norbeck Organic Act. Thus, the Forest Service failed to "justify the proposed timber harvests ... by showing specifically that game animals and birds are protected" as the Tenth Circuit ordered on remand. This deficiency was literally "shouted" at the agency (in bold, underlined, enlarged font) with emphasis that has been lost in the production of Appendix I of the FEIS:

**The 7/89 Norbeck EIS remains “inadequate” regarding compliance with the Norbeck Organic Act, and cannot be used by the Forest Service as an underlying programmatic document.**

[FEIS at I-111, comment 30d, emphasis lost in Appendix I.] The Forest Service “response” is once again an irrelevant reference to the Phase II Amendment.

And finally, we note that the NFMA regulations require an integrated set of programmatic documents [16 U.S.C. § 1604(f)(1)] that are kept relevant to current conditions and information by being revised at least every 15 years [16 U.S.C. § 1604(f)(5)(A)]. The 1989 Norbeck EIS and 1992 Norbeck Supplemental EIS have both surpassed this 15-year programmatic relevancy criterion. Therefore, in addition to being deficient with respect to the Norbeck Organic Act, the underlying Norbeck programmatic documents have also expired. Therefore, tiering to these documents, as is done in the Norbeck Wildlife Project, is contrary to law.

**B. The 1997 Forest Plan Revision and 1996 FEIS Tier to the Deficient and Expired NEIS, and also Manage for the ‘Habitat Diversity’ Objectives Struck Down by the Tenth Circuit for Failure to Comply with NOA.**

In 1976, the US Congress passed a comprehensive "organic act" for the Forest Service entitled the National Forest Management Act (NFMA). NFMA, 16 U.S.C. §§ 1600 et seq., requires the Secretary of Agriculture to develop land and resource management plans for units of the National Forest System. 16 U.S.C. § 1604(a). NFMA imposes substantive requirements, which have been promulgated as regulations. See 16 U.S.C. § 1604(g)(3); 36 C.F.R. §§ 219 et seq.

NFMA envisions a two-stage approach to forest planning. At the first stage, the agency develops a Land Resource Management Plan ("LRMP"), also known as a Forest Plan. 36 C.F.R. § 219(a) & (b). The Forest Plan is the general zoning document for the forest, setting standards and guidelines for activities that may occur on different areas of the forest. The Forest Plan is so general, in fact, that it is not directly appealable by citizen groups. The NEPA requires Forest Plans to be consistent with all public laws and regulations, such as the Norbeck Organic Act. 40 U.S.C. § 1500.2(a).

Once the Forest Plan is approved, direct implementation of the Forest Plan occurs at a second stage, when individual site-specific projects are proposed and assessed. These site-specific projects must be consistent with the Forest Plan. 16 U.S.C. § 1694(i). If the Forest Plan is consistent with applicable laws and regulations, then the site-specific projects are presumed to also be so consistent.
The 1997 Revised Land and Resource Management Plan (hereinafter, “LRMP”) for the Black Hills National Forest was adopted several years before the Tenth Circuit Mandate. For the Norbeck Preserve, the LRMP tiered to the 7/89 Norbeck EIS and ROD:

The direction for Norbeck Wildlife Preserve is to provide habitat for game animals and birds. … Direction in the FEIS … was consistent with the wording in the Records of Decision (RODs) for Norbeck Wildlife Preserve (7/89 and 8/82 (sic)). … The Forest Service does not consider timber harvest incompatible with the Congressional mandate for Norbeck; rather, timber harvest is merely one means to achieve needed habitat diversity. Additional information is contained in the Norbeck EIS/SEIS and accompanying RODs, dated 7/89 and 8/92.

[LRMP FEIS at A-22.] The Forest Service also notes that two approved vegetation treatment projects in Norbeck “are currently the subject of a lawsuit” [LRMP FEIS at A-22].

For Management Area Direction for MA 5.4A (57.4 Percent of Norbeck Wildlife Preserve [LRMP at III-102]), tiering is made to the 7/89 Norbeck EIS [LRMP at E-1].

For Management Area Direction for MA 4.2B (Peter Norbeck Scenic Byway, 1,801 acres or 6.1 Percent of Norbeck Wildlife Preserve [LRMP at III-58]), the Forest Plan defers to MA 5.4A if conflicts arise, thereby tiering to the 7/89 Norbeck EIS [LRMP at III-61].

For Management Area Direction for MA 1.1A (Black Elk Wilderness, 9,831 acres or 36.2 Percent of Norbeck Wildlife Preserve [LRMP at III-6]), the Forest Plan makes reference only to the Wilderness Act, asserting the “Black Elk Wilderness will continue to be managed to protect and perpetuate its Wilderness character and values” [LRMP at III-8]. No reference whatsoever is made to the Norbeck Organic Act.

Additional Information about Norbeck Management is given in the LRMP FEIS Appendix C, “Inventory and Evaluation of Roadless Areas” that clearly repeats the Norbeck habitat diversity objectives driving the 1997 Forest Plan Revision:

The Forest Service prepared an EIS to examine alternative means of improving habitat diversity. … Forest Supervisor Roberta Moltzen issued the accompanying ROD on August 21, 1992. Her ROD affirmed conclusions contained in the July 1989 ROD. Further, Ms. Moltzen stated "Given the long controversy over management of Norbeck, I'm sure some people wonder why the Forest Service doesn't just allow Norbeck to become de facto wilderness. The reason is the law. Congress established Norbeck for game animals and birds. It is therefore my responsibility to provide habitat suitable for game animals and birds" (ROD page 10).

[1996 Forest Plan Revision FEIS at C-19 (pdf version)]. This is precisely the misinterpretation of the Norbeck Organic Act that the Tenth Circuit Mandate struck down. Every decision flowing from the flawed reasoning of the 1989 Norbeck EIS process must be revisited in light of the Tenth Circuit Mandate of August 8, 2001.

And finally, the LRMP fails to even list the Norbeck Organic Act in its Appendix C, “Relevant Federal and State Statutes, Regulations, and Executive Orders and Agreements” (the Migratory Bird Treaty Act is also missing from the list of statutes allegedly governing the LRMP). And once again, these deficiencies were brought to the Forest Service’s attention in “screaming” emphasis:
Thus, the 1997 LRMP, with its tiering to the “inadequate” 7/89 Norbeck EIS, is also “inadequate” regarding compliance with the Norbeck Organic Act, and cannot be used by the Forest Service as an underlying programmatic document for the Norbeck Wildlife Project.

[FEIS at I-112 to I-113, comment 30e, emphasis lost in Appendix I.] And once again, the Forest Service “response” is the irrelevant reference to the Phase II Amendment.

C. The Phase I and Phase II Forest Plan Amendments Fail to Provide any Programmatic Direction for the Norbeck Wildlife Preserve, or to bring the Forest Plan into Compliance with the Tenth Circuit Mandate and NOA.

The Phase I Amendment to the LRMP of May 18, 2001, produced through the Veteran/Boulder Settlement Agreement, was also completed before the Tenth Circuit Mandate. Thus, the only Norbeck reference we find in the Phase I Amendment is to repeat the Standards and Guidelines from the Forest Plan in the Phase I Standards document. The Phase I EA does not mention Norbeck. The Forest Service offers the following response:

The Phase I amendment was a short term Forest Plan amendment and has been superseded by the current Phase II amendment.

The Phase II Record of Decision was signed in October 2005, the decision was upheld on appeal and the Forest Plan as amended by Phase II which became effective in March 2006. The Norbeck Wildlife Project implements Forest Plan direction. Any concerns over the Phase II Amendment represent a Forest-level planning issue and are outside the scope of the Norbeck Wildlife Project.

[FEIS at I-113, Response 30f.] The Phase II Amendment to the LRMP of October 31, 2005, Record of Decision refers to Norbeck only once, in a list of complimentary areas of habitat diversity:

The diverse habitat objectives set in Phase II are complimented by 1997 Revised Forest Plan direction featuring late-successional areas, Wilderness, the Norbeck Wildlife Preserve, and the Southern Hills, among others.

[Phase II ROD at 7.] The Phase II FEIS does not mention Norbeck, even though it was produced subsequent to the Tenth Circuit Mandate on the primacy of the Norbeck Organic Act. And once again, these deficiencies were brought to the Forest Service’s attention in “screaming” emphasis:

Thus, the 2001 Phase I Amendment and 2005 Phase II Amendment fail to correct the deficiencies in the 1997 LRMP; with its tiering to the “inadequate” 7/89 Norbeck EIS, the LRMP remains “inadequate” regarding compliance with the Norbeck Organic Act, and cannot be used by the Forest Service as an underlying programmatic document for the Norbeck Wildlife Project.

[FEIS at I-113, comment 30f, emphasis lost in Appendix I.]
D. Public Law 107-206 Section 706 Does Not Diminish the Specific Wildlife Mandates of the Norbeck Organic Act, or in Any Manner Restrict the Scope of the Tenth Circuit Mandate of 2001.

The Forest Service repeatedly (fourteen times) includes the following statement in its Responses to Public Comment in Appendix I of the Norbeck Wildlife Project FEIS:

Section 706 (h) of the August 2, 2002, P.L. 107-206 states: the Forest Service”…is authorized to use the full spectrum of management tools including prescribed fire and silvicultural treatments to benefit game animal and bird habitat in meeting the purposes of the Norbeck Organic Act”.

[e.g., FEIS at I-109, Response 30b.] These “responses” never elaborate just what the Forest Service thinks is the significance of this legal citation, or how it corrects the deficiencies in the underlying programmatic documents for managing the Norbeck Wildlife Preserve. We repeat that “to benefit game animal and bird habitat” is not required by the Norbeck Organic Act, per the Tenth Circuit 2001 Mandate. And as far as we know, no challenge to “management tools” has ever been made under the NOA; rather, the challenge has been to the assessment of the effects of actions on the specific wildlife mandates of the NOA.

Section 706 (h) is the only section of P.L. 107-206 cited by the Forest Service, but never with further elaboration than simply citing the words of the law itself. We are reminded of Portia’s summary of the apparently formidable “pound of flesh” bond held by Shylock in Shakespeare’s The Merchant of Venice, Act 4, Scene 1, that evaporates into nothingness when investigated more closely:

Tarry a little; there is something else.
This bond doth give thee here no jot of blood;
The words expressly are ‘a pound of flesh’:
Take then thy bond, take thou thy pound of flesh;
But, in the cutting it, if thou dost shed
One drop of Christian blood, thy lands and goods
Are, by the laws of Venice, confiscate
Unto the state of Venice.

The “full spectrum of management tools” is like the “pound of flesh,” while the Norbeck Organic Act mandate to “protect from trespass” the game animals and birds and their breeding places is like the “no jot of blood” constraint. Similarly, Section 706 (h) presents formidable-sounding legal verbiage that in the end signifies nothing of substance. It certainly is not a waiver of the legal deficiencies plaguing all of the programmatic documents produced thus far for management of the Norbeck Wildlife Preserve.


The Norbeck Wildlife Project FEIS fails to tier to any programmatic NEPA document that demonstrates compliance with the Norbeck Organic Act direction to ‘protect from trespass’ the game animals and birds
present in the Preserve, and to be 'recognized as a breeding place' for them. None of the proposed logging or prescribed burn actions has been shown to be compatible with the clearly stated purpose of the Preserve or with the Tenth Circuit Mandate to prioritize the NOA within the Norbeck Preserve.

Numerous Regional Foresters and Black Hills Forest Supervisors have come and gone in the nearly nine years since the Tenth Circuit Mandate regarding management of the Norbeck Wildlife Preserve. None of these responsible officials has initiated the required update of the Black Hills Forest Plan and Norbeck Wildlife Preserve programmatic Standards and Guidelines, or initiated the required Roadless Area Review for the Black Elk Additions. Therefore,

**The Norbeck Wildlife Project FEIS must be withdrawn and the Norbeck Wildlife Project cancelled. The Black Hills National Forest must either (1) rehabilitate the 7/89 Norbeck EIS through a new NEPA process to demonstrate compliance with the Norbeck Organic Act, or (2) begin a completely new Norbeck Management Plan EIS process.**
II. The ROD/FEIS Fails to Amend the Forest Plan Standards and Guidelines for the Norbeck Preserve, to Bring Them into Compliance with the Norbeck Organic Act and the Tenth Circuit Mandate.

The Tenth Circuit’s landmark 2001 Ruling is so important it bears repeating citings from Section I above. The Court ruled that the Black Hills National Forest must give primacy to the Norbeck Organic Act’s specific mandates in managing the Norbeck Wildlife Preserve:

> These preserves comprise less than .05 percent of the National Forest System. In this limited context, we cannot apply the NFMA mandate in a way that effectively abolishes the specific statutory mandates Congress has established. That is the law even if reason and equity support a different conclusion. See Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978). Accordingly, we hold that the Norbeck Organic Act governs the management of the Norbeck Preserve, and management plans must comply with its specific mandate.

[Tenth Circuit at paragraph 15, emphasis added.] This overturns the entire programmatic structure of Norbeck management in the 1997 Revised Forest Plan. The Court continued:

> The Forest Service can continue to establish management plans under both the Norbeck Act and the NFMA, but the NFMA mandate must be supplemental and may not diminish (through balancing) the more specific mandate of the Norbeck Act.

[Tenth Circuit at paragraph 18, emphasis added.] The Court Mandate unequivocally establishes that, within the Norbeck Wildlife Preserve, management actions must protect game animals and birds, and retain the area's breeding place characteristics, in compliance with the specific mandate of the Norbeck Organic Act.

Yet in the nearly nine years subsequent to the landmark 2001 Tenth Circuit Mandate, the Black Hills National Forest has failed to respond to this rebuke of its past management direction for the Norbeck Preserve. Indeed, the Norbeck Wildlife Project fails to meaningfully respond to any of the assertions in the above Section, instead presenting unconvincing and irrelevant responses about following Forest Plan Direction and the Phase II Amendment.

We do not blame the project team members for this failure to address the total lack of lawful Forest Plan direction to guide their evaluation of the Norbeck Wildlife Project; rather, it is the failure of the responsible officials, in this case the Regional Forester and the Forest Supervisor, to order revision of the Norbeck Forest Plan direction that is to be blamed for the impossible situation the Project Team finds itself in. Nothing short of a completely new programmatic EIS for the Norbeck will redress the fact that current Forest Plan direction is, in totality, contrary to the Norbeck Organic Act and the Tenth Circuit Mandate, and must be revised.

* * * * *

The 1983 Black Hills Forest Plan was the first of its kind in the National Forest System. As such, it was blazing new trails in land management, without any existing guidance to follow. The resulting Forest Plan contained a mixture of Standards, Guidelines, and even Glossary definitions that served as the programmatic direction until the 1997 Plan Revision, with little distinction made between the various categories.

This all changed with the 1997 Revised Forest Plan: most all management direction was downgraded to goals and guidelines, rather than legally enforceable standards. This was
unacceptable for the forest as a whole, but completely contrary to the specific wildlife mandates of the Norbeck Organic Act, which the Tenth Circuit has mandated have priority over all other non-wildlife uses.

Standards and guidelines are one way in which the Forest Plan programmatic direction prioritizes the resolution of conflicts between differing forest objectives and impacts. The Tenth Circuit Mandate makes it imperative that all conflicts within the Norbeck Preserve be resolved in favor of wildlife. The 1997 Forest Plan Direction fails to give this prioritization to wildlife, and instead prioritizes almost all other uses higher than wildlife concerns in one form or another. These deficiencies are outlined below, with the Standards and Guidelines citations lifted from Chapter III of the Revised Forest Plan.

A. Forest Plan Direction for MA 1.1A—Black Elk Wilderness—is Contrary to NOA and the Tenth Circuit Mandate.

None of the proposed actions within the Black Elk Wilderness Area are mandatory under the Wilderness Act. Therefore, as discretionary actions, it is imperative that these actions be screened for compatibility with the overarching wildlife mandates of the Norbeck Organic Act. The complete lack of tiering of Black Elk management direction to the NOA is contrary to law, as mandated by the Tenth Circuit.

1. Forest Plan Rangeland Direction for BEW Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate.

The Forest Service has never completed a programmatic site-specific assessment of the impacts of livestock grazing within the Norbeck Preserve, but instead has merely cited “livestock-wildlife” conflicts, such as was done in the North Custer Allotment Plan analyses of 1990 and 1997. Rather than documenting these conflicts, the Forest Service eventually removed the cattle from the challenged allotments, yet it retains the pretense that livestock grazing is acceptable in Norbeck. This is contrary to the clear language of the Tenth Circuit Mandate. We note further that the Forest Service has never claimed a single wildlife benefit of livestock grazing, so that this activity can be assumed to have purely negative impacts on game animals and birds and their breeding places. The following standards and guidelines for grazing in Black Elk Wilderness must be revised to declare all of the Norbeck unsuitable for livestock grazing.

1.1A-2501. Livestock grazing activities shall be permitted in accordance with guidelines in House of Representatives Report No. 96-617. STANDARD

1.1A-2503. Existing livestock grazing may continue. Do not permit any increase in livestock numbers (head or animal months). STANDARD

1.1A-2504. The Palmer Gulch Allotment is designated suitable to graze livestock; the remainder of the Wilderness is designated as unsuitable to graze livestock. However, because the unsuitable area is not fenced, occasional livestock use may take place. STANDARD

1.1A-2505. Livestock grazing in the area designated unsuitable within the Wilderness may occasionally be used as a tool to achieve management objectives. These uses could include noxious weed control, hazard reduction of fine fuels, and grass/shrub health, etc. GUIDELINE
2. Forest Plan Disturbance Processes Direction for BEW Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate

The Norbeck Wildlife Project proposal to burn up to 5291 acres of Black Elk Wilderness, for no cited wildlife objectives whatsoever, is incompatible with the Norbeck Organic Act and the Tenth Circuit Mandate. On the August NFAB field trip, when we stopped at Breezy Point to talk about the wilderness fire options, the fire specialist described the proposed actions, saying Alternatives 3 and 4 were essentially the same. Both would let the pine beetle outbreak run its course, and 2-3 years after the outbreak subsided, when rotten trees started toppling over and “jack-strawing”, the areas slated for prescribed fire would be burned in 100-150 acre blocks. This process would take 7-10 years (counting from Decision or when outbreak subsided wasn’t clearly specified). This would also allow time for the logging activities on surrounding lands to be completed, so any escaped fire would be easier to contain and less damaging (at least to timber resources).

Moreover, on the NFAB tour the District Ranger said (twice) that the decision to burn in the Wilderness Area would have to be made by the Regional Forester. Yet the FEIS now claims that the District Ranger will be making this decision himself [FEIS at 7], now deferred until Spring 2011, even though he told the NFAB tour attendees that he has no authority to make such a decision. The following ‘Fires and Fuels’ Direction must be revised to make it conditional on compliance with the wildlife mandates of the NOA:

1.1A-4102. Emphasize the use of prescribed fires through management and natural ignitions under approved prescribed burn plans to reduce unnatural buildups of fuels and to simulate conditions representative of a ponderosa pine fire regime. A fire management strategy will be prepared to describe the procedures and conditions needed to meet this guideline. GUIDELINE

1.1A-4103. The use of natural control features and hand tools are the preferred means to confine, contain and/or control wildfires. GUIDELINE

The ‘Noxious Weeds’ Direction prioritizes concerns for lands outside the Wilderness over any other concerns, in violation of the Tenth Circuit Mandate. This direction to prioritize concerns for lands outside the Wilderness must be removed from the revised Norbeck direction.

1.1A-4301. Control noxious weeds by grubbing, chemicals or biological agents when they threaten lands outside Wilderness or when they are spreading within the Wilderness, provided that it is possible to effect control without causing serious adverse impacts on Wilderness values. GUIDELINE

The Tenth Circuit Mandate clearly established the primacy of the Norbeck Organic Act throughout the Preserve, including within the Black Elk Wilderness. Yet the proposed prescribed burn actions failed to consider the specific wildlife mandates of the NOA. In addition, it is completely incomprehensible that the Forest Service would propose actions inside the Black Elk Wilderness in order to achieve objectives for surrounding lands. This stands the hierarchy of public land management on its head, and is completely unacceptable.

Furthermore, the assertion that fire “escaping from the wilderness” is more of a threat than fire entering the wilderness from disturbed areas of the surrounding forest is speculative, at best. Given the topography of the wilderness (i.e., higher elevations), the converse is more likely to be true. In addition, prescribed burning of Black Elk Wilderness (or non-wilderness parts of Norbeck) must be evaluated against developing prescriptions under which natural fires would be allowed to continue burning, and how both of these might impact future climate change mitigation efforts. In any event, any actions proposed inside
Black Elk Wilderness must be justified by their asserted benefits to the Wilderness and the game animals and birds thereon, not to objectives on any other surrounding area. In addition, those actions must be shown to be consistent with the specific wildlife mandates of the Norbeck Organic Act.

B. Forest Plan Direction for MA 4.2B—Peter Norbeck Scenic Byway (Section within Norbeck Wildlife Preserve)—is Contrary to NOA and the Tenth Circuit Mandate.

1. Forest Plan Rangeland Direction for MA 4.2B Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate.

Guideline 4.2B-2501 allows an unacceptable activity (livestock grazing) under recreational objectives, never mentioning wildlife protection or breeding place needs. This is totally contrary to the Tenth Circuit Mandate, and must be eliminated from the revised Norbeck direction.

4.2B-2501. Livestock management strategies in allotment management plans should meet the recreational objectives for the management area. GUIDELINE

2. Forest Plan Biological Diversity Direction for MA 4.2B Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate.

Standard 4.2B-2101 prioritizes, and bindingly mandates, timber production within the Scenic Byway over wildlife protection and breeding place needs. This is totally contrary to the Tenth Circuit Mandate, and must be eliminated from the revised Norbeck direction.

4.2B-2101. Suitable lands are available for timber production and contribute to the allowable sale quantity. STANDARD


Standard 4.2B-4101 prioritizes, and bindingly mandates, fuel reduction over wildlife protection and breeding place needs within the Scenic Byway. This is totally contrary to the Tenth Circuit Mandate, and must be eliminated from the revised Norbeck direction.

4.2B-4101. *Manage fire and fuels through various methods to improve wildlife habitat and to protect the biological and scenic values of the area, but in the wildland-urban interface the priority will be fuel reduction. STANDARD

4. Forest Plan Transportation and Travel Direction for MA 4.2B Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate.

Guideline 4.2B-9102 resolves conflicts between log hauling and tourism in favor of tourism, but no standard or guideline at all is presented for resolving conflicts with wildlife. This is totally contrary to the
Tenth Circuit Mandate, and must be eliminated from the revised Norbeck direction.

4.2B-9102. Prohibit log hauling from National Forest System lands between Memorial Day and Labor Day. GUIDELINE

C. Forest Plan Direction for MA 5.4A—Norbeck Wildlife Preserve—is Contrary to NOA and the Tenth Circuit Mandate.

The over-arching goal of the 1997 Revised Forest Plan (non-Wilderness) Norbeck management is directly contrary to the Tenth Circuit Mandate, which emphatically rejected the equating of habitat and diversity with the specific wildlife mandates of the NOA:

5.4A-201. Manage tree stands for wildlife habitat and vegetative diversity. GOAL

This sets the entirety of the Norbeck Standards and Guidelines on a collision course with the Tenth Circuit Mandate, and requires the revision of all the management direction for the Norbeck Wildlife Preserve. Below we highlight some of the more egregious standards and guidelines for the Norbeck Preserve most immediately in need of revision.

