

**Before the Regional Forester
Of the Rocky Mountain Region, US Forest Service
United States Department of Agriculture**

Appeal of the Record of Decision
And Final Environmental Impact Statement

For the Palmer Gulch Allotment, Mystic Range Project

On the Mystic Ranger District
Of the Black Hills National Forest

Appellants:

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Biodiversity Conservation Alliance
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Responsible Official:

Robert J. Thompson, Mystic District Ranger

Appeal No. _____

**Notice of Appeal
Relief Requested
Statement of Reasons**

Dated this 5th Day of December 2010

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Notice of Appeal

On October 12, 2010, Mystic District Ranger Robert J. Thompson signed a Record of Decision (ROD) approving implementation of Alternative C, as Modified as it relates to the Norbeck Wildlife Preserve, for the Palmer Gulch Allotment on the Mystic Ranger District on the Black Hills National Forest. The project is further described [Palmer Gulch Allotment ROD at 2] as eliminating grazing within the Norbeck Wildlife Preserve as it is currently being conducted. Specifically, this decision eliminates grazing within the NWP as a part of two existing grazing permits on the Palmer Gulch Allotment. This elimination will be phased in over a period of three to five years—three years on the South half and five years on the North half of the allotment. This decision allows for limited trailing of cattle within the NWP in order to eliminate the hazard of herding cows along high-speed roads and areas of steep topography. This decision will require either construction of fences to exclude livestock from the Preserve, or avoidance of pastures lying totally or partially within the Preserve. This decision preserves the option of using livestock in a very targeted way to improve vegetation (e.g., reduce weeds, control smooth brome) within the NWP. Such targeted use would be conducted only in an effort to improve habitat for game animals and birds and would be used in a limited and infrequent basis.

Pursuant to 36 CFR 215 and 5 USC 555(b), NOTICE IS HEREBY GIVEN that the *Friends of the Norbeck*, *Native Ecosystems Council*, *Biodiversity Conservation Alliance*, and *Prairie Hills Audubon Society of Western South Dakota* hereby appeal to the Regional Forester of the Rocky Mountain Region of the United States Forest Service for relief from District Ranger Thompson's failure to amend the Black Hills Forest Plan to declare the Norbeck Wildlife Preserve unsuitable for livestock grazing and to bring Forest Plan direction into compliance with the 2001 Tenth Circuit Ruling, his decision to authorize continued livestock grazing on the Palmer Gulch allotment for three to five years simply to convenience the existing permittee(s), his decision to allow trailing of livestock through the Norbeck Preserve, and his decision to reauthorize livestock grazing on the non-Norbeck portions of the Palmer Gulch Allotment without first revising the Phase II Amendment.

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Appellant *Friends of the Norbeck* (FotN) is a South Dakota nonprofit corporation headquartered in Rapid City, SD. Formed in 2008, 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 Mystic Range Project. FotN submitted substantive and extensive comments on the Mystic Range 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 Mystic Range Project DEIS and the Black Hills Forest Plan Revision and ROD.

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 Mystic Range Project, 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 Mystic Range Project, the Norbeck Wildlife Project and the Black Hills Forest Plan Revision.

* * * * *

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 Mystic Range 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) remand of those parts of Ranger Thompson's 10/12/10 decision that authorize continued livestock grazing for three to five years on the Palmer Gulch Allotment within the Norbeck Wildlife Preserve on the Mystic Ranger District of the Black Hills National Forest;
- 2) immediate designation of the Sunday, Palmer, Ford, and south half of the Rabbit Pastures, and the ungrazed portions of the Lower and Upper Bear Pastures, as unsuitable for livestock grazing; and immediate permanent closure of FS 356.
- 3) remand of those parts of Ranger Thompson's 10/12/10 decision that authorize trailing of livestock through the Norbeck Preserve;
- 4) remand of those parts of Ranger Thompson's 10/12/10 decision that authorize construction by permittee(s) of boundary fencing along the north and west borders of the Norbeck Preserve;
- 5) remand of the non-Norbeck parts of Ranger Thompson's 10/12/10 decision, with instructions to bring the Mystic Range Project into compliance with NFMA, the 1982 regulations, the 1999 Forest Plan Appeal Decision, and the 2000 Settlement Agreement in order to avoid being inextricably tied to the illegal flaws of the Phase II Amendment; and
- 6) mandate 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" of game animals and birds, and their "breeding place" mandates of the Norbeck Organic Act, conducts the required review of expansion of Black Elk Wilderness, and all Norbeck / Black Elk Wilderness Forest Plan Standards and Guidelines have been brought into line with NOA direction as interpreted in the 2001 Tenth Circuit Ruling.

Signed this 5th Day of December 2010



Brian Brademeyer, for Appellants

GRAZING 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."*
- July 28, 1989 BHNH Supervisor Kenops signs the Record of Decision for the Norbeck Wildlife Preserve Final EIS, acknowledging that "livestock grazing is inconsistent with the purposes of the wildlife preserve."
- Sept. 4, 1990 Supervisor Kenops issues a DN approving livestock grazing in the North Custer Allotment within the Norbeck Wildlife Preserve.
- Oct. 26, 1990 The North Custer Allotment Management Plan is appealed by the Black Hills Sierra Club and Nancy Hilding. Norbeck landowners Brian Brademeyer and Eugene Koevenig intervene on December 23, 1990. The appeal is denied by the Regional Forester.
- 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.
- 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.
- 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 projects must be justified by showing specifically that game animals and birds are protected.
- October 12, 2010 District Ranger Robert J. Thompson issues a Record of Decision, selecting Alternative C, with Modification as relates to grazing in the Norbeck Wildlife Preserve, for the Palmer Gulch Allotment on the Mystic Ranger District. The ROD eliminates livestock grazing in the Norbeck Preserve, but allows three to five years for the permittee to achieve this elimination either through fencing or avoidance of pastures within the Preserve.

STATEMENT OF REASONS

I. By Failing to Prioritize the Protection of Game Animals and Birds within the Norbeck Portions of the Palmer Gulch Allotment, the FEIS / ROD Violates the Norbeck Organic Act (NOA) and the Tenth Circuit Mandate.

The Norbeck Organic Act is one of the strongest wildlife laws ever passed by the United States Congress, setting aside the Norbeck Wildlife Preserve “*for the protection of game animals and birds, and to be recognized as a breeding place therefor.*” 16 USC 675. The primary purpose of NOA is not human benefit, distinguishing it from almost all other environmental statutes. Congress established no other purposes than protection of the lands of the Preserve, and the game animals and birds that may be thereon, from trespass. 16 USC 675, 677. If Congress had wanted to balance non-wildlife interests with wildlife protection, it would have said so.

There is only one court case interpreting the Norbeck Organic Act as a matter of first impression. *Sierra Club—Black Hills Group v. USFS*, 259 F.3d 1281 (10th Cir. 2001). The Tenth Circuit ruled on August 8, 2001, 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 ruling 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 the BHN Forest Plan permits livestock grazing on the Palmer Gulch Allotment, which comprises about 8% of the Norbeck Wildlife Preserve. NWP¹ FEIS at 238. No environmental analysis has ever shown that livestock grazing benefits wildlife. In fact, the ROD / FEIS document that livestock grazing does not benefit any of the twelve key game animals and birds evaluated:

The effects analysis for the Norbeck Wildlife Preserve included an analysis of twelve key game animal and bird species. The conclusion (See Wildlife Section in EIS) is that the No Action Alternative (No Grazing) is more beneficial for eight of the twelve species than are the other two alternatives. These species are generally affected either by competition for forage, effects on riparian and other habitat, or by trampling of nests or the young. There is no effect on the other four species for any of the alternatives. My decision relies heavily on the Wildlife evaluation.

[Palmer Gulch Allotment Record of Decision, hereinafter "ROD," at 7.] These four "no effect" species are never collectively identified in the FEIS. Actually, by close inspection of Chapter 3 of the FEIS and Appendix D Biological Evaluation of R2 Sensitive Species, we find that all twelve focus species benefit from elimination of livestock grazing (some perhaps only indirectly).

By prioritizing non-wildlife objectives, livestock grazing on the Norbeck Wildlife Preserve violates the NOA and the 2001 Tenth Circuit Ruling. There should be no grazing permitted on the Norbeck portions of the Palmer Gulch Allotment. The agency fails to provide any quantitative assessment of the harm this inappropriate grazing is causing wildlife in the Norbeck Preserve, especially wildlife seeking protection or breeding places. The agency's speculation about likely behavior of permittees denied grazing access to Norbeck does not justify the certain harm and disturbance to wildlife, and especially to the Preserve's protection and breeding place mandate.

The 2001 Tenth Circuit Court Mandate unequivocally establishes that, within the Norbeck Wildlife Preserve, management actions must protect game animals and birds, and retain the

¹ Hereinafter, citations to "NWP FEIS" will refer to the Norbeck Wildlife Project FEIS, while citations simply to "FEIS" or "DEIS" will refer to the Mystic Range Project documents.

