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Working to protect and restore Western Watersheds

Western Watersheds Project

Appeal Deciding Officer
USFS Region 2
740 Simms Street
Golden, CO 8040

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Working to protect and restore Western Watersheds

Appeal Deciding Officer
USFS Region 2
740 Simms Street
Golden, CO 8040

December 5, 2010

Dear Appeal Deciding Officer,

Enclosed, please find our appeal of the Mystic EIS and ROD's from the Mystic Ranger District on the Black Hills Isabel National Forest.

We look forward to working with the Forest Service in fulfilling the intent of NEPA, NFMA and the other statutes and regulations the Forest Service works within, through a complete and accurate analysis of the impacts of this project and better decision-making.

Sincerely,

Jonathan B. Ratner
Director – Wyoming Office

APPEAL OF DECISION OF THE MYSTIC DISTRICT RANGER,
BLACK HILLS NATIONAL FOREST

Western Watersheds Project APPELLANT v. Robert J. Thompson District Ranger RESPONDENT	Notice of Appeal, Statement of Reasons and Request for Relief Regarding the Mystic EIS and ROD's

NOTICE OF APPEAL

STATEMENT OF REASONS

RELIEF REQUESTED

DATED this 5th day of December, 2010

Jonathan B. Ratner
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NOTICE OF APPEAL

On October 13th, 2010, District Ranger Robert Thompson signed two ROD's for the Mystic group of allotments EIS. This is a Notice of Appeal of that decision pursuant to 36 C.F.R. Part 215. Western Watersheds Project (WWP) have members who use and enjoy the Black Hills National Forest and the area covered by the Decision. Further, WWP submitted copious scoping comments and provided dozens of agency documents and research findings to be considered for this NEPA process as it was developed, all of which seem to have been ignored. This appeal is timely pursuant to 36 C.F.R. § 215.14.

Appellant will demonstrate that the District Rangers' decision is arbitrary and in error and not in accordance with the legal requirements of federal statutes and regulations. Consequently, Appellant requests that the ROD's be withdrawn, a proper and defensible NEPA process be conducted and a new decision issued that protects our public resources.

THE APPELLANT

Western Watersheds Project is a regional, membership, non-profit conservation organization with over 2,000 members, based in Hailey, Idaho, with offices in Idaho, Montana, Wyoming, California, Arizona and Utah. WWP commented on the scoping notice and the DEIS. WWP's staff and members use the analysis area for a variety of activities, including fishing, hiking, hunting, wildlife viewing, spiritual renewal, biological and botanical research, photography, and for other forms of recreation. They will be adversely affected by the decision as proposed. WWP claims partial ownership in the public lands covered by this decision and consequently has legal standing to participate in the process and challenge those decisions it finds unacceptable.

WWP has participated in various NEPA processes and in meetings with the Black Hills National Forest regarding a variety of other projects on that National Forest and have spent considerable time and resources surveying the resources contained within the boundaries of the Forest and the project area.

WWP has invested significant time, resources and effort at each stage of the process by providing considerable input of research, analysis, agency reports, meetings, tours and communications with district personnel and FOIA requests and subsequent analyses, but even though we brought to the decision-maker's attention a number of significant issues in the underlying assumptions of the analysis, as well as specific details of the process, our input was ignored.

In addition to the issues raised below, we incorporate by reference all of the points raised in our DEIS comments here as appeal points.

The EIS and ROD's for the Mystic group of allotments are based on flawed and/or inadequate information. By selecting the Proposed Action, the Forest Service is in violation of NEPA, NFMA, CWA and the APA. The following analysis details how these federal statutes and agency regulations will be violated by the project's implementation.

I. THE EIS AND ROD'S VIOLATE NFMA, NEPA

A) THE ROD'S FAILED TO ADEQUATELY IMPLEMENT DESIGN CRITERIA AND MITIGATION TO PROTECT SENSITIVE SPECIES AND INSURE VIABILITY

According to FS policy, the Forest "must develop conservation strategies for those sensitive species whose continued existence may be negatively affected by the Forest Plan or a proposed project."[1] FSM 2670.45. These strategies must contain quantifiable objectives, and must be adopted prior to implementation of projects that would adversely impact that species habitat. FSM 2622.01, 2670.45. The EA failed to discuss these nor did the DN implement them. This violates NFMA and NEPA.

Regulations promulgated to ensure such diversity mandate that fish and wildlife habitat be managed to maintain viable populations and the diversity of species throughout the planning area. 36 C.F.R. §§ 219.19, 219.27.

In accord with 16 U.S.C. 1604(g), which requires the promulgation of regulations that "provide for diversity of plant and animal communities" in the development and revision of Forest Plans, the 1982 regulations implementing NFMA provided specific direction concerning species viability at 26 C.F.R. 219.19:

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

According to Forest Service policy interpreting the 1982 regulations on viability, "well distributed" as used in NFMA means "a population's *unceasing presence* 'throughout its

[1] USDA Forest Service defines sensitive species as "those plant and animal species identified by a regional forester for which population viability is a concern, as evidenced by *significant current or predicted downward trends in population numbers or density, or significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution*." (emphasis added, excerpted from USFS Official Website).

existing range in the planning area' (*Hilmon* 1982)." (emphasis added) USDA 1983 ("Wildlife Resource Planning Assistance To the Payette and Boise National Forests," Rocky Mountain Research Center, USFS).

In order to estimate impacts of management activities on fish and wildlife populations and diversity, certain species must be identified as "management indicator species" ("MIS") for the various biological communities represented on the forest. 36 C.F.R. § 219.19. Management alternatives are to be evaluated in terms of the quality of habitat and the population trends of the MIS. Id. The regulations go on to require that viability be insured through the utilization of quantitative inventory analysis:

> "Forest planning shall provide for diversity of plant and animal communities and tree species consistent with the overall multiple-use objectives of the planning area. Such diversity shall be considered throughout the planning process. *Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition.* For each planning alternative, the interdisciplinary team shall consider how diversity will be affected by various mixes of resource outputs and uses, including proposed management practices." (emphasis added) 36 C.F.R. 219.26

This requirement for insuring species viability with quantitative data is in accord with the NFMA requirement for "continuous monitoring and assessment," 16 U.S.C. 1604(g)(3)(C), as well as the Forest Supervisor's duty to "obtain and keep current inventory data appropriate for planning and managing" the forest's resources. 36 C.F.R. 212(d).

> "USDA Forest Service defines sensitive species as those plant and animal species identified by a regional forester for which population viability is a concern, as evidenced by *significant current or predicted downward trends in population numbers or density, or significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution.*" (emphasis added), excerpted from USFS Official Website)

Scientific studies have disclosed that a minimum viable population of most vertebrates consists of at least 7,000 breeding adults (Reed et al. 2003, 2004, see also exhibits), but the Forest has provided no data to indicate that the range of Sensitive Species are currently viable, let alone make a defensible determination that the project will not impact viability.