1. Forest Plan Rangeland Direction for MA 5.4A Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate.

The Forest Service has never completed a programmatic site-specific assessment of the impacts of livestock grazing within the Norbeck Preserve, and has never claimed a single wildlife benefit of livestock grazing, so that this activity can be assumed to have purely negative impacts on game animals and birds and their breeding places. The following standards and guidelines for grazing in Norbeck must be revised to declare all of the Norbeck unsuitable for livestock grazing.

5.4A-2501. Existing livestock grazing may continue; permits may be reissued to existing or new permittees. Do not permit any increase in livestock numbers (animal months). STANDARD

5.4A-2502. Take advantage of opportunities to transfer forage use from livestock to wildlife. GUIDELINE

5.4A-2505. Livestock grazing may be used intermittently as a management tool (even in areas designated unsuitable for livestock grazing) to improve habitat conditions, e.g., to control noxious weeds. GUIDELINE

2. Forest Plan Biological Diversity Direction Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate.

The deletion of all Norbeck-specific snag standards and guidelines is totally unacceptable, and contrary to law as mandated by the Tenth Circuit. We include here by reference those portions of our appeals of the Phase II Amendment and the 1997 Forest Plan Revision related to snag standards and guidelines (see Attachments, Vol4—Other Appeal Documents, BCA etal Phase II Appeal—Snags pp 23-34, and Attachments, Vol4—Other Appeal Documents, BCA Appeal VII—Snags). The reestablishment of stricter snag standards than included in Phase II Amendment is one of the top priorities needing correction.
In revising the Norbeck programmatic direction.

In addition, the priorities in 5.4A-2104 are backwards: snags should always be retained, unless it can be shown that their removal is consistent with game animal and bird breeding place needs. Snags are the most important component of wildlife management for breeding place concerns, and the bigger the snags are the better they serve wildlife breeding needs. This has strong implications as well for retention of large trees and downed logs as necessary wildlife Standards for Norbeck management direction.

5.4A-2101. *DELETED
(See Forest-wide Standards and Guidelines for guidance concerning snag distribution, creation, replacement and soft snag retention.)

5.4A-2104. Fell or remove trees killed or damaged by fire, insect, disease or windstorm if they constitute hazards on roads open year-round or seasonally, in developed recreation sites and along designated trails. (In summer home groups, this is the responsibility of the permittee with authorization from the District Ranger.) Otherwise, remove trees killed or damaged by fire or natural causes if such removal is consistent with wildlife habitat needs. GUIDELINE

The Forest Service has never shown that any of its proposed logging activities will actually add to the ‘protection’ and ‘breeding place’ needs of any wildlife species within the Norbeck Preserve. Until such activities have been shown to be compatible with the Tenth Circuit Mandate, logging must be assumed to be incompatible with the purposes of the Norbeck Preserve. The bindingly mandated use of Standards for timber production in Norbeck fails to prioritize wildlife as directed by the Tenth Circuit Mandate.

5.4A-2106. Suitable lands are available for timber production and contribute to the allowable sale quantity. STANDARD

5.4A-2107. Do not offer more than 5.4 million cubic feet of sawtimber and 1 million cubic feet of products other than logs (POL) on suitable lands in Norbeck in the decade from fiscal year 1997 to 2006. STANDARD

3. Forest Plan Wildlife Direction for MA 5.4A Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate.

The deletion of all Norbeck-specific goshawk standards and guidelines is totally unacceptable, and contrary to law as mandated by the Tenth Circuit. We include here by reference those portions of our appeals of the Phase II Amendment and the 1997 Forest Plan Revision related to goshawk standards and guidelines (see Attachments, Vol4—Other Appeal Documents, BCA et al Phase II Appeal—Goshawk pp 35-48, and Attachments, Vol4—Other Appeal Documents, BCA Appeal XI—Wildlife). The reestablishment of stricter goshawk standards than included in Phase II Amendment is one of the top priorities needing correction in revising the Norbeck programmatic direction.

5.4A-3201. *DELETED
5.4A-3202. *DELETED
5.4A-3203. *DELETED
(See Forest-wide Standards and Guidelines for additional direction regarding goshawk nest stands and fledgling habitat.)

5.4A-3205. In habitat critical to wildlife, as defined in the Norbeck EIS (7/89), the season of
operations for vegetation treatment and other activities is limited to August through November. (See Appendix E.)

The following guidelines fail to prioritize wildlife protection over other concerns. These guidelines should be made into enforceable Standards to reflect the wildlife priorities of the Tenth Circuit Mandate.

5.4A-3206. At least 50 percent of any vegetation treatment area will be undisturbed at a given time, providing places for wildlife to escape from human activity. GUIDELINE

5.4A-3207. To reduce wildlife disturbance, do not log any area more often than every 20 years. GUIDELINE

5.4A-3208. Fuelwood gathering is prohibited, except under special permit. GUIDELINE

4. Forest Plan Insect and Disease Direction For MA 5.4A Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate.

Guidelines 5.4A-4201 prioritizes concerns for lands outside the Norbeck Preserve over any other concerns, in violation of the Tenth Circuit Mandate. This direction to prioritize concerns for lands outside Norbeck must be removed from the revised Norbeck direction.

5.4A-4201. Control native insect or disease outbreaks only when positive effects to wildlife habitat are outweighed by predicted loss of resource values outside the management area. GUIDELINE

5. Forest Plan Recreation Direction for MA 5.4A Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate.

The following guidelines fail to prioritize wildlife protection over other concerns. These guidelines should be made into enforceable Standards to reflect the wildlife priorities of the Tenth Circuit Mandate.

5.4A-5101. Manage recreational activities so they do not conflict with wildlife needs. GUIDELINE

5.4A-5102. The predominant recreation opportunity spectrum class is roaded natural non-motorized. Specific areas and travel routes are open year-round or seasonally for motorized recreation. Otherwise, the area is closed to motorized recreation, including snowmobiling. (See Appendix E.) GUIDELINE

5.4A-5107. Under the Congressional Act establishing Norbeck (41 Stat 986), the Secretary of Agriculture has authority to regulate hunting and trapping in Norbeck Wildlife Preserve. Hunting and trapping may be allowed, consistent with negotiated agreements with the State of South Dakota. GUIDELINE

6. Forest Plan Transportation and Travel Direction for MA 5.4A Fails to Comply with the Norbeck Organic Act and Tenth Circuit Mandate.
The following guidelines fail to prioritize wildlife protection over other concerns. These guidelines should be made into enforceable Standards to reflect the wildlife priorities of the Tenth Circuit Mandate. In addition, the additional direction in Appendix E for 5.4A-9105 is primarily for roads comprising the Scenic Byway, and is not applicable to the broader “back country” of MA 5.4A areas of the Norbeck Preserve. Also, road FS 356 serves no wildlife purposes, and mudrunners using it are causing severe resource damage; FS 356 should be permanently gated at both ends, Hwy 244 and Old Hill City Road.

5.4A-9101. Manage road use to provide for habitat needs of wildlife and to maintain habitat effectiveness. Construct new local roads or reconstruct existing local roads needed for management activities. Physically block and revegetate local roads between periods of use. (See Appendix E.) GUIDELINE

5.4A-9105. Prevent conflicts between log hauling and recreation traffic. (See Appendix E.) GUIDELINE

5.4A-9107. Specific areas and travel routes are open year-round or seasonally for motorized recreation. Otherwise, the area is closed to motorized recreation, including snowmobiling. (See Appendix E.) GUIDELINE

5.4A-9108. Limit motorized administrative travel to emergencies and work which cannot be accomplished by other means. (See Appendix E.) GUIDELINE
III. The Required Wilderness Review Has Never Been Completed for Expanding the Black Elk Wilderness within the Norbeck Wildlife Preserve; the 1997 Reason for Denying This Review Has Been Overturned by the Tenth Circuit Mandate.

The Forest Service must finally conduct the wilderness eligibility review for the Black Elk Additions that it failed to do in the 1997 Forest Plan Revision. The Forest Plan FEIS concluded that a wilderness designation for the Black Elk Additions would be “inconsistent with the 1920 law which established the Preserve.” [LRMP FEIS Appendix at C-4]. The LRMP FEIS further explains that the “Norbeck Wildlife Preserve was established by Congress in 1920 ‘for the protection of game animals and birds and to serve [sic] as a breeding place therefore.’” [Id. at C-19]. On this bald assertion alone, without further supporting evidence, the Black Elk Additions were dropped from consideration, without any analysis of the potential wilderness values of these areas (even though they were one of the four areas on the Black Hills found to be “unroaded” in the 1996 Roadless Review. [LRMP FEIS at C-3]. Yet, the Black Elk Additions were still excluded from wilderness consideration, and omitted from the list of Inventoried Roadless Areas, because of alleged conflicts between wilderness and the Norbeck Organic Act:

The Black Elk Addition was not included for wilderness consideration. The Black Elk Addition lies within Norbeck Wildlife Preserve, which was the subject of an EIS/Record of Decision and a Supplemental EIS/Record of Decision, issued in 1989 and 1992, respectively. Both the EIS and the Supplemental EIS examined alternatives which would have left Norbeck in an essentially unmanaged state, i.e., similar to wilderness. These alternatives were determined to be inconsistent with the 1920 law which established the Preserve to protect game animals and to provide them a breeding place. For additional information concerning Norbeck Wildlife Preserve, see page C-19.

[LRMP FEIS at C-4.] This conclusion was absurd at the time, since Congress had clearly declared wilderness compatible with the Norbeck Organic Act by the 1980 designation of the Black Elk Wilderness, which lies completely within the Preserve. This was further confirmed with the designation of additional wilderness acres in the 706 Rider of 2002, acres that had been part of the Black Elk Additions proposal arbitrarily dismissed during the Forest Planning process. [To our knowledge, the Forest Service did not oppose the Black Elk Wilderness expansion in the 706 Rider.]

The Chief’s October 12, 1999 Forest Plan Appeal Ruling of the BCA et al. Appeal (obtained from the Forest Service under FOIA request), repeated this alleged “inconsistency” between NOA and the Wilderness Act:

Within Appendix C of the FEIS is a summary of the reasons for excluding six areas as potential additions to the National Wilderness Preservation System. Also within this appendix is “additional information about the Norbeck Wildlife Preserve” (pp. C-19 to C-20). The appellants contend the Black Elk addition was disqualified for its perceived conflict with the mandate of the Norbeck Wildlife Preserve. … Wilderness management has been determined to be inconsistent with the Congressional mandate to manage Norbeck “for the protection of game animals and birds” (Record, Vol. 67, pp. 474-475, 482; FEIS Appendix A, pp. A-21 to A-22; Appendix C, pp. C-19 to C-20). With regard to whether proposed timber sales violates the Norbeck Organic Act, the Court (Sierra Club v. U.S. Forest Service) determined, based on statutory interpretation of the Act (16 U.S.C. 675), that timber sales, necessary to provide plant diversification for the survival of a wide variety of animals currently living within the Preserve, certainly falls within the scope of protecting Norbeck Wildlife Preserve wildlife and is therefore a reasonable interpretation of the statute.
The Chief relied on agency interpretations and the Sierra Club District Court Ruling of August 3, 1999; all of these rationalizations were overturned by the Tenth Circuit Mandate of August 8, 2001. The current FEIS is the first opportunity the public has had to challenge this unwarranted dismissal of additional wilderness acreage in the Norbeck Preserve. The Forest Service must correct its past failure to comply with its roadless review obligations under the Forest Planning process by now undertaking a review of all potential additional acres that can be added to the Black Elk Wilderness. The current EIS process is the proper vehicle for remedying these past deficiencies.

The Forest Service has failed to comply with existing law and regulations that require a thorough evaluation of roadless areas on the BHNPF for wilderness consideration. This failure renders the BHNF decision to propose no additional wilderness to be unsupported, contrary to NFMA and implementing regulations, and arbitrary and capricious. The failure to adequately analyze the capability, availability and need for additional wilderness on the BHNF has led to the denial of recommended wilderness protection for some of South Dakota and Wyoming’s most spectacular and ecologically valuable remaining roadless areas, including especially the Black Elk Additions. The need for additional wilderness is clear: the BHNF has only one wilderness, amounting to less than two percent of the Forest, and only nine roadless areas remain; recreation use on the Black Elk Wilderness is steadily increasing and is exceeding the carrying capacity; protection of existing roadless areas could contribute meaningfully to the regional representation of the ponderosa pine ecotype in the National Wilderness Preservation System; and there is significant public support for additional wilderness.

Had the Forest Service properly analyzed the values of these areas as required by its regulations, the Black Elk Additions would have been included in the list of Inventoried Roadless Areas, and thus subject to the current moratorium on actions in Roadless Areas of the Secretary of Agriculture, and this decision would be reviewable by the Secretary of Agriculture under the 2001 Roadless Rule. But because of the faulty legal reasoning of the Forest Service regarding management of the Norbeck for the past 40 years, none of these protections were achieved.

Had the Forest Service properly analyzed the values of these areas as required by its regulations, the Forest Service likely would have concluded the Black Elk Additions merited inclusion into the National Wilderness Preservation System.

The Black Elk Additions, which would expand the existing Black Elk Wilderness, contains some of the most magnificent stands of old-growth ponderosa pine forest in the Black Hills. These ancient pines also contribute to the sacred nature of this area for Native Americans, who consider the region integral to their religion. The Additions also include spectacular rock formations, similar to the nationally famous Needles in adjacent Custer State Park. When combined, the Additions and the Black Elk Wilderness preserve rugged mountains and soaring granite spires, interlaced with pristine valleys. The proposed additions are prime habitat for mountain goats, elk, deer, and a host of other old-growth dependent species. In evaluating the Black Elk Additions, no mention is made of these values, the cultural value of this area to Native Americans, or the ecological or recreational value of expanding the wilderness area. The Black Elk Additions certainly meet the qualifications of wilderness, and should be recommended for designation to enhance and expand the heavily used Black Elk Wilderness.

The Norbeck Wildlife Project FEIS fails to correct the Wilderness Review that was improperly done in the Forest Plan Revision (we include in our Attachments on the accompanying CD the Section XIII of the BCA et al. Forest Plan Appeal, Roadless Area Review, as well as the Roadless Area section of the Chief’s 1999 Forest Plan Appeal Ruling). The Norbeck Wildlife Project FEIS must be withdrawn, and a thorough review for expanding the Black Elk Wilderness must be presented to the public in a new NEPA analysis.
IV. The 2009 Extension of the Memorandum of Understanding with SD Game, Fish and Parks Fails to Implement the ‘Protection’ and ‘Breeding Place’ Mandates of the NOA, is Arbitrary and Capricious in Selecting ‘Focus Species’ and Fails to Constrain Hunting and Trapping within the Norbeck Preserve Sufficiently to Comply with the Norbeck Organic Act and the Tenth Circuit Mandate.

The Memorandum of Understanding Extension signed on October 20, 2009, by Forest Supervisor Bobzien (see Attachments, Vol2—Legal Authority, SDGFP_mou_oct_09_extension) fails to comply with the clear language of the Norbeck Organic Act and the Tenth Circuit Mandate regarding the primacy of protecting game animals and birds, and their breeding places, with the Norbeck Preserve. The Focus Species list fails to address the protection and breeding place needs of any species, or to focus on species needing sanctuary from the industrial forestry activities on the million acres of surrounding Black Hills National Forest, and arbitrarily and capriciously excludes the mountain lion from the focus species list. And finally, the MOU fails to establish a Norbeck-specific Black Hills hunting unit where annual licenses can reasonably be related to objectives to control specific wildlife population numbers within the Preserve.

A. Failure to Comply with the ‘Protection from Trespass’ and ‘Breeding Place’ Mandates of the Norbeck Organic Act and the Tenth Circuit Mandate.

Given the long history of overturned management proposals on the Norbeck Preserve, it is discouraging to see the Forest Service continue to try to interpret the clear language of the Norbeck Organic Act (NOA) as compatible with routine forest management. The scoping document notes that the Custer State Park Game Sanctuary was established “for the protection of game animals and birds and to be recognized as a breeding place therefore” and points the reader to a May 2007 “Focus Species” document. Rather than using the clear and unambiguous language of the NOA itself, this web document develops the following tortured definition to be used in the development of management alternatives for the Preserve:

"Protection: The controlled use, skill and systematic conservation and management of game animals and birds and their habitats; to protect game animals and birds and their habitats from depletion or the need to preserve individuals."

At best, this is a contorted and convoluted rehashing of the NFMA’s “diversity of habits” and “viable populations” direction; at worst, it is simply obfuscation. Indeed, this precise argument was the focus of the entire proceedings before the Tenth Circuit, which emphatically rejected this conflating of NOA “protection of game animals and birds” with NFMA “overall diversity”. With the above definition’s assertion of “no need to preserve individuals”, it reaches a result that is almost completely opposite from the clear language of the NOA. The MOU with SDGFP incorporated this definition of “protection” in violation of the clear language of the NOA and the Tenth Circuit Mandate.

The Forest Service continues to ignore the substantive mandate of the second prong of the Norbeck wildlife mandate, to “be recognized as a breeding place” for game animals and birds. The May 2007 “Focus Species” document incorporated into the Norbeck MOU fails to quantify components needed for breeding and rearing of young for any species in Norbeck. Rather, it merely “checks off” whether these species “Breed in NWP” [Focus Species, Appendix A]. The FEIS also merely suggests a check-list approach was taken:

The Forest Service recognizes that a breeding place is a component identifying which game
animals and birds spend a significant portion of their life requirements, including breeding, within the Preserve (Griebel et al. 2007, page 12). Griebel et al. (2007) identified those species that breed in Norbeck that will guide management so that other game animals and birds will be conserved.

[FEIS at I-118, Response 30n.] This is like asserting that to “be recognized as a place of worship” all that would be required would to check that the place was listed in the Yellow Pages under “Churches.” This ignores that context is key, and that actions that would be routine or unexceptional in common circumstances (playing a “boom box”, wearing a bathing suit, not covering your head) would be considered highly disruptive or even disturbing the peace in a recognized place of worship. Similarly, acts of vandalism might rise to hate crimes given the context of a recognized place of worship.

In a similar way, the NOA “breeding place” prong sets the “context” in which to evaluate all proposed actions: any approved action(s) must not degrade breeding habitat. Clearly, snags are breeding sites for cavity-nesting birds, and downed logs provide visual isolation for fawning areas. Thus, destroying snags or downed logs would not be compatible with the NOA “breeding place” mandate. Whether or not destroying or damaging future snags or downed logs (aka “trees”) would also violate NOA has not been established, but in our opinion this also would degrade breeding habitat. [Trees also provide hiding cover by impeding visual surveillance of game animals and birds, thus “protecting” them “from trespass.” As such, it is our opinion that cutting trees and other vegetation would also violate the “protection” prong of NOA.]

B. The ‘Focus Species’ List is Arbitrary and Capricious, and Fails to Comply with the Norbeck Organic Act and the Tenth Circuit Mandate.

The Focus Species list is heavily weighted towards “weedy species” that can tolerate or even thrive amid human disturbances (white-tailed deer), early-successional species (mountain bluebird, song sparrow, grasshopper sparrow), and exotic species (mountain goat, bighorn sheep, Merriam’s turkey). These species are in no need of sanctuary or protection from the commodity program activities; in fact, these species benefit from the forestry activities on the million acres of surrounding Black Hills National Forest; if they cannot thrive on the 98% of non-Norbeck forest acres, adding an additional 1% of non-Wilderness Norbeck acres to providing for their needs is unlikely to change their forest-wide viability.

In fact, of all the big game species hunted on the Black Hills, only the mountain lion is not included on the ‘Focus Species’ list (antelope are not present in the Preserve, see Attachments, Vol5—Other Agency Documents, South Dakota’s Big Game Seasons). This top predator is known to be secretive and averse to human disturbance, and is precisely the type of species envisioned in the NOA as needing “protection” and “sanctuary” within the Norbeck Preserve. This omission is unacceptable, and arbitrary and capricious under APA. The species list needs to be reformulated to highlight those species for which breeding needs are quantifiable and for which human-avoidance habits and breeding habitat needs are understood, in order to formulate management alternatives for various levels of restrictions on human activities in the Preserve.

C. The MOU Fails to Constrain Hunting and Trapping within the Norbeck Preserve Sufficiently to Comply with the Norbeck Organic Act and the Tenth Circuit Mandate.

In our comments on the DEIS, we pointed out that the Norbeck Wildlife Project DEIS fails to amend the
Forest Plan to prohibit hunting and trapping of game animals and birds within the Preserve, in violation of the clear language of Section 2 of the Norbeck Organic Act. The MOU must be withdrawn, and a new MOU developed that prohibits general hunting and trapping within the Norbeck Wildlife Preserve, unless approved “from time to time” by the Secretary of Agriculture (or his designee). In response, the FEIS provides the following:

The original legislation establishing Norbeck prohibited hunting, trapping, killing, or capturing of game animals and birds, except as authorized by the Secretary of Agriculture. Currently, the State of South Dakota regulates hunting and trapping within Norbeck, which is the result of regulations and agreements developed after the creation of the Norbeck Wildlife Preserve. First, under his legal authority, the Secretary of Agriculture issued regulations (36 CFR Part 241) in 1941 directing the Chief of the Forest Service to determine how much and which National Forest lands “…may be devoted to wildlife protection in combination with other uses and services of the National Forests, and in cooperation with the Fish and Game Department…of the State… formulate plans for securing and maintaining desirable populations of wildlife species.’ The regulations further directed the Forest Service to “…enter into such general or specific cooperative agreements with appropriate State officials as are necessary and desirable for such purposes.” In addition, under these regulations, the Forest Service and the State of South Dakota entered into a Master Memorandum of Understanding in 1985, in which the Forest Service formally recognized the SD Department of Game, Fish and Parks as “…being responsible for establishing the regulations and programs under which populations of fish and wildlife species will be managed in South Dakota.” This Memorandum did not exclude the Norbeck Wildlife Preserve. See Forest Plan Guideline 5.4A-5107

[FEIS at I-12 to 13, Response 7d.] This brief history is useful information from the Forest Service, but it fails to show that game management within the Norbeck Preserve is being conducted consistently with the Norbeck Organic Act and the Tenth Circuit Mandate of 2001.

We do not challenge the authority of the Secretary of Agriculture to delegate his authority under NOA to State Game, Fish, and Parks officials. Rather, we challenge the legality of the Forest Supervisor signing a Memorandum of Understanding with SDGFP that fails to ensure hunting and trapping regulation consistent with the NOA. The fact that the general state-wide MOU of 1985 failed to exclude the Norbeck Preserve is not relevant to whether SDGFP is currently managing hunting and trapping consistent with the NOA.