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 Mystic Range Project, like the Norbeck Wildlife Project before it, fails to meaningfully respond to any of the above assertions. Instead, the FEIS presents the absurd and unsupported assertion that the Tenth Circuit Mandate does not apply to the Mystic Range Project since it is not a timber harvest project:

3-13. The Tenth Circuit ruling cited in the comment pertains to a different action. The Mystic Range Project proposes no timber harvest. The decision on this project will be consistent with the Revised Forest Plan, as amended, and with the Norbeck Organic Act.

[FEIS at A-14, Response to Comment 3-13.] We note that the ROD fails to even mention the NOA in the list of Federal Laws it is allegedly complying with [ROD at 13-14]. Similarly, the Revised LRMP fails to even list the Norbeck Organic Act in its Appendix C, "Relevant Federal and State Statutes, Regulations, and Executive Orders and Agreements."

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 portions of the Mystic Range 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 Preserve will redress the fact that current Forest Plan direction is, in totality, contrary to the Norbeck Organic Act and the 2001 Tenth Circuit Mandate, and must be revised.

In particular, the following standards and guidelines prioritize non-wildlife objectives over and above the specific Norbeck mandates for protection of game animals and birds, and their breeding places, in violation of NOA and the Tenth Circuit Ruling:

1.1A-2501, 1.1A-2503, 1.1A-2504, 1.1A-2505, 1.1A-4102, 1.1A-4103, 1.1A-4301,
4.2B-2101, 4.2B-2501, 4.2B-4101, 4.2B-9102,
5.4A-2101, 5.4A-2104, 5.4A-2106, 5.4A-2107, 5.4A-2501, 5.4A-2502, 5.4A-2505,
5.4A-3201, 5.4A-3202, 5.4A-3203, 5.4A-3205, 5.4A-3206, 5.4A-3207, 5.4A-3208,
5.4A-4201, 5.4A-5101, 5.4A-5102, 5.4A-5107, 5.4A-9101, 5.4A-9105, 5.4A-9107,
5.4A-9108

We incorporate here by reference, in their entirety, Sections I and II, pages 16-32, of the attached *FotN et al Norbeck Appeal w-o images*, as apart of this appeal.

II. By Relying on Economic Factors to Determine that Livestock Grazing Should be Permitted for the Next 3-5 Years within the Norbeck Portions of the Palmer Gulch Allotment, the FEIS / ROD Violate NOA and the Tenth Circuit Mandate.

A. The ROD Improperly Prioritizes Concerns for Permittee Operations over the Specific Wildlife Mandate of the NOA.

Although the ROD claims that the Palmer Gulch Decision “relies heavily on the Wildlife evaluation” [ROD at 7], the three to five year phase out of grazing in the Norbeck Preserve was clearly driven by non-wildlife concerns for the economic well-being of permittees:

My last decision criteria for the Norbeck Wildlife Preserve regards practical considerations for allotment management pertaining to the affected permittees. This decision will have an effect on the ongoing management of two permit holders. The permit for the South half of the Palmer Gulch Allotment will be the most affected. Several miles of fence may need constructed to keep livestock out of the Preserve, or other actions such as avoiding certain pastures altogether may need to be taken. The permittee will need time to make these adjustments. My decision provides a three year time period to eliminate use within the NWP.

[ROD at 7-8.] The ROD never elaborates as to why the decision was not to immediately introduce avoidance of all pastures lacking fences that preclude livestock use of the Norbeck Preserve; this would have minimized wildlife impacts during this phase-out period. Moreover, in allowing grazing as early as June 15 [ROD at 4], the Decision assures many weeks of overlap with the nesting season of ground-nesting birds, leading to direct trampling deaths to chicks, eggs, and nests in violation of NOA and the 2001 Tenth Circuit Ruling.

By allowing the permittee(s) to continue grazing the Norbeck Preserve for three years (and possibly as many as eight years), while deciding whether to fence livestock out of the Preserve, clearly subordinates wildlife protection and breeding place concerns to other objectives not elaborated in the NOA. This is precisely the type of improper balancing decision struck down by the 2001 Tenth Circuit Ruling.

It is not that the FEIS failed to identify adverse impacts to wildlife; such adverse impacts of livestock grazing are widely documented in the FEIS, as given below in direct excerpts from the Wildlife section and the Biological Evaluation (citations apply to all excerpts for a given species):

Mountain Goat (*Oreamnos americanus*) Species of Local Concern [FEIS at 176]

The overall available riparian and hardwood habitat for goats would improve if livestock grazing were no longer allowed in mountain goat home ranges. ... Available habitat for this species would improve if competition between mountain goat and livestock is no longer allowed. ... Direct effects [of grazing] may include mortality from being tangled in barbed wire fence material or if range riders causes goats to lose footing while moving to cover. ... Indirect effects include potential loss of foraging habitat in uplands, riparian areas, meadows, and hardwood stands due to livestock grazing and browsing ... In addition, lack of diverse understory grass and shrub communities in riparian areas may increase predation and sight-ability by hunters.

Bighorn Sheep (*Ovis canadensis*) R2 Sensitive Species [FEIS at D-2]

Alt. A [would have] Beneficial impact -- No competition for forage would increase carrying capacity of use areas. Increase in water tables would improve riparian habitat and provide water sources.

Rocky Mountain Elk (*Cervus elaphus*) NWP Focus Species [FEIS at 181]

overall available habitat for elk would improve in the absence of grazing ... existing fences within the MRP potentially could cause mortality and injury ... Indirect effects include potential loss of foraging and cover habitat in uplands, riparian areas, meadows, and hardwood stands due to livestock grazing and browsing. In addition, lack of diverse understory grass and shrub communities in riparian areas potentially increase predation and sight-ability by hunters. ... The greatest potential for effects between elk and livestock would likely occur when competition for forage would be the greatest (late summer/fall), which could affect elk survivability during the winter. The possibility of competition for resources would be exacerbated during periods of low forage production and drought.

White-tailed Deer (*Odocoileus virginianus*) Management Indicator Species [FEIS at 150, 181]

Generally, effects on elk are similar for white-tailed deer ... Indirect effects [of grazing] include potential loss of foraging and cover habitat in uplands, riparian areas, meadows, and hardwood stands due to livestock grazing and browsing. ... In addition, decreased vegetation diversity in riparian habitats attributable to livestock grazing may result in increased predation on deer and sight-ability by hunters. ... The greatest potential for effects between deer and livestock would likely occur in hardwood stands and riparian zones. The effects are attributed to the limited amount of riparian and hardwood habitats on the Forest, the fact that these areas satisfy deer requirements for cover, food, water, and because of their extensive use during fawning periods.

Merriam's Turkey (*Meleagris gallopavo merriami*) NWP Focus Species [FEIS at 183]

[no grazing] alternative would provide habitat for turkey at an increased rate ... Direct effects from livestock grazing include potential mortality of eggs and nestlings due to trampling nests, crushing eggs or chicks, knocking eggs or young out of nests or beds, or covering eggs, chicks or young with manure piles. Livestock grazing may indirectly affect the Merriam's turkey by changing grassland species composition, reducing prey abundance, and reducing turkey's ability to avoid predators by removing required cover.

Mountain Bluebird (*Sialia currucoides*) NWP Focus Species [FEIS at 186]

no grazing would likely improve foraging and watering habitat by increasing prey availability and abundance, improving riparian vegetation cover and composition, increasing water tables, and stabilizing stream morphology ... Potential [in]direct effects may come from possible nest disturbance and associated nesting failure (loss of eggs and hatchlings) resulting from activities related to livestock grazing, such as maintenance and reconstruction of range improvement structures (e.g. fence line clearing) ... Grazing could reduce plant species diversity and reduce important food sources if changes in the understory vegetation occur where specific plants to provide food and oviposition sites for prey species are removed.

Ruffed Grouse (*Bonasa umbellus*) Management Indicator Species [FEIS at 144]

The overall available habitat for ruffed grouse would improve if livestock grazing is no longer allowed on these allotments. ... Direct effects [of grazing] may include potential mortality from crushing grouse eggs or chicks, knocking eggs or chicks out of nests, or covering nests with manure. Indirect effects include the potential for livestock grazing to impede succession of aspen stands by browsing aspen leaders ..., soil compaction due to trampling that would reduce suckering, and creating trails for predators. Loss of vegetation adjacent to a nest can increase the risk of predation on nests by predators.

Song Sparrow (*Melospiza melodia*) Management Indicator Species [FEIS at 136]

Direct effects to song sparrows may include potential mortality from crushing song sparrow eggs or chicks, knocking eggs or chicks out of nests, or covering nests with manure. ... Livestock grazing may indirectly affect riparian species that utilize understory and mid-story vegetation for cover, feeding, building nests, or creating dams. Livestock grazing would trample stream banks, removing overhanging vegetation, widen channels, aggrading channels, increasing water temperatures, and lowering the water table; all of which lead to reduced riparian shrub habitat. ... For ground nesting birds, such as the song sparrow, removal of vegetation adjacent to a nest can increase the risk of predation on eggs or chicks.