MIS species are likewise not dealt with in accordance with regulation. In order to sufficiently analyze and assess impacts to management indicator species, the Forest must gather and utilize quantitative population trend data. Although the USFS should be well aware of this duty by now, it seems as if the agency continues to rely on measures of habitat and/or inadequate population data as a proxy for actual trend data. As courts have widely held, such a reliance is not appropriate. See e.g., UEC v. Bosworth, 372 F.3d 1219, 1225 (10th Cir. 2004). In this case, the Forest does not even have data on habitat quality trends.

The MIS section fails to comply with the extensive case law regarding management and analysis of MIS species. We request that they Forest Service read through this wide range of case law and correct its analysis in order to comply with NEPA and NFMA. (See Exhibits)

We also attach as an exhibit a March 21, 2001 letter from the Regional Office discussing TES species requirements after a string of losing litigation. As an attachment the RO provided checklists to help insure compliance with requirements. These requirements have not been complied with.

We also attach a wide range of FS manuals with highlighted material. In nearly every case these requirements have been ignored.

The NEPA document fails to provide any information regarding current productivity as required by NFMA in comparison with capable acres. Also the pattern of capable acres needs to be displayed to allow review of feasibility of livestock movements and use of no-capable acres. This information is vital to understand stocking rates within these allotments.

B) THE EIS AND ROD'S FAILED TO COMPLY WITH FOREST PLAN REQUIREMENTS

The EIS and ROD's fail to provide discussion, analysis or evidence that all the applicable Forest Plan Standards, Guidelines, MA direction and other requirements have been complied with.

FSH 2209.13 91.1 requires:

"Under the National Forest Management Act (NFMA), project level decisions which authorize the use of specific National Forest System lands for a particular purpose like livestock grazing must be consistent with the broad programmatic direction established in the LRMP. Consistency is determined by examining whether the project level decision will implement the goals, objectives, desired conditions, standards and guidelines, and monitoring requirements from the LRMP."

No such examination has taken place in the EIS or ROD's.

C) THE EIS AND ROD'S FAIL TO COMPLY WITH THE SENSITIVE SPECIES POLICY

The FSM 2670.5 defines a Sensitive Species designation as when the Regional Forester determines that a species:

"for which population viability is a concern, as evidenced by:
a. Significant current or predicted downward trends in population numbers or density.
b. Significant current or predicted downward trends in habitat capability that would reduce a species' existing distribution."

This manual goes on to define the requirements the Forest Service must follow with regards to the management of Sensitive Species:

"2672.1 - Sensitive Species Management. Sensitive species of native plant and animal species must receive special management emphasis to ensure their viability and to preclude trends toward endangerment that would result in the need for Federal listing. There must be no impacts to sensitive species without an analysis of the significance of adverse effects on the populations, its habitat, and on the viability of the species as a whole. It is essential to establish population viability objectives when making decisions that would significantly reduce sensitive species numbers."

The EIS fails to discuss viability issues at all, relying instead on unsupported conclusory statements.

The FSM also requires that the Forest Service:

"2670.22 - Sensitive Species.
1. Develop and implement management practices to ensure that species do not become threatened or endangered because of Forest Service actions.
2. Maintain viable populations of all native and desired nonnative wildlife, fish, and plant species in habitats distributed throughout their geographic range on National Forest System lands.
3. Develop and implement management objectives for populations and/or habitat of sensitive species."

We saw no evidence in the EIS that the Forest Service analyzed the effectiveness of the "management practices" proposed, how they relate to current science, or whether the current populations were biologically viable or what the relation of the occupied habitat was with unoccupied habitat and habitat made unsuitable due the Forest Service's decisions to permit domestic sheep grazing within the project area and throughout the Forest. We also found no "management objectives" for this species recovery and removal from the R2 Sensitive Species list.

The FSM additionally requires that the Forest Service:

"2670.45 - Forest Supervisors. The Forest Supervisors:
2. Develop quantifiable recovery objectives and develop strategies to effect recovery of threatened and endangered species. Develop quantifiable objectives for managing populations and/or habitat for sensitive species.

2672.32 - Forest Plan Objectives for Sensitive Species. For sensitive species, include objectives in Forest plans to ensure viable populations throughout their geographic ranges. Once the objectives are accomplished and viability is no longer a concern, species shall not have "sensitive" status."

We could find no evidence that any "quantifiable objectives" for the recovery of any of the Sensitive Species were developed nor were these "quantifiable objectives" discussed

in the EIS. Nor did we find any evidence that the Forest Service has amended the Forest Plan to include the "objectives" required in 2672.32 even though this species was added to the Sensitive Species list nearly 3 years ago.

"2670.32 - Sensitive Species
3. Avoid or minimize impacts to species whose viability has been identified as a concern.
4. If impacts cannot be avoided, analyze the significance of potential adverse effects on the population or its habitat within the area of concern and on the species as a whole. (The line officer, with project approval authority, makes the decision to allow or disallow impact, but the decision must not result in loss of species viability or create significant trends toward Federal listing.)"

Since the Forest Service has failed to determine if the current populations are viable (and provide its scientific rationale) the calls for this species are rendered baseless, for if the populations currently are not viable from a biological and genetic standpoint then any impact whatsoever would continue impacting viability and will cause a trend towards listing.

"2670.46 - District Rangers. The District Rangers:
1. Ensure compliance with legal and biological requirements for the conservation of threatened, endangered, and proposed species in District land management and project planning; ensure compliance with procedural and biological requirements for sensitive species.
2. Identify, manage, and protect essential and critical habitats to meet legal requirements and recovery objectives for Federally listed species; identify, protect, and manage habitat necessary to meet sensitive species objectives."

Here again the decision violates NFMA for failing to have any "objectives" to protect Sensitive Species habitat.

"2620.44 - Forest Supervisor. Each Forest Supervisor has the authority and responsibility to:
4. Evaluate the cumulative effects of proposed management on habitat capability for wildlife and fish, including endangered, threatened, and sensitive animal and plant species.

2620.45 - District Ranger. Each District Ranger has the authority and responsibility to:
2. Implement management direction and ensure that standards and objectives for wildlife and fish, including endangered, threatened, and sensitive animal and plant species are met.

2621.2 - Determination of Conservation Strategies. To preclude trends toward endangerment that would result in the need for Federal listing, units must develop conservation strategies for those sensitive species whose continued existence may be negatively affected by the forest plan or a proposed project."