We contend that current SDGFP game management within the Norbeck Preserve is not consistent with the clear language of the NOA. There would appear to be two reasonable ways to interpret the hunting and trapping constraints imposed on the Norbeck Preserve. First, the clear language of the NOA prohibits “hunting, trapping, killing, or capturing of game animals and birds” subject to fine of up to $1000. Taking this language literally would require the prohibition of hunting and trapping within the Norbeck Wildlife Preserve. This would certainly be a reasonable interpretation of the wildlife requirements imposed by the Organic Act (see Tenth Circuit Ruling, paragraph 13).

On the other hand, the NOA also permits the Secretary of Agriculture to issue regulations to govern "hunting, trapping, killing, or capturing of game animals and birds" on the Preserve “from time to time” to meet overall wildlife population objectives [16 U.S.C. 676.] However, to be consistent with the NOA such regulations must be specific to the Norbeck Preserve, not applicable to the much larger Black Hills National Forest. It is in this latter respect, primarily, that current SDGFP management of Norbeck wildlife fails to comply with the NOA. For example, the Black Hills Deer and Fall Turkey unit containing the Norbeck Preserve appears to be about 250,000 acres in the central-southwest Black Hills (see Unit BHD-BD4 in Attachments, Vol5—Other Agency Documents, SDGFP BH Deer F'Turkey). Any hunting license numbers on this much larger area can hardly be considered as necessary to control
populations of deer or turkey “from time to time” on the Norbeck Preserve itself.

The BHE-H9A elk unit is much tighter on the Norbeck Preserve (see Attachments, Vol5—Other Agency Documents, SDGFP 2010 Resident Elk), being roughly three times the size of the Preserve. This is still too dilute a Norbeck fraction to be a reasonably constrained hunting unit for the Norbeck. However, if this unit were split in two, with the area south of the Hill City—Keystone Road and Hwy SD 40 used as the northern boundary, a hunting unit that had a Norbeck density of greater than 70% could be established. This could reasonably be considered a Norbeck-specific hunting unit wherein annual license quotas would fulfill the NOA direction for only allowing hunting “from time to time” for population control objectives.

The Memorandum of Understanding with SDGFP would appear to have to adopt one or the other of the above options to become consistent with NOA direction. While we would prefer you adopt the former, the latter would also be a reasonable interpretation of the NOA hunting restrictions. The current hunting regulations fail to provide such a Norbeck-specific licensing and regulatory framework, and as such are contrary to the NOA.

And finally, we note that the SDGFP is able to provide special Wildlife Refuge hunting units for the Sand Lake, LaCreek and Waubay National Wildlife Refuges (see Attachments, Vol5—Other Agency Documents, South Dakota’s Big Game Seasons). It is arbitrary and capricious for the SDGFP to comply with wildlife protections on wildlife refuges, but ignore the specific wildlife protection mandate of the Norbeck Organic Act on the lands of the Norbeck Wildlife Preserve.
V. The Proposed Actions are a Desecration of the Okawita Paha Sacred Landscape and Violate the Religious Freedom of Native Americans

Appellant Defenders of the Black Hills has called upon President Obama, under his Executive Authority pursuant to the Antiquities Act of 1906, to designate some 40,000-acres at the heart of the Great Sioux Reservation in the Black Hills of South Dakota as the Okawita Paha National Monument (see Attachments, Vol2—Legal Authority, Okawita Letter to President Obama 11-23-09). DoBH further asked that the Secretary of Agriculture and the Chief of the Forest Service be directed to suspend all current and proposed actions on these lands that would be incompatible with a sacred landscape designation, and that the Secretary of the Interior and the Director of the National Park Service be directed to develop budgetary and staffing options for managing these lands as a unit of the National Park System. We call upon the District Ranger to withdraw the proposed Norbeck Wildlife Project timber sale, since this logging / burning project is incompatible with a sacred landscape designation.

The word “sacred” appears only once in the Norbeck Wildlife Project FEIS, in the glossary definition of Heritage Resources:

Heritage Resources The physical remains (including but not limited to artifacts, structures, landscape modifications, rock art, trails, or roads) and conceptual content or context (as a setting for legendary, historic, or prehistoric events, such as a sacred area for native peoples) of an area. [FEIS at 294]

That’s it, in its entirety, for perhaps the most sacred part of the entire Great Sioux Reservation! The Black Hills for millennia has been considered sacred by more than thirty Native American nations. The sacred peak, Opahata’, also known as Harney Peak, is considered to be the “center of all that is” to many Native American nations. The surrounding Okawita Paha area (literally “Gathering Place”) is considered a sacred landscape that was used for thousands of years in traditional Native American spiritual and cultural practices.

Prior to the incursion of Euro-Americans, people of the Great Sioux Nation gathered at Okawita Paha at the beginning of every Lakota New Year (first day of Spring). They gathered to welcome back the Thunder Nation and gave thanks for the renewal of all life: plants, animals, birds, insects, and all living beings. Their prayers were for all of Creation and reminded everyone of the relatedness of everything.

The people of the Great Sioux Nation must preserve these spiritual traditions and cultural identities, and complete these practices in their rightful places. The Okawita Paha sacred landscape provides a place for this traditional Native American spirituality, and is unsuited for commercial and secular activities such as logging, prescribed burning, and building of roads as proposed in the Norbeck Wildlife Project. The Okawita Paha sacred landscape, part of which is the Black Elk Wilderness, is the last place in the Black Hills that provides protection and sanctuary for wildlife.

The ROD/FEIS is severely limited in an understanding of the sacredness of the Black Hills and the Norbeck area. One of the reasons why the understanding of the sacredness of the Black Hills is limited is because of the research tendency to accept only what has been written by non-Indian archaeologists and anthropologists. Such experts, through no fault of their own, are basically unable to comprehend the meaning of “sacred landscape” from an Indigenous perspective, for a number of reasons. Some of those reasons include: the disregard for and discarding of the oral traditions of the Indigenous nations and people that were in the area before Euro-American settlement; the inability to comprehend the values and perspectives of Indigenous peoples and nations; the historic perspective that the “childish” Indigenous peoples of this region were unable to comprehend higher concepts of life and philosophies; and the intrinsic racism that says that Indigenous peoples and their lifeways are inherently inferior to western
European and American values and lifestyle.

Therefore, we take exception to the FEIS’ prehistoric perspective and explanation of the “belief systems” that only specific locations were used at only specific times of the year for spiritual purposes. This is blatantly false. The entire He Sapa area is sacred, not just a few specific sites. The entire area was (and is) used year around for traditional spirituality, not just during certain celestial or weather events. Such claims show the gross misunderstanding of the term “sacredness” from a Native American perspective.

At the same time, those Native Americans who currently practice the “old traditions” in order to protect the entire area, are not about to explain or show this to anyone, even including other ’colonized’ Native Americans. The ’colonization’ of all the Tribes by the federal government forced the old spiritual practices to be taught in secret and now many ’colonized’ Native Americans are used by agencies of the federal government, including the Forest service, to give approval to projects, such as this one, for which they do not understand the spiritual significance. This also explains why the Field Surveys and Section 106 Project Concurrence do not answer our concerns for the protection of this sacred landscape:

“…however, the Black Hills National Forest did receive multiple concerns regarding the continuation of spiritual use of the Black Elk Wilderness from other interested parties. These comments led to an expansion of the design criteria to assure that the project complies with the American Indian Religious Freedom Act (1978).”

[FEIS at 254.] Our understanding is that American Indians, as American citizens, also have protection of their Religious Freedom as guaranteed in the Constitution of the United States, not just the American Indian Religious Freedom Act. By only offering limited protections of the American Indian Religious Freedom Act, the Forest Service is denying American Indians the full Constitutional protection of their Freedom of Religion.

Furthermore, the United Nations Declaration on the Rights of Indigenous Peoples, now an International Law passed by the United Nations General Assembly by majority vote on Sept. 13, 2008, states in Article 25:

“Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.”

The United Nations mandate to the signatory countries, such as the United States, is contained in Article 26, where Section 3 states:

“States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

With regard to the Norbeck Wildlife Project, Appellants are asking for the area to be designated as a ‘sacred landscape’ with the protections intrinsic to such an area. Churches have protections within the systems of the United States. It is time that Native American ‘sacred landscapes’ finally be given the same long-overdue respect and recognition. As a sacred landscape, traditional Native American spiritual practices may be freely exercised, spiritual practices that are once again resurfacing after nearly 100 years of suppression.
Spiritual concerns also must be raised about your proposal to use prescribed fire to burn the Black Elk Wilderness and other areas of the Norbeck Preserve. This is another form of desecration. If lightning-caused wildfires occur, this is a natural part of the great circle of life. Prescribed-fire or arson fires are not respectful of this cycle of life, and must be avoided as acts of desecration to traditional spirituality. (Logging or other mechanical manipulation of vegetation is also viewed as desecration.)

A “sacred landscape” is a natural landscape where the Creator’s handiwork is recognized in all the rocks, water, and wildlife that are present on the land. Providing a place for traditional spiritual practices of reverence and respect towards the land is an integral part of such a sacred landscape designation. Protecting wildlife from disturbance, harassment, and trespass is consistent with a sacred landscape designation, as is providing a secure breeding place.
VI. The ROD/FEIS Fail to Disclose Existing Conditions of, and Direct Effects of Proposed Actions on, the ‘Protection’ and ‘Breeding Place’ Needs of Game Animals and Birds.

A. Failure to Disclose Existing Conditions and Post-Logging Structural Stages.

The FEIS failed to respond to comments about the dearth of information in the DEIS about existing conditions, about effects of the recent Needles and Grizzly timber sales within the project area, and the direct effects of the proposed activities (before being masked by the alleged impacts of the current mountain pine beetle outbreak). None of these comments or requests for information were responded to in the manner outlined in the CEQ implementation regulations of NEPA. This is true for comments Letters 7, 8, 15, 16, 18, 30, 33, 44, 47, 48, and 49. Rather than list all of these unanswered requests for information, we repeated here only the headings from the Letter #49 comments (FEIS at I-213 to I-228):

A. The agency failed to define how past logging projects in the Norbeck Preserve have affected wildlife habitat and wildlife populations in the Grizzly and Needles Project Areas. The information requested below should be provided in an appendix to the DEIS, yet summarized within the body of the DEIS.

B. The agency failed to provide a reasonable description of the planned road use within the Norbeck Preserve before, during and after logging. This information should be provided in an appendix to the DEIS, and summarized within the body of the DEIS.

C. The DEIS failed to demonstrate how the forests in the Norbeck Preserve will change following logging, even though these changes are identified as the reason for the project. A full accounting of current and projected stand conditions after logging need to be provided in an appendix to the DEIS, and summarized in the body of the DEIS.

D. The DEIS failed to estimate what the condition of the forest stands to be treated will be if no treatment is implemented. This information is key as it is the basis for the proposed action.

E. The DEIS failed to provide any specific information on the existing level of infestation or the vulnerability of various trees to beetle mortality, or why mountain pine beetle infestations are detrimental to wildlife.

F. The DEIS failed to define specifically why “large tree enhancement” and “stand diversity enhancement” will benefit the brown creeper, goshawk, and black-backed woodpecker.

G. The DEIS does not define how snag management will occur during and after project implementation. Since a large number of the sensitive species in Norbeck Preserve depend upon snags, a complete accounting of snag management is clearly required in order that project impacts on these numerous species is reported to the public.

H. The DEIS fails to provide any meaningful information on goshawk management in the project area or across the Black Hills National Forest.

I. The DEIS did not address project impacts on the sensitive pine marten and golden-crowned kinglet.

J. It is unclear why habitat conditions for big game will be better with than without treatment.

K. The DEIS failed to identify the number of wildlife species per year that will be killed by the project, either directly or indirectly.

L. There are no Forest Plan amendments included in the proposed project, even though numerous wildlife standards and guidelines will be violated.
M. The DEIS failed to identify what the specific conservation strategy is for the numerous sensitive species, indicator species, and species of management concern in the project area.

On January 13, 2010, immediately after the close of the comment period on the DEIS, Sara Jane Johnson, Director of Native Ecosystems Council, submitted a FOIA request to District Ranger Kolund, requesting information that should have been included in the Norbeck Wildlife Project DEIS. Dr. Johnson asked for the following detailed information about the Project area:

1. A CD disc that contains all literature citations provided in the DEIS.
2. A CD disc that contains the NEP A documents for the already completed Grizzly and Needles projects.
3. A hard copy of any Black Hills National Forest monitoring reports that defined the extend of pine beetle mortality (tree size and mortality within a given stand) from any past epidemics on the Forest, such as occurred in the Beaver Park Roadless area.
4. A hard copy of any table that identifies the specific acres of structural stage 4A that will be treated in the Norbeck Wildlife Project, and what structural stages these acres will be converted to.
5. A hard copy of any wildlife surveys that have been completed "within the Norbeck Preserve" during the last 10 years, up through 2010.
6. A hard copy of the Forest Inventory Analysis (FIA) data summaries that define the historic and current levels of snags in the sizes 10-15 inches dbh, 15-20 inches dbh, and over 20 inches dbh on the Black Hills National Forest.
7. A hard copy of the Forest Inventory Analysis (PIA) data summaries that define the current level of old growth habitat as per Melh 1992 on the Black Hills National Forest.
8. A hard copy of any snag surveys for the Needles and Grizzly projects in the Norbeck Preserve following project completion, including snag sizes over time, if available.

Her fee waiver request, and thus provision of the requested data, was denied, citing failure to document how such provision of information would be in the public interest. Given that the Forest Service failed to disclose the most basic of project data, including the existing conditions and the resultant structural stages after the proposed logging actions, this failure to provide requested information appears to be more to cover up the project impacts, than to comply with NEPA disclosure requirements.

B. Failure to Disclose Existing and Post-Logging Snag Densities.

Snags are perhaps the most essential forest component of wildlife breeding needs. Many birds and small mammals obviously use snags and downed logs for nesting, and even deer and elk utilize downed logs as visual isolation aids and crude ‘denning’ sites for fawning and calving. However, snags on the BHNF are dominated by small-diameter trees unsuitable for the needs of many wildlife species, and are very low in general (see our appeals of the Forest Plan and Phase II Amendment in Attachments, Vol4—Other Appeal Documents, BCA Appeal VII—Snags and BCA etal Phase II Appeal—Snags pp 23-44). The existing conditions indicate that snag-dependent wildlife are essentially living on deficit habitat, a situation that will only lead to further declines and potentially extirpations of snag-dependent wildlife on the Black Hills.
Mountain pine beetle infestations, if left alone, lead to the creation of snags and consequently the existence of down woody debris. These habitat components are essential to the survival of many native species on the Black Hills. The FEIS failed to fully analyze and assess how the Norbeck Wildlife Project will affect snag habitat and down-woody debris habitat, as well as snag recruitment and the creation of future down-woody debris. Such an analysis and assessment should have considered the fact that certain native species depend upon large-diameter snags and large diameter down-woody debris.

Adding to the concern over the scarcity of large-diameter snags on the BHN is the obvious fact that large snag recruitment is constrained by the size of existing trees, which continue to decline across the BHN due to extensive and ongoing logging and thinning activities. Trees greater than 20” dbh average only 1.3 per acre across the Forest.

The Phase II Amendment is not based on sufficient population trend data for snag-dependent species to provide a context for assessing the impacts of forest management actions to snag densities, taking into consideration the “current age and structure of the forest” and any other natural or human-caused impacts. The Phase II Amendment fails to establish a sufficient snag-density standard that meets the documented needs of snag-dependent species in order to ensure snag-dependent species viability on the BHN. Once again, we urge you to review our Appeals of the Forest Plan and Phase II Amendments.

The BHN has demonstrated that it has the data to do a much better assessment of at least the impacts on the proxy habitat components needed by many species of concern. This can be seen in the presentation of the “very large” (>16” dbh) tree component, which indicates that stand tree-size distribution data are available for wildlife assessments, but are not being used in any meaningful way. This indicates that the data is available for a much more useful representation of existing conditions for wildlife impact assessments.

The Southwest Guidelines for the goshawk are widely regarded as the best science available for managing the large tree habitat required for goshawk nesting sites. We have long recommended that the BHN needs to expand the mature category (largely equivalent to commercial timber size, not to categories affecting wildlife needs) by using the current SS classification to describe the stand understory, and dividing the SS4 category (>8” dbh) into more meaningful categories for the overstory of ponderosa pine stands, such as those established in the Southwest Goshawk Guidelines.

With such a revised categorization of existing (and post-treatment) stand conditions, the BHN would at least be able to make some minimal attempt at quantifying direct, indirect, and cumulative wildlife impacts as required by NEPA. The BHN would also be in a much better position to analyze impacts of actions on fire and insect concerns, since the conditions of the understory are primary determinants of risks associated with these concerns. And again we point out the obvious fact that large snag objectives cannot be met if large trees are not monitored and retained.

C. Friends of the Norbeck Processing of Grizzly Stand Data Obtained Under FOIA.

In a February 24, 2010, FOIA request, Friends of the Norbeck obtained hard-copies of the “Treatment Tables for before and after Structural Stage conditions for all cutting units in the Needles and Grizzly Timber Sale Project Areas.” Along with a handwritten marginal note saying Project File 11/5/93, these tables included, among other items, the following data for each site-location-treatment alternative:

- Record Number
- Location-Site
Each record reflected a given site-location-alternative combination. The records between 60 and 225 represented actions in Unit 093003, which the Norbeck Wildlife Project shows is the Iron Mountain area within Norbeck. The other records, although some claimed to be within Norbeck, could not be matched against any of the Units shown on the Norbeck Wildlife Project treatment maps, and so were ignored.

These data were sufficient to compute stand tree densities, in trees per acre, for each stand-site-location record, before and after logging, and the quadratic mean diameter of the trees before and after logging, and thus the size and number of trees cut. (See Attachments, Vol6—Norbeck Stand Data, Needles/Grizzly TS Data Processing, for full details of how these data were assessed. See Vol6—Norbeck Stand Data, Grizzly PP Stand Density Trees-Acre for the table below) We summarize these results for the ponderosa pine structural stages in the following Table:

<table>
<thead>
<tr>
<th>PP SS</th>
<th>Before Average Basal Area</th>
<th>Before Average Trees/Acre</th>
<th>Before qmd DBH</th>
<th>After Average Basal Area</th>
<th>After Average Trees/Acre</th>
<th>After qmd DBH</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>(2)</td>
<td>(4)</td>
<td>(10)</td>
<td>(2)</td>
<td>(4)</td>
<td>(10)</td>
</tr>
<tr>
<td>2</td>
<td>(2)</td>
<td>(4)</td>
<td>(10)</td>
<td>(2)</td>
<td>(4)</td>
<td>(10)</td>
</tr>
<tr>
<td>3A</td>
<td>49</td>
<td>183</td>
<td>7.0</td>
<td>71</td>
<td>225</td>
<td>7.6</td>
</tr>
<tr>
<td>3B</td>
<td>72</td>
<td>245</td>
<td>7.3</td>
<td>78</td>
<td>245</td>
<td>7.6</td>
</tr>
<tr>
<td>3C</td>
<td>100</td>
<td>433</td>
<td>6.5</td>
<td>67</td>
<td>291</td>
<td>(6.5)</td>
</tr>
<tr>
<td>4A</td>
<td>52</td>
<td>132</td>
<td>8.5</td>
<td>25</td>
<td>31</td>
<td>12.1</td>
</tr>
<tr>
<td>4B</td>
<td>85</td>
<td>208</td>
<td>8.7</td>
<td>77</td>
<td>103</td>
<td>11.7</td>
</tr>
<tr>
<td>4C</td>
<td>108</td>
<td>280</td>
<td>8.4</td>
<td>(105)</td>
<td>(273)</td>
<td>(8.4)</td>
</tr>
<tr>
<td>5</td>
<td>95</td>
<td>188</td>
<td>9.6</td>
<td>(65)</td>
<td>(130)</td>
<td>(9.6)</td>
</tr>
</tbody>
</table>

Notes:
1. For SS 1 and 2, the residual trees are taken as 4 10" trees per acre, rather than 0.
2. Values in bold are derived from Grizzly before and after treatment data.
3. Numbers in (non-bold) are estimated values derived from other Grizzly data.
4. Basal Area is in square feet per acre.
5. qmd DBH is quadratic mean diameter at breast height, inches.
From these data, we can determine the number of trees in each stand in the Grizzly Project Area. Applying these same stand density data to the rest of the Norbeck Wildlife Project, we can determine and estimate of the number and size of trees within the Preserve. [Note that this is information that should have been provided in the DEIS, and certainly in the FEIS in response to numerous commentors requests for such data; that we have to resort to such calculations and assumptions shows the failure of the Forest Service to meet the disclosure requirements of NEPA within the DEIS and FEIS.] We can apply these stand density (trees/acre) numbers to the Table 34 data for acres under the alternative actions in each ponderosa pine structural stage in 2020:

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>SS</td>
<td>TPA</td>
<td>Acres</td>
<td>TPA</td>
<td>Acres</td>
<td>Acres</td>
<td>Acres</td>
<td>Acres</td>
</tr>
<tr>
<td>1</td>
<td>4</td>
<td>706</td>
<td>4</td>
<td>1,876</td>
<td>2,135</td>
<td>6,148</td>
<td>1,355</td>
</tr>
<tr>
<td>2</td>
<td>4</td>
<td>2,062</td>
<td>4</td>
<td>13,287</td>
<td>11,823</td>
<td>8,444</td>
<td>11,648</td>
</tr>
<tr>
<td>3A</td>
<td>183</td>
<td>699</td>
<td>225</td>
<td>739</td>
<td>755</td>
<td>754</td>
<td>754</td>
</tr>
<tr>
<td>3B</td>
<td>245</td>
<td>525</td>
<td>245</td>
<td>97</td>
<td>97</td>
<td>97</td>
<td>97</td>
</tr>
<tr>
<td>3C</td>
<td>433</td>
<td>701</td>
<td>291</td>
<td>114</td>
<td>114</td>
<td>114</td>
<td>114</td>
</tr>
<tr>
<td>4A</td>
<td>132</td>
<td>6,036</td>
<td>31</td>
<td>7,803</td>
<td>8,777</td>
<td>8,077</td>
<td>9,724</td>
</tr>
<tr>
<td>4B</td>
<td>208</td>
<td>8,053</td>
<td>103</td>
<td>65</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>4C</td>
<td>124</td>
<td>5,289</td>
<td>273</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>5</td>
<td>188</td>
<td>1,183</td>
<td>130</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

**Table 2. Modified Table 34 – Total NWP Trees in 2020 for All Alternatives**

<table>
<thead>
<tr>
<th>Total Trees</th>
<th>3,921,163</th>
<th>532,454</th>
<th>554,733</th>
<th>535,344</th>
<th>580,045</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pct Mortality</td>
<td>86</td>
<td>86</td>
<td>86</td>
<td>85</td>
<td></td>
</tr>
</tbody>
</table>

Notes:
1. TPA is total trees per acre, by structural stage
2. Total Trees is the sum over all structural stages of the TPA times the acres of that SS.
3. Grizzly "Before" TPA is the trees per acre from the existing 1994 Grizzly stand data.
4. Grizzly "After" TPA is the trees per acre for Grizzly treatments resulting in that SS, which is likely an over-estimate of the impacts of MPB mortality.
5. The 2009 Existing total trees are the 2009 value, not the projection to 2020.