Northern Goshawk (*Accipiter gentilis*) R2 Sensitive Species [FEIS at D-3]

[grazing would] Increase habitat alteration and human disturbance of nesting habitat due to structural maintenance and fence line clearing."

Golden-crowned Kinglet (*Regulus satrapa*) Species of Local Concern

Brown Creeper (*Certhia americana*) Management Indicator Species

Black-backed Woodpecker (*Picoides arcticus*) R2 Sensitive Species

(analyzed together as tree-nesting species) [FEIS at 132, 133]

Potential direct effects to these species may come from possible nest disturbance and associated nesting failure (loss of eggs and hatchlings) resulting from activities related to livestock grazing, such as maintenance and reconstruction of range improvement structures (e.g. fence line clearing). ... Indirect effects for tree nesting species would be minimal, although livestock overuse in riparian areas may alter riparian vegetation species composition, decrease cover, and watering sources that could lead to increased potential for predation. ... Reduced grazing impact in riparian areas and increased streambank stability, improvement in riparian vegetation extent and diversity, and restoration of hydrologic function would benefit tree nesting MIS species

Rather, the FEIS failed to assess and disclose the specific wildlife impacts that would accrue during the phase-out period for elimination of livestock grazing from the Norbeck Preserve. Partly this is due to the indeterminateness of the needed actions: "New structural improvements will be required under this decision, and adaptive structures are included that *might or might not* be constructed in the future depending on need. ... The [South half] permittee *might choose to not* utilize the Rabbit and/or Palmer Pastures in lieu of building fences." [ROD at 4, emphasis added]. Given the laundry-list aspect of the "adaptive options" available to mitigate livestock damage [FEIS at 46], this failure is understandable. Nevertheless, it is a violation of NEPA.

B. Direct and Indirect Impacts to Game Animals During the Phase-Out Period Were Not Assessed.

The Forest Service never addressed the negative impact that livestock grazing during the phase-out period will have on the breeding place needs of elk, deer, bighorn sheep, mountain goats, and turkeys. The agency does not deny that grazing removes cover material that protects these species and their young from predators, or that enhances visible separation of big-game parturition areas. The agency failed to present evidence that the negative effects of degrading such breeding places for big game during the phase-out period are insignificant. Since providing for the "breeding place" needs of game animals is a core mandate of NOA, this lack of assessment of impacts is a clear violation of NEPA.

There is conflict amongst focus species and livestock for forage. [NWP FEIS at 111] We pointed out in our appeal of the 1990 North Custer AMP that 11% of the forage tonnage to be gained in 10 years, and 50% of the tonnage to be gained in 40 years, after treatment of Norbeck could be supplied to wildlife by restricting cattle from the Norbeck Wildlife Preserve. Extrapolation leads us to conclude that 50% of the area to be treated under the 1989 Norbeck EIS/SEIS program is being treated to compensate for cattle grazing within the Norbeck. Our 1990 analysis demonstrated that a substantial portion of the forage created by commercial timber treatment within the Norbeck Preserve would simply compensate wildlife for forage utilized by domestic livestock. Furthermore, this proportion would be even higher if one considered that vegetation in the lowland primary range is more nutritious than vegetation in the upland secondary ranges.

Big horn sheep were selected as a focus species to represent foraging and stand habitat diversity. Big horn sheep compete with livestock for forage. [NWP FEIS at 83] A limiting factor in big horn sheep habitat is competition for forage and space with livestock. [NWP FEIS at 83]

While-tailed deer and elk are focus species. [NWP FEIS at 5] The impacts to white-tailed deer and elk were analyzed together because their requirements and habitat objectives are similar. [NWP FEIS at 86]. Many of the shrub and forb species that benefit deer are also palatable for livestock. [DEIS at 150] Competition for forage from livestock has altered distribution and habitat use of deer. [DEIS at 159]

Deer and elk compete for forage with livestock. This competition increases in the late summer. [DEIS at 150] Elk avoid livestock in the summer. [DEIS at 155] One Forest Service study found that:

Elk diets overlap more closely with cattle and forage competition can be a management concern on both summer and winter ranges. When cattle are allowed to graze all summer on deer and elk winter ranges, competition for forage may increase sharply. Additionally, cattle displace elk through space competition.

[DEIS at 155] The overall habitat for deer would improve in the absence of grazing. [DEIS at 155] Grazing is "expected to contribute to cumulative effects [on white-tail deer]." [DEIS at 159] "The overall available habitat for elk would improve in the absence of grazing." [DEIS at 189] Grazing is "expected to contribute to cumulative effects on elk." [DEIS at 190]

The mountain goat is distributed from southeast Alaska through the Canadian Rockies to various mountain ranges in the northern US. The goat was introduced to the Black Hills in 1924, and

became established in only one area: the Black Elk Wilderness and Norbeck Wildlife Preserve region. Livestock compete with mountain goats for forage. [DEIS at 182-83] A 2007 survey suggests a current population of only 60 goats. [DEIS at 183] The overall available riparian and hardwood habitat for goats would improve if livestock grazing were no longer allowed in mountain goat home ranges. Available habitat for this species would improve if competition between mountain goat and livestock was no longer allowed. [DEIS at 183]

C. Direct and Indirect Impacts to Birds During the Phase-Out Period Were Not Assessed.

The Forest Service never addressed the negative impact that livestock grazing during the phase-out period will have on the protection needs of ground-nesting birds, small mammals, reptiles, and amphibians. The agency did not deny that grazing removes cover material that protects these species from predators. The agency failed to present evidence that the negative effects of such lack of protection for small wildlife are insignificant. Since "protection" of birds is a core mandate of NOA, this lack of assessment of impacts is a clear violation of NEPA.

The song sparrow is a focus species. [NWP FEIS at 5] Livestock grazing can degrade song sparrow habitat. [DEIS at 140] In addition, livestock grazing can increase the risk of predation on eggs or chicks. [DEIS at 141] Livestock grazing poses one of the greatest threats to the song sparrow. [DEIS at 139] Livestock grazing in riparian areas can degrade song sparrow habitat by removing woody vegetation, destroying nests, and increase parasitism and predation rates. [DEIS at 140]

The Ruffed Grouse is a focus species. [NWP FEIS 5] Livestock grazing can have direct effects on the grouse such as potential mortality from crushing grouse eggs or chicks, knocking eggs or chicks out of nests, or covering nests with manure. [DEIS at 149] Livestock grazing can also impede the succession of aspen stands by browsing aspen leaders, compacting soil, and creating trails for predators. [DEIS at 149] Livestock grazing can also negatively impact ruffed grouse by changing vegetation structure and food supplies. "The overall available habitat for ruffed grouse would improve if livestock grazing is no longer allowed on these allotments." [DEIS at 149]

Several concerns with grazing and turkey habitat management include reducing foraging habitat and nesting habitat. Loss of food sources including insects, grasses, and forbs can occur. [DEIS at 191] Reducing the grazing effects on this browse species (e.g., aspen, willow) would improve nesting sites. [DEIS at 192] Livestock grazing is expected to contribute to cumulative impacts. [DEIS at 194]

Grazing impacts the mountain bluebird, from possible nest disturbance and associated nesting failure (loss of eggs and hatchlings) resulting from activities related to livestock grazing such as maintenance and reconstruction of range improvement structures (e.g. fence line clearing). Grazing could reduce plant species diversity and reduce important food sources if changes in the understory vegetation occur where specific plants to provide food and oviposition sites for prey species are removed. [DEIS at 194]

D. Direct and Indirect Impacts to Aquatic Habitat and Water Quality Were Not Assessed.

The FEIS failed to assess or disclose the direct and indirect impacts that would occur to aquatic habitat and water quality during the three to eight year grazing phase-out period. This is a violation of NEPA.

In the Norbeck Preserve 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 NWP FEIS states that the watersheds that will be affected by the Project are some of the most sensitive watersheds in the Black Hills. [NWP FEIS at 210] Already an undisclosed number of streams are functioning at “diminished” or “at-risk” capacity due to sedimentation from existing roads. [NWP FEIS at 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. [NWP FEIS at 121] The Forest Service admits that the population and habitat trends for the mountain sucker are already declining. [NWP FEIS at 124]

The Palmer Gulch Allotment Area includes the watershed of Upper Battle Creek. The designated use of Upper Battle Creek is Coldwater Permanent Fish Life Propagation Waters (CPFLP). [NWP FEIS at 212] Upper Battle Creek has been identified by South Dakota as failing to meet water quality standards and is therefore on South Dakota’s CWA § 303(d) list. [NWP FEIS at 212] Upper Battle Creek is on the CWA 303(d) list because its water temperature is greater than 66 degrees Fahrenheit, the required maximum temperature for CPFLP. [NWP FEIS at 212] The reason for its failure to meet required maximum temperatures is listed as natural causes. [NWP FEIS at 212] No TMDL assessment has been initiated on Upper Battle Creek to determine what natural causes are creating the impairment or possible remedies.