Again, we see no evidence that the Forest Service has complied with these requirements

II. THE EIS VIOLATES NEPA

A) THE EIS FAILED TO ANALYZE AN APPROPRIATE RANGE OF ALTERNATIVES

NEPA regulations require that agencies should "(r)igorously explore and objectively evaluate all reasonable alternatives…"[2] Furthermore, "NEPA requires that federal agencies consider alternatives to recommended actions whenever those actions 'involve […] unresolved conflicts among alternative uses of available resources.'[3] Consideration of alternatives is critical to the goals of NEPA even where a proposed action does not trigger the EIS process. This is reflected in the structure of the statute: while an EIS must also include alternatives to the proposed action,[4] the consideration of alternatives requirement is contained in a separate subsection of the statute and therefore constitutes an independent requirement."[5]

The language and effect of the two subsections also indicate that the consideration of alternatives requirement is of wider scope than the EIS requirement. The former applies whenever an action involves conflicts while the latter does not come into play unless the action will have a significant effect. An EIS is required where there has been an irretrievable commitment of resources, but unresolved conflicts as to the proper use of available resources may exist well before that point. Thus the consideration of alternatives requirement is both independent of and broader than, the EIS requirement. Recent case law has established that consideration of alternatives that lead to similar results is not sufficient to meet the intent of NEPA.[6]

NEPA documents discuss alternatives to the proposed action, to "provide a clear basis for choice among options by the decision maker and the public."[7] The purpose of this requirement is "to insist that no major federal project should be undertaken without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means."[8]

Furthermore, the courts have taken federal agencies to task for stating a purpose and need so narrowly that only the agency's preferred alternative could meet it, thus subverting NEPA's clear requirement to "*rigorously explore and objectively evaluate all reasonable alternatives."*[9] The Seventh Circuit Court explained:

> "One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence) . . . If the agency constricts the definition of

[2] 40 CFR 1502.14[a]
[3] 42 USC 4332[2][E][1982]
[4] 42 USC 4332[2][C][iii][1982]
[5] See id. 4332[2][E]
[6] See Citizens for Environmental Quality v. United States, 731 F.Supp. 97 0, 989 (D. Colo. 1989); State of California v. Block, 690 F2d 753 (9th Cir. 1982)
[7] 40 C.F.R. 1502.14; see also 42 U.S.C. 4332(2) (E); 40 C.F.R. 1507.2(d), 1508.9(b).
[8] Environmental Defense Fund v. Corps of Engineers, 492 F.2d 1123, 1135 (5th Cir. 1974).
[9] 40 CFR 1502.14a

the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role."[10]

NEPA further states that it is the responsibility of the federal government to use all practicable means to attain the widest range of beneficial uses of the environment without degradation or other undesirable and unintended consequences.[11]

To make a decision, the first thing an agency must define is the project's purpose.[12] The federal courts cannot condone an agency's frustration of Congressional will, and if the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the NEPA process cannot fulfill its role. Nor can the agency satisfy the Act.[13]

FSH 2209.13 Section 92.21 states "There is a two-part decision to be made for authorizing livestock grazing.

1. Whether livestock grazing should be authorized on all, part, or none of the project area.

2. If the decision is to authorize some level of livestock grazing, then what management prescriptions will be applied (including standards, guidelines, grazing management, and monitoring) to ensure that desired condition objectives are met or that movement occurs toward those objectives in an acceptable timeframe."

This is repeated at Section 93.3f. Neither the EIS nor the ROD's provides any rationale as to why livestock grazing should continue to be permitted except to state that the permittees want to and it helps fulfill one (of many dozens) of the Forest Plan goals. The EIS and ROD's also failed to provide any analysis or rationale why certain areas should not be grazed such as Sensitive Species habitats or big game winter range where the Forest Plan requires that the needs of wildlife take priority over private livestock production.

This failure violates NEPA as well as NFMA.

Even more egregious is the refusal to consider changes in permitted numbers. We provide as exhibits various spreadsheets produced by the Forest Service regarding actual use of the last few years within the allotment. Each one of these documents indicate significantly less AUMs have been used in the allotment compared to the number of AUMs permit it, yet in nearly every instance the minimal utilization requirements currently in place have not been met.

NEPA requires that agencies "insure the professional integrity, including scientific integrity, of the discussions and analyses…They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied

[10] Simmons v. U.S. Army Corps of Engineers, 120 F.3d 664, Page Number (C.A.7 (Ill.) 1997)

[11] (NEPA, 42 U.S.C. 4231 Section 101(b)(3)).

[12] Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 195-96 (D.C.Cir.1991)

[13] 42 U.S.C. 4332(2)(E)

upon for conclusions relied upon in the statement…"[14] The NEPA document states "the scope of the analysis was limited to evaluating the appropriate level of permit it to livestock grazing". The record lacks any indication that the Forest conducted any type of scientifically sound analysis of the appropriateness of the project area for domestic livestock grazing or the appropriate level of such use. The only conclusion is that the Forest arbitrarily and capriciously decided that domestic livestock grazing is appropriate in the project area. That decision led to the omission of many reasonable alternatives to the proposed action, especially in light of the resource conditions.

NEPA "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision- making process and the implementation of that decision."[15] In other words, it "prohibits uninformed--rather than unwise--agency action."'[16] Yet, in the case of determining the appropriateness of domestic livestock grazing within the project area it appears that the Forest simply arrived at a predecisional conclusion that current livestock numbers and seasons of use were appropriate, an action which NEPA and the APA forbid.

Further, "relevant information" was purposefully withheld from the "decision-making process". This clearly violates NEPA

The management of Forest Service Lands is largely set forth in two laws, NEPA and the National Forest Management Act (NFMA). NFMA sets forth the process for determining whether or not livestock grazing is appropriate on certain parcels of land while the policy behind NEPA is to ensure environmental considerations are integrated into agency planning,[17] and that the public be informed in agency planning decisions.[18]

"NEPA ensures the agency ...will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience."[19] NEPA's disclosure goals are "to insure the agency has fully contemplated the environmental effects of its actions and to insure the public has sufficient information to challenge the agency.[20] The lack of scientific or verifiable data indicating the appropriateness of the proposed action, or grazing in general, inhibits the public's ability to challenge the agency's determination that such use, and the amount of authorized use, is appropriate for the project area. Moreover, the process for determining the appropriateness of domestic livestock grazing on public lands is set forth in NFMA and is known as a suitability determination. The regulations promulgated to implement the National Forest

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[14] 40 C.F.R. 1502.24
[15] Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 348 (1989)
[16] Custer County Action Ass'n. v. Garvey, 256 F.3d 1024, 1034 (10th Cir. 2001)
[17] 40 C.F.R. §1501)
[18] ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken....Accurate scientific analysis, expert agency comments, and **public scrutiny** are essential to implementing NEPA." 40 C.F.R. §1500.1(b) (emphasis added).
[19] Idaho Sporting Congress v. Thomas, 1998 WL 89066 (9th Cir. (Idaho)). *Citing* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989).
[20] Idaho Sporting Congress v. Thomas, 1998 WL 89066 (9th Cir. (Idaho)). *Citing* Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 758 (9th Cir. 1996)."

Management Act define "suitability" as, “The appropriateness of applying certain resource management practices to a particular area of land, as determined by an analysis of the economic and environmental consequences and the alternative uses foregone.”[21]

The regulations also require that "the suitability and potential capability of National Forest System lands for grazing animals and for providing habitat for management indicator species shall be determined.”[22]

The regulations thus require a site-specific review in which the agency determines whether grazing livestock is appropriate to particular areas, given the value of other uses diminished or foregone (e.g., wildlife, recreation, cultural, etc.). This was not done.

The meager information provided in the EIS fails to discuss the process that was used. As you well know the region has a guidance document on how to conduct capability and suitability analyses which specifically mention removing from capable acres those on sensitive or highly erosive soils, or slopes over those what cattle use and other factors. In addition, most forested vegetation types are not considered capable of supporting livestock.