Under the assumptions in Appendix J of the FEIS, the above structural stages are likely to overestimate the number of trees in the 3A and 4A stages, since these numbers are for stages that result from logging activities. Appendix J indicates that these stages will “experience some overstory mortality” beyond what was produced by the logging activities [FEIS at J-1]. Since these two structural stages dominate the trees projected to be remaining in 2020, further thinning of these stands by beetles might reduce the overall mortality projections to the 90% range for the trees within the Norbeck Preserve. Such a high mortality over such a large area has never before been documented anywhere on the Black Hills National Forest.

From the analysis of the Grizzly stand data, we also find that the combined treatments proposed (permitted as emergency actions under PL 107-206 Sec 706) removed 66% of the trees over all treated
stands. From this we can get a crude estimate of the number of trees that would be remaining in the Norbeck Project Area after the proposed logging activities are completed, but before the pine beetle effects are brought in to mask the logging impacts. If we apply all the 4,944 acres of mechanical treatments (ROD at 13) to the non-Wilderness SS-4B stands (5,137 acres), we will somewhat underestimate the trees removed by logging (SS-4C stands average 280 trees per acre before logging, while SS-4B stands average 208 trees per acre). We assume these treatments convert half the 4B stand to 4A, with the other half remaining 4B. With these assumptions, we would have the following estimate of “post-logging” conditions for the modified Alternative 4 actions:

Table 3. Estimated Trees on 4,944 SS-4B Acres, Before and After Logging

<table>
<thead>
<tr>
<th>SS</th>
<th>2009 Acres</th>
<th>2009 Trees/Acre</th>
<th>2013 Acres</th>
<th>2013 Trees/Acre</th>
</tr>
</thead>
<tbody>
<tr>
<td>4A</td>
<td>0</td>
<td>132</td>
<td>2,472</td>
<td>31</td>
</tr>
<tr>
<td>4B</td>
<td>4,944</td>
<td>208</td>
<td>2,472</td>
<td>103</td>
</tr>
<tr>
<td>Total Trees</td>
<td></td>
<td>1,028,352</td>
<td>331,248</td>
<td></td>
</tr>
</tbody>
</table>

Thus, the proposed actions can be expected to cut and remove 697,104 trees from the Norbeck Wildlife Preserve by the time the logging is completed in 2013. This is 68% of the estimated trees on these 4,944 acres of 4B stands, which is in quite good agreement with the 66% removal average obtained from the Grizzly stand data. So the assumptions about applying all the treatments to the 4B stands only, and splitting the resultant stand conditions between 4A and 4B, cannot be too far from what is actually proposed. [Note that we again protest that we have to make these assumptions, since this basic data should have been included in the Norbeck Wildlife Project FEIS.]

These nearly 700,000 trees killed by logging, rather than beetles, have not been accounted for in the impacts discussion in the ROD/FEIS. The snag-years and downed-log years represented by these trees, had they remained in the Preserve, and even if killed by beetles, represent a significant adverse impact to the ‘breeding place’ needs of wildlife in the Preserve that has not been disclosed or assessed in the FEIS.

It is also of interest to compare the 700,000 trees logged with the projected differences between the No-Action and Proposed-Action at year 2020. From Table 2 above, we see that the total projected difference in trees within Norbeck in 2020 between Alternative-4 and Alternative-1 is a mere 47,591 trees. Thus, to allegedly retain an additional 50,000 trees, the Forest Service proposes to log nearly 700,000 trees accompanied by 23 miles of roadworks to remove the logs!

It would take 70 years for these 50,000 additional retained trees to provide the lost snag-years from the 700,000 trees removed, even if all of them are killed by beetles before 2020. The proposed actions are not justifiable under the premises presented.

D. Additional Processing of Stand Diameter-Class Data to be Obtained Under FOIA.

In a May 8, 2010, Freedom of Information Act Request, *Friends of the Norbeck* asked for copies of electronic files containing the following information, from which a detailed determination of the size and distribution of trees within the Project Area could be determined:

1. Stand diameter-class distribution tables for all sites / locations shown in App. D of the Norbeck Wildlife Project DEIS (i.e., including the Black Elk Wilderness Area).
2. Stand diameter-class distribution tables for all sites / locations in the Veteran / Boulder Project Area, including the Beaver Park Roadless Area, and accompanying site-location index map, at: (i) sometime prior to 1997 and (ii) after completion of the emergency actions authorized in PL 107-206 Sec 706.

In a response letter dated May 14, 2010, Forest Supervisor Bobzien replied as follows:

Please be assured that every attempt will be made to respond to your request in a timely manner. The documents responsive to your request should be mailed to you no later than June 7, 2010. Your FOIA has been assigned tracking number BKF-2010-014.

At the time of the closing of the appeal period for this appeal, we had not yet received this information.

We request that these documents be included in the Project File and the Administrative Record for the Norbeck Wildlife Project.

When we receive them, we will analyze them to validate the assertions made in this appeal as to the failure of the Forest Service to disclose existing conditions and direct effects of proposed actions, to provide a description of the project area overstory and understory according to the Southwest Goshawk Guidelines, and an assessment of the snag sizes and densities likely to result from the proposed actions and the effects of beetles under the no-action alternative.
VII. The Alleged “Purpose and Need” Has Not Been Demonstrated (NEPA), and Fails to Comply with the Norbeck Organic Act (NOA) and the Tenth Circuit Mandate.

A. Managing for “Habitat Objectives” Does Not Comply with the Specific Wildlife Mandate of the Norbeck Organic Act or the Tenth Circuit Ruling.

The Forest Service claims the “purpose of the Norbeck Wildlife project is to meet habitat objectives for focus species” [FEIS at 5]. This justification of the proposed actions has not been shown to “protect game animals and birds” from trespass, or comprise recognition of their “breeding place” needs, as specifically mandated by the Norbeck Organic Act. As a threshold matter, the Forest Service must show how current conditions are hindering protection of game animals and birds, and how current conditions degrade the area as a breeding place. This has not been done in the Norbeck Wildlife Project FEIS.

In addition, despite the colorful maps and appearance of a variety of proposed treatments, the fact remains that all of these proposed mechanical treatments fall into a very limited range of logging actions: (1) commercial, (2) pre-commercial, (3) commercial/pre-commercial, and (4) defer. The marking of trees for these treatments requires specialized Forest Service personnel, who must try to accomplish things like “leave every 3rd tree in diameter class X and every 4th tree in diameter class Y” as they cruise through hundreds of acres of timber stands. No matter what the intended “objective” the resultant marking is likely to be one comparable to routine tree farming operations on the larger BHN.

As Ranger Kolund explained to one of us [Brian Brademeyer] about the “backwards” markings of trees near his property in the concurrent Norbeck Scenic Byway Project, “it is best to keep the instructions as simple as possible.” This was in relation to a relatively simple instruction (cut everything), the question being how to describe the geographic range of the instruction. Ranger Kolund stated that it would be clearer to give an instruction like “everything east of driveway” than to try to define setbacks that varied from one end of the driveway to the other. So we have serious doubts about these colorful maps have any meaning whatsoever in terms of the final trees cut. Certainly, no follow-up was conducted on the Needles and Grizzly Timber Sales to see how accurately design criteria were followed (at least none were presented to the public).

B. The Norbeck Wildlife Project Proposed Actions Do Not Meet the “Breeding Place” Mandate of the Norbeck Organic Act.

The ‘Focus Species’ list [ROD at 6] contains numerous species in questionable need of sanctuary within the Norbeck Preserve. These include: mountain bluebird (open pine forest), golden-crowned kinglet (white spruce obligate), ruffed grouse (aspen / hardwoods), and song sparrow (riparian areas). The projected pine beetle impacts are going to expand the limited habitats preferred by these species (see, e.g., J-1). The proposed actions cannot be justified, therefore, by considerations for these species. And we have already noted that big game animals will benefit from increased fallen logs creating more parturition areas, and openings providing more forage, that are projected from the beetle activity. Therefore, concerns for the breeding place needs of mountain goat, bighorn sheep, deer and elk cannot be the justification for the proposed actions.

On the other hand, those focus species that prefer to nest in denser, older forest stands are projected to be most severely impacted by the beetle outbreak. These include the goshawk (FEIS at 106), Merriam’s turkey (FEIS at 91), brown creeper (FEIS at 99), and black-backed woodpecker (FEIS at 107). In addition, the mountain lion arbitrarily and capriciously excluded from the focus species list would also be negatively impacted by the loss of dense, older forest.
The proposed logging will directly eliminate future potential snag habitat by removing up to 700,000 trees from the project area. It will indirectly eliminate existing snag habitat by exposing existing snags to increased blow-down by reducing the surrounding forest canopy closure, which is critical in reducing blow-down losses of snags. Again, we refer you to the snag portions of our Forest Plan Revision and Phase II Amendment appeals for detailed exposition of the deficiencies of current snag management direction.

In addition, the FEIS cites no underlying programmatic NEPA analysis showing that pine beetle impacts are in any way inconsistent with the Congressionally stated purposes of the Preserve. The logging 'cure' will be many times worse than the beetle effects on wildlife protection and breeding place concerns.

C. The Proposed Actions Cumulatively Log More Acres than were Declared Suitable in the 1992 Norbeck Supplemental EIS.

This timber sale is worse than 'business as usual' since it proposes logging an even higher percentage of the project area than typical timber sales. As explained by the silviculturist on the NFAB August field trip, the Norbeck Wildlife Project proposes to log every acre that is not too steep or rocky to access. This is unacceptable on any public lands, much less a National Wildlife Preserve, and certainly fails on its face to give primacy to the NOA over timber or fire risk reduction objectives. The Table below compares the logging intensity on the Norbeck Wildlife Project with other recently completed timber sales on the BHNFS; clearly, this project is just a run-of-the-mill timber sale:

Table 4. Comparison of Norbeck Wildlife Project with Recent BHNFS Timber Sales

<table>
<thead>
<tr>
<th>Project</th>
<th>NFS Acres</th>
<th>MBF Acres</th>
<th>Pct</th>
<th>Total MMBF</th>
<th>MBF/Acre</th>
</tr>
</thead>
<tbody>
<tr>
<td>Castle-Slate</td>
<td>38,271</td>
<td>23,061</td>
<td>60</td>
<td>45.0</td>
<td>1.95</td>
</tr>
<tr>
<td>South</td>
<td>43,044</td>
<td>31,527</td>
<td>73</td>
<td>54.0</td>
<td>1.71</td>
</tr>
<tr>
<td>Telegraph</td>
<td>56,172</td>
<td>20,425</td>
<td>36</td>
<td>75.0</td>
<td>3.67</td>
</tr>
<tr>
<td>Upper Spring Creek</td>
<td>39,700</td>
<td>27,005</td>
<td>68</td>
<td>60.0</td>
<td>2.22</td>
</tr>
<tr>
<td>West Rim</td>
<td>43,028</td>
<td>13,379</td>
<td>31</td>
<td>59.0</td>
<td>4.41</td>
</tr>
<tr>
<td>Rattlesnake</td>
<td>42,171</td>
<td>10,847</td>
<td>26</td>
<td>45.1</td>
<td>4.16</td>
</tr>
<tr>
<td>Needles-II</td>
<td>3,368</td>
<td>1,792</td>
<td>53</td>
<td>6.8</td>
<td>3.78</td>
</tr>
<tr>
<td>Grizzly-II</td>
<td>1,820</td>
<td>757</td>
<td>42</td>
<td>2.7</td>
<td>3.51</td>
</tr>
<tr>
<td>Norbeck Wildlife*</td>
<td>7,997</td>
<td>4,944</td>
<td>62</td>
<td>19.3</td>
<td>3.90</td>
</tr>
</tbody>
</table>

*Includes only the acres outside the Black Elk Wilderness Area and the Needles and Grizzly Projects.

We can see that the Norbeck Wildlife Project is at the high end of recent timber sale decisions, both for the percentage of project area logged as well as timber volume per acre logged. Other sales (West Rim, Rattlesnake, Telegraph) are comparable in per-acre intensity, but log a much smaller portion of the
project area. Other sales (Castle-Slate, South, and Upper Spring Creek) log a comparable project area percentage, but at much lower intensities per acre. Thus, rather than wildlife benefits, the Norbeck Wildlife Project appears to be designed to log as many acres as possible at maximum intensity.

The 1992 Norbeck Supplemental EIS summarized the affected environment under the NSEIS as follows:

About 9,000 acres in Norbeck are considered capable, suitable, and available for timber production. [NSEIS at 1-8]

From the data contained in the Needles and Grizzly stand data obtained under FOIA, we find that the Needles Timber Sale logged 1,792 of 3,368 Norbeck acres, while the Grizzly Timber Sale, which include portions outside the Norbeck Preserve, logged at least 971 of 1,820 Norbeck acres. [See Attachments, Vol6—Norbeck Stand Data, Needles Stand Data Analysis and Grizzly 093003 PP Stands.] The Norbeck Wildlife Project proposes to log 4,944 acres outside the Needles and Grizzly Project Areas. These total 7,707 acres out of the total 9,000 acres estimated capable, suitable, and available for timber production.

In 1992, 10,700 acres (39%) within Norbeck were Black Elk Wilderness, leaving 17,066 acres of non-Wilderness lands as potential suitable and available for timber production in the 27,766-acre Norbeck Preserve. The “about 9,000” acres would thus be 53% of the non-wilderness acres. However, since that 1992 assessment, the Black Elk Wilderness area has been expanded by 2,842 acres, to 13,452 acres [ROD at 4]. The potential land base for timber production was reduced by a similar amount to 14,314 acres. Using the same fraction of 53% as capable, suitable, and available on this reduced land base would yield 7,586 acres. Yet the combined Needles, Grizzly, and Norbeck Wildlife Projects propose logging on 7,707 acres.

If the current proposal isn’t just a disguised attempt to log every last available suitable acre in the Norbeck Preserve, it must be very close to being so. This reveals the true purpose of the proposed actions: to log every accessible acre in the Norbeck “before the bugs get it.”
VIII. The MPB Assumptions in Appendix J are ‘Arbitrary and Capricious’ and Contrary to Best Available Scientific Evidence and Direct Local Experience.

A. Failure to Utilize the Most Relevant and Direct Local Experience and Data.

The Norbeck Wildlife Project FEIS alleges, without scientific support, that this extreme logging disturbance is needed to contain a mountain pine beetle outbreak. The FEIS is long on speculative projections about future fire risk increases following this pine beetle outbreak, but short on actually describing the current outbreak within the Norbeck Preserve. Indeed, the CEEM team of outsiders who spent a few weeks reviewing the Norbeck for a team project, provided more information about pine beetle mortality within Norbeck [CEEM, Table 11 at 40] than the FEIS.

The Forest Service continues to focus on roadless areas in its public pronouncements of beetle activity. For example, on the BHNF ‘Mountain Pine Beetle’ webpage we find the following leadoff description:

The first major outbreak occurred in 1997 in the Northern Hills by Sturgis, but the pine beetles did not stop there. They moved to the central hills and consumed a large portion in the Black Elk Wilderness, Harney Peak, and surrounding areas. As of 2006 about 30% of this area was affected. Forest Service scientists estimate that 50% of the wilderness area is infected. Kurt Allen, a Forest Service entomologist at Rapid City, said if this outbreak continues there is a chance of 100% mortality rate around Harney Peak.

Of course, this misleads the public with the phrase “100% mortality” in several ways. First, it fails to say that this statement is applicable to the overstory only; pine beetles rarely attack trees less than 5” dbh (see Attachments, Vol1—References, Mathis M—BHNF MPB 1996-2001), and the area around Harney Peak being discussed is largely a granite outcrop, which is a stressful location for pine under any circumstances. The Forest Service’s current favorite pine beetle picture, taken from their website, is the following:

Figure 1. Harney Peak Area seen from the southeast. From BHNF Forest Service website.
This propaganda is clearly intended to leave a public impression of connection between the Beaver Park outbreak (“by Sturgis”) and the more recent Black Elk Wilderness and Norbeck outbreak, where “they [the beetles] moved.” And to suggest to the scientifically naïve that it is the same beetles that are running amok in both places! Recent field visits (as well as recent BHNF forest-wide beetle activity maps) show that the pine beetle outbreak “in the Northern Hills by Sturgis” is completely over. It began subsiding in early 2002, ironically just before the PL 107-206 Section 706 Rider was enacted. The local experience of the recent pine beetle outbreak in this other roadless area on the BHNF would be the most directly comparable situation to the current Norbeck outbreak. We suggested that the FEIS should look at the comparable 1997-2003 beetle outbreak in the Beaver Park Roadless Area:

Rather than speculating wildly about structural stage conditions at year 2020 (DEIS at Appendix A, Maps 5-8), the DEIS should present the natural history of the similar pine beetle outbreak that impacted the Beaver Park area from 1997-2007. Similar wild projections of massive mortality were predicted for the Beaver Park Roadless Area in 2002, similar to the DEIS projections for Norbeck for 2020. The Beaver Park projections turned out to be largely baseless, as the beetle outbreak within the roadless area subsided naturally from 2003-2007. This fact alone calls the wild projections of Maps 5-8 (which do not match the data in the Tables in Chapter 3 of the DEIS) into serious question as regards to scientific and professional integrity. We ask that the Forest Service present the natural life history of the Beaver Park Roadless Area outbreak in the revised DEIS, including annual pine mortality and maps of remaining structural stages, as the best empirical guide as to likely future developments on the Norbeck Preserve.

[FEIS at I-126, Comment 30w.] When the FEIS came out without including this critical information from the recent Beaver Park Roadless Area beetle outbreak, Friends of the Norbeck filed a FOIA request on May 5, 2010, requesting:

Pine structural stage maps showing the Beaver Park Roadless Area at: (i) sometime prior to 1997 and (ii) after completion of the emergency actions authorized in PL 107-206 Sec 706.

While the response indicated these materials “should be mailed by June 1, 2010,” we were pleasantly surprised to receive these maps on May 15, 2010. Analysis of these maps resulted in the Table 5 below (see Attachments, Vol6—Norbeck Stand Data, Beaver Park MPB Total Tree and SS Impacts).

Table 5. Beaver Park Roadless Area 1997-2003 MPB Total Tree and SS Impacts

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>361</td>
<td>7</td>
<td>4</td>
<td>1,444</td>
</tr>
<tr>
<td>2</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>0</td>
<td>196</td>
<td>4</td>
<td>4</td>
<td>784</td>
</tr>
<tr>
<td>3A</td>
<td>299</td>
<td>6</td>
<td>183</td>
<td>54,717</td>
<td>97</td>
<td>2</td>
<td>127</td>
<td>12,319</td>
</tr>
<tr>
<td>3B</td>
<td>92</td>
<td>2</td>
<td>245</td>
<td>22,540</td>
<td>127</td>
<td>3</td>
<td>162</td>
<td>20,511</td>
</tr>
<tr>
<td>3C</td>
<td>823</td>
<td>16</td>
<td>433</td>
<td>356,359</td>
<td>138</td>
<td>3</td>
<td>250</td>
<td>34,500</td>
</tr>
<tr>
<td>4A</td>
<td>161</td>
<td>3</td>
<td>132</td>
<td>21,252</td>
<td>488</td>
<td>10</td>
<td>79</td>
<td>38,308</td>
</tr>
<tr>
<td>4B</td>
<td>129</td>
<td>3</td>
<td>208</td>
<td>26,832</td>
<td>1,150</td>
<td>23</td>
<td>143</td>
<td>163,875</td>
</tr>
<tr>
<td>4C</td>
<td>3,496</td>
<td>70</td>
<td>280</td>
<td>978,880</td>
<td>2,483</td>
<td>49</td>
<td>193</td>
<td>477,978</td>
</tr>
<tr>
<td>Total</td>
<td>5,000</td>
<td>100</td>
<td>1,460,580</td>
<td>5,040</td>
<td>749,718</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

53
These maps clearly show that the pine beetle outbreak in Beaver Park was greatly exaggerated, and that the impacts of the 1997-2003 outbreak were lower than that of the typical BHNF timber sale. The key map is shown below in Figure 2, from an unidentified Forest Service source document:

Figure 2. Beaver Park Structural Stages After MPB Outbreak Subsided
The above map (and its counterpart for 1996, excerpted from the Forest Plan Cover Type and Structural Stage map, also provided under the above-mentioned FOIA request; see Attachments, Vol7—Maps and Images, Beaver Park SS-96.jpg and FEIS-96 SS Key.jpg) and the data derived from it in Table 5 above, call into question virtually every assumption in Appendix J.

These maps were processed manually, as follows, to derive the structural stage percentages. The map was printed out on \( \frac{1}{4} \) x \( \frac{1}{4} \) inch gridded paper, and the grid cells within the Beaver Park Roadless Area [outlined by the SS-1 and 2 (light green and tan) narrow strip along the northern and western boundary, and the SS-2 and 4A (tan and navy blue) narrow strip along the southern boundary that mark the fuel break cut around the Beaver Park Roadless Area under the Section 706 Rider] were then tabulated as to the shares of each structural stage that was present. The data were summed over all grid cells within the BPRA (each cell representing about 23 acres of land). This yielded the acres and structural stage percentages given in Table 5 above. The “1996 trees per acre” were assumed to be the same as for the 1994 existing Grizzly stand density data from Table 1 above. The “2003 trees per acre” was taken as the average of the “before” and “after” Grizzly Table 1 data (the Grizzly “after” data represent trees/acre after logging has occurred, which on the BHN usual pushes the stand down to the more open end of the canopy closure scale for a given structural stage. On the other hand, the Beaver Park Structural Stage map was a survey after the outbreak subsided, so the stands within a given canopy closure class should be more uniformly distributed between the range boundaries. [E.g., SS-4B has canopy closure of 41-70%; logging a stand that left it in 4B condition would be highly likely to leave the canopy closure at the 41-45% canopy range, while a stand resulting in 4B from beetle activity would, on average, be at the 55% canopy level.]

The mortality is not nearly as great as the 90% projected for the Norbeck Preserve, but rather less than 50% of the existing trees. This is significantly less than the 66% logging mortality on treated stands in the Grizzly Project Area. And only 14% was reduced to SS-1 and SS-2 combined, not the 75% assumed in App. J. The 86% of BPRA in >70% canopy closure state (SS-3C and 4C) remained on over half of the Roadless Area (at 52%). The Beaver Park beetle outbreak seems to be following the geometric relation between severity and extent (or frequency) that is such a distinct feature of natural disturbance events: 15% severe impact, 30% moderate impact, and 55% low to no impact. In fact, we will surely soon be hearing that the Beaver Park area is once again “too dense” and in need of further logging, due to this majority dense canopy condition!