The NWP FEIS does not analyze the effects of logging and thinning on water temperature. The NWP FEIS simply states that the logging will have a positive effect on temperature because it will decrease evapotranspiration thereby increasing the amount of water in streams. [NWP FEIS at 212] In making this assertion, the FEIS does not rely on any scientific study, data, or specific impact assessment of the current project that shows there will be a positive effect from logging on stream temperature. *Id.* Citing a USFS publication, the NWP FEIS states: “Streamflows throughout the Black Hills have been reduced over the last century, which is likely a result of fire suppression and the associated increase of woody biomass (trees). Higher leaf area ... increases evapotranspiration.” [NWP FEIS at 212] There is no scientific study of the project area, no data, and no impact assessment of the proposed logging or livestock grazing on water temperature cited in the NWP FEIS. None is presented in the current FEIS, either.

Regarding the impact of logging and prescribed burning in the WIZ on water bodies in the Norbeck Preserve, the NWP FEIS states that the potential for sediment in Alternative 4 (the chosen alternative) is a “slight increase” compared to Alternative 1 (the no action alternative). [NWP FEIS at 213] How the USFS concludes that logging in the WIZ will only result in a “slight increase” is not supported by any scientific assessment or data. There is nothing in the NWP FEIS showing an actual measurement of how much sediment is produced in a “slight increase”. [NWP FEIS at 213] The Forest Service provides no quantitative assessment of how much sediment will be produced by treatments in the WIZ in the Norbeck Preserve area.

Every watershed in the Norbeck Wildlife Preserve is listed as either moderate or high sensitivity. [NWP FEIS at 209; Project File, S&WSR² at 28] The S&WSR states: “There are several reasons why these [NWSI] ratings are high. The big one is the large amount of soils with severe erosion rating. There is also a high percentage of perennial and intermittent streams and steep slopes also play a role. These index numbers are some of the highest in the Black Hills and it has a lot to do with geology.” [NWP Project File, S&WSR at 28-29] Stream health is defined as “the condition of a stream versus reference conditions for the stream type and geology” and is used as an indicator of water quality. [NWP Project File, S&WSR at 35] A stream health rating (SHR) is assigned to each stream in the project area.

Four watersheds are within the Norbeck portions of the Palmer Gulch Allotment area: Upper Battle Creek, Palmer Creek, Rabbit Gulch, and Sunday Gulch. Three of these four watersheds are listed as “Diminished” or “At-Risk” because of sediment levels and/or water temperatures. Upper Battle Creek is considered to have a SHR of “Diminished.” [NWP Project File, S&WSR at 35-36] Palmer Creek and Rabbit Gulch are listed with a SHR of “At-Risk.” [NWP Project File, S&WSR at 35-37]

The NWP FEIS does not explain, and the USFS does not scientifically explore how much sediment is already present in water bodies in the Norbeck Wildlife Preserve area. There is no scientific assessment of the amount of sediment in tons that would enter the stream or how the sediment will affect water quality or stream health in the Project area. “Sediment is a concern within the NWSA because the types of soils present and the extensive stream network. The soils are very erosive, when the organic cover is removed or if the water is concentrated on them.” [NWP Project File, S&WSR at 51] In the Upper Battle Creek Watershed and Spring Creek/Sunday Gulch Watershed, the S&WSR states: “Timber harvest will have cumulative impacts to the aquatic ecosystem from sediment. Short-term sediment will added (sic) to the long-term sediment from the roads and trails. ... With prescribed fire, ... there will be short-term cumulative effects to the aquatic ecosystem from sediment adding to the short-term timber harvest, and long term sediment from roads.” [NWP Project File, S&WSR at 71-79] For Palmer Creek Watershed the S&WSR states: “Timber harvest will have cumulative impacts to the aquatic ecosystem from sediment. Short-term sediment will added (sic) to the long-term sediment from the roads and trails and past short-term sediment from timber harvest. ... With prescribed fire, ... there will be short-term cumulative effects to the aquatic ecosystem from sediment adding to the short-term timber harvest, and long term sediment from roads.” [NWP Project File, S&WSR at 80-81] The NWP S&WSR report makes no assessment of additional sediment impacts due to livestock grazing.

Soils in the Norbeck Preserve were assessed and a significant portion of the Project Area received a Very High Erosion Hazard Rating (VHEHR). [NWP Project File, S&WSR at 24, 111] The NWP FEIS states that the potential to generate sediment is low when the FPS&G including Best Management Practices (BMPs) and Water Conservation Practices (WCPs) are implemented. [NWP FEIS at 213] The NWP FEIS does not explain, and the USFS does not explore, how much sediment the Project will generate and deposit into water bodies after the implementation of WCPs and BMPs. The NWP FEIS simply states that the implementation of WCPs and BMPs will “reduce” the impacts and that the potential to generate sediment is “low.”

² Soil and Water Specialist Report.

The NWP FEIS does not explain, and the USFS does not explore, the ability of each water body to assimilate the amount of sediment that will be generated from logging and burning in the WIZ and in the remainder of the project area.

Furthermore, the Norbeck Wildlife Project preferred alternative proposes logging within 100 feet of a stream – i.e. within the Water Influence Zone – at over 100 sites. [NWP FEIS B-16 to B-18] Although the Forest Service admits that these activities have the potential to further increase stream sedimentation [NWP FEIS at 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 Norbeck Preserve and what the threshold levels of sedimentation are for effective mountain sucker reproduction.

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.

Perhaps even more disconcerting are the numerous Forest Plan violations posed by the fact that over 100 activity sites are within water influence zones [NWP FEIS B-16 to 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. [NWP FEIS at 212] The Forest Plan prohibits actions that do not maintain or improve stream health to “robust.” [Forest Plan Standard 1201] 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]

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 decision to continue livestock grazing during the phase-out period 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 USC § 1604(i)]

On the topic of stream temperature, one of the streams in the Palmer Gulch Allotment area – Upper 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. [NWP FEIS at 211-212] Before allowing continued livestock grazing within the Ford Pasture during the grazing phase-out period, the Forest Service must disclose grazing impacts, including removal and trampling of streamside vegetation, to the headwaters of Battle Creek in order to avoid further increasing stream temperature.

We incorporate here by reference, in its entirety, Section XIII, pages 73-74, of the attached *FotN et al Norbeck Appeal w-o images*, as apart of this appeal.

E. Misrepresentation of the Timeline of the No-Grazing Alternative Biases the Perceived “Reasonableness” of the Duration of the Grazing Phase-Out Period.

The ROD / FEIS assert that the Alternative A (No-Grazing) timeline would require two years (citing 36 CFR 222.4(4)(1) *sic*, ROD at 10, FEIS at iii, 35, 262) or one year (citing 36 CFR 222.4(a)(7)(8) *sic*, ROD at 11) to terminate current grazing permits. This is contrary to the clear language applying to revision of grazing allotment management plans:

(7) Modify the terms and conditions of a permit to conform to current situations brought about by changes in law, regulation, executive order, development or revision of an allotment management plan, or other management needs.

[36 CFR 222.4(a)(7).] Clearly, such modifications apply to the “revision of an allotment management plan” being appealed here; they can be implemented immediately upon resolution of any challenges to such revision.

One wonders how so many mistakes occurred in referencing this basic federal regulation on changes to grazing permits (5 mistakes in 5 references). While the motivation cannot be determined, the effect of these mistaken citations is to establish a 1-2 year delay in changes to grazing permits as a minimum baseline for modifications. This makes the three-year phase-out appear much more “reasonable” than if the ROD had acknowledged that it could order the immediate avoidance of the Ford, Rabbit, Palmer, and Sunday Pastures in the Decision.

This delay in eliminating grazing from the Ford, Palmer, Sunday, and Rabbit Pastures is not only unreasonable, it is unlawful under NOA and the 2001 Tenth Circuit Ruling.

III. By Authorizing Trailing of Livestock within the Norbeck Wildlife Preserve, the FEIS / ROD Violate NOA by Prioritizing Non-Wildlife Concerns Over the Specific “Protection” and “Breeding Place” Mandates for Norbeck.

After documenting that all twelve Norbeck focus species will benefit, or at least not be harmed, by elimination of livestock grazing, the ROD then inexplicably continues livestock grazing for an unnecessary phase-out period and authorizes livestock trailing actions in the Preserve:

My decision provides a three year time period to eliminate use within the NWP. Further, this decision allows limited trailing of livestock through the NWP if needed to eliminate the hazard of trailing livestock along high speed roads and areas of steep topography.

[ROD at 8.] While the timeline of the above authorized trailing is not explicitly stated, we take it as being open-ended, rather than for the three-year phase-out period. Moreover, no areas within the Norbeck Preserve where livestock need to be trailed to avoid “areas of steep topography” are ever identified in the FEIS. The principal high-speed road concerns expressed in the FEIS are for the Old Hill City Road, Twin Springs Road, Deerfield Road and Sheridan Lake Road.