NFMA requires the weighing the impacts of resource management practices is consistent with the Forest Service's mission of providing lands for multiple uses as required by NFMA and recognized in the Multiple Use Sustained Yield Act. Case law cited in the Service's guidance concludes that the "multiple use" concept as defined in law and regulations requires "a reasoned and informed decision that the benefits of grazing ... outweigh the costs" and a weighing of "the relative values of the resources" on a site-specific basis.[23] This was not done.

Only through such an analysis can the Forest determine whether or not livestock grazing is appropriate in the project area.

I would like to call your attention to the recent Order by the U.S. District Court in the matter *Western Watersheds Project v. USFS, No. 05-cv-189-E-BLW (D. Idaho)*.

As that decision holds, the Forest Service must assess “capability” of forest lands for livestock grazing on a site-specific basis, before authorizing livestock grazing. That decision recognized that the Forest Plans contains a more generalized capability analysis, which should act as the starting point for more site-specific analysis at the allotment level. The arguments put forth by the FS that capability and suitability analyses are just “exercises” was clearly dismissed by the court.

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[21] 36 C.F.R. § 219.3 (emphasis added)
[22] Id. at § 219.20(a).
[23] National Wildlife Federation v. BLM, No. UT-06-91-01 US Dep't of Interior, Office of Hearings & Appeals, Hearings Div.) (Rampton, J. 1993), p. 23, the "Comb Wash Allotment" decision; see Guidance, p. 6.

In order to determine the appropriateness of domestic livestock grazing in the area and in order to comply with NEPA's requirement to rely on the best available science[24], the Forest should have scientifically and accurately determined those lands which are capable and suitable for livestock grazing at the site-specific level. This is necessary to account for changes in range condition that have occurred over time.[25]

The EIS failed to accurately and quantitatively determine how much forage (i.e. forage capacity) is currently available. This fails to account for a variety of management activities that have occurred in the project area that may have had an effect on grazing capacity, including loss of productivity from livestock grazing.

The laws are clear that the Forest has an obligation to formulate and analyze alternatives. It is not the public's responsibility to provide the alternatives or the analysis of the alternatives. "Compliance with [NEPA] is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs."[26] As the Seventh Circuit recently noted, "[w]hat other alternatives exist we do not know, because the [government] has not looked."[27] And, "**the existence of a viable but unexamined alternative renders an environmental impact statement inadequate**."[28]

Appellants acknowledge that the Forest is not required to consider remote or speculative alternatives, but NEPA, as well as Forest Service policy, practice, and guidance clearly requires the Forest to consider "reasonable" alternatives that even may be inconsistent with regulation and policy.

The CEQ's 40 Most Asked Questions, which are incorporated into the Forest Service's NEPA regulations, provides this further guidance:

> Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense . . . An alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. Section 1506.2(d).
>
> Alternatives that are outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. Section 1500.1(a).

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[24] NEPA requires that agencies "insure the professional integrity, including scientific integrity, of the discussions and analyses…They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions relied upon in the statement…" (40 C.F.R. 1502.24)

[25] Heitschmidt, R.K., J.W. Stuth. 1991. Grazing Management: An Ecological Perspective. 297 p. Timber Press. Portland, OR.

[26] City of Davis v. Coleman, 521 F.2d 661, 671 (9th Cir. 1975)

[27] Simmons v. United States Army Corps of Engineers, 120 F.3d 664, 670 (7th Cir. 1997). See also City of Carmel-By-The-Sea, supra (government, not plaintiffs, has the burden of describing cumulative impacts).

[28] Alaska Wilderness Recreation & Tourism v. Morrison, 67 F.3d 723, 729 (9th Cir.1995)

Clearly, if the Forest is required to consider alternatives that require a change in the law or are outside their jurisdiction to implement, they must also consider otherwise reasonable alternatives that are "already decided by regulation and policy" such as a reduction in livestock numbers, season of use, or grazing technique. Reduced stocking rates and season of use are reasonable alternatives from a common sense standpoint, and they are economically feasible.

"[Courts] must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment."[29]

As the EIS itself shows, the differences between the 2 action alternatives are close to nonexistent. This means in reality, there are only 2 alternatives, then no grazing alternative which the Forest Service never seriously considered and the action alternative. No alternative, such as reducing AUMs were considered

The EIS did not have an adequate range of alternatives under NEPA due to these alternatives (i.e. reduced stocking rate, reduced season of use, no more "range improvements") and other alternatives not being studied and developed, despite the clear need for this alternative as documented in the administrative record. Therefore, the EIS and ROD's are clearly arbitrary and capricious decision making.

B) THE EIS FAILED TO ANALYZE PAST ACTIONS

The EIS failed to provide any review of how well past AMP's were implemented nor how effective the actions proposed in them were nor permittee compliance. The EA failed to examine assumptions and analyses made in previous NEPA processes to determine if current assumptions and analyses are valid and supportable. This violates NEPA.

The Forest Service is required to "disclose the history of success and failure of similar projects." Sierra Club v. Morton, 510 F.2d 813, 824 (5th Cir. 1975); National Wildlife Federation v. USFS, 592 F. Supp. 931, 943 (D. 1 Or 1984). This was not done. This violates NEPA.

C) THE EIS FAILED TO ANALYZE IMPACTS OF ACTIONS

The EIS failed to provide any analysis of the impacts or efficacy of the proposed water developments and other "range improvements". The EIS failed to provide information as to their exact locations, other than a general map. It failed to provide information regarding distance to water, soil properties, slope, vegetation, relations to crucial winter range or other wildlife habitats or cultural resources in the areas proposed or distance to water. The document discusses how these water developments will supposedly improve riparian conditions yet the majority of them are built within riparian areas themselves. The map provided in the EIS fails to provide sufficient detail to even present this

[29] Ibid

information and the text of the document fails to discuss any aspect of this. In fact there is no site-specific analysis for any of the water developments. This violates NEPA.

Further, the Watershed Conservation Practices Handbook does not allow the construction of water developments within riparian areas. This is the same Watershed Conservation Practices Handbook which the NEPA document supposedly relies on to come to the conclusion of no significant impacts.

While the EIS fails to provide an honest "hard look" at riparian conditions, the information provided by FOIA are clearly indicates significant riparian degradation has occurred and is occurring on the allotments. But the EA provide no rationale that would support the implementation of 4" stubble height for recovery. In fact the Forest Service's own GTR-INT-263 states that for recovery and to protect habitats of Sensitive Species, such as the creeks within this allotment, a stubble height greater than 6" may be needed.

D) THE EIS GROSSLY MISREPRESENTS SCIENCE, FAILS TO IMPLEMENT BAS

None of the volumes of research and analyses which the appellants provided to the Forest Service was utilized in this process or even addressed. In fact, the EA fails to even cite most of the sources we provided, let alone actually use them. The best available science is simply ignored as if it does not exist. This is even more of a concern because the best available science casts fundamentally serious doubt on the efficacy of projects such as this in terms of wildfire mitigation or need. This failure to even try to dispute or debunk, let alone consider or use, the best available science, much of which is produced by the Forest Service itself, is arbitrary and capricious and in violation of the NEPA, NFMA and the APA. The process likewise fails to comply with the Forest Service's direction for the implementation of Best Available Science (BAS). See also CWA section below.