The assumptions in Appendix J are not compatible with the recent experience of pine beetle impacts on the Beaver Park Roadless Area, an area in virtually the same “dense, mature” forest condition as the Norbeck Wildlife Preserve. The 12 assumptions (FEIS at J-1) were not numbered, so we will italicize and indent them below to indicate the FEIS assertions regarding MPB impacts. Also, we note that the FEIS Chapter 5 Literature Citations does not include any Allen (2009a) reference. We assume that this is to the Allen 2009 citation, although it could be to the unpublished update memo of November 2009.

*The current mountain pine beetle population will continue to increase due to the abundance of preferred beetle habitat (ponderosa pine sites in structural stages 3B, 3C, 4B, 4C and 5) in the project area (Allen, 2009).*

This is clearly contrary to the Beaver Park experience. If this were true, the mountain pine beetle outbreak in Beaver Park would not have stopped with severe impacts only in the central 15% of the 5,000-acre Roadless Area. No other actions were authorized in the 706 Rider that could have disrupted the spread of the beetle outbreak, since the only action authorized was to clearcut and remove 700 acres
of long-dead pine. In 1996, before the outbreak, the BPRA was 91% structural stages 3B, 3C, 4B, and 4C (no SS-5 was present).

Mountain pine beetle activity will affect the entire project area by the year 2013. It has begun in the western third of the Wilderness and will progress outward from Harney Peak at approximately 1 mile per year (Allen, 2009a).

This is not true. The outbreak was well underway both north and south of Harney Peak by 2006 (see the CEEM report). If the outbreak were spreading at 1 mile per year, it would have spread 4 miles outward from Harney Peak, and be well past the northern and southern boundaries of the Preserve and halfway through Mt. Rushmore Memorial. This clearly has not occurred. We also note that the consensus in the literature is a spread of ¼ mile per year, which was assumed in the Mt. Rushmore RAAP Report (NPS 2010), which is also based on an internal November 2009 memo from K. Allen.

Ponderosa pine sites in structural stages 3B, 3C, 4B, 4C and 5 will experience massive overstory mortality converting approximately 75% of them to either structural stages 2 or 1 (depending on the presence of advance regeneration) (Allen, 2009). One exception is that 4B sites in the Stockade Lake portion would remain as 4B due to their physical detachment from the main beetle outbreak.

The Beaver Park data would indicate that, at most, 15% of such stands will be reduced to SS-1 or SS-2. In addition, Allen seems to be completely unfamiliar with the SS-3 regeneration under the SS-4 overstory in much of the Norbeck Preserve. This is why numerous commentors were asking for details on the “understory” to determine whether trees >1” dbh are present on various site locations that are projected to have extreme overstory beetle kill. Most of the 4B and 4C stands are multiple story stands, and will revert to SS-3 if beetles kill most of the trees in the >5” range. We again note that Mathis found tree morality for trees <5” dbh to be much less than 1% of total mortality. Therefore, the conclusion about resultant structural stage reverting to SS-1 or SS-2 simply doesn’t follow from the premise of even massive overstory mortality.

Twenty-five percent of ponderosa pine sites in structural stages 4B, 4C and 5 escape complete overstory mortality and remain on the landscape as structural stage 4A (Allen, 2009).

Again, this overlooks the presence of multi-storied stands. Many of these SS-4 stands will revert to SS-3A, 3B, or even 3C, all of which are ignored by Allen.

A small amount of the area occupied by ponderosa pine in structural stages 4B, 4C and 5 will escape overstory mortality and will remain intact in pockets up to 5 acres (Allen, 2009).

Again, the Beaver Park data indicates otherwise. From Table 5 above, 60% of SS-3C, 4C, and 5 survive intact. The above projection is more likely to occur in the roughly 15% of severe mortality to be expected from this beetle outbreak event.

It is impossible to predict the exact sites where complete overstory mortality will not occur (Allen 2009a).

This is hyperbolic, as well irrelevant, and should never have been included as an assumption. See Response 16c.10 [FEIS at I-34].

Ponderosa pine and white spruce sites in less dense structural stages 3A and 4A experience some overstory mortality, but remain intact

Since a 4A stand can have anywhere from 4-132 trees per acre, it is hard to see what quality “intact” is to signify, exactly. SS-3A stands have from 194-297 trees per acre, indicating the prolific regeneration rate of ponderosa pine on the Black Hills. It is extremely unlikely, per Mathis review of Beaver Park tree size-mortality relationships, that SS-3 stages will be impacted as assumed above. (see Attachments, Vol6—Norbeck Stand Data, Grizzly 093003 PP Stand Density Analysis).
White spruce sites will experience overstory mortality (Allen, 2009).

Would this be one tree per acre, or 100? This and the above assertion regarding white spruce mortality are unsupported by other than anecdotal evidence, and have no scientific standing.

The project area contains several ponderosa pine 3B and 3C sites with an average diameter under 7 inches. These sites within the Wilderness are projected to sustain overstory mortality due to their close proximity to the main beetle population. The sites outside of the Wilderness (within the Needles and Grizzly areas) further from the main beetle population experience limited overstory mortality, but retain overall stand structure (Allen, 2009a).

The Norbeck portion of the Grizzly Project Area (unit 093003) alone contained 8 such stands in 1993, and retained 5 such stands after the logging actions under PL 107-206 Sec 706. Again, what does “sustain overstory mortality” mean? And once again, this assertion ignores the multi-story character of stands within the Norbeck Preserve.

White spruce advanced regeneration is present along stream bottoms in mixed sites of overstory ponderosa pine and white spruce. These sites are projected to change to white spruce due to mortality of the overstory ponderosa pine and white spruce.

This might well be true, since pine is not really “at home” in riparian areas; ponderosa pine thrives best on exposed mineralized soils too poor in quality to support competitors to pine.

Hardwoods are not directly affected by mountain pine beetle and are expected to increase due to mortality of overstory ponderosa pine and white spruce.

Again probably true, since pine is stressed by ‘moist’ conditions that allow aspen and spruce to thrive.

Treatments converting ponderosa pine and white spruce sites into the less dense structural stages 3A and 4A experience some overstory mortality, but remain intact (Allen, 2009).

Again, since resultant SS-4A can have a huge range of trees per acre and still be within the 0-40% range (4-132 trees per acre, from our Grizzly data analysis), this statement is largely meaningless. And again, the statements about white spruce are largely anecdotal, rather than based on scientific literature.

* * * * *

Two out of twelve is pretty thin gruel to base the proposed logging of virtually every accessible acre in a National Wildlife Preserve upon. Moreover, the beetles are accomplishing what the NEIS and NSEIS and Norbeck Wildlife Project says are the objectives of their proposed Norbeck activities: increasing limited non-pine habitats and thinning dense pine stands. And the beetles are doing it without destructive roads and waste of taxpayer dollars.

C. The Projected Impacts of Pine Beetles Fail to Reflect Best Available Science.

In addition to being totally contrary to the most relevant local experience, the evidence of beetle impacts from the 1997-2003 outbreak in the most comparable area on the Black Hills National Forest (Beaver Park), the assumptions in Appendix J are also contradicted by the scientific literature.

Yes, bark beetles are killing many trees in the Norbeck Preserve, but that won’t necessarily lead to large fires. Even if it did, there’s not much humans can do directly to forests to influence fire risk, except to begin reducing human causes of climatic change. Logging the forest will not significantly influence fire spread, and removal of dead trees has many negative impacts on forest ecosystems. Logging itself creates many additional environmental impacts, such as greater sedimentation of streams, invasion of weeds, and so on that are far too often ignored by proponents of active forest management.
Nor can humans have much influence on the spread of beetles. To effectively reduce forest susceptibility to bark beetles, 50-80% of the trees have to be removed (as we have seen, logging in the Grizzly timber sale removed 66% of trees on treated stands). Since that is typically as much, or in many cases even more, trees than are killed by bark beetles, such “let’s cut the trees to save them” seems unwarranted (the Beaver Park outbreak killed 49% of existing trees within the Roadless Area). Plus, there is no guarantee that those particular stands of trees that are treated with thinning are the same ones that will be attacked by beetles. Yet, the Mt. Rushmore Resource Assessment and Action Plan (see Attachments, Vol5— Other Agency Documents, NPS 2010—Final MORU MPB Action Plan, which is based on the Draft Norbeck MPB Update Memo from K. Allen dated November 2009, and attached as Vol1—References, Allen K NWP_MPB_Update_Nov2009) boldly asserts that only mechanical manipulation of the entire area can maintain the desired conditions:

The only effective long-range strategy to minimize beetle-caused mortality is promoting forest health over large landscapes and monitoring for areas of beetle build-up. Treating large landscapes does not mean every stand needs to be treated. Denser stands can be left for other objectives and should be afforded some protection from beetles if the surrounding area has been treated to reduce stand density and beetle hazard. Denser stands will require more intense monitoring, as they are still more susceptible to beetles. If beetles are found in these stands, then there should be a contingency plan guiding whether they will be treated or not. Creating diverse stand conditions across the landscape will result in an overall forest that is less susceptible long-term to landscape level beetle events. [NPS 2010 at 40, emphasis added]

There is very little reliable empirical evidence to suggest that silvicultural treatments can effectively stop outbreaks once a large-scale insect infestation has started (Black et al., 2010). Despite nearly 100 years of active forest management to control the mountain pine beetle, evidence for the efficacy of this approach is scant and contradictory (Wood et al., 1985). Citing multiple sources, Hughes and Drever (2001) found that most control efforts have had little effect on the final size of outbreaks, although they may have slowed beetle progress in some cases and prolonged outbreaks in others. They also suggest that management interventions have never controlled a large-scale outbreak. Although control of such outbreaks is theoretically possible, it would require treatment of almost all of the infected trees (Hughes and Drever, 2001), which may be possible only for a small infestation.

In some situations, removing infested trees prior to the emergence of broods is recommended to protect remaining trees. These efforts at the Memorial should be continued, especially in the developed areas. However, the overall effectiveness of this strategy over a large area is unproved (Wilson and Celaya, 1998). Further, in most situations, it is probably not logistically feasible to locate and remove all trees before the emergence of adult beetles (Wilson and Celaya, 1998).

Amman and Logan (1998) point to failed attempts to use direct control measures, such as pesticides and logging, after an infestation starts. They suggest that by the early 1970s, it was apparent that controlling the extensive mountain pine beetle outbreaks that were occurring in the northern Rockies by directly killing the beetles was not working.

Because stressed and unhealthy trees may be more susceptible to bark beetles, another management approach is to modify stand structure by thinning forests before an outbreak starts. Some thinning studies show success in ameliorating mountain pine beetle infestations in lodgepole and ponderosa pine forests (Amman and Logan, 1998). But the overall evidence of the effectiveness of thinning is mixed. Yet the Action Plan proposes more of these same questionable policies:

The use of thinning alone is not going to be effective in preventing beetles from infesting stands of pine. Treatments to promote a healthy forest are a highly recommended alternative for managing mountain pine beetle. Forest management, changing the condition of the forest, is the
The only way to minimize extensive losses to the beetle over long periods of time. These include maintaining a diversity of age classes, diversity of species where possible, and reducing basal area. Thinning of stands should proceed prior to beetle infestations, where possible. As pointed out above, the stand density may need to be reduced significantly to minimize beetle mortality considering the high level of beetle activity.

[NPS 2010 at 41, quoting directly from the Allen Nov2009 Memo.] Most evidence supporting thinning as a control for bark beetles is based on tree vigor, not on directly measured insect activity in the stand. Thinning may increase tree vigor, which in turn may make trees less susceptible to insect infestation. The premise is that if the trees are healthy and highly vigorous, they may be able to “pitch out” the attacking beetles, essentially flooding the entrance site with resin that can push out or drown the beetle. Some studies suggest that thinning forest stands to reduce competition for light and water may increase tree vigor, leaving what appear to be the best trees and resulting in less successful bark beetle attacks (Sartwell, 1971; Schmid and Mata, 2005; Fettig et al., 2006).

Other research has found bark beetles do not preferentially infest trees with declining growth (Santoro et al., 2001). Sánchez-Martínez and Wagner (2002) studied bark beetles in ponderosa pine forests of northern Arizona to see if differences in species assemblages and relative abundance were apparent for managed and unmanaged stands. They found no evidence to support the hypothesis that trees growing in dense stands are more colonized by bark beetles.

Some scientists have suggested caution in using thinning to control bark beetles because geographic and climatic variables may alter the effect (Hindmarch and Reid, 2001). Hindmarch and Reid (2001) found that pine engravers had longer egg galleries, more eggs per gallery and higher egg densities in thinned stands.

Warmer temperatures in thinned stands also contributed to a higher reproduction rate (Hindmarch and Reid, 2001). However, pine engravers in Arizona had the opposite reaction to a similar thinning experiment (Villa-Castillo and Wagner, 1996).

There is also evidence to suggest that thinning can exacerbate pest problems. Outbreaks of pine engravers have been shown to be initiated by stand management activities such as thinning (Goyer et al., 1998). The process of thinning can wound remaining trees and injure roots, providing entry points for pathogens and ultimately reducing the trees’ resistance to other organisms (Paine and Baker, 1993). Hagle and Schmitz (1993) suggest that thinning can be effective in maintaining adequate growing space and resources to disrupt the spread of bark beetles; but note that there is accumulating evidence to suggest that physical injury, soil compaction and temporary stress due to changed environmental conditions caused by thinning may increase susceptibility of trees to bark beetles and pathogens.

Even if thinning does alleviate tree stress at the stand level it is unlikely to be effective against large-scale infestations (Safranyik and Carroll, 2006). Preisler and Mitchell (1993) used autologistic regression models to analyze mountain pine beetle colonization in thinned and unthinned lodgepole pine in Oregon.

Thinned plots were initially reported to be unattractive to beetles; but when large numbers of attacks occurred, colonization rates were similar to those in unthinned plots (Preisler and Mitchell, 1993). Similarly, Amman et al. (1988) studied the effects of spacing and diameter of trees and concluded that tree mortality was reduced as basal area was lowered. However, if the stand was in the path of an ongoing mountain pine beetle epidemic, spacing and density of trees had little effect (Amman et al., 1988).

Although thinning may be effective in certain circumstances, it must significantly reduce water stress to be effective, which is unlikely during severe droughts associated with many outbreaks. Thus, forest
management, either in the form of searching for and removing infested trees or thinning forest stands before outbreaks, is unlikely to prevent major outbreaks due to the inherent difficulties of manipulating stand structure over large enough areas, and the overriding influence of climatic stress in driving outbreaks.

Depending on how it is done, logging after a natural disturbance (so-called salvage or post-disturbance logging) can also inadvertently lead to heightened insect activity. Specifically, logging after insect outbreaks can reduce parasites and insect predators by effectively eliminating their habitat of standing and downed trees (Nebeker, 1989). Therefore, outbreaks could be prolonged because of a reduction in the effectiveness of the beetle’s natural enemies (Nebeker, 1989). Standing dead trees are important for several birds that feed on mountain pine beetles (Steeger et al., 1998), and the widespread removal of dead and dying trees eliminates the habitat required by insectivorous birds and other species with the result that outbreaks of pests may increase in size or frequency (Torgerson et al., 1990). Post-disturbance logging differs from natural disturbance: it tends to decrease habitat complexity and diversity by removing large legacies (e.g., standing dead and downed logs), which can lead to an increase in insect activity (Hughes and Drever, 2001).

Moreover, recent research has shown that thinning the trees won’t keep the beetles from spreading (Black et al. 2010). Wickman (1990) detailed the effort to control the mountain pine beetle at Crater Lake National Park in Oregon from 1925 to 1934. More than 48,000 trees were cut down and then burned in the last three years of the outbreak. The lesson learned was that once a mountain pine beetle population had erupted over a large area of susceptible forest, and as long as environmental conditions remained favorable, there was no effective way to stop the beetles until almost all the susceptible trees were either killed or removed by logging or until climatic conditions became unfavorable for sustaining an outbreak (Wickman, 1990).

The Crater Lake experience is not an isolated one, as control efforts have been standard practice across the West. Klein (1978) traced several mountain pine beetle epidemics from beginning to end and detailed the control efforts. More than 30,000 infested ponderosa pine trees and 20,000 infested lodgepole pine trees were treated in 1910 and 1911 in the Wallowa-Whitman National Forest in Oregon. The treatments included felling and peeling, felling and scoring the top, and felling and burning. Chemical methods were employed in the 1940s and ‘50s. DDT and other pesticides, such as lindane, were sprayed on thousands of acres across the intermountain West. In Operation Pushover, more than 1,800 acres of lodgepole pine in the Wasatch National Forest in Utah were mowed down by heavy tractors linked together, and the surrounding stands were sprayed with pesticides. In spite of these control attempts, mountain pine beetle outbreaks continued (Klein, 1978). Klein (1978) ultimately suggests that letting infestations run their course may be a viable option.

Pine beetle suppression projects often fail because the basic underlying causes (e.g., stand structure, age of trees, drought) of the outbreak have not changed (DeMars and Roettgering, 1982). Wood et al. (1985) point out that once bark beetles reach epidemic levels and cause extensive tree mortality, treatments aimed at stopping the outbreak are futile because it is logistically impossible to eliminate all suitable habitat or to mitigate the overriding effect of climate.

Large-scale efforts to control beetles are also expensive and ecologically harmful. The uncertain benefits of control efforts should be weighed carefully against costs (Hughes and Drever, 2001). In fact, much of the logging in stands infested with bark beetles has been to log merchantable timber. In 1994, then-U.S. Forest Service Chief Jack Ward Thomas, in testimony before the Senate Subcommittee on Agricultural Research, Conservation, Forestry and General Legislation, acknowledged that “the Forest Service logs in insect-infested stands not to protect the ecology of the area, but to remove trees before their timber commodity value is reduced by the insects.” There is no doubt that timber extraction is a viable and
legitimate use of national forest lands. However, it is important that ecosystem management be driven by clear and explicit goals (Christiansen et al., 1996).

In addition to having no credible referenced support, the Park Service’s position in the Rushmore Mountain Pine Beetle Action Plan also conflicts in some ways with available published, peer-reviewed science on mountain pine beetle responses to thinning and thinning-and-burning. For example, the data obtained from the Forest Service’s National Fire and Fire Surrogate Study indicates that in general “[p]ost-treatment mortality of trees due to bark beetles was lowest in the thin-only and control units and highest in the units receiving [prescribed] burns” (Six & Skov 2009). This implies that the units proposed for both thinning and burning in this Project could result in higher mortality from beetles than no action.

As to mountain pine beetles specifically, the study found that “thinning had no detectable effect on beetle-caused tree mortality” (Six & Skov 2009). The authors do qualify their results with the acknowledgment that the results may be different if there were more beetles present, but this does point to the fact that, as the authors say, “[w]hile these approaches [thinning, prescribed burning, and a combination of the two] are already in widespread practice, their efficacy in meeting objectives, and their impacts on forest ecosystems are mostly unknown” (Six & Skov 2009). Another recent peer-reviewed, published study done by Forest Service researchers found that thinning for fire risk reduction resulted in higher levels of beetle infestation than no treatment: the “mean percentage of residual trees attacked by bark beetles ranged from 2.0% (untreated control) to 30.2% (plots thinned in spring with all biomass chipped)” (Fettig et al 2006). In light of these studies and others like them, there is at least some scientific uncertainty and controversy that must be disclosed to the public in the Mountain Pine Beetle Action Plan EA. 40 C.F.R. § 1502.9(b).

In conclusion, if a bark beetle infestation is relatively small and concentrated in a limited area, it may be feasible to reduce the population growth by removing infested trees from a forest stand or by thinning a stand to reduce stress on trees competing for limited nutrients, sunlight and moisture. For example, if a small stand of spruce is blown down by a windstorm and populations of bark beetles begin growing in fallen logs, it may be feasible to remove all fallen, infested trees over a small area. However, given the climatic requirements for beetle population levels to reach epidemic levels, it is not known whether such a situation would lead to an outbreak. In other words, a small population of beetles is not sufficient for an outbreak to occur. Conversely, under climatic conditions favorable for an outbreak, such as those of the past decade, outbreaks of bark beetles can erupt simultaneously in numerous dispersed stands across the landscape. Unfortunately, even if a growing population of beetles is successfully removed from one stand, under outbreak conditions beetles from other stands are likely to spread over a landscape. Given that climate typically favors beetle populations and stresses trees over very large areas, it is unlikely that management could successfully identify and remove all populations of beetles over an extensive region.

* * * *

And finally, we note that both the Park Service and the Forest Service continue to speak of the “threat” from the Black Elk Wilderness, even though the current outbreak began in the Sylvan Lake portion of Custer State Park. A small area of winter storm breakage in Sunday Gulch in 2001, combined with sloppy slash management from subsequent logging activities around Sylvan Lake, allowed beetles to incubate within Custer State Park until weather conditions allowed an eruption that peaked within Custer State Park in 2006, as can be seen in Figure 3 below. Yet both agencies seem to be going down the same misguided road as the SD Game, Fish and Parks in using logging as the preferred management tool in “controlling” natural processes. The results are likely to be the considerable and unnecessary destruction of the natural forest environment at the Mount Rushmore Memorial, as can be seen now in the Sylvan Lake portion of Custer State Park. The famous Vietnam era rationalization comes to mind: “We had to destroy the village in order to save it.” We cannot let the same destruction occur to the Norbeck.
Finally, we note that the FEIS’s assumptions in Appendix J about beetle mortality are based on what it calls “professional, local knowledge” (FEIS at 46) and apparently not on published, peer-reviewed scientific literature. Again, there is a credibility problem here in light of the inherent bias of the Forest Service management branch toward logging (Ruggiero 2007). Indeed, the Forest Service fails to cite to a single peer-reviewed, published scientific study to support its assumption that no logging will cause a greater and longer-term loss of old growth and dense mature forest than logging.
IX. The Proposed Actions Fail to Provide for the Needs of Big Game Animals as Mandated in the NOA and Tenth Circuit Ruling, and Fail to Even Comply with the Deficient Forest Plan Direction.

One of the primary purposes of the Norbeck Organic Act is “the protection of game animals . . . .” Norbeck Organic Act. This purpose mandates that protection of game animals trumps other uses such as resource extraction and recreation. See Sierra Club v. U.S. Forest Service, 259 F.3d 1281 (10th Cir. 2001). As discussed below, the preferred alternative violates this mandate because it would eliminate necessary thermal cover and security for elk, a big game animal. Although the preferred alternative would create forage, forage already exceeds the objective percentage and is therefore not a critical habitat element that currently needs to be expanded or even conserved at the existing level.

A. Thermal Cover

Thermal cover for big game is defined as conifer stands, 30-60 acres in size, at least 40 feet tall, with a 70% canopy closure. FEIS 45. This description correlates with “structural stages” 3C, 4C and 5 on the BHNF. FEIS 45. The Forest Plan direction for the Norbeck Wildlife Preserve outside of the Black Elk Wilderness – designated as Management Area 5.4A – is to maintain at least 30% thermal cover for the needs of big game species such as elk. Forest Plan 5.4A-210(a). The Project area is currently failing to meet this requirement because MA 5.4A currently has only 1,618 acres of thermal cover, which is only 14%. FEIS 45. The low percentage of thermal cover in the Project area is due in part to the “reduction in thermal cover” that the Forest Service concedes was the result of the recent Needles and Grizzly commercial logging projects in the Norbeck Wildlife Preserve. FEIS 76. The preferred alternative for this Project would further reduce thermal cover in MA 5.4A below the mandatory minimum by allowing the elimination of hundreds or thousands of acres of thermal cover. See FEIS 70 (noting that the preferred alternative will eliminate 2,566 acres of structural stages 4B and 4C).

