

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

**FILED**

SEP 17 2007

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

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No. 07-35000  
\_\_\_\_\_

THE LANDS COUNCIL and WILDWEST INSTITUTE,

Plaintiffs-Appellants,

v.

RANOTTA MCNAIR, Forest Supervisor  
for the Idaho Panhandle National Forests,

Defendant-Appellee,

BOUNDARY COUNTY; CITY OF BONNERS FERRY; CITY OF MOYIE  
SPRINGS; EVERHART LOGGING, INC.; and REGEHR LOGGING, INC.

Defendants-Intervenors-Appellees.

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On Appeal from the United States District Court for the District of Idaho

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**FEDERAL DEFENDANT-APPELLEE'S PETITION FOR PANEL  
REHEARING AND FOR REHEARING EN BANC**

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## STATEMENT

The panel majority rejected Forest Service scientific determinations that were based on widely accepted sources of the best scientific analysis and data available, including peer-reviewed studies and modeling. Instead, the panel held that the agency must verify its scientific determinations through a more stringent judicially-created requirement for “observation” and “on the ground analysis.” Addendum (“Add.”) at 7,783-86. This requirement is not based in the relevant substantive statutes and conflicts with deferential review, particularly of scientific issues, under the Administrative Procedure Act (“APA”). The panel would read the National Environmental Policy Act – a statute designed to encourage study and disclosure – to require that agencies prove with certainty the environmental benefits of their actions. The panel would read the National Forest Management Act – a statute that on its face requires a balancing of environmental concerns with other uses such as recreation and timber harvesting – as substantively requiring they prove “no harm” to the environment, and further requiring that agencies meet this burden of proof with a high degree of certainty, employing only the specific methods preferred by judges, rather than those used by agency scientists.

Rehearing or rehearing en banc is appropriate under Federal Rule of Appellate Procedure 35(b)(1)(A). In particular, the panel's opinion conflicts with scores of cases from the Supreme Court and this Court, including:

- *Baltimore Gas and Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983) (when court reviewing scientific determinations “within its area of special expertise, at the frontiers of science,” “reviewing court must generally be at its most deferential”); *Dickinson v. Zurko*, 527 U.S. 150, 164 (1999) (record-based factual conclusions reviewed for whether they are supported by “substantial evidence”); *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 953-54 (9<sup>th</sup> Cir. 2003) (courts “cannot substitute [their] judgment for that of the Forest Service . . . but instead must uphold the agency decisions so long as the [agency has] ‘considered the relevant factors and articulated a rational connection between the facts found and the choice made’”).
- *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 542-43, 549 (1978) (courts should not impose upon agency their own notion of which procedures are best or most likely to further general public interest); *Churchill County v. Norton*, 276 F.3d 1060, 1071 (9<sup>th</sup> Cir. 2001) (same); *Wilderness Soc’y v. Tyrrel*, 918 F.2d 813, 818 (9<sup>th</sup> Cir. 1990) (courts cannot require an agency to jump through procedural hoops that are not explicitly enumerated in the pertinent statutes).

As Judge Smith noted in his concurrence, en banc review is warranted. Rehearing is also appropriate under Rule 35(b)(1)(B) because the case involves questions of exceptional importance. The Court's ruling places a massive burden on an agency that manages 192 million acres.

## LEGAL BACKGROUND

The National Environmental Policy Act of 1969 (“NEPA”), 42 U.S.C. § 4231 *et seq.*, requires that federal agencies prepare an Environmental Impact Statement (“EIS”) for major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). An EIS should contain “a reasonably thorough discussion of the significant aspects of the probable environmental consequences.” *Churchill County v. Norton*, 276 F.3d at 1071 (quotation marks and citations omitted). NEPA is a procedural statute and does not mandate a particular substantive result. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). NEPA is designed to “insure a fully informed and well-considered decision, not necessarily a decision [judges] would have reached had they been members of the decisionmaking unit of the agency.” *Vt. Yankee*, 435 U.S. at 558.

The National Forest Management Act of 1976 (“NFMA”), 16 U.S.C. § 1600 *et seq.*, governs the Forest Service’s management of the National Forest System. NFMA directs the Forest Service to develop land and resource management plans (“Forest Plan”) covering each unit of the system to provide for multiple use and sustained yield of the various natural resources, including timber and wildlife. *See* 16 U.S.C. § 1604(a), (e). A Forest Plan is a long-term programmatic plan that

establishes the goals and objectives for units of the National Forest System.