Cowley, 1999 shows a 1" POPR stubble equating with 90% utilization and a 4" stubble on equates to 68% utilization. GTR-INT-308 provides similar information. Clearly, the default 4" do not comply with this direction.

WCHP 12.1(h) requires the Forest Service to manage riparian areas that have been invaded by POPR and upland species to achieve "more mesic native plant communities"

Nowhere within the various NEPA documents did we find an analysis of the use of Best Available Science (BAS) as required by current regulations.

E) THE EIS AND BA/BE'S DETERMINATIONS ARE INSUPPORTABLE

FSM 2672.1 states in part that "There must be no impacts to sensitive species without an analysis of the significance of the adverse effects on the populations, its habitat and on the viability of the species as a whole." The BA/BE fails to fulfill these requirements because it has, firstly, not defensibly determined that the population of the species in question is currently viable. Secondly, because the FS does not know what the condition of the various populations of the species in question are on the Forest, it can not defensibly determine the effects on these populations. For instance, if a population is near, at or below the population and demography necessary for viability, impacting

individuals or habitat may have a significant impact on the population. So without this critical information, all determinations are rendered insupportable. The FS has failed to complete viability assessments for any of the Sensitive Species, Species of Local Concern or MIS. This violates NEPA and NFMA.

FSM 2672.42 provides direction for BE's stating "Biological evaluations shall include the following:" (emphasis added) and lists seven points. The BE failed to comply with many of the requirements listed. This violates NEPA and NFMA.

We request the ARO and ADO review:

- Assessment of BE's and BA's" November 2000, USFS R5
- BE's/BA's: Suggestions for Improvements in their Preparation, USFS R5 1994
- OIG audit of documentation for projects in Region 5, USFS 2000
- OIG Evaluation Report No. 08801-10-AT January 1999

The overriding assumption guiding the conclusions in the EIS and BA/BE is that populations of species of local concern, MIS, and Sensitive Species are all currently viable. As an example, the Forest made viability determinations for countless sensitive species without obtaining, providing, or referencing any quantitative population data available for these species within the Forest.

To base management decisions and conclusions off of unsupported assumptions is entirely inappropriate and violates NEPA and the APA. Essentially, the agency has arbitrarily defined a baseline (in this case no baseline) for which to assess the significance of impacts and the effectiveness of management direction in relation to viability standards. The FS has assumed that every native species, including all sensitive species, that exist in the Forest currently have the numbers and distribution to ensure their continued existence is well distributed within the Forest. Yet the EA, BA/BE, and other information in the administrative record provide no information on population abundances, trends, or distributions for many species of concern or even habitat condition trend data, except for general data for a few hunted species provided by the Game and Fish Department. As a result, the agency's effects and viability determinations in the BA/BE are fatally flawed as there exists no adequate context for which to base such determinations.

Further vitiating the agency's reliance on this arbitrarily established baseline is the fact that the FS itself does not reference or provide information that establishes what constitutes a minimum viable population for any species of concern on the Forest. This is of particular concern as recent scientific studies have reported that minimum viable populations of vertebrate species to consist of at least approximately 7,000 breeding adults (Reed et al. 2003, 2004 and exhibits).

This failure violates NEPA and NFMA.

F) THE EIS FAILED TO ANALYZE ACTUAL FORAGE USE

While stocking rates, in terms of numbers of animals may have remained fairly steady on this allotment over the last half century, cattle weights have increased dramatically. The following discussion updates the FS with this information and shows that cattle weights have increased markedly over the past decades and this additional forage consumption is not being accounted for by the FS in its permits and billings.

The Society for Range Management (SRM) in 1974 defined an Animal Unit *"to be one mature (1000 lb.) cow or the equivalent based upon average daily forage consumption of 26 lbs. dry matter per day."*[30] SRM also defined an Animal Unit Month as *"The amount of feed or forage required by an animal-unit for one month."* NRCS defined the forage demand for a 1,000 pound cow as 26 pounds of oven-dry weight or 30 pounds air-dry weight of forage per day[31]. It is important to ensure that forage consumption rates by livestock are based on the size of animals present on the allotment and a reasoned estimate of their daily consumption rates. The following analysis provides some background and justifies a more current forage consumption rate for cow/calf pairs. When records from the permittees are made available, they can be used to determine the actual weights of cattle grazed on the allotment and the consumption rate proposed here can be adjusted to take that into account.

The University of Nevada Agricultural Experiment Station published a report on cattle production in 1943[32]. That report analyzed 14 years of ranch operation for eleven ranches in northeastern Nevada. At that time, a mature cow was considered one unit and a branded calf or weaner as ½ cow unit, for a combined total of 1.5 cow units per cow/calf pair. Bulls were considered 1.5 cow units. For the period 1938 – 1940, the average turnoff weight (when they left the range) of mature cows was 959 pounds, calves were 381 pounds and bulls were 1222 pounds. This means that in the 1930's, a cow/calf pair was 1340 pounds. With breeding, supplements and hormones, weights have increased over time, for example, Anderson et al (ca 2000) calculated a 35% increase in dressed weights per animal between 1975 and 1995[33].

USDA market statistics[34] give the average weights of slaughter cattle for the week ending August 14, 2004 as 1251 pounds. The estimate for the same week in 2005 for slaughter cattle average weight was 1260 pounds. The USDA National Agricultural Statistics Service data for average live weight of cattle slaughtered in 2004 was 1242 pounds compared to 1187 pounds in 1995, or an increase of nearly 8.5% in those 10 years[35]. The Livestock Monitor is a newsletter produced by the North Dakota State University Extension Service Livestock Marketing Information Center in cooperation with USDA State Extension Services[36]. The Livestock Monitor shows for the week ending August 6, 2005, live weights of slaughter cattle averaged 1258 pounds.

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[30] Society for Range Management. 1974. A Glossary of Terms Used in Range Management.
[31] NRCS. 2002. National Range and Pasture Handbook.
[32] Brennan, C. A. and Fred B. Harris. 1943. Fourteen Years Cattle Production and Ranch Earning Power in Northeastern Nevada 1928 to 1941. University of Nevada Agricultural Experiment Station, Reno.
[33] http://agecon.uwyo.edu/RiskMgt/marketrisk/TheCattleCycle.pdf
[34] http://www.ams.usda.gov/mnreports/SJ_LS712.txt
[35] http://www.usda.gov/nass/pubs/agr05/acro05.htm
[36] http://www.ag.ndsu.nodak.edu/aginfo/lsmkt/monitor.htm

The potential weights of mature cows can be even larger than these numbers. For example, NRCS in its National Range and Pasture Handbook, referenced above, defines body condition scores. A body condition score of 6 which is described as *"Good, smooth appearance throughout. Some fat deposits in brisket and over the tailhead. Ribs covered and back appears rounded."* This body condition score relates to a pregnancy percentage of 88%, which is important as a goal for cow/calf operations as dry cows are usually culled and replaced and the weight gain of calves is important for income. According to Dr. Larry W. Olson, Extension Animal Scientist at Clemson University, a medium frame cow in body condition score 6 could easily weigh 1300 – 1400 pounds[37].