Notably, the Forest Service has not actually disclosed how many acres of thermal cover will be eliminated by the commercial logging proposed by the Project. The FEIS also fails to clearly inform the public, in the elk habitat discussion, that the Forest Plan objective is 30% thermal cover, that the MA currently has only 14% thermal cover, and that the Project will further reduce thermal cover. See FEIS 45. The preferred alternative as proposed violates the Norbeck Organic Act by failing to maintain crucial elk habitat in an already compromised area. Additionally, the Project violates NFMA by violating the Forest Plan thermal cover protection. 16 U.S.C. § 1604(i). Finally, the Forest Service’s failure to clearly disclose just how many acres of thermal cover will be logged and eliminated by the Project is a violation of NEPA because the Forest Service has failed to take a NEPA “hard look” at this issue and fully inform the public and decision-maker of the reduction of thermal cover posed by the Project. See New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683(10th Cir. 2009).

Thermal cover retention is not only an individually significant issue for this Project. It is also cumulatively significant in light of the recent reductions from the Needles and Grizzly Projects, noted above, as well as the intensive commercial logging that has already been approved adjacent to the Project area. The Forest Service has already approved at least 41,443 acres of commercial logging in four different projects adjacent to the Project area. FEIS F-6. Yet the Forest Service provides no quantitative analysis of the cumulative reduction of thermal cover in the Project area from Needles, Grizzly, and this Project, nor is there any quantitative analysis of the amount of thermal cover that will be available to elk in the areas adjacent to the Project area after the implementation of over 40,000 acres of commercial logging in those areas. In order to comply with NEPA, the Forest Service must quantitatively assess the
cumulative impact of recent and planned projects on the reduction of thermal cover in the Project area and adjacent to it. 40 C.F.R. § 1508.25 (2); 40 C.F.R. § 1508.7.

B. Security and Vulnerability

There are currently 127.1 miles of road in the Project area, which equates to a total road density of 3.0 miles/square mile, with an open road density of 2.4 miles/square mile. FEIS 256. If private roads, county roads, and U.S. Highways are excluded, the total current road density of the remaining National Forest roads in the Project area is 1.9 miles/square mile, with a summer open road density of 1.3 miles/square mile and a winter open road density of 1.2 miles/square mile. FEIS 256. The FEIS fails to disclose the open motorized route density during implementation of the preferred alternative. By our calculations – and including only Forest Service motorized routes – the open motorized route density during implementation of the Preferred Alternative will increase from 1.3 to 1.9 miles/square mile during the summer and will increase from 1.2 to 1.8 miles/square mile during the winter, and the total motorized route density will increase from 1.9 to 2.2 miles/square mile.

If all roads in the Project area are included in these calculations, open motorized route density during implementation of the Preferred Alternative will increase from 2.4 to 3.0 miles/square mile, and the total motorized route density will increase from 3.0 to 3.4 miles/square mile. The FEIS indicates that full implementation of this Project will take ten years. FEIS 15.

Increasing open motorized route density in the Project area from 2.4 miles/square mile to 3.0 miles/square mile for ten years clearly does not promote the maintenance of the area as a wildlife preserve for big game, in clear violation of the Norbeck Organic Act and Sierra Club v. U.S. Forest Service, 259 F.3d 1281 (10th Cir. 2001). To the contrary, increasing open motorized route density at all above the pre-existing 2.4 miles/square in the Project area will have the effect of further degrading elk habitat below a 50% effectiveness level (USDA 1993). Forest Service researchers have clearly stated that where elk management is a primary consideration – such as in this wildlife preserve dedicated to maintaining big game habitat – the Forest Service should maintain at least 50% elk habitat effectiveness, and in areas where the Forest Service should be maintaining summer habitat or high use areas, it should maintain at least 70% elk habitat effectiveness (Christensen et al. 1993). The researchers further stated that “[a]reas where habitat effectiveness is retained at lower than 50 percent must be recognized as making only minor contributions to elk management goals” (Christensen et al. 1993). Moreover, the BNF Forest Plan itself recognizes that road density should be no more than 1 mile/square mile in areas that are designed to maintain big game winter range. See e.g. Forest Plan Objective 5.4-207.

Notably, the Forest Service completely fails to calculate and disclose the level of elk habitat effectiveness during implementation of the Project in the FEIS. Clearly, the Forest Service has failed to take a NEPA “hard look” at this issue and failed to use the “best available science” under NFMA since it never even mentions the term habitat effectiveness, much less demonstrate that the preferred alternative will comply with the well-documented thresholds for elk habitat effectiveness. See New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683(10th Cir. 2009); 36 C.F.R. 219.11 (2001), FSM 1921.81 (2006). The closest the Forest Service comes to discussing the issues of habitat effectiveness and security blocks in the FEIS is a statement that “[s]ome important management practices for elk include establishment of no more than 1 mile of road per square mile of area and promote or maintain dense coniferous stands more than 0.5 miles from open roads (SAIC 2003).” FEIS 86. These “important management practices” were not discussed any further, much less actually applied to the Project.

The Forest Service is also violating NFMA here by violating its Forest Plan requirement to “[m]anage road use to provide for habitat needs of wildlife and to maintain habitat effectiveness.” Forest Plan 5.4A-
Another key elk security issue that the Forest Service ignores is the maintenance of security blocks in the Project area, before, during, and after Project implementation. A security block is defined as a block of habitat that is at least 250 acres in size and at least one-half mile from roads (Hillis 1991). In order to comply with the best available science, security blocks must comprise at least 30% of the analysis area (Hillis 1991). The Forest Service has completely failed to disclose the percentage of the Project area in security blocks, thus it is impossible to determine whether it is applying the best available science for this key element of elk habitat maintenance. Just as with the issue of elk habitat effectiveness, the void of information on this issue of security blocks is a violation of NEPA’s requirement to take a hard look and NFMA’s requirement to use the best available science. See New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683(10th Cir. 2009); 36 C.F.R. 219.11 (2001), FSM 1921.81 (2006).

The issues of degradation of habitat effectiveness and security block protection are not just individually significant issues for this Project. They are also cumulatively significant in light of the fact that Forest Service road density on the BHNRF as a whole is even higher than in the Project area at 4.4 miles/square mile. FEIS 256. This figure is lower than the actual road density because it does not include private roads, county roads, or U.S. highways. FEIS 256. In order to comply with NEPA, the Forest Service must assess the cumulative impact of increasing road density in the Project area – and thereby reducing habitat effectiveness and security blocks – in light of the already very degraded habitat effectiveness and security block conditions on the rest of the BHNRF outside the Project area. 40 C.F.R. § 1508.25 (2); 40 C.F.R. § 1508.7.

C. Displacement

One final way in which the preferred alternative violates the Norbeck Organic Act’s mandate to protect big game species is by causing direct disruption of breeding activities. The Forest Service admits that Project activities will displace elk and deer. FEIS 90. In particular, the Forest Service admits that Project activities will occur during fawning/calving season and that “direct effects to fawns/calves may occur as a result.” FEIS 90. Clearly, the Forest Service is not protecting big game breeding habitat if it is allowing activities that displace deer and elk when they are trying to give birth.

D. Road Impacts and Effectiveness of Road Closures

Although road density is discussed above in the big game security section, the issue of road closures merits further emphasis. The Forest Service must demonstrate that its road closures will be fully funded, monitored, and enforced before it can discount their significance as “open roads.” Christensen et al. (1993) stated that all roads that receive motorized use should be counted in consideration of roads that are degrading elk habitat effectiveness, even if they are only being used administratively. Forest Service monitoring of compliance with road closure promises appears to be minimal, but the Kootenai National Forest in Montana did monitor such compliance in 2005 and found numerous, significant violations in just one year:

- The Forest Service exceeded its own allowable seasonal use threshold for closed roads at least seven times;
• the Forest Service did not complete final road decommissioning for Kelsey-Beaver Project, so "with the Garver project on-going core and TMRD [total motorized route density] worsen and do not meet standards;

• an anonymous member of the public cut the Forest Service lock off the gate on FS Road 215 and the gate was opened, and then the entire gate was pulled out of the ground;

• an anonymous member of the public breached the barrier to FS Road 1054;

• the Forest Service never completed the final road decommissioning for the BlueGrass Bound Project; and

• the Forest unintentionally left the gate open on FS Road 2516.

Johnson (2005). In order to comply with NEPA, the Forest Service must take a “hard look” at the impacts of its proposed action; it must do “a careful job at fact gathering and otherwise supporting its position.” New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683(10th Cir. 2009). Thus, here the Forest Service must clearly disclose the actual open motorized route density in the Project area during and following implementation, taking into account the realities noted above that nominally closed roads are still used by motorized vehicles, as well as the fact that members of the public often create their own illegal motorized routes.

E. Forage is not the Limiting Need for Breeding Big Game

In the Project area, big game forage correlates with structural stages 1, 2, 3A, and 4A. FEIS 52. The Forest Plan objective for the Norbeck Wildlife Preserve, MA 5.4A, is to maintain only 15-20% forage. Forest Plan 5.4A-203. MA 5.4A currently far exceeds that threshold objective with 36% forage, or 3,881 acres. FEIS 46. Accordingly, the Forest Service concedes that there is already an “excess of the area in Forage . . . .” FEIS 75. This excess is in part due to the recent Needles and Grizzly commercial logging projects that were permitted in the Norbeck Wildlife Preserve. FEIS 76. The preferred alternative will create at least another 2,566 acres of forage. FEIS 70. As noted above, the creation of this forage will come at the expense of further reducing thermal cover below the mandatory minimum.

Reducing critical thermal cover to increase superfluous forage violates the Norbeck Organic Act’s mandate to maintain big game habitat. Forage already far exceeds the objective threshold and the preferred alternative will create even more forage. This forage will be created at the expense of further reducing thermal cover below the minimum objective amount. In light of these facts, the Forest Service’s position that it is maintaining big game habitat by increasing forage acres is arbitrary and capricious because it “is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).
X. The Proposed Actions Fail to Provide for the Needs of Birds as Mandated in the NOA and Tenth Circuit Mandate, and Fail to Even Comply with the Deficient Forest Plan Direction.

In addition to protecting game species, the Norbeck Organic Act mandates that the Norbeck Wildlife Preserve provides for “the protection of . . . birds and [recognition] as a breeding place therefore.” This priority trumps commercial logging and other “multiple uses.” Sierra Club v. U.S. Forest Service, 259 F.3d 1281 (10th Cir. 2001).

A. Direct Mortality

The Forest Service admits that the preferred alternative “may directly kill nesting [turkeys] because activities may occur during nesting season . . . .” FEIS 92. The Forest Service admits that the preferred alternative may directly affect brown creepers by destroying nests and “killing hatchlings.” FEIS 98. The Forest Service admits that the Project has “the potential to impact [ruffed grouse] by killing nesting birds.” FEIS 101. The Forest Service admits that the Project presents the “potential for disturbance or direct mortality” to the song sparrow. FEIS 103. The Forest Service admits that the preferred alternative “may directly kill nesting [goshawks], in unknown nests, if nests are not detected before treatment occurs.” FEIS 106. Presenting the risk of direct mortality from management activities to numerous bird species does not comply with the mandate of the Norbeck Organic Act to be a refuge that protects these birds from such risks, especially because birds may be killed while engaged in breeding activities such as nesting.

B. Goshawk Requirements

As noted above, the goshawk is a sensitive species and a Norbeck focus species that depends on dense, mature and old-growth forest for nesting. The goshawk is vulnerable to habitat loss and disturbance and has a low reproductive rate. FEIS 104. The Forest Service admits that the goshawk population may be decreasing in the Black Hills. FEIS 104. The Forest Service does not speculate that logging could be a potential cause of the decrease, but a published, peer-reviewed study in the Greater Yellowstone Area found that logging may be causing a population decline of goshawk in that area (Patla 2005). There are at least five known historic or active goshawk territories in the Project area. FEIS 104.

The Forest Plan sets forth the following requirement for timber sales in goshawk habitat: Identify nest areas around historically active nests. Nest areas shall consist of 180 acres best suited for nesting habitat within one-half mile of the nest and greater than 300 feet from buildings. Nest areas need not be contiguous but must occur in 30-acre units or larger. Nest areas shall include alternate nests if known. If these conditions cannot be met, then nest areas will include stands that are not currently suitable but that could be managed to meet nesting conditions over time. Vegetation management activities within nest areas shall be limited to those that maintain or enhance the stand’s value for goshawk.

Forest Plan 3108(a). The FEIS does not demonstrate that the Forest Service has identified a 180 acre nest area for each of the five historic/active goshawk territories in the Project area. Without disclosing the location and composition of these designated nest areas it is impossible to determine whether the Forest Service is complying with Forest Plan standard 3108(a). It is also impossible to determine if the Forest Service is complying with Forest Plan Goal 221 to “conserve [] habitat for R2 sensitive species . . . .”
The Forest Service’s failure to demonstrate compliance with these Forest Plan provisions violates NFMA. 16 U.S.C. §1604(i). This is also a violation of the Norbeck Organic Act’s mandate to protect bird breeding habitat.

The Forest Service’s goshawk analysis also violates NFMA’s mandate to consider the best available science regarding required attributes of goshawk habitat. 36 C.F.R. 219.11 (2001). The U.S. Court of Appeals for the Tenth Circuit has made it crystal clear that the best available science to be used by the Forest Service for goshawk habitat is the Forest Service’s “Management Recommendations for the Northern Goshawk in the Southwestern United States,” published in 1992 by the USDA Forest Service Rocky Mountain Range and Experiment Station, which is often referred to as the “Reynolds Report” (Reynolds et al 1992). Ecology Center v. U.S. Forest Service, 451 F.3d 1183, 1188 (10th Cir. 2006). In Ecology Center, the federal appellate court upheld the “unchallenged status of the Reynolds Report as the best available science....” 451 F.3d at 1188. In short, the Reynolds Report recommends that each goshawk territory include a nesting area of at least 180 acres (6 stands of 30 acres) comprised of 100% old growth and mature forest with at least 50% canopy closure, and that each territory also include a 420 acre post-fledgling area (PFA) that is comprised of 40% old growth and mature forest with at least 50% canopy closure (Reynolds et al. 1992). In this Project area, these recommendations would translate into retention of 100% structural stage 5 and 4C in the five 180 acre goshawk nesting areas, and retention of 40% structural stage 5 and 4C in the five 420 acre post-fledgling areas.

The Forest Service pays only cursory lip service to a grossly oversimplified summary of the Reynolds Report in the FEIS. Instead of mapping the designated nest areas and post-fledgling areas for each of the five historic goshawk territories, and disclosing the percentage of structural stages 5 and 4C in each, both pre-Project and post-Project, the Forest Service simply states that “[i]mportant habitat attributes include snags, downed logs, woody debris, large trees, openings, herbaceous and shrubby understories, and an intermixture of various forest vegetation structural stages (Reynolds et al. 1992).” FEIS 104. There is no further disclosure of the specific quantitative recommendations of the Reynolds Report, much less an explanation as to how the proposed Project will comply with those recommendations. The Forest Service’s failure to apply the “unchallenged” best available science of the Reynolds Report violates NFMA. Ecology Center, 451 F.3d at 1188.

To whatever extent the Forest Service may be completely relying on Forest Plan Standards 3108 and 3111 to meet its duty to ensure the viability of the goshawk in the Project area and Forest-wide, see FEIS 107, that reliance is arbitrary for at least two reasons. First, as noted above, the Forest Service has failed to demonstrate compliance with Standard 3108. Second, and more importantly, the implementation of Forest Plan Standards 3108 and 3111 alone will not ensure the viability of the goshawk because those standards do not incorporate the key elements of the Reynolds Report – discussed above – regarding how much and what type of old growth (i.e. late successional) and mature forest to retain in goshawk nest areas and post-fledgling areas. Thus, in addition to the various other goshawk-related NFMA violations posed by the Project, the BHNF Forest Plan itself violates NFMA because it does not implement the best available science for goshawk management and thus cannot be assumed to ensure goshawk viability. 36 C.F.R. 219.11 (2001).

C. Recognition of the “Breeding Place” Mandate

The FEIS indicates that numerous bird species – including focus species for the Norbeck Wildlife Preserve, management indicator species, sensitive species, species of local concern, and rare South Dakota species – require late successional or dense, mature habitat as their preferred nesting habitat. The Merriam’s wild turkey is a focus species for the Norbeck and its preferred nesting habitat is dense forest
with a canopy coverage from 41-70%, i.e. structural stage 4B. FEIS 91. The brown creeper is a Norbeck focus species and a management indicator species for the BHNF. FEIS 96. The preferred nesting habitat for this species is dense, old forest with a high canopy closure. FEIS 97. The Forest Service notes that its preferred habitat corresponds with structural stages 4C and 5. FEIS 99. The northern goshawk is a sensitive species and focus species for the Norbeck. FEIS 103. The goshawk nests in mature forest stands with a closed canopy (over 60%). FEIS 103. The Forest states that suitable goshawk nesting habitat correlates with structural stages 4B, 4C, and 5. FEIS 106. The black-backed woodpecker is a Norbeck focus species, BHNF management indicator species, and sensitive species. FEIS 107. The preferred nesting habitat for the black-backed woodpecker is mature or old-growth forest with high canopy cover, which the Forest Service correlates with structural stages 4C and 5. FEIS 107. The broad-winged hawk is a species of local concern that uses structural stages 4B, 4C, and 5 for nesting. FEIS 107. The northern saw-whet owl is a species of local concern and rare species under the South Dakota Natural Heritage Program, which prefers 4C and 5 for nesting habitat. FEIS 142-143. The pygmy nuthatch is a species of local concern that prefers structural stages 4B, 4C, and 5 for nesting habitat. FEIS 146.

Thus, preferred nesting habitat for numerous important bird species in the Norbeck correlates with structural stages 4B, 4C, and 5. The Forest Plan specifically recognizes the importance of maintaining old growth forest, i.e. “late-successional” forest, for bird breeding in the Norbeck Wildlife Preserve. In particular, the Forest Plan sets an objective that 20 - 25% of MA 5.4A should be late successional forest (structural stage 5). Forest Plan 5.4A-203. Currently, MA 5.4A does not meet that objective because it currently has only 8% late successional forest. FEIS 45. Thus, the next most valuable nesting habitat for these birds is structural stages 4B and 4C, which are mature forest with over 40% canopy closure. See FEIS 37.

The Forest Service would violate the Norbeck Organic Act by implementing this Project because the Act explicitly set aside this preserve for bird breeding habitat but the Project eliminates thousands of acres of preferred bird nesting habitat. First, regarding structural stage 5, the maps in FEIS Appendix A (Maps A-6, A-12) indicate that the preferred alternative proposes commercial logging in late successional stands, including at least “late successional enhancement,” “large tree enhancement,” and “stand diversity enhancement.” Any reduction in late successional habitat from logging would not only violate the Norbeck Organic Act by reducing preferred nesting habitat, but it would also violate NFMA by further reducing old-growth habitat below the Forest Plan objective percentage. 16 U.S.C. §1604(i). Moreover, the Forest Service’s failure to clearly disclose the number of acres of late successional habitat that will be eliminated from commercial logging violates NEPA because it is a failure to take a hard look at the issue of old growth dependent wildlife viability. See New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683(10th Cir. 2009).

Additionally, regardless of the number of acres of structural stage 5 that will be eliminated by the Project, the preferred alternative will also eliminate 2,566 acres of structural stages 4B and 4C, which also provide preferred nesting habitat for these species. FEIS 70. The elimination of over two thousand acres of preferred nesting habitat is a clear violation of the Norbeck Organic Act mandate to protect and preserve bird nesting habitat in the Norbeck Wildlife Preserve. It is also a NFMA violation because it violates the Forest Plan provision to “conserve . . . habitat for R2 sensitive species . . . .” Forest Plan Goal 221. 16 U.S.C. § 1604(i).
XI. The Proposed Actions Fail to Provide for the Needs of Small Game Animals as Mandated in the NOA and Tenth Circuit Mandate, and Fail to Even Comply with the Deficient Forest Plan Direction.

A. American Marten

The sensitive, American marten has habitat in the Project area and is present in the Project area. FEIS G-4. The marten requires old-growth and mature forest with high canopy closure, which would likely translate into structural stages 4B, 4C, and 5. These are the very structural stages that will be reduced by over 2,000 acres by the Project. See e.g. FEIS 70. The Forest Plan sets out a stringent protection for marten habitat: “In areas identified as important connectivity corridors for marten, maintain canopy closure of at least 50 percent.” Forest Plan Standard 3215. The Forest Service has completely failed to demonstrate compliance with this standard. Its failure to determine the location of marten connectivity corridors in the Project area violates NEPA. New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683 (10th Cir. 2009). Its failure to demonstrate compliance with the requirement to maintain 50% canopy cover in those corridors violates NFMA because it violates the Forest Plan. 16 U.S.C. §1604(i). Additionally, the Forest Service’s failure to show that the Project will “conserve or enhance habitat” for the marten violates Forest Plan Goal 221 because the marten is a R2 sensitive species. Thus, this is another violation of NFMA. 16 U.S.C. § 1604(i).
XII. The Proposed Actions Violate Forest Plan Soil Disturbance Standards (NFMA).

There are numerous significant omissions in the Forest Service’s analysis on compliance with Forest Plan soil standard 1103, which limits disturbance to 15% of a unit, and other soil protections. First, the Forest Service failed to disclose the percentage of pre-existing soil disturbance in each of the units proposed for treatments. The Forest Service must at least disclose the percentage of soil disturbance in the nine “sites” assessed and describe how those sites relate to proposed activity units. The Forest Service further failed to estimate the percentage of soil disturbance that Project treatments will cause in each unit. Even with the proposed mitigation measures, there will still be some disturbance: feller-bunchers will be allowed off of designated trails and will cause compaction and displacement; new temporary roads will be constructed or re-constructed and hiking trails will be converted to temporary roads, which will all cause compaction and displacement; and pile burning will create areas of severely burned soil.

Regarding compaction and displacement, monitoring in the Gallatin National Forest in Montana has shown that even with the same types of mitigation measures proposed here, and an additional prohibition against the use of any machinery off-trail, soil disturbance still exceeded 15% at 16.5% (Shovic 2006). Where machinery such as feller-bunchers was allowed off trail, disturbance averaged 27.5% (Shovic 2006). Regarding severely burned soil, the FEIS completely fails to acknowledge that pile burning will leave behind areas of severely burned soil due to the fact that piles take many hours to completely burn. The FEIS argues that prescribed burning will not result in severely burned soils because the fires will move quickly across the forest floor, but it makes no mention of the effect of all of the pile burning where the fire will remain in one spot for many hours. See Jurgensen et al. (1997) (including pile burning as a factor that degrades soil quality in logged areas).