Also, there is a risk on the Sheridan Lake, Deerfield, Old Hill City Highway, and Twin Spring roads for livestock-vehicle collisions because the cattle are not fenced off of the road right-of-way.

[FEIS at 33.] Also,

A direct social and economic effect of the three alternatives is the risk associated with livestock-vehicle collisions. This potential currently exists along the Sheridan Lake Road, Deerfield Road, Twin Springs Road, and the Old Hill City Highway.

[FEIS at 270-271.] And also,

Some comments expressed concern about fencing to restrict livestock access along high speed roads—both for and against. An important part of the decision is to require fencing along the Old Hill City Road. This is necessary to reduce the risk of livestock-vehicle collisions.

[ROD at 9.] Sheridan Lake Road and Deerfield Road are not within the Palmer Gulch Allotment. No portion of the other two roads needs fencing because of the Norbeck Preserve. The Ford Pasture lies between the Old Hill City Road and the Norbeck Preserve, with a fence and cattle guard along the Old Hill City Road. The Rabbit Pasture lies south of the Old Hill City Road, with a fence along the boundary with the Old Hill City Road.

Pennington County Highway Department raised a concern about omission of Palmer Creek Road, which bisects the Palmer Pasture within the Norbeck Preserve, in this list of “high-speed” roads (FEIS at A-6, Letter 2, Comment 5), and got the following response (Mystic Road and Slate Prairie Road are outside the Palmer Gulch Allotment):

The Mystic Road, Palmer Creek Road, and Slate Prairie Road may still be fenced to prevent livestock access as an adaptive management measure as shown on Page 47 of the DEIS.

An inspection of Table 2-1 Adaptive Options [DEIS at 47, FEIS at 46] fails to uncover any option for fencing along Palmer Creek Road.

The decision to authorize trailing of livestock through the Norbeck Preserve is arbitrary and capricious, and a violation of the NOA and the 2001 Tenth Circuit Ruling prioritizing wildlife protection within the Preserve.

IV. By Failing to Adequately Address the Cumulative Impacts of Livestock Grazing Coupled with the Logging that has been Proposed by the Norbeck Wildlife Project and Other Recent Projects, the FEIS / ROD Violate both the NOA and the NEPA.

The concerns that we raised in our October 26, 1990 appeal and our December 23, 1990 Intervention on Supervisor Kenops' original North Custer Allotment decision have never been addressed. We had asked in our scoping letter of November 14, 1996, and again in our comments on the draft EA of January 28, 1997, that these appeal and intervention concerns be fully addressed in the revision of the North Custer AMP. In particular, we repeated our contentions that: (1) livestock grazing is inappropriate on the Norbeck portions of the Allotment; and (2) the impacts to the protection and breeding place needs of game and non-game wildlife have never been adequately addressed.

The Forest Service admits that the Norbeck Wildlife Project preferred alternative “may directly kill nesting [turkeys] because activities may occur during nesting season ...” [NWP FEIS at 92] The Forest Service admits that the preferred alternative may directly affect brown creepers by destroying nests and “killing hatchlings.” [NWP FEIS at 98] The Forest Service admits that the Project has “the potential to impact [ruffed grouse] by killing nesting birds.” [NWP FEIS at 101] The Forest Service admits that the Project presents the “potential for disturbance or direct

mortality” to the song sparrow. [NWP FEIS at 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.” [NWP FEIS at 106] By allowing livestock onto these allotments as early as June 15 [ROD at 4], the Decision guarantees direct mortality to ground-nesting birds. Presenting a 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.

The final North Custer EA continued to ignore these concerns, and failed to even respond to the deficiencies that prompted the remand of the 1990 Decision. As the Chief pointed out regarding the previous North Custer analysis:

While some environmental effects were determined, we find there are some deficiencies. There is mention of cattle/wildlife conflicts, but the analysis of these effects has not been made. The effects on critical riparian resources of the proposed action and alternatives are not site specific, nor are the effects on vegetation and soil productivity. [Chief's Ruling of 5/29/91 at 2, emphasis added].

The North Custer Allotment final EA continued to ignore these specific deficiencies pointed out by the Chief. In 1990, the agency used a categorical exclusion to improperly bypass a thorough site-specific assessment of grazing impacts in the North Custer Allotment in general, and the Norbeck Wildlife Preserve in particular. The final North Custer EA presented an Environmental Assessment that failed to assess any impacts to the critical protection and breeding place needs of wildlife. Rather, the EA continued to present mere post hoc rationalizations for decisions already made, in violation of the clear mandate of NEPA.

In his 1991 remand, the Chief explicitly pointed out that impacts to riparian resources were not site-specific, and thus failed to satisfy NEPA's mandate for full disclosure and fully-informed decisionmaking. Cattle destroy riparian areas and consume forage that otherwise might be available for game animals. Cattle destroy soil and vegetation, particularly in riparian and boggy areas.

The Forest Service has continued to allow cattle grazing within the Norbeck Wildlife Preserve, all the while justifying timber sales on the basis of need for additional forage. Moreover, the agency has never addressed the environmental impacts of grazing on wildlife, particularly the negative impacts of grazing and logging on their protection and breeding place needs, as pointed out by the Chief in his remand.

The Forest Service is required to consider cumulative impacts in its NEPA analysis. 40 CFR §1508.25(c)(3). A cumulative impact is “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions.” 40 CFR § 1508.7.

The Norbeck Wildlife Project does not evaluate the cumulative impacts of cattle grazing in the Project Area on each focus species individually. Instead, the FEIS contains a cumulative impacts analysis for all species in one section of the FEIS. [NWP FEIS at 111]

The cumulative impacts section limits its analysis of how livestock grazing impacts focus species and their habitat to one sentence:

All alternatives are expected to increase forage (grasses/forbs and browse) for these species, which may incrementally reduce conflicts and competition with grazing livestock.

[NWP FEIS at 111] The FEIS documents how livestock grazing can impact Focus Species, but did not specifically document how grazing, combined with cutting trees, will cumulatively impact these species in the Palmer Gulch Allotment Area. Livestock grazing is expected to contribute to the cumulative effects of the black-backed woodpecker, brown creeper, and golden-crowned kinglet. [DEIS at 138] Removal of livestock grazing would likely increase available watering habitat for these species by raising water tables, and increasing riparian vegetation cover and composition that would protect them from predators. [DEIS at 136]

The FEIS does not contain an analysis of the site-specific cumulative impacts that livestock grazing would have on the Focus Species' habitat within the Norbeck Wildlife Preserve.

Finally, in order to comply with NEPA, the Forest Service must disclose cumulative water quality/aquatic habitat impacts in the Project area. 40 CFR § 1508.25(2); 40 CFR § 1508.7. 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 Norbeck Wildlife Project and the Needles and Grizzly Projects, and how that sedimentation has affected the mountain sucker population and habitat trend.

We incorporate here by reference, in its entirety, Section XIII, pages 73-74, of the attached *FotN et al Norbeck Appeal w-o images*, as apart of this appeal.

V. By Failing to Consider the Direct and Indirect Impacts on Game Animals of Birds of the Proposed Fencing that would be Used to Exclude Livestock from the Norbeck Portions of the Palmer Gulch Allotment, the FEIS / ROD Violate NEPA.

For over 20 years now, the agency has displayed a deliberate pattern of failing to address the issue of grazing impacts on wildlife within the Norbeck Wildlife Preserve. Once again, this is true of the cavalier use of “adaptive options” without any assessment of their direct, indirect, or cumulative impacts on the “protection” and “breeding place” needs of game animals and birds within the Preserve. We asked directly that only wildlife-friendly fencing be considered:

Fencing should only be used for excluding cattle from riparian areas, not along highways, unless the fencing is wildlife-friendly so as not to impede movement of game species. Open range signs along roads should help avoid cattle-vehicle accidents.

[FEIS at A-47, Letter 11, Comment 16.] Yet no such assessment of impediments to game species mobility was provided in the FEIS. This, despite acknowledgement in the FEIS that fences can produce fatal results for game species: “Direct effects [of grazing] may include mortality [of mountain goats] from being tangled in barbed wire fence material” [FEIS at 176]; “existing fences within the MRP potentially could cause mortality and injury” of elk ... “effects on elk are similar for white-tailed deer” [FEIS at 181]; and “Potential direct effects to these [mountain bluebird, golden-crowned kinglet, brown creeper, black-backed woodpecker, and northern goshawk] species may come from possible nest disturbance and associated nesting failure (loss of eggs and hatchlings) resulting from activities related to livestock grazing, such as maintenance and reconstruction of range improvement structures (e.g. fence line clearing).”

[FEIS at 132, 133, 136, and D-3].