Holechek et al (2001) summarized the weaning weights of calves grazed on various types of rangelands at different stocking rates. The data for the period since 1990 produced an average weaning weight of 430 pounds and a range of 382 – 475 pounds. Ray, et al (2004) gave a weaning weight of 480 pounds for calves[38]. Using the current market statistics for slaughter cattle at about 1250 pounds and assuming a calf weight of 300 pounds to allow for weight gain during the grazing season, an estimate for the average weight of a cow/calf pair during the grazing season of 1,500 pounds seems reasonable.

As pointed out above, the NRCS used 26 lbs/day of oven dry weight for a 1,000 pound cow and stated this was equivalent to 30 pounds per day air-dry weight. The NRCS Range and Pasture Handbook value of 30 pounds air-dry weight would be 3% of body weight for a 1,000 pound cow. Applying this to the current weight of 1,680 pounds for a cow/calf pair, the daily forage consumption would be 50.4 lbs of air-dry forage per day, or for a month (30.4 days), 1532 pounds of forage per AUM. The EA failed to discuss the above issue, nor did it update its forage consumption rate on this allotment to provide the forage needed for wildlife as required by the Forest Plan and to ensure the public trust is not violated by undercharging for the actual weights of cattle and calves grazed. This lack of disclosure of this important issue violates NEPA. Further, the FS is allowing far more AUM's to be removed by livestock than what is being permitted. So even though cattle numbers may have stayed constant, forage removal has increased by ~40%. This was not analyzed in the EA which violates NEPA.

While the Forest would like to avoid dealing with this issue, for obvious reasons, other Forests have. We refer to the Dakota Prairie National Grasslands as an example. In their current Forest Plan, they are required to adjust permits based on current livestock sizes (both cattle and calves) during permit renewals.

G) THE EA FAILED TO JUSTIFY "RANGE IMPROVEMENTS"

The ROD's authorize the construction of many new water developments and other "range improvements". The rationale provided is to "help increase cattle distribution" and "to help draw animals away from areas in need of less grazing use". Unfortunately, the EIS fails to mention that all of the proposed water developments are within a few hundred

[37] Email correspondence with Dr. Olson dated 8/18/05.

[38] Ray, D.E., A.M. Lane, C.B. Roubicek, and R.W. Rice. 2004. Range beef herd growth statistics. In: Arizona Rancher's Management Guide. Arizona Cooperative Extension, College of Agriculture, University of Arizona.

yards of natural watercourses and will do little if anything to improve conditions In addition, the EA failed to provide any scientific basis or other information that would indicate these actions will be effective.

Further, there was no site-specific analysis of the impacts of these water development which violates NEPA.

H) THE EIS AND ROD'S FAIL TO IMPLEMENT ADAPTIVE MANAGEMENT

In every grazing need to process the Forest Service conducts the principal need is "for greater management flexibility" but little justification for this need is provided. Virtually every so-called "tool" the Forest Service wishes to have as part of adaptive management, has been available to it for decades. Most of these tools are part of the normal hermit administration process. Again, a so-called need is to open currently vacant allotments "to facilitate the management flexibility just mentioned" but the Forest Service provides no rational basis for this so-called need.

We see in the EIS that somehow not permitting livestock grazing would result in inflexibility, as if domestic livestock (an invasive alien species) grazing is required to avoid ecosystem collapse. This is of course absurd and indicates the biased attitude of this NEPA process.

Under alternative C we see that the grazing system "would be flexible and could be readily modified on an annual basis to respond to biological, physical and social needs within the constraints of the Forest plan in this decision" but no information is provided as to how this would be more flexible than the current flexibility. The Forest Service has always had the ability to change turn out and take off dates. It is totally unsupportable that the Forest Service does not have flexibility in this matter. It is just dishonest. Again, the number of AUMs is exactly the same between the 2 alternatives.

As is universal within Forest Service NEPA processes, the defining of the adaptive management process in this case is woefully inadequate. We request that you review the R2 Adaptive Management Guidance document which clearly defines the minimum level of adaptive management. We also include as an attachment a useful document written by the US Fish and Wildlife Service on how to write goals and objectives. This document meshes closely with the R2 document discussed above.

FSH 2209.13 93.3a requires:

"The team, using an interdisciplinary approach, should identify the desired rangeland conditions within the analysis area. Desired conditions should be specific, quantifiable, and focused on rangeland resources."

The EIS do not comply with this requirement.

FSH 2209.13 93.3c requires:

"Identification of resource management needs is simply the comparison of desired conditions with existing conditions to determine the extent and rate at which current management is meeting or moving toward those desired conditions." (emphasis added)

The EIS failed to meet this requirement. To say conditions are "moving toward" is meaningless without this information. For instance, everyone admits these lands were basically unmanaged until about the 1950's. Given how severely degraded these lands were up through that time, it would not be surprising that things look better than 1950, but is that "moving towards" sufficient?

FSH 2209.13 93.3g defines adaptive management as:

Adaptive management is an interdisciplinary planning and implementation process that provides for: 1) identification of site specific desired conditions; 2) definition of appropriate decision criteria (constraints) to guide management; 3) identification of pre-determined optional courses of action, as part of a proposed action, from which to adjust management decisions over time; and 4) establishment of carefully focused project monitoring to be used to make adaptive adjustments in management over time.

As stated previously, the DC's laid out for benchmark areas don't meet the requirement of the FSH. Additionally, as discussed in more detail in the Quimby document, "pre-determined" means "if this… then that", not just a general 'toolbox' with everything stuffed into it. And lastly, the EA's "monitoring plan" could hardly be called "carefully focused"

We attach the cited Quimby document with key sections highlighted. These sections need to be thoroughly reviewed as the EIS does not implement most of them.

We also include as an attachment a useful document written by the US Fish and Wildlife Service on how to write goals and objectives. This document meshes closely with the R2 document discussed above.

The falsity of the Forest Service's purported need for "flexibility" is clearly exposed in FSH 2209.13 – 92 which states:

"The majority of these changes can be implemented administratively, provided the changes do not fall outside the scope of the NEPA decision. Examples of actions that may be taken without further NEPA analysis include alteration of management to respond to Biological Opinions or other ESA, Clean Water Act, or other consultation requirements; changes in specific dates of grazing, class of livestock to be grazed, grazing systems, or livestock numbers based on evaluation of monitoring results; and, implementation of the LRMP through modifications to the term grazing permit. Administrative actions to implement higher level decisions or to respond to monitoring results should be undertaken as a routine administrative action prior to initiating NEPA."

Further undermining the alternatives that were analyzed is the fact that current management and the adaptive management alternatives are basically the same. Virtually all of the actions listed under the adaptive management alternative have been available to

the Forest Service for years or decades. The Forest Plan has been in effect for well over a decade. So the real difference between these alternatives is semantics. This violates NEPA.