In order to comply with NFMA, the Forest Service must disclose pre-existing and post-Project soil disturbance for each proposed treatment unit because without that information it is impossible to determine whether the Project will comply with Forest Plan soil standard 1103. A failure to demonstrate compliance with Forest Plan soil standard 1103 is not only a violation of the Forest Plan proper, but also a violation of NFMA more generally because NFMA prohibits logging that will cause irreversible soil damage, 16 U.S.C. § 1604(g)(3)(E), and presumably the 15% threshold standard is intended to be the threshold above which soil damage is irreversible. In order to comply with NEPA’s “hard look” requirement, the Forest Service must clearly disclose existing and projected soil disturbance in each proposed unit. See New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683 (10th Cir. 2009). Additionally, the Forest Service must disclose the scientific support for its implication that units that comply with the proposed soil mitigation measures will never exceed 15% detrimental soil disturbance, regardless of the amount of pre-existing disturbance. See Burlington Truck Lines. v. United States, 83 S. Ct. 239, 245-246 (1962) (holding that an agency’s findings must be supported by substantial evidence).

Furthermore, the Forest Service must disclose cumulative soil impacts in the Project area. 40 C.F.R. § 1508.25 (2); 40 C.F.R. § 1508.7. In particular, it must disclose quantitative data such as the acres and percentages of soil disturbance still remaining in treatment units in the Project area from the Needles and Grizzly Projects. See Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 993-997 (9th Cir. 2004). So far the Forest Service has provided only generalized conclusory statements that there has been “little compaction” from past logging and that “it recovers over time,” but it does not provide actual data on the amount (i.e. percentages) of soil disturbance in the Project area. FEIS 208. This is a significant and under-analyzed issue. Forest Service researchers have determined that cumulative impacts to soils on the National Forests are likely occurring from decades of management activities:

An emerging soils issue is the cumulative effects of past logging on soil quality. . . . the concern has been increasing of the cumulative effects on watershed health. The effects of extensive
areas of compacted and/or displaced soil in conjunction with impacts from roads, negative impacts in riparian areas, fire and other impacts may be having cumulative effects on watershed health that need further evaluation.

Kuennen et al (2000). Thus, the Forest Service must provide quantitative data on cumulative soil impacts in the Project area to comply with NEPA.
XIII. The Proposed Actions Violate Forest Plan Water Quality and Aquatic Habitat Standards (NFMA).

In this Project area, there are over 122 miles of streams, a large amount of soil with a severe erosion rating, and numerous steep slopes. Because of these factors, the FEIS states that the watersheds that will be affected by the Project are some of the most sensitive watersheds in the Black Hills. FEIS 210. Road density in the Project area, on Forest Service roads alone, is already at 1.9 miles/square mile of closed road and 1.3 miles/square mile of open road. DEIS 88. Already an undisclosed number of streams are functioning at “diminished” or “at-risk” capacity due to sedimentation from existing roads. FEIS 212. This area is home to the aquatic management indicator species, the mountain sucker, which is a sensitive species in this region of the Forest Service. The mountain sucker requires cool, clear water and was selected by the Forest Service to indicate the effects of management activities on other species that require similar habitat. FEIS 121. The Forest Service admits that the population and habitat trends for the mountain sucker are already declining. FEIS 124.

The implications are that roads are the primary generators of sediment in the Project area, that the existing road density in the Project area and across the Forest is already adding too much sedimentation into streams that provide mountain sucker habitat, and that the mountain sucker and other species with similar needs for cool, clean mountain water are declining in population numbers because of road sediment. Despite the pre-existing negative impacts on water quality and aquatic habitat in the Project area, the Project will further increase stream sedimentation by building new temporary roads and re-opening closed roads. More specifically, the preferred alternative will re-open or newly construct over 36 miles of roads, FEIS 26, which will include eight new stream crossings, FEIS 214. As discussed above, open motorized route density during implementation of the Preferred Alternative will increase from 2.4 to 3.0 miles/square mile, and the total motorized route density will increase from 3.0 to 3.4 miles/square mile. It appears that this open road density increase will last for 10 years. FEIS 15. Additionally, logging equipment may directly cross streams on skidding and forwarding trails, FEIS 215, which will add additional sediment.

Furthermore, the preferred alternative proposes logging within 100 feet of a stream – i.e. within the Water Influence Zone – at over 100 sites. FEIS B-16 - B-18. A final problem is that during Project implementation the Forest Service will completely rely on the logging contractors to remove sediment from “sediment collection ponds” and “silt fences” and “eliminate[e] erosion” and keep all drainage structures functional. FEIS 257. Only after Project implementation will the Forest Service take over the road maintenance tasks. FEIS 257. Some of these Project roads may not receive any maintenance actions by the Forest Service for five years after Project implementation. FEIS 258.

Although the Forest Service admits that these activities have the potential to further increase stream sedimentation, FEIS 214, it completely fails to calculate and disclose how much sedimentation will occur and whether sedimentation will be deposited into already compromised streams. The Forest Service also completely fails to disclose the current amount of sedimentation in streams in the Project area and what the threshold levels of sedimentation are for effective mountain sucker reproduction.

This information is undoubtedly available via existing scientific literature and existing sedimentation models because the Forest Service routinely measures existing sedimentation in aquatic habitat, predicts sedimentation from logging activities, and compares those levels to aquatic species needs in NEPA analyses. For example, the Forest Service recently conducted exactly this analysis for Yellowstone cutthroat trout in the Smith Creek drainage of the Gallatin National Forest in Montana (USDA Forest Service 2007). Thus, in order to comply with NFMA and NEPA, the Forest Service must assess and disclose existing sediment levels in Project area streams, disclose any applicable threshold sediment
levels for effective mountain sucker reproduction and survival, and project how much sediment will be created from Project activities and whether that sedimentation will exceed thresholds for effective mountain sucker habitat. Only then will the Forest Service be able to come to a non-arbitrary conclusion regarding how Project implementation will affect mountain sucker viability. See New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683 (10th Cir. 2009) (requiring a “hard look” under NEPA); Burlington Truck Lines v. United States, 83 S. Ct. 239, 245-246 (1962) (requiring substantial supporting evidence for agency decisions); 36 C.F.R. 219.11 (2001) (requiring consideration of the best available science).

Perhaps even more disconcerting are the numerous Forest Plan violations posed by the facts that over 100 activity sites are within water influence zones, FEIS B-16 - B-18, and logging will apparently occur near numerous streams that are already functioning at “diminished” or “at-risk” capacity due to sedimentation from existing roads, FEIS 212. The Forest Plan prohibits actions that do not maintain or improve stream health to “robust.” Forest Plan Standard 1201. The Forest Plan also prohibits logging activities that degrade long-term stream health. Forest Plan Standard 1209. The Forest Plan further prohibits activities in the water influence zone that do not “maintain or improve long-term stream health . . . condition.” Forest Plan Standard 1301. The Forest Plan states that vegetation treatments “should only be done in riparian areas to reestablish riparian vegetation for the protection and/or enhancement of those ecosystems.” Forest Plan Guideline 1303. Finally, the Forest Plan requires the conservation and enhancement of mountain sucker habitat. Forest Plan Goals 221, 238(d). All of these Forest Plan provisions will be violated by the Project because it will increase stream sediment in streams in water influence zones/riparian areas, thereby degrading stream habitat for the mountain sucker that is already compromised. These Forest Plan violations violate NFMA. 16 U.S.C. § 1604(i).

On the topic of stream temperature, one of the streams in the Project area – Battle Creek – is already listed as impaired under the Clean Water Act by the South Dakota Department of Environment and Natural Resources because stream temperature is too high. FEIS 211-212. The Forest Service must disclose whether any proposed logging units are near Battle Creek in order to avoid further increasing stream temperature. Although the Forest Service states that thinning will have a “positive effect” on stream temperature, FEIS 215, this claim is unsupported and contradicted by the agency’s own analyses for other timber sale projects. For example, the EIS for the Bussel 484 Project on the Idaho Panhandle National Forest found that past riparian logging had increased stream temperature by reducing canopy coverage (USDA Forest Service 2008). Thus, the prescription – from the state water quality agency in its TMDL – to remedy high stream temperatures was to increase canopy coverage 20-80%, not to decrease canopy coverage with commercial and non-commercial thinning as proposed here.

Finally, in order to comply with NEPA, the Forest Service must disclose cumulative water quality/aquatic habitat impacts in the Project area. 40 C.F.R. § 1508.25 (2); 40 C.F.R. § 1508.7. The issue of sedimentation is not just an individually significant issue for this Project. It is also cumulatively significant in light of the fact that Forest Service road density on the BHNF as a whole is 4.4 miles/square mile, which is even higher than in the Project area. FEIS 256. This figure is lower than the actual road density because it does not include private roads, county roads, or U.S. highways. FEIS 256. To adequately assess cumulative impacts on this issue, the Forest Service must at least disclose quantitative data such as the amount of sedimentation into streams in the Project area from the implementation of the Needles and Grizzly Projects, and how that sedimentation has affected the mountain sucker population and habitat trend. See Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 993-997 (9th Cir. 2004). It should also disclose how high road density Forest-wide has degraded water quality and aquatic habitat.
XIV. The Impacts of the Proposed Actions on Carbon Sequestration and Climate Change Have Not Been Adequately Assessed (NEPA).

There is an ever-increasing body of peer-reviewed, published scientific literature demonstrating that logging our public land forests significantly reduces the capacity of those forests to sequester carbon. The Forest Service’s token, cursory dismissal of the Project’s impacts on climate change does not satisfy the hard look required under NEPA or the consideration of the best available science required under NFMA. See New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683(10th Cir. 2009) (requiring a “hard look” under NEPA); Burlington Truck Lines v. United States, 83 S. Ct. 239, 245-246 (1962) (requiring substantial supporting evidence for agency decisions); 36 C.F.R. 219.11 (2001) (requiring consideration of the best available science). In fact, the Forest Service does not cite a single scientific study for its position that the commercial logging proposed by the Project will “maintain[] or increase[] [the area’s] ability to sequester carbon.” FEIS 266.

Just last December, the U.S. Environmental Protection Agency filed a formal finding that climate change poses serious adverse impacts to public health and the environment. 74 Fed. Reg. 66495-66546 (Dec. 15, 2009). In Massachusetts v. Environmental Protection Agency, 127 S. Ct 1438, 1459-60 (2007), the U.S. Supreme Court also acknowledged the reality of global climate change. Noting the “enormity of the potential consequences associated with [human-caused] climate change,” the Supreme Court stated:

> While it may be true that regulating motor-vehicle emissions will not by itself reverse global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to slow or reduce it . . . . A reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere.

127 S. Ct at 1458. Subsequently, the U.S. Court of Appeals for the Ninth Circuit ruled in Center for Biological Diversity v. Nat’l Hwy Traffic Safety Administration, 538 F.3d 1172 (9th Cir. 2008) that a federal agency had violated NEPA by failing to consider the cumulative impact of carbon dioxide emissions on global climate change. More specifically, it held that “[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” 538 F.3d at 1217. The court did not find persuasive the agency’s argument that many other factors outside of its control are causing climate change. On the contrary, the court stressed the importance of addressing individual incremental actions that foreseeably and collectively contribute to climate change. 538 F.3d at 1217.

The impact of forest management on global carbon sequestration was also considered at the recent United Nations Climate Change Conference in Copenhagen to be “a key component of a larger pact on climate change.” See http://en.cop15.dk/news/view+news?newsid=2968. Indeed, in its most recent report, the international Intergovernmental Panel on Climate Change found that one-third of increased global carbon emissions are caused by the effects of land use changes on plant and soil carbon stores (Solomon et al. 2007).

The Chief of the Forest Service has declared that the relationship between National Forest management and climate change is one of the three top current issues for the Forest Service. In a 2007 memorandum, the Chief encouraged Forest Service land managers to “learn all you can about climate change and work with others to apply what you learn to fulfill our mission” (Kimbell 2007). Published, peer-reviewed scientific studies and reports echo that sentiment. One such report, co-authored by a Forest Service scientist, admits that “[s]cientists and policy makers have long recognized the role that forests can play in countering the atmospheric buildup of carbon dioxide (CO2), a greenhouse gas” (Depro et al 2008).
In particular, public forest lands in the United States “have considerable impact on the U.S. forest carbon balance” (Depro et al 2008). The study found that eliminating logging on public forest land in the U.S. would result in “as much as a 43% increase over current sequestration levels on public timberlands and would offset up to 1.5% of total U.S. [greenhouse gas] emissions” (Depro et al 2008). The study noted that the “economic value of sequestered carbon on public lands could be substantial relative to timber harvest revenues” (Depro et al 2008). This economic impact is especially relevant in light of the fact that in this case the preferred alternative for this Project will result in a budget deficit of over 9.3 million dollars for the Forest Service, which in reality represents a cost to the federal taxpayers of 9.3 million dollars. FEIS 263.

Other scientific studies have also addressed the potential to store carbon in unlogged forests. One study determined that replacing older forests with fast-growing young trees will not provide increased carbon storage, as may be commonly assumed (Harmon 2001). On the contrary, once an old-growth forest is logged the new young forest will take at least 200 years to recover the carbon storage previously held by the old-growth forest, if storage recovery happens at all (Harmon 1990). Illustratively, an agricultural field transformed into a tree plantation will only store 31 percent of its carbon storage potential, while an agricultural field transformed into an old-growth forest will store 83 percent of its carbon storage potential (Harmon and Marks 2002).

Findings such as these have led researchers to remark that “if carbon stores were the only concern then conversion to an old-growth dominated landscape would be the best option as this system stores close to 90 percent of the potential maximum, even with fire or wind disturbance and no timber salvage” (Harmon and Marks 2002). As an example, researchers found that the current carbon storage in forests in Oregon and Washington is less than one-half of its potential (Homann et al. 2005). They stated that there is a “substantial prospect to sequester carbon in the future, should land management and natural disturbance regimes move the region toward a landscape more dominated by old-growth forests (Homann et al. 2005).

The Forest Service’s unsupported assumption that thinning will result in more carbon sequestration by reducing stand mortality from wildfire or insect infestation is belied by the actual scientific literature on this subject. As noted above, old growth forests will store 90% of potential carbon even with wildfires (Harmon and Marks 2002). Additionally, most of the aboveground biomass in a forest is in tree boles. As studies in the Biscuit Fire in southwestern Oregon have shown, the boles of large diameter trees are rarely consumed by fire, and even when dead, generally less than 12% of the biomass is consumed (Campbell et al. 2007). Likewise, in areas infested by beetles, the trees are not consumed but remain in the forest and eventually break down into soil. Approximately one-half of the carbon in a forest is stored in soil (Turner et al. 1995).

In managed forests, the slash is usually removed to reduce the fire hazard. While doing so, much of the surface litter will be consumed, just as in a wildfire. Moreover, thinning a forest generally results in higher soil temperatures than is the case following a wildfire where dead and dying trees are left standing. As a result, soil organic matter is converted more rapidly to carbon dioxide following disturbance by logging than by wildfire. A full accounting shows that harvesting trees results in more carbon lost over time than a no-action policy following a wildfire (Mitchell et al. 2009).

The Forest Service has completely failed to provide any quantitative assessment as to how the logging of thousands of acres of public forest land proposed by the Project – in addition to the other 43,000 acres of commercial logging currently authorized adjacent to the Project area – could individually or cumulatively impact climate change. As noted above, logging significantly reduces the ability of a forest to mitigate greenhouse gas emissions by storing carbon. In particular, the logging of old growth and mature forest – such as the logging of over 2,000 acres of older forest proposed by the Project – is a significant concern because once logged, old growth forest may never regain its full carbon storage potential (Harmon 1990).
Although “any given” timber sale “might have an ‘individually minor’ effect” on climate change, as discussed above the published scientific literature indicates that timber sales on public forest lands qualify as “collectively significant actions taking place over a period of time.” *See Center for Biological Diversity*, 538 F.3d at 1217; Depro et al. (2008). Thus, just as in *Center for Biological Diversity*, here the impact of public forest logging on climate change “is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.” 538 F.3d at 1217.

In light of the express directive from the Chief of the Forest Service to address climate change, the numerous scientific studies that have found public forest logging to be a significant concern in managing global carbon stores, and the recent federal appellate court ruling holding that NEPA requires an analysis of climate change, the Forest Service’s failure to quantitatively assess the issue of climate change is arbitrary and capricious and a violation of NEPA. *State Farm*, 463 U.S. at 43; *Oregon Natural Desert Ass’n*, 531 F.3d at 1142; *Center for Biological Diversity*, 538 F.3d at 1217.

At the very least the Forest Service must acknowledge the large body of responsible scientific literature that contradict or undermine the unsupported assumption in the FEIS that the project will maintain or increase the ability of the Project area to sequester carbon, 40 C.F.R. § 1502.9(b). Additionally, the Forest Service must disclose substantial supporting evidence for its as-yet unsupported assumptions. *See Burlington Truck Lines. v. United States*, 83 S. Ct. 239, 245-246 (1962).
XV. The ROD/FEIS Fail to Utilize the Best Available Science (NEPA).

A. Impacts of Current Mountain Pine Beetle Outbreak.

The discussion regarding climate change is especially pertinent in light of the mountain pine beetle infestation in the area. Recently, University of Montana forest entomologist Dr. Diana L. Six – who has studied beetles for over 17 years – summed it up by reminding us that the widespread beetle outbreaks are primarily a result of warming temperatures from climate change (Six 2009). Warmer temperatures cause drought that reduces the ability of trees to resist infestation (AP 2003). Warmer temperatures also mean that winter temperatures are not dipping low enough long enough to kill overwintering beetles (Six 2009). Dr. Six stated that reducing density alone will not eliminate these infestations because even areas of whitebark pine, which are naturally widely spaced, i.e. low density, are still being eliminated by beetles (Six 2009).

The Forest Service argues that the beetle infestation in the area will likely thin some ponderosa pine stands of 5, 4C, and 4B (25%) to 4A, reduce the remaining percentage to structural stages 1 or 2, FEIS 52, and result in an increase “of other cover types, such as aspen, spruce and bur oak” as well as a “release [of] riparian vegetation and [an] increase [in] available snag habitat.” FEIS 47. The Forest Service also argues that because of fire suppression, this area is outside of historic conditions with too much ponderosa pine stand density. See e.g. FEIS 5-6, 72.

This proposition is suspect due to the Forest Service’s admissions, addressed above, that it is failing to retain the objective amount of both thermal cover and late successional forest in MA 5.4A, and far exceeding the objective amount of forage cover in MA 5.4A. It should also be balanced by the peer-reviewed, published findings that the Black Hills did historically include dense ponderosa pine stands, that there is “no significant difference between average BA of the historical and current forests . . . .” and that “[i]t is possible that broad-scale even-aged forest structure in Black Hills ponderosa pine forests has little if anything to do with variations in fire severity . . . .” (Brown & Cook 2006). These discrepancies should be disclosed to the public.

The Forest Service admits that the dominant model for historic wildfires in the ponderosa pine forests of the Black Hills was a mixed severity fire regime, which includes both low severity surface fires as well as high intensity stand-replacing fire. FEIS 175. Thus, it appears that historically wildfires would naturally thin areas to low density (like 4A) via surface fires, as well as completely reverting stands to early successional stages (like 1 or 2) via stand-replacing fires. This begs the question: if beetles are naturally reducing stand densities in the Project area to levels that would historically be maintained by wildfire, why is logging necessary?

This gets to the gravamen of the case: it appears that this Project is designed primarily for the silvicultural objective of managing the Norbeck Wildlife Preserve as a tree farm. Such an intention may be appropriate in other areas of the BHNF, but it is not legal in the Norbeck Wildlife Preserve. The Norbeck Organic Act forbids the Forest Service from prioritizing silvicultural objectives over protection of game and bird species and their habitat. Unlike in other areas of the BHNF, there is no equitable balancing permitted here: the statute and federal courts have made it clear that protection of game and bird species must come first above all else. Sierra Club v. U.S. Forest Service, 259 F.3d 1281 (10th Cir. 2001).

The Forest Service’s prediction that the beetle infestation will eliminate dense ponderosa pine habitat for a longer time period than logging, FEIS 68, is completely speculative because there is no way to predict the outcome of the beetle infestation. It is also suspect due to the inherent bias of the Forest Service management branch towards timber harvest. See Ruggiero (2007). On the other hand, as discussed above, it is guaranteed that if this Project proceeds it will certainly (a) eliminate thousands of acres of
preferred bird breeding (nesting) habitat, (b) eliminate hundreds or thousands of acres of big game thermal cover, (c) further reduce big game (elk) habitat effectiveness below objectives, and (d) displace or kill individual bird and big game species during their breeding seasons. Thus, the known violations of the Norbeck Organic Act posed by this Project outweigh the Forest Service’s speculation that logging might have more long-term benefits for some species than no logging. The Forest Service may conduct commercial logging for the primary silvicultural purpose of reducing beetle mortality outside of the Norbeck Wildlife Preserve, but it may not do so inside the Preserve.

Finally, we note that the Forest Service’s assumptions about beetle mortality are based on what it calls “professional, local knowledge,” FEIS 46, and apparently not on published, peer-reviewed scientific literature. Again, there is a credibility problem here in light of the inherent bias of the Forest Service management branch toward logging (Ruggiero 2007). Indeed, the Forest Service fails to cite to a single peer-reviewed, published scientific study to support its assumption that no logging will cause a greater and longer term loss of old growth and dense mature forest than logging. This does not satisfy the hard look required under NEPA or the consideration of the best available science required under NFMA. See New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683(10th Cir. 2009)(requiring a “hard look” under NEPA); Burlington Truck Lines. v. United States, 83 S. Ct. 239, 245-246 (1962)(requiring substantial supporting evidence for agency decisions); 36 C.F.R. 219.11 (2001) (requiring consideration of the best available science).

In addition to having no credible referenced support, the Forest Service’s position also conflicts in some ways with available published, peer-reviewed scientific data on mountain pine beetle responses to thinning and burning. For example, the data obtained from the Forest Service’s National Fire and Fire Surrogate Study indicates that in general “[p]ost-treatment mortality of trees due to bark beetles was lowest in the thin-only and control units and highest in the units receiving [prescribed] burns” (Six & Skov 2009). This implies that the units proposed for both thinning and burning in this Project could result in higher mortality from beetles than no action.

As to mountain pine beetles specifically, the study found that “thinning had no detectable effect on beetle-caused tree mortality” (Six & Skov 2009). The authors do qualify their results with the acknowledgment that the results may be different if there were more beetles present, but this does point to the fact that, as the authors say, “[w]hile these approaches [thinning, prescribed burning, and a combination of the two] are already in widespread practice, their efficacy in meeting objectives, and their impacts on forest ecosystems are mostly unknown” (Six & Skov 2009). Another recent peer-reviewed, published study done by Forest Service researchers found that thinning for fire risk reduction resulted in higher levels of beetle infestation than no treatment: the “mean percentage of residual trees attacked by bark beetles ranged from 2.0% (untreated control) to 30.2% (plots thinned in spring with all biomass chipped)” (Fettig et al 2006). In light of these studies and others like them, there is at least some scientific uncertainty and controversy that should have been disclosed to the public in the FEIS. 40 C.F.R. § 1502.9(b).