Rather, the ROD authorizes the permittee(s) to construct boundary fences to exclude livestock from the Preserve over a 3-5 year period under an unanalyzed “adaptive option,” depending on the South or North portion of the Palmer Gulch Allotment. On the North half of the Palmer Gulch Allotment, the permittee will be given from 5-8 years to install one mile of fence in the Ford Pasture:

A new fence approximately one mile in length will be constructed to exclude livestock use from the Norbeck Wildlife Preserve. This fence will be constructed after tree thinning and other work is completed in the NWP that was authorized under a recently issued decision by the Hell Canyon District Ranger. ... The time frame for this is dependent on when the natural barrier is removed. This may be as long as five years. The fence should be in place no later than three years after the natural barriers have been removed.

[ROD at 4, 8.] We must point out that this “natural barrier” is currently ineffective in excluding livestock from the Norbeck Preserve, since cattle can walk unimpeded along FS 356 to Hay Draw, where they can access the old Norbeck one-way alignments that lead directly into the meadow containing the headwaters of Battle Creek. Since Upper Battle Creek is already in violation of State water quality standards, avoidance of the Ford pasture is needed immediately to allow restoration of Upper Battle Creek to its lawful beneficial uses. With use of the Ford Pasture eliminated, Forest system road FS 356 should be permanently closed, and gated at both ends (Old Hill City Road and SD Highway 244).

On the South half of the Palmer Gulch Allotment, the ROD gives a three-year phase out period for livestock grazing within the Preserve:

The Selected Action eliminates grazing within the NWP over a three year time period on the South Half of the Allotment. It requires approximately three miles of fence to exclude use of the Norbeck Wildlife Preserve in the Rabbit and Palmer Pastures, and avoidance of the Sunday Pasture. The permittee might choose to not utilize the Rabbit and/or Palmer Pastures in lieu of building fences.

[ROD at 4.] Whether there are subpastures within the Rabbit pasture that could be avoided to eliminate livestock from the Norbeck Preserve is never elaborated within the FEIS (which fails to address this “phase out” period in any manner whatsoever). What we can be sure of, however, is that these phase-out timetables are clearly established for non-wildlife objectives:

My last decision criteria for the Norbeck Wildlife Preserve regards practical considerations for allotment management pertaining to the affected permittees. This decision will have an effect on the ongoing management of two permit holders. The permit for the South half of the Palmer Gulch Allotment will be the most affected. Several miles of fence may need constructed to keep livestock out of the Preserve, or other actions such as avoiding certain pastures altogether may need to be taken. The permittee will need time to make these adjustments. My decision provides a three year time period to eliminate use within the NWP.

[ROD at 7-8.] Given the potential for direct mortality to nesting birds due to fence line clearing, and direct mortality or injury to big game animals from entanglement in barbed wire materials, the siting of these fences is a critical concern. Given the water quality concerns on the Ford, Sunday, and Palmer Pastures, these pastures should be avoided entirely, and no new fencing constructed. For the Rabbit Pasture, any new fencing to exclude livestock from the Norbeck Preserve should be located along the northern boundary of the Rabbit Gulch watershed, rather

than along the nominal boundary of the Preserve. The Sunday Pasture is to be avoided under the Decision [ROD at 4]. For the Lower and Upper Bear Pastures, any new fencing to exclude livestock from the Norbeck Preserve should be located along the western boundary of the Sunday Gulch watershed, rather than along the nominal western boundary of the Preserve.

Since the decision to phase out the grazing permits on the Norbeck portions of the allotment is given a period of three years on the South Half, and as many as eight years on the North Half, of the Palmer Gulch Allotment, and since continued grazing adversely impacts wildlife, this phase-out decision is in violation of the NOA and the 2001 Tenth Circuit Ruling. Since the direct and indirect effects of this new fencing on wildlife movements into and out of the Preserve were never assessed, this phase-out and fencing option also violates NEPA.

Finally, we note that any fencing along the Norbeck boundary must be considered a “major federal action” requiring its own Environmental Impact Statement. Moreover, only the State of South Dakota is authorized to build such a “good, sturdy fence” (16 USC 677), and the setback requirements of such fencing are not obvious (see 16 USC 678b). Such an action is clearly inappropriate for delegation to permittee(s), and a comprehensive EIS must be prepared if the agency decides to proceed with a Norbeck boundary fence.

VI. Failure to Provide a Norbeck-specific Big Game Hunting Unit Violates NOA; Absent such a Norbeck-specific Big Game Hunting Unit, Forest Plan Standard 5.4A-2505 Violates the Specific “Protection” and “Breeding Place” Mandates for Norbeck by Prioritizing Livestock Grazing over Big Game.

The ROD repeatedly claims that the Decision “preserves the option of using livestock in a very targeted way to improve vegetation (e.g. reduce weeds, control smooth brome)” within the Norbeck Preserve [e.g., ROD at 2, 6]. This is essentially the language of management guideline 5.4A-2505:

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

This management direction could conceivably be interpreted as consistent with the NOA, but only if hunting, logging, and grazing activities that suppress big game populations were prohibited on the Preserve. This would require a Norbeck-specific hunting unit for which annual big game quotas could be set to control overall populations within the Norbeck Preserve.

In addition, the FEIS identified indirect grazing impacts that would likely increase the success of hunters within the Norbeck Preserve: “In addition, lack of diverse understory grass and shrub communities in riparian areas [due to grazing] may increase predation and sight-ability by hunters” on mountain goats [FEIS at 176]; elk [FEIS at 181] and white-tailed deer [FEIS at 150].

In our comments on the NWP DEIS, we pointed out that the Norbeck Wildlife Project 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 NWP 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

[NWP 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 USC 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 . 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, 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. It is arbitrary and capricious for the SDGFP to comply with wildlife protections on these national wildlife refuges, but ignore the specific wildlife protection mandate of the Norbeck Organic Act on the lands of the Norbeck Wildlife Preserve.

We incorporate here by reference, in its entirety, Section IV, pages 35-38, of the attached *FotN et al Norbeck Appeal w-o images*, as apart of this appeal.

VII. 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.

Some 1000 acres of the Norbeck-portion of the Palmer Gulch Allotment in the Palmer and Sunday Pastures were proposed for wilderness designation in the Black Elk Wilderness Additions Proposal of 1991. The Forest Plan Revision of 1997 failed to adequately review these acres for possible wilderness designation, in violation of NFMA.

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.

[Chief's Black Hills Forest Plan Revision Appeal Ruling, Vol2 Page 76.] 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 BHNF 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 Mystic Range Project FEIS fails to correct the Wilderness Review that was improperly done in the Forest Plan Revision. The Mystic Range 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.

We incorporate here by reference, in its entirety, Section III, pages 33-34, of the attached *FotN et al Norbeck Appeal w-o images*, as apart of this appeal.

VIII. By Tiering to the Fatally Flawed Phase II Amendment, the non-Norbeck parts of the FEIS / ROD Violate the NFMA, the 1982 Planning Regulations, the 1999 LRMP Appeal Decision, and the 2000 Settlement Agreement between BCA et al. and USFS.

On August 1, 2000, BCA *et al.* and USFS entered into a binding legal agreement by which USFS agreed to develop the Phase II Amendment of the 1997 Revised BHNF Plan “to ensure compliance with the requirements of NFMA, its implementing regulations and agency policy, and all inadequacies identified in the Chief’s appeal decision of October 12, 1999, for the remainder of the life of the Forest Plan Revision.” Settlement Agreement 9(a), Civ. No. 99-N-2173 (Aug. 1, 2000). The implementing regulations in place at the time of the Settlement Agreement were the 1982 regulations. On May 30, 2006, BCA filed an appeal of the Phase II Amendment based on USFS’ failure to comply with NFMA and the 1982 implementing regulations or the Chief’s 1999 appeal decision, among other specific claims. The Chief of the

Forest Service decided that appeal on November 1, 2006, by affirming the Phase II Amendment despite its legal inadequacies.

Paragraph 14(g) of the 2000 Settlement Agreement states that “Plaintiffs retain the right to enforce the terms of this agreement pursuant to the terms of this paragraph.” Settlement Agreement 14(g). BCA followed the terms of the agreement when it filed its appeal of the Phase II Amendment. In previous administrative appeals, USFS has asserted Paragraph 14(i) of the 2000 Settlement Agreement against BCA. That paragraph states “[t]his Agreement, and the rights and obligations created by it, shall expire and be of no further effect or validity upon the promulgation of the Phase II Forest Plan amendment.” Settlement Agreement 14(i). This clause in the Agreement presumes, of course, compliance with the Agreement’s terms in the Amendment’s promulgation, which did not occur. USFS further has asserted that Paragraph 12(c) precludes the use of the 2000 Settlement Agreement terms “in any future litigation or negotiations with respect to any matter whatsoever.” Settlement Agreement 12(c). However, the same paragraph qualifies this limitation to allow use of the Settlement Agreement terms “to enforce this agreement pursuant to paragraph 14(g).” *Id.* BCA has not yet achieved enforcement of the agreement, and “reserve[s] the right to petition . . . a United States District Court Judge for the purposes of interpreting or enforcing the terms of this Agreement.” Settlement Agreement 14(g).