We are expected to believe that somehow by applying the name "adaptive management" the Forest Service will now begin implementing the direction and requirements that had been in place for a long time. As we have said before the problem has not been a lack of tools, it has been the long-term failure to implement these tools that has been the problem. Nothing presented in the adaptive management alternative would lead to a reasoned conclusion, given the past evidence of failure, that the Forest Service will do any better implementing these tools than it has in the past.

FSH 2209.13 94.2 requires:

"The evaluation of a proposed action's environmental effects must include the potential effects of all adaptive management options that may be implemented at some future point in time. For example if one potential option is to fence off a riparian area, the effects of that fence must be evaluated even if that management option may never actually be implemented."

This was not done.

Again for the short or long-term monitoring we found no commitment, locations, triggers or measurable objectives.

Adaptive management is frequently abused by agencies in a number of critical ways, as has been done in this case:

a. Failure to follow the implementation criteria contained in the literature on the use of adaptive management.
b. Failure to properly define triggers, actions based on those triggers and timelines.
c. Failure to properly design, fully fund and properly implement the monitoring needed for a defensible adaptive management strategy.
d. Failure to take needed actions now by putting off needed actions for some future.

III. EIS AND ROD FAIL TO INSURE COMPLIANCE WITH CWA

The EIS and ROD's make two erroneous and unsupportable assumptions. Firstly, that if a stream is not on the state's 303d list that it is compliant with state water quality standards and is meeting all of its "beneficial uses". This is arbitrary and contradicts with the principle that absence of evidence is not evidence of absence. The EA failed to provide any data supporting its claims that streams not listed on the 303d list are compliant with the CWA. Secondly, the EIS makes the assumption that by implementing BMP's that water quality will be protected and state water quality standards will be met. This is not supported by research or the FS's own experience. We provide a review of this research below. For the FS's own experience, we would ask you examine the experience on the

North Tongue on the Bighorn National Forest, which is probably the only location on any National Forest where the impacts of livestock grazing and the effects on water quality of BMP's has been measured quantitatively. In this case the FS collected e. coli data over dozens of streams with sampling locations chose to correspond with pastures. After more than 5 years of data collection the results are consistent and clear: 1) e. coli levels spike within 24 hours of cattle entering a pasture and remain well above state standards and remain elevated for up to 2 months after removal and 2) application of current BMP's resulted on no statistically significant reduction in contamination. (Contact David Beard at the Tongue Ranger District for complete details)

Ziemer and Lisle (1993) indicated that there are no reliable data indicating that BMP's are cumulatively effective in protecting aquatic resources.[39] Espinosa et al. (1997) provided evidence from case histories in granitic watersheds in Idaho that BMP's thoroughly failed to cumulatively protect salmonid habitats and streams from severe damage from roads and logging.[40] In analyses of case histories of stereotypical resource degradation by stereotypical land management (logging, grazing, mining, roads) several researchers have concluded that BMP's actually increase watershed and stream damage because they encourage heavy levels of resource extraction under the false premise that resources can be protected by BMP's (Stanford and Ward, 1993, Rhodes et al., 1994 Espinosa et al., 1997).[41] Stanford and Ward (1993) termed this phenomenon the "illusion of technique." The EIS entirely fails to address these responsible opposing views, fails to address the fact that there are even responsible opposing views regarding the effectiveness of BMP's.[42]

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[39] Ziemer, R.R., and Lisle, T.E., 1993. Evaluating sediment production by activities related to forest uses--A Northwest Perspective. Proceedings: Technical Workshop on Sediments, Feb., 1992, Corvallis, Oregon. pp. 71-74.
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[40] Espinosa, F.A., Rhodes, J.J. and McCullough, D.A. 1997. The failure of existing plans to protect salmon habitat on the Clearwater National Forest in Idaho. J. Env. Management 49(2):205-230.

[41] Stanford, J.A., and Ward, J.V., 1992. Management of aquatic resources in large catchments: Recognizing interactions between ecosystem connectivity and environmental disturbance. Watershed Management: Balancing Sustainability and Environmental Change, pp. 91-124, Springer Verlag, New York.

Rhodes, J.J., Espinosa, F.A., and Huntington, C., in process. Watershed and Aquatic Habitat Response to the 95-96 Storm and Flood in the Tucannon Basin, Washington and the Lochsa Basin, Idaho. Final Report to Bonneville Power Administration, Portland, Or.

[42] The NEPA and the CEQ NEPA regulations are clear that federal agencies must address responsible opposing views in an EIS to ensure the agencies make well-informed decision and to ensure the public understands the impacts of major federal actions. To ensure federal agencies carry out the substantive intent of Section 101 of NEPA, as well as the procedural requirements of Section 102, the CEQ NEPA regulations specifically require federal agencies to "discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement[.]" 40 CFR § 1502.9(b). Agencies must "ensure that the [environmental impact] statement contains sufficient discussion of the relevant issues and opposing viewpoints to enable the decisionmaker to take a "hard look" at environmental factors, and to make a reasoned decision." Izaak Walton League of America v. Marsh, 655 F.2d 246, 371 (D.C. Cir. 1981). See also, All Indian Pueblo Council v. United States, 975 F.2d 1437, 1444; Andrus v. Sierra Club, 442 U.S. 347, 350 (1979). Consideration of responsible opposing views in an EIS is crucial to ensuring agencies are fully aware of the environmental trade-offs, risks, hazards, and impacts (beneficial and negative, direct, indirect, and cumulative) associated with their decisions. Calvert Cliffs Coordinating Committee, Inc. v. United States Atomic Energy Commission, 449 F.2d 1109, 1114 (D.C. Cir. 1971), Natural Resources Defense Council, Inc. v. Morton, 458 F.2d 827, 836 (D.C. Cir 1972), Kleppe v. Sierra Club, 427 U.S. 390. Consideration of responsible opposing views in an EIS is also crucial to ensuring the public understands the impacts of decisions and can challenge federal agencies if necessary. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151.

Courts have held on numerous occasions that Forest Service prepared NEPA documents that fail to adequately address responsible opposing views are contrary to the intent of Congress and NEPA and violate the CEQ NEPA regulations. In Colorado Environmental Coalition v. Glickman for example, the U.S. District Court for the District of Colorado found in 1998 that the Forest Service had violated NEPA by failing to present a "reasoned analysis of the opinions of reputable scientists." Colorado Environmental Coalition v. Glickman, Civil Action No. 94-B-277 (Dist. Col. 1998), Order Issued September 25, 1998, p. 11. In Center for Biological Diversity v. United States Forest Service, the 9th Circuit Court of Appeals held that the Forest Service violated NEPA by "failing to disclose and discuss responsible opposing scientific viewpoints in the final [environmental impact] statement[.]" Center for Biological Diversity v. United States Forest Service, No. 02-16481 (9th Cir. 2003). In Sierra Club v. Bosworth, the court held that the Forest Service violated NEPA by "failing to disclose and analyze scientific opinion in support of and in opposition to the conclusion that the Phase 1 [salvage

Courts have struck down reliance upon BMP's to protect water quality when not considering key information regarding their effectiveness. In The Wilderness Society v. Bosworth, the U.S. District Court for the District of Montana ruled:

> Because BMP's have not been assessed for their effectiveness against landslide events and because of a high risk of landslides is acknowledged in the Fish Bate [timber sale] preferred alternative, the Court finds it is not reasonable for the Defendants to just summarily rely on BMP's to mitigate this environmental impact. Therefore, the Court finds the FEIS conclusion that the project will have no effect on water quality to be arbitrary and capricious based on the undisputed risk of landslides in the FEIS. Accordingly, the decision is reversed and remanded.
>
> The Wilderness Society v. Bosworth 118 F. Supp.2d 1082, 1107 (D. Mont. 2000).