**B. Impacts on Future Wildfire Risk**

The FEIS says that the dominant fire regime for the area is mixed severity. FEIS 175. The FEIS argues that “[l]ack of thinning in dense pine stands contributes to an increase in wildland fire behavior.” FEIS 197. The implications here and throughout the DEIS is that commercial thinning will reduce wildfire severity in the Project area. See also FEIS 198 (The proposed treatments, combined with monitoring and foreseeable future projects, would decrease the risk of large-scale, high-intensity wildfire damage . . . ”) The Forest Service does not provide any reference to any published, peer-reviewed scientific study that supports this position in a mixed conifer, mixed severity fire regime. See Brown et al (2004) (explaining
the difference between different forest types and fire regimes). To the contrary, published, peer-reviewed scientific studies have found that commercial thinning actually increases fire severity, unless all logged units also received concurrent prescribed burning treatments (Raymond & Peterson 2005). In this Project, less than one-fourth of the mechanical treatment units will also undergo prescribed burning. The preferred alternative will allow 5,190 acres of mechanical treatments, but only “1,282 acres of the proposed burning would occur on sites also proposed for mechanical treatments.” FEIS S-2. Thus, the best available science indicates that the Project will actually increase fire severity on three quarters of the acreage proposed for logging.

Another peer-reviewed, published scientific study found that dense mixed conifer forests burned with much lower severity than open forests (Odion et al 2004). Scientists have repeatedly expressed similar concerns to the Forest Service regarding the scientific controversies over implementing commercial logging ostensibly to reduce wildfire risk. See e.g. Sierra Club v. Eubanks, 335 F.Supp.2d 1070, 1077-79 (E.D. Cal. 2004); Sierra Club v. Bosworth, 199 F.Supp.2d 971, 979-981 (N.D.Cal. 2002). In order to comply with NEPA, the Forest Service must disclose the scientific controversy over using commercial logging to reduce wildfire risk to the public in the body of the final EIS. 40 C.F.R. § 1502.9(b). It must respond to the responsible scientific viewpoints noted above and elsewhere in the literature, that commercial logging will increase fire risk, not decrease fire risk. 40 C.F.R. § 1502.9(b). In order to comply with NFMA, the Forest Service must demonstrate that it has conducted a literature search of the best available science on commercial thinning for wildfire risk reduction in mixed severity fire regimes and considered that science in the planning process for this Project. 36 C.F.R. 219.11 (2001), FSM 1921.81 (2006).

While it may seem “intuitively obvious” that dead trees will lead to more fires, there is little scientific evidence to support the contention that beetle-killed trees substantially increase risk of large blazes. In fact, dead trees don’t automatically lead to more fires since climate/weather events, not fuels, largely controls large blazes (Black et al., 2010). If the climate/weather isn’t conducive for fire spread, it doesn’t much matter how much dead wood you have piled up, you won’t get a large fire.

Although it is widely believed that insect outbreaks set the stage for severe forest fires, the few scientific studies that support this idea report only a small effect, while other studies have found no increase in fire following outbreaks of spruce beetle and mountain pine beetle (Kulakowski et al., 2003; Bebi et al., 2003; Kulakowski and Veblen, 2007; Simard et al., 2008; Jenkins et al., 2008; Bond et al., 2009; Tinker et al., 2009).

Theoretically, the effect of outbreaks on subsequent fires will vary with the time since the outbreak occurred (Romme et al., 2006). For example, it is reasonable to expect that foliar moisture in trees killed by beetles will decrease and canopy density will be reduced during and immediately after an outbreak; in subsequent years, canopy density may be further reduced as dead needles and small branches fall from killed trees, which may be associated with an increase in volume of large fallen fuel; and finally increased growth of smaller trees may lead to greater structural heterogeneity and fuel ladders (Romme et al., 2006; Bentz et al., 2009). Although such a model is theoretically possible, studies on the influence of outbreaks on subsequent stand-replacing fires over a range of years since outbreak have found little or no increase in fire occurrence, extent or severity.

To understand why beetle-killed trees don’t necessarily lead to large fires, one needs to know more about how bark beetles affect forests. Younger trees are not killed by beetles, and remain in the forest to fill the void created by the death of more mature trees. In effect, bark beetles “thin” the forest but typically there are still lots of trees growing on the site—some large mature trees and a lot of smaller ones. So the “forest” is not destroyed, nor does it “disappear” as may be implied from the hysterical statements coming from logging proponents, and others connected to the timber industry.
Beetle-killed lodgepole pine stands, which were characterized by lower density, experienced significantly lower fire severity compared to adjacent burned areas that had not been affected by beetles in the 3,400-hectare (8,398-acre) Robinson Fire that burned in Yellowstone National Park in 1994 (Pollet and Omi, 2002). A possible explanation is that beetle kill may actually decrease the hazard of high-severity crown fire by reducing the continuity of the canopy.

When a bark beetle attempts to bore into the tree, the tree uses its sap to push out the beetle and any eggs. A strong healthy tree with sufficient resources can often flush out the beetles. Trees under stress from drought or damage from other causes are more vulnerable; so while beetles do kill trees, they aren’t able to “destroy the forest.” Many smaller trees—and even a significant number of mature trees—survive. Since bark beetles tend to focus on larger trees, and not all trees are killed, this has important implications for fire risk. Fine fuels—not large snags—are the prime ingredients for sustained fire.

Lynch et al. (2006) also examined the influence of previous beetle activity on the 1988 Yellowstone fires by testing whether fire was more likely where beetles had killed trees than in areas unaffected by the beetles. These researchers found that stands affected by beetles in 1972-5 had a higher probability of burning but that the increase was only about 11 percent compared to areas unaffected by beetles. In contrast, stands that were affected by beetles in 1980-3 did not increase the likelihood of fire in comparison to uninfested stands (Lynch et al., 2006).

It has been hypothesized that the risk of fire may increase only during and immediately after outbreaks of bark beetles when the dry red needles are still on the trees (Romme et al., 2006). However, Kulakowski and Veblen (2007) found that ongoing outbreaks of mountain pine beetle and spruce beetle did not affect the extent and severity of fire and suggested that changes in fuels brought about by outbreaks may be overridden by climatic conditions. Tinker et al. (2009) examined fuel conditions for 35 years following outbreaks of mountain pine beetle in Yellowstone National Park. They documented reduced canopy moisture content after an outbreak, which was coupled with reduced canopy bulk density.

In simulation models of fire behavior, under intermediate wind conditions (20 to 60 kilometers per hour, or 12.5 to 37 miles per hour), the probability of active crown fire in stands recently affected by beetles was significantly lower than in stands not affected by beetles (Tinker et al., 2009). If winds were below 20 kph, (12.5 mph) or above 60 kph (37 mph), stand structure had little effect on fire behavior. Thus, although the canopy was drier immediately after an outbreak, no increase in fire risk was observed likely because of the more important effect of reductions in canopy bulk density.

So what you have after a major beetle outbreak is a lot of standing upright big boles. You can’t get big logs to burn unless you have fine fuels beneath them to sustain the heating process. That is why one uses small kindling and other fine fuels to start a campfire, and must continuously feed small wood under the bigger logs to keep the fire going. Assuming you have the right conditions for a fire in the first place, a forest fire will spread more rapidly, and with greater intensity, in a totally green forest than a sea of dead boles, in part because the green forest possesses a lot more fine fuels in the form of resin-filled needles and small branches.

Other independent modeling studies have also predicted a reduced risk of active crown fire five to 60 years after outbreaks, due to decreased canopy bulk density (Page and Jenkins, 2007b; Jenkins et al., 2008). The best available science indicates that outbreaks of bark beetles in lodgepole pine may have little or no effect on subsequent fires and may in some cases actually reduce the risk of fire. In contrast, there is strong scientific evidence linking severe forest fires in lodgepole pine to drought conditions (Bessie and Johnson, 1995; Sibold and Veblen, 2006; Schoennagel et al., 2004). Thus, the occurrence of severe fires in lodgepole pine forests is primarily influenced by climatic conditions rather than changes in fuels caused by bark beetle outbreaks.

Tree flammability is not constant, but varies over time. It is highest immediately after beetles kill the tree, and brown needles and small branches remain on the tree. However, after a winter or two, the needles and
smaller branches are knocked from the trees, and their flammability goes way down since the remaining upright snags are actually quite resistant to flames. Thus, the immediate threat from bug-killed trees is not likely to be great, especially if the climate/weather is wet. It is generally only after understory trees, released by the death of more mature canopy trees, grow taller and provide a ladder into the canopy that fire hazard again increases. These ladder fuels, along with any dead snags that have toppled to the ground, can potentially lead to greater fire hazard. But this process takes decades.

Potential is not the same as occurrence. Most of the high, rocky granite outcrop areas of the central core of the Black Hills found in the Norbeck area are found at more moist, higher elevations which simply do not dry out enough to burn well in most years. That is why pine forests in the Harney Range typically have long rotations between burns—on the order of hundreds of years in some places. Thus the presence of dead trees does not necessarily lead to fires. The probability of any particular bug-killed stand being ignited by lightning (or humans) during the few years out of a hundred when they are dry enough to carry a large blaze is actually quite small. So even if there is a lot of dead wood on the ground, that doesn’t mean there will be large blazes. Probability is important—and the probability is low.

The Norbeck FEIS states that the dominant fire regime for the area is mixed severity, which includes both low severity surface fires as well as high intensity stand-replacing fire. (FEIS at 175). Thus, it appears that historically wildfires would naturally thin areas to low density (like 4A) via surface fires, as well as completely reverting stands to early successional stages (like 1 or 2) via stand-replacing fires. This begs the question: if beetles are naturally reducing stand densities on the Memorial to levels that would historically be maintained by wildfire, why is logging and thinning necessary?

The Norbeck FEIS argues that “[l]ack of thinning in dense pine stands contributes to an increase in wildland fire behavior.” (FEIS at 197). The implication here and throughout the FEIS is that commercial thinning will reduce wildfire severity in the Project area. The Forest Service does not provide any reference to any published, peer-reviewed scientific study that supports this position in a mixed conifer, mixed severity fire regime. See Brown et al (2004) (explaining the difference between different forest types and fire regimes).

Another peer-reviewed, published scientific study found that dense mixed conifer forests burned with much lower severity than open forests (Odion et al 2004). Scientists have repeatedly expressed similar concerns regarding the scientific controversies over implementing commercial logging ostensibly to reduce wildfire risk. See e.g. Sierra Club v. Eubanks, 335 F.Supp.2d 1070, 1077-79 (E.D. Cal. 2004); Sierra Club v. Bosworth, 199 F.Supp.2d 971, 979-981 (N.D.Cal. 2002).

In order to comply with NEPA, the Forest Service must disclose the scientific controversy over using commercial logging to reduce wildfire risk to the public in the body of the FEIS. 40 C.F.R. § 1502.9(b). It must respond to the responsible scientific viewpoints noted above and elsewhere in the literature, that commercial logging will increase fire risk, not decrease fire risk. 40 C.F.R. § 1502.9(b). In addition, the Forest Service must demonstrate that it has conducted a literature search of the best available science on commercial thinning for wildfire risk reduction in mixed severity fire regimes and considered that science in the planning process for the Norbeck Wildlife Project. The FEIS fails to comply with NEPA in all these areas.
XVI. The ROD/FEIS Fail to Present a Reasonable Range of Alternatives (NEPA).

The Norbeck Wildlife Project FEIS presents an inadequate range of alternatives, since all the action alternatives are essentially the same. From Table 4 [FEIS at 30], we find that the three action alternatives will mechanically treat from 4,723 to 5,190 acres, and conduct prescribed burns on 2,158 to 2,211 acres. Similarly, the action alternatives would either burn 0 or 5,291 acres of wilderness [Table 7, FEIS at 32]. These are distinctions without a meaningful difference, and do not constitute the “reasonable range” envisioned by NEPA.

Moreover, virtually all of the suggested alternatives rejected by the Forest Service [FEIS at 27-29] would have provided more wildlife protection and breeding habitat than the action alternatives promulgated for the Norbeck Wildlife Project. The No-Action is the only analyzed alternative that complies with the specific wildlife mandate of the Norbeck Organic Act.

The last issue in our comments is the more general issue of the Forest Service’s failure to consider reasonable alternatives for this “wildlife project.” NEPA directs federal agencies to “rigorously explore and objectively evaluate all reasonable alternatives” in an EIS. 40 C.F.R. § 1502.14(a). As the Tenth Circuit Court of Appeals has stated:

The reasonableness of the alternatives considered is measured against two guideposts. First, when considering agency actions taken pursuant to a statute, an alternative is reasonable only if it falls within the agency's statutory mandate. []. Second, reasonableness is judged with reference to an agency's objectives for a particular project.

New Mexico ex rel. Bill Richardson v. BLM, 565 F.3d 683, 708 (10th Cir. 2009). In New Mexico, the court rejected a federal agency’s argument that it did not need to consider an alternative that prohibited leasing and development in a particular section of federal public land. The court stated:

It would fit well within the scope of the plan objectives for BLM to conclude that no lands in the plan area are suitable for leasing and development. Accordingly, a management alternative closing the Otero Mesa would have been fully consistent with the objectives of the RMPA.

Applying the rule of reason, we agree with NMWA that analysis of an alternative closing the Mesa to development is compelled by 40 C.F.R. § 1502.14. Excluding such an alternative prevented BLM from taking a hard look at all reasonable options before it.

As discussed above, the lands at issue are extraordinary in their fragility and importance as habitat. . . Given the powerful countervailing environmental values, we cannot say that it would be “impractical” or “ineffective” under multiple-use principles to close the Mesa to development. Accordingly, the option of closing the Mesa is a reasonable management possibility. BLM was required to include such an alternative in its NEPA analysis, and the failure to do so was arbitrary and capricious.

New Mexico, 565 F.3d at 710. The stated purpose of this Project is “to meet habitat objectives for focus species.” FEIS 5. Thus, any action that helps to meet habitat objectives for focus species is within the scope of this Project and could be reasonably considered. See New Mexico, 565 F.3d at 710.

Nonetheless, in the FEIS, the Forest Service dismissed numerous suggestions by the public to consider an alternative for the Project that would have included various protections or habitat improvements for Norbeck focus species. For example, the Forest Service rejected all of the following suggestions that would protect habitat for Norbeck focus species:
• refraining from thinning dense, mature forest habitat, i.e. refraining from eliminating preferred nesting habitat for several focus species;

• retaining all trees over 10 inches dbh, i.e. retaining nesting trees for several focus species;

• prohibiting livestock grazing, i.e. eliminating competition between big game focus species and livestock;

• prohibiting or restricting motorized recreation and access, i.e. increasing security and habitat effectiveness for big game focus species; and

• designating some of the Project area as wilderness, i.e. increasing security for all focus species.

FEIS 27-28.

If the purpose of this Project is really to meet the needs of Norbeck focus species, all of these dismissed suggestions are eminently reasonable alternatives that would meet that purpose and are thus squarely within the scope of the Project. Just as in Davis v. Mineta, these “[a]lternatives were dismissed in a conclusory and perfunctory manner that do not support a conclusion that it was unreasonable to consider them as viable alternatives . . . .” 302 F.3d 1104, 1122 (10th Cir. 2002). The analysis in New Mexico controls this case. Just as in New Mexico, in this case the Project area is “extraordinary in [its] fragility and importance as habitat.” New Mexico, 565 F.3d at 710. Indeed it is so important that it was Congressionally-designated as a wildlife preserve, and is the only wildlife preserve on the entire Black Hills National Forest and rare on the National Forest system as a whole. FEIS 76. Just as in New Mexico, restricting resource extraction and human use is not an unreasonable alternative because it is well within the Forest Service’s statutory authority, especially in light of the overriding mandate of the Norbeck Organic Act to protect bird and game species. New Mexico, 565 F.3d at 710. Thus, just as in New Mexico, here the Forest Service’s failure to consider alternatives that restrict or prohibit resource extraction and human use is a violation of NEPA. New Mexico, 565 F.3d at 710.
XVII. The ROD/FEIS Fail to Consider the ‘Breeding Place’ Role of the Norbeck Preserve for the Black Hills National Forest as a Whole (NEPA).

The Norbeck Wildlife Project FEIS failed to address the larger questions that have long been raised, but have never been answered: What is the role being played by the Norbeck Preserve for forest-wide wildlife diversity and viable populations? How will this role change over time as climate change accelerates? Should “old growth” forest be protected as much as possible on the Norbeck in order to buy time for climate change mitigation measures? Should “yellow-barks” be considered an endangered species on the heavily manipulated BHNF and included as a Focus Species for the Norbeck Preserve?

The Norbeck Timber Sale FEIS fails to assess the critical role played by the Norbeck Preserve in maintaining species on the BHNF, and the value of the extremely rare habit provided by the Norbeck's large yellow-bark pines. The criticality of the Norbeck Preserve to maintaining viable populations forest-wide must be assessed in a new NEPA analysis.
XVIII. The ROD/FEIS Fail to Meaningfully Respond to Substantive and Relevant Public Comments (NEPA).

One of the fundamental tenets and guiding principles of NEPA is the requirement that the public must be given ample notice and opportunity to comment on agency actions, and that the agency must carefully consider such comments in its decisionmaking. See State of California v Block, 690 F.2d 753, 770 (9th Cir. 1982) ("NEPA's public comment procedures are at the heart of the NEPA review process") (emphasis added); id. at 771 ("NEPA requires not merely public notice, but public participation in the evaluation of environmental consequences of a major federal action").

Regulations implementing NEPA state that federal agencies must "facilitate public involvement in decisions," 40 C.F.R. § 1500.2(d), and require that agencies solicit and respond to comments "individually and collectively." 40 C.F.R. § 1503.4.

Regulations implementing NEPA clarify agencies' duties regarding responding to comments. CEQ regulations state that "[a]n agency preparing a final environmental impact statement shall assess and consider comments ... individually ..., and shall ... stat[e] its response in the final statement." 40 C.F.R. § 1503.4 (emphasis added.). In addition, the agency must discuss "any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised." 40 C.F.R. § 1502.9(b) (emphasis added.) The CEQ has clarified that when responding to individual comments on a draft EIS, "the agency must state what its response was, and if the agency decides that no substantive response to a comment is necessary, it must explain why." Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026 (Mar. 23, 1981), answer to question 29a.

Where public comment has been ignored or responses not prepared, the agency decisionmaker will fail to base his or her decision on the record NEPA and its implementing regulations require. Unfortunately, the Forest Service's analysis of and dealings with public comment on the Norbeck Wildlife Project violate NEPA, rendering inadequate the current FEIS and ROD. As highlighted throughout this Appeal, the FEIS has failed to provide reasonable responses to the substantive and relevant comments submitted by the public. On this basis alone, the Norbeck Wildlife Project ROD/FEIS should be withdrawn and revised.
ATTACHMENTS

Table of Contents

Vol1—References
- Allen and Long 2008 norbeck_08_mpbr_report
- Allen K 2009 rscs_7_09_norbeck_noaction
- Allen K NWP_MPB_Update_Nov2009
- Anderson T 2003 woodpeckers
- BCA et al 2006—Phase II Appeal
- Black et al 2010—Insects and Roadless Forests
- Ghalambor C 2003 pygmy_nuthatch
- Kennedy PL 2003 northern_goshawk
- Rumble 2005 rmrs_m001
- Rumble et al 2001—364-W Bird Diversity
- Schmidt CA 2003a northern_myotis
- Schmidt CA 2003b big_ear_bat
- Schmidt CA 2003b smallfooted_bat
- Schmidt CA 2003c longear_bat
- Schmidt CA 2003d longlegged_bat
- Wiggins D 2005—BrownCreeper

Vol2—Legal Authority
- CFR-2009-title36-vol2-part241
- Okawita Letter to President Obama 11-23-09
- Norbeck Organic Act of 1920
- SDGFP_mou_oct_09_extension

Vol3—Litigation Documents
94-D-2273 Sierra Club v Forest Service
- 94-D-2273 D-1 Complaint
- 94-D-2273 D-31 Amended Complaint
- 94-D-2273 D-38 Plaintiffs Opening Brief
- 94-D-2273 D-69 Defendants Response Brief
- 94-D-2273 D-73 Plaintiffs Reply Brief
- 94-D-2273 D-77 Oral Argument pp 1-24
- 94-D-2273 D-77 Oral Argument pp 25-48
- 94-D-2273 D-77 Oral Argument pp 49-73
- 94-D-2273 D-83 Judge Daniel Order

99-1445 Sierra Club v Forest Service
- 94-D-2273 Order
99-1445 Appellants Opening Brief i-iv
99-1445 Appellants Opening Brief pp 1-16
99-1445 Appellants Opening Brief pp 16-35
99-1445 Appellants Reply Brief
99-1445 Appellees Response Brief Addendum
99-1445 Appellees Response Brief i-vi
99-1445 Appellees Response Brief pp 1-30
99-1445 Appellees Response Brief pp 31-53
99-1445 Judgment

Vol4—Other Appeal Documents
   BCA Appeal VII—Snags
   BCA Appeal XI—Wildlife
   BCA etal Phase II Appeal—Goshawk pp 35-48
   BCA etal Phase II Appeal—Snags pp 23-34
   NEC FOIA Request 1-13-10

Vol5—Other Agency Documents
   1983_MA4B_SandG
   Chiefs BHNF LRMP Appeal Ruling—Roadless Areas
   Chiefs BHNF LRMP Appeal Ruling 10-12-99
   LRMP App-C pp 18-19 Additional Norbeck Information
   LRMP97 App-E Further Norbeck Direction
   LRMP97 FEIS App-C
   LRMP97 III-1 to III-13 MA-1-1A
   LRMP97 III-57 to III-63 MA-4-2B
   LRMP97 III-95 to III-104 MA-5-4A
   NPS 2010—Final MORU MPB Action Plan
   MWP_MPB_Update_Nov2009
   SDGFP 2010 Resident Elk
   SDGFP BH Deer FTurkey
   South Dakota Small Game Seasons
   South Dakota Trapping Information
   South Dakota’s Big Game Seasons

Vol6—Norbeck Stand Data
   Beaver Park MPB Impacts
   Beaver Park MPB Impacts Before-After-Average
   Beaver Park MPB Total Tree and SS Impacts
   FEIS App-D Alt4-ROD
   Grizzly 093003 CT-SS Formulae (RichTextFormat)
   Grizzly 093003 PP Stand Density Analysis
   Grizzly 093003 PP Stands
   Grizzly PP Stand Density Trees-Acre
   Modified Table 34 Total NWP Trees
   NEEDLES Stand Data Analysis
Norbeck Comparison with Other Timber Sales

**Vol7—Maps and Images**
- Beaver Park SS-96 (jpeg)
- BPRA_ss_post_706 (jpeg)
- FEIS-96 SS Key (jpeg)
- Harney Peak from Southeast—MPB Impacts (jpeg)
- Norbeck SS-96 (jpeg)

**Vol8—Miscellaneous**
- Roadless Vilsack RCJournal 5-29-10