USFS has now signed a Record of Decision authorizing implementation of the Palmer Gulch Allotment of the Mystic Range Project, a project that must adhere to the 1997 Revised Forest Plan as amended by the Phase II Amendment and the 1982 implementing regulations. However, because the Phase II Amendment itself is illegal and does not comply with the applicable 1982 implementing regulations, 1999 Appeal Decision, or 2000 Settlement Agreement, as BCA explained in its 2006 appeal, any site-specific BHNF projects authorized pursuant to it are illegal if they do not meet the requirements of the 1982 regulations or the Settlement Agreement. As such, the illegal flaws of the Phase II Amendment define the scope of any site-specific project authorized under its auspices, including the project in question, and merit consideration in this appeal.

IX. By Failing to Ensure Viable Populations of Wildlife on the non-Norbeck Portions of the Black Hills National Forest, the FEIS / ROD Violate NFMA.

A. The 1982 regulations regarding wildlife viability and Management Indicator Species apply to the Mystic Range Project.

NFMA requires the Secretary of Agriculture to promulgate forest planning regulations that “specif[y] guidelines for land management plans . . . [to] provide for diversity of plant and animal communities based on the suitability and capability of the specific land area.” 16 U.S.C. § 1604(g)(3)(B) (2010). To meet this statutory requirement, the 1982 planning regulations direct USFS to manage habitat “to maintain viable populations of existing native and desired non-native vertebrate species in the planning area.” 36 C.F.R. § 219.19 (1999). The provision goes on to define a “viable population . . . as one which has the estimated numbers and distribution of

reproductive individuals to insure its continued existence is well distributed in the planning area.” *Id.* To accomplish this, USFS must provide habitat “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.” *Id.* Furthermore, § 219.19(a)(1) requires USFS to identify and select as management indicator species (MIS) “certain vertebrate and/or invertebrate species present in the area” in order to monitor the “effects of management activities.”

Following such selection based on appropriate criteria, USFS must monitor population trends of MIS and determine relationships to habitat changes. 36 C.F.R. § 219.19(a)(6). Also, “[p]lanning alternatives shall be stated and evaluated in terms of both amount and quality of habitat *and of animal population trends of [MIS].*” 36 C.F.R. § 219.19(a)(2) (emphasis added). The 1982 planning regulations have never been overturned by a federal court, a notable indication they legally satisfy Congress’ intent in enacting NFMA.

The 2000 Settlement Agreement requires USFS to analyze population trend data for Management Indicator Species (MIS) under the 1982 planning regulations at 36 C.F.R. § 219. Despite the USFS’ previous assertions that the Settlement Agreement does not mention specific provisions of the 1982 regulations, the 1982 regulations were the relevant planning regulations in effect at the time USFS entered into the Agreement and governed both the development of the 1997 Revised Forest Plan and the Phase II Amendment. USFS’ reliance on the transition provision of the 2005 planning regulations in the Record of Decision for the Phase II Amendment to escape its MIS obligations is disingenuous. BCA entered into the 2000 Settlement Agreement in good faith with a shared understanding of USFS obligations toward MIS based on the 1982 regulations. Furthermore, the District Court for the Northern District of California struck down the 2005 regulations as unlawful under the National Environmental Policy Act (NEPA), the Endangered Species Act (ESA), and the Administrative Procedure Act (APA), rendering them invalid. *Citizens for Better Forestry v. U.S. Dep’t of Agric.*, 481 F.Supp.2d 1059 (N.D. Cal. 2007).

Instead, the 1982 provisions of the planning regulations requires that “[p]opulation trends of the management indicator species . . . be monitored and relationships to habitat changes determined” in order to satisfy NFMA. 36 C.F.R. § 219.19(a)(6) (1999). USFS must conduct “inventories” that “include quantitative data making possible the evaluation of diversity in terms of its prior and present conditions.” *Id.* § 219.26. USFS “must evaluate planning alternatives for projects that affect the selected management indicator species ‘in terms of both amount and quality of habitat and of animal population trends of the management indicator species.’” *Forest Guardians v. U.S. Forest Serv.*, Civ. No. 00-714 JP/KPM-ACE (D. N.M. 2001) (quoting 36 C.F.R. § 219.19(a)(2) (1999)). This stems from the prescription that forest plans must contain “[m]onitoring and evaluation requirements that will provide a basis for periodic determination and evaluation of the effects of management practices.” 36 C.F.R. § 219.11(d) (1999).

The Phase II Amendment Record of Decision audaciously claims not to “impose an obligation to maintain viability at the project level,” despite courts’ opposite determinations. Phase II Amendment Record of Decision, p. 7 (2005). The fact that most species’ range “extends beyond the scale of any particular project” does not relieve USFS from its monitoring and analysis duties at the site-specific level. Phase II ROD, page 8. Instead, USFS must demonstrate it undertook the necessary steps to collect and assess targeted population trend data to determine whether a particular project will cause a species to be rendered unviable. USFS’ assertion that “the 1982

regulation did not require that viability be maintained at the geographic and temporal scale of a single project nor did it require monitoring of MIS population trends at that scale” is unsupported by case law.

USFS has also previously asserted against BCA that the 1982 NFMA planning regulations do not apply to projects implemented under the 1997 BHNF Plan, despite precedent to the contrary from the Tenth Circuit Court of Appeals, the District Court for the District of Colorado, and other federal jurisdictions. In *Utah Environmental Congress v. Bosworth*, the Tenth Circuit noted preliminarily that “[i]ndividual projects must comply the NFMA’s enacting regulations.” *Utah Environmental Congress v. Bosworth*, 372 F.3d 1219, 1221 (10th Cir. 2004) (citing 16 U.S.C. 1604(i)). The Tenth Circuit further held that 36 C.F.R. § 219.19 (1999), which governs USFS actions relating to wildlife viability and MIS, applies to the authorization of site-specific projects. *Utah Environmental Congress*, 372 F.3d at 1224-25. Site-specific projects must comply with forest plans, which must comply with planning regulations, which must comply with NFMA, the Tenth Circuit reasoned. *Id.* Following this logic, each tier of national forest management must comply with every higher tier, and the Tenth Circuit applied § 219.19 to a site-specific project. Under Tenth Circuit precedent, § 219.19 applies to the Mystic Range Project.

Similarly, the District Court for the District of Colorado held “that unless it is technically infeasible and not cost-effective, the Forest Service has an obligation to collect and analyze quantitative population data, both actual and trend, for MIS.” *Colorado Wild v. U.S. Forest Serv.*, Civ. No. 03-Z-2592 (PAC) (D. Colo. 2004). The court reiterated “this requirement applies at both the forest-plan level and the project level.” *Id.* Other district courts agree “[t]he unambiguous language of the MIS regulations requires collection of population data.” *Sierra Club v. Glickman*, 974 F. Supp. 905, 936 (E.D. Tex. 1997). Under both binding and persuasive precedent, § 219.19 applies to the Mystic Range Project.

In light of the invalidation of the 2005 and subsequent 2008 regulations, USFS asserts the “best available science” standard drawn from the 2000 planning regulations (published after the 2000 Settlement Agreement) applies to site-specific projects. See Federal Register notice at http://www.fs.fed.us/emc/nfma/includes/2009_12_18_2000RuleFed_Reg_Notice.pdf; 36 C.F.R. § 219.35(a) (2001). All site-specific projects must comply with the Forest Plan, developed under the 1982 regulations, as well as the terms of the 2000 Settlement Agreement. While use of the “best available science” sounds good for forest ecology, in effect it allows USFS to avoid ensuring wildlife viability or meeting its specific obligations regarding MIS in accordance with the 2000 Settlement Agreement. It allows USFS to arbitrarily opt not to seek up-to-date data and instead rely on obsolete research that barely scratches the surface of what actually is occurring on the ground across the planning area. Such evasion of the MIS and wildlife viability standards in the 1982 regulations ultimately leads to the USFS’ violation of the NFMA mandate to provide plant and animal diversity across the BHNF. 16 U.S.C. § 1604(g)(3)(B).

USFS says “[d]ata were collected and compiled from field surveys (2007-2009), District wildlife observation data, South Dakota Natural Heritage Program (SDGF&P 2008a), literature reviews, communication with District personnel, and the Wildlife Report completed for the Phase II Amendment to the Black Hills National Forest Land and Resource Management Plan Revision,” but fails to provide any exact figures collected in the FEIS, so the general public cannot determine population levels absent perhaps a Freedom of Information Act request. FEIS 127. A glance through the “Literature Cited” reveals the vast majority of research used by USFS is at

least five years old, some more than ten years old or more. *See* FEIS 273-290. Wildlife populations are subject to fluctuations and some data may quickly become obsolete. Relying on data collected over half a decade ago fails to satisfy the purpose of having MIS. MIS essentially serve as proxies for other species that occupy similar habitat ecosystems. Without actual, current population data or viability calculations, this proxy purpose offers no way to confirm compliance with NFMA's diversity mandate. Neither do USFS' conclusions stem reasonably from facts the public can readily glean in the FEIS, as required by the Tenth Circuit. *Olenhouse v. Commodity Credit Corp.* 42 F.3d 1560, 1575 (10th Cir. 1994).