In this case, the Clearwater National Forest failed to show that BMP's were effective in light of the potential for landslide events, an arbitrary and capricious act. The Forest has failed to show that BMP's will effectively protect water quality and soils. Thus, the Forest is inappropriately relying on BMP's to assess water quality and soil impacts and failing to take a hard look at the impacts to water quality and soils.

The Forest seems to claim that the watershed degradation will be sufficiently mitigated by the use of BMP's. While the use of BMP's is to be encouraged, Appellants note that the use of these measures are not themselves sufficient to ensure compliance with the CWA. Northwest Indian Cemetery Protective Ass'n v. Peterson 795 F.2d 688, 697 (9th Cir. 1986) (holding that compliance with BMP's does not equate to compliance with the CWA). Indeed, the Forest assumes that the implementation of BMP's will sufficiently mitigate any problems that forest management will have on aquatic systems, but offers no proof of this assertion. Consequently, this assumption is flawed and violates the law.

A recent USDA Office of the Inspector General Report concluded that reliance on speculative mitigation measures in order to reach a FONSI significantly compromised environmental quality. OFFICE OF INSPECTOR GENERAL, U.S. DEPT' OF AGRIC., EVALUATION REPORT NO. 08801-10-AT: FOREST SERVICE TIMBER SALE ENVIRONMENTAL ANALYSIS REQUIREMENTS (1999). The OIG concluded that:

> "Applicable mitigation measures contained in 10 of 12 decision notices and referenced environmental assessments reviewed, were not always implemented. In addition, mitigation measures were either omitted or incorrectly incorporated into 4 of 12 accompanying timber sale contracts. These mitigation measures are designed to reduce the adverse impacts of timber sale activities on the

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logging] project will reduce the intensity of future wildfires in the project area." Sierra Club v. Bosworth, 199 F. Supp. 2nd 971, 981 (N.D. Cal. 2002). See also, Seattle Audubon Society v. Espy, 998 F.2d 699, 704 (9th Cir. 1993) (finding that Forest Service was required to address in the final environmental impact statement criticisms opposing evidence upon which the final statement's management strategy rested); Seattle Audubon Society v. Lyons, 871 F.Supp. 1291, 1318 (W.D. Wash. 1994) (holding EIS must "disclose responsible scientific opinion in opposition to the proposed action, and make a good faith, reasoned response to it."); Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1482 (W.D. Wash. 1991) ("NEPA requires that the agency candidly disclose in its EIS the risks of its proposed action, and that it respond to the adverse opinions held by respected scientists.").

environment. Generally, mitigation measures were not implemented due to district personnel (a) not being familiar with the mitigation measure contained in the environmental documents, (b) not adequately monitoring actual implementation of the mitigation measures, (c) not comparing timber sale contract clauses with the applicable environmental documents and, (d) oversight. As a result, streams, wildlife habitat, heritage resources, water quality, and visual quality were or could be adversely affected. Timber sale field visits disclosed that mitigation measures designed to protect key resource areas were not adequately implemented. The measures involved mitigation of riparian areas and stream management zones, wildlife habitat, heritage resource sites, visual quality, and soils."

This clearly shows that the Forest Service failed to use Best Available Science (BAS) as it is required to.

Until the Forest is able to substantiate its proposed mitigation measures/design criteria - that they are appropriate, will be fully funded, will be implemented, and will be effective - the agency can not rely on non-mandatory BMP's to ensure compliance with the CWA and State water quality standards. This vitiates the EIS and ROD's and violates NEPA, APA and the CWA.

We also incorporate by reference our original comments on the EIS as specific appeal points as they were not adequately addressed in the final EIS.

REQUEST FOR RELIEF

Pursuant to 5 USC § 555(b), we hereby request the following relief from the Appeals Deciding Officer on these issues. If the foregoing request for relief is denied in whole or in part, we are entitled to a full statement of reasons as to the grounds for denial in accordance with 5 USC § 555(e).

The EIS and ROD's fail to meet their legal requirements as laid out in the Statement of Reasons Section. Therefore the decision must be withdrawn as it is not based on high quality information and analysis, is not well-informed, and clearly errs in its assumptions and analyses. If the Forest chooses to issue a new decision, they must first be instructed conduct NEPA in accordance with CEQ NEPA regulations at 40 CFR § 1502.9 and prepare a thorough, rigorous, accurate, non-arbitrary analysis and assessment of impacts.

Further, we request the following relief:

1) That the Forest makes good faith efforts to work with appellants to redesign the project to reduce environmental impact, create a defensible monitoring plan and take measures to adequately protect Sensitive Species and the habitats on which they depend
2) That the Forest develop a defensible monitoring plan for the project area that is fully funded

3) That experts from the RMRS, the Regional Office and other institutions be utilized in the design criteria needed to fully protect Sensitive Species and their habitats.

CONCLUSIONS

The APA prohibits an agency from acting in an arbitrary and capricious fashion. Fair and honest procedures are also an element of complying with NEPA (40 C.F.R. 1502.1). To assure that a fair discussion occurs, agencies are required to obtain high quality information, including accurate scientific analysis (40 C.F.R.1500.1 (b)). The regulations are very explicit that: Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements (40 C.F.R. 1502.24). CEQ regulations also require that: Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency action, rather than justifying decisions already made (40 C.F.R. 1502.2(g)).

The policy behind NEPA is to ensure environmental considerations are integrated into agency planning (40 C.F.R. §1501), and that the public be informed in agency planning decisions ("NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken....Accurate scientific analysis, expert agency comments, and **public scrutiny** are essential to implementing NEPA." 40 C.F.R. §1500.1(b) (emphasis added). "NEPA ensures the agency ...will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience." Idaho Sporting Congress v. Thomas, 1998 WL 89066 (9th Cir. (Idaho)). *Citing* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349, 109 S.Ct. 1835, 104 L.Ed.2d 351 (1989). NEPA's disclosure goals are "to insure the agency has fully contemplated the environmental effects of its actions and to insure the public has sufficient information to challenge the agency (Idaho Sporting Congress v. Thomas, 1998 WL 89066 (9th Cir. (Idaho)). *Citing* Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 758 (9th Cir. 1996)."

The flaws in the EIS and ROD's identified in this appeal violate the requirement of NFMA, NEPA, APA, CWA and the Forest Plan and agency regulations. Appellant is willing to meet with the Regional Forester or the Forest Supervisor to discuss the issues raised in this Appeal, in order to attempt to resolve them, and to ensure that these areas of the Forest are managed in a way that complies with federal law.

RESPECTFULLY SUBMITTED this __5th___ Day of December, 2010.

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