Some courts prohibit using a habitat-as-proxy ("proxy-on-proxy approach") except "where both the Forest Service's knowledge of what quality and quantity of habitat is necessary to support the species and the Forest Service's method for measuring the existing amount of that habitat are reasonably reliable and accurate." *Native Ecosystems Council v. Tidwell*, Civ. No. 06-35890 3718-19 (D. D.C. 2010) (citing *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1250 (9th Cir. 2005)). In order for the proxy-on-proxy approach to pass judicial muster, it must "reasonably ensure[] that the proxy results mirror reality." *Native Ecosystems Council*, Civ. No. 06-35890, 3719 (citing *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9th Cir. 2004)). Other courts (notably in the Tenth Circuit) prohibit the use of "habitat trend data" as a proxy for population inventories outright, based on the plain language of the 1982 regulations. *Forest Guardians v. U.S. Forest Serv.*, Civ. No. 00-714 JP/KPM-ACE (D. N.M. 2001); *Sierra Club v. Martin*, 168 F.3d 1, 6 (11th Cir. 1999).

The FEIS does not demonstrate that either up-to-date population counts and viability calculations or a justifiable proxy-on-proxy approach satisfy USFS' legal obligations regarding MIS. Without baseline data and non-obsolete on-the-ground monitoring, USFS has not shown compliance with NFMA's diversity mandate or implementing regulations, let alone the 2000 Settlement Agreement or NEPA's "hard look" requirement.

Neither has USFS honored its own policies. While the Phase II Amendment does not explicitly require population monitoring and USFS argues the 1982 regulations pertaining to MIS do not apply, the agency retains the concept of MIS yet then ignores the concept's purpose. USDA Departmental Regulation 9500-4 reiterates direction to USFS to manage habitat "to maintain at least viable populations" of "all existing native and desired non-native plants, fish, and wildlife species." USDA Departmental Regulation 9500-4. Specifically, the USDA regulation commands USFS to conduct "[m]onitoring activities . . . to determine results in meeting population and habitat goals." *Id.* The Forest Service Manual echoes this notion: "Conduct monitoring of plans and projects . . ." FSM 2621.5.

We direct USFS' attention to the study by Traill, L.W. *et al.*, showing "[t]he science of more than 30 years of empirical and genetic research on the viability of wild-living populations thus implies that the number of individuals (required to avoid a turning point toward extinction) is greater than generally appreciated or implemented within conservation management." Traill *et al.*, *Pragmatic population viability targets in a rapidly changing world*, Biol. Conserv. (2009).

The authors contend "conservationists often manage below a biologically reasonable extinction threshold." *Id.* "[A]ny conservation project that is serious about the long-term survival . . . of a species," the authors determine, "must aim for a meta-population of thousands of individuals." *Id.*

In the context of the Mystic Range Project, USFS must demonstrate how this "site-specific"

project actually contributes to the maintenance of such viable meta-populations, through both localized population monitoring and habitat connectivity emphasis beyond the arbitrary boundaries of a project's scale. "[M]ost populations presently exist as fragmented sub-populations within a larger meta-population," the authors acknowledge, and this reality rings especially true for the BHNF. *Id.* Thus, "successful conservation depend[s] on genetic exchange among units to maintain high genetic diversity." *Id.*

A separate study defined "a minimum viable population size as one with a 99% probability of persistence for 40 generations." Reed, D.H., et al., *Estimates of minimum viable population sizes for vertebrates and factors influencing those estimates*, Biol. Conserv. 113 (2003) 23-34. The authors of this study "estimate[d] that in order to ensure long-term persistence of vertebrate populations, sufficient habitat must be conserved to allow for approximately 7000 breeding age adults." *Id.* at 30. The authors acknowledge the problems with managing for such large populations, as "continuous blocks of land capable of supporting populations of 7000 large vertebrates, especially carnivores, is not available." *Id.* at 31. "Thus," the authors recognize, "the need to coordinate networks of smaller populations to ensure viable populations through the use of corridors, or managed immigration, should be a high priority." *Id.*

The Palmer Gulch ROD and the FEIS for the Mystic Range Project fail to clarify how USFS intends to provide corridors or allow for managed immigration to accommodate viability on the larger temporal and spatial scale. Population viability analysis may not be an exact science, but it "is the method that most capably brings all the factors considered important to population persistence under one umbrella." *Id.* Merely tiering back to the flawed Phase II Amendment blatantly avoids assessing the current situation and planning accordingly to account for all factors involved in wildlife viability.

No matter how USFS tries to avoid the viability and MIS standards of the 1982 regulations, the terminology and purpose of these concepts pervades throughout each tier of resource management for the National Forest System, and USFS has not satisfactorily addressed how it intends to comply with its obligations to viability in general and MIS specifically in the ROD and FEIS for the Mystic Range Project. USFS must respond to and correct its inadequacies based on the above-mentioned case law, statutory and regulatory provisions, and scientific studies. The public demands and the law requires (via NFMA, NEPA, the Administrative Procedure Act, etc.) intellectual honesty and transparency from USFS, not mere lip service to wildlife viability and MIS that avoids making reasoned decisions supported by evidence fully disclosed in the record.

B. The FEIS fails to provide thorough consideration and protections for MIS.

Page 128 of the FEIS refers back to the Phase II Amendment FEIS to avoid providing up-to-date data regarding the status of MIS in the planning area. The FEIS says "MIS are evaluated based on observations and/or presence of suitable habitat" in the planning area. Wildlife populations fluctuate. Relying on data collected over half a decade ago fails to satisfy the purpose of having MIS. MIS essentially serve as proxies for other species that occupy similar habitat ecosystems. Without actual, current population data or viability calculations, this proxy purpose offers no way to confirm compliance with NFMA's diversity mandate.

Furthermore, courts caution against using a habitat-as-proxy (“proxy-on-proxy approach”) except “where both the Forest Service’s knowledge of what quality and quantity of habitat is necessary to support the species and the Forest Service’s method for measuring the existing amount of that habitat are reasonably reliable and accurate.” *Native Ecosystems Council v. Tidwell*, Civ. No. 06-35890 3718-19 (D.D.C. 2010) (citing *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1250 (9th Cir. 2005)). In order for the proxy-on-proxy approach to pass judicial muster, it must “reasonably ensure[] that the proxy results mirror reality.” *Native Ecosystems Council*, Civ. No. 06-35890, 3719 (citing *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066 (9th Cir. 2004)).

The FEIS does not demonstrate that either up-to-date population counts and viability calculations or a justifiable proxy-on-proxy approach satisfies USFS’ legal obligations regarding MIS. Without baseline data and non-obsolete on-the-ground monitoring, USFS has not shown compliance with NFMA’s diversity mandate or implementing regulations, let alone the 2000 Settlement Agreement or the National Environmental Policy Act’s “hard look” requirement.

C. The FEIS fails to provide thorough consideration and protections for R2 Sensitive Species.

Page 127 of the FEIS acknowledges that no biological assessment/biological evaluation (BA/BE) was completed for the Mystic Range Project: “This document tiers directly to the revised Forest Plan and the Phase II Forest Plan Amendment EIS (USDA Forest Service 1996b, 2005a) and the associated Biological Assessment/ Biological Evaluations (BA/BE), (Appendices H and C respectively).” To help the public better understand the implications of the alternatives presented, the FEIS should have presented more clear information on the effects of R2 Sensitive Species. Instead, the FEIS refers to evaluations done for the Phase II Amendment regarding population viability to presume persistence of these species over the next 50 years “if standards and guidelines are followed, and if conditions move toward Forest Plan objectives.”

First, the nature of fluctuating wildlife populations renders evaluations done over half a decade ago for the Phase II Amendment obsolete. In Appendix D, for every single R2 Sensitive Species, the FEIS asserts the action alternatives are “not likely to result in a loss of viability” despite expected adverse impacts to individuals. Such assertions lack reasoning, as the FEIS fails to provide calculations of populations necessary for viability. Nor does the FEIS refer to current baseline data demonstrating the species’ population statuses. The public is thus unable to discern whether the proposed project will comply with NFMA, its implementing regulations, the Forest Plan, or the Settlement Agreement (particularly regarding the northern goshawk), let alone the National Environmental Policy Act’s “hard look” requirement.

Second, the reliance on the Phase II Amendment’s evaluations presumes USFS has complied and will comply with its legal obligations toward wildlife across the BHNF, which USFS has repeatedly demonstrated has not and will not occur, even after prompting and orders from federal courts. The FEIS must provide current monitoring data establishing a relevant baseline, and must calculate population viability for R2 Sensitive Species in the planning area. The ROD, in turn, must implement protections for these species that ensures their viability and complies with all legal obligations mentioned above.

LIST OF ATTACHMENTS

Attachment 1 – FotN et al Nobeck Appeal w-o images