NFMA directs that Forest Plan guidelines “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.” *Id.* § 1604(g)(3)(B).

## FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Lands Council and WildWest Institute (“Lands Council”) sued to challenge the Mission Brush Project (“Project”) in the Idaho Panhandle National Forest (“IPNF”). The Project assessment area encompasses approximately 31,350 acres, which includes approximately 16,650 acres of National Forest as well as private and Canadian land. SER 48.<sup>1</sup> The Forest Service issued an initial Environmental Impact Statement (“EIS”) and Record of Decision (“ROD”) for the Project in May 2004.

In April 2006 the Forest Service issued a Supplemental Final EIS (“SFEIS”) to address the issues raised by *Lands Council v. Powell*, 395 F.3d 1019 (9<sup>th</sup> Cir. 2005) (“*Lands Council I*”), and issued a new ROD to authorize the Project. SER 52. The SFEIS is approximately 397 pages long, and is supported by a 10,312-page Administrative Record. In it, the agency identified four factors of primary importance to the Project’s environmental consequences: vegetation, aquatics,

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<sup>1</sup> Citations to “ER” refer to Lands Council’s Excerpts of Record and “SER” refers to the United States’ Supplemental Excerpts of Record.

wildlife habitat, and recreation. SER 48. For vegetation, the Project would move vegetation composition and structure towards forest stands that will better resist insects, diseases, and stand-replacing wildfires. SER 48. The most significant changes within the Project area have been in dry forest types. Prior to the twentieth century, these forest types were burned frequently by low- or mixed-severity fires. SER 72. As a result of fire suppression for the last 50 years, long-lived seral tree species – ponderosa pine, western white pine, and western larch – have been replaced by more shade-tolerant species such as Douglas-fir. SER 161. Douglas-fir is much less resistant to fire, insects, and disease than the long-lived seral species. SER 163. In addition, stands with Douglas-fir and grand fir are much denser, making the forest more prone to devastating stand-replacing fire. SER 73. The Project will reduce tree density to return forest composition to its more historic open character, promote the development of large-diameter ponderosa pine and western larch, and return fire to its traditional role in the ecosystem. SER 48-49. The Project will result in no net-loss of old growth forest. SER 242. The Project will reduce the risk of stand-replacing fires by about 50% within treated areas and by about 20% overall in the Project area. SER 468. The Project would implement silvicultural activities on 3,829 acres in the 31,000 acre area. SER 446.

With respect to wildlife habitat, the Project will promote the long-term persistence and stability of habitat and biodiversity by trending toward vegetation providing a variety of wildlife habitats. SER 49. The Project area currently contains forest stands that are relatively similar in size and age that do not provide a range of wildlife habitats. SER 58. For example, certain species in the Project area, such as flammulated owl, seek as habitat relatively open forest areas. SER 198. Less than 2% (364 out of 18,359 acres) of the area analyzed is currently suitable for flammulated owls. SER 279. Other species, such as the fisher, prefer denser forests than those preferred by the owl, with high cover. SER 200. Thus, some species have conflicting habitat needs. By seeking to provide a variety of wildlife habitats in the Project, the Forest Service seeks to meet the habitat needs of all species.<sup>2</sup>

Lands Council filed a complaint and a request for a preliminary injunction. SER 1-44. On December 18, 2006, the district court denied the preliminary injunction, concluding that Lands Council had not demonstrated that it was likely to prevail on either its NFMA or NEPA claims. In particular, the court held that administrative record supported the Forest Service's conclusion in the SFEIS that the Project would improve habitat and benefit species that utilized it. ER 6. The

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<sup>2</sup> The proposed Project also includes aquatic and recreational improvements, including several miles of road closures. SER 49.

court explained that “[t]he administrative record contains several current reports and analysis which support the conclusions reached by [the Forest Service] regarding the impact of the proposed project on the old growth stands.” ER 7.

After discussing the SFEIS’s analyses of the impact of the Project on animal species and soil and water quality, the court concluded that the Forest Service did not violate NEPA or NFMA because it “utilized recent site-specific data, reliable methodology, and took a ‘hard look’ at the information” in approving the Project. ER 14. The court also held that plaintiffs “failed to point to irreparable harm beyond the general allegation that environmental harm is irreparable.” ER 15.

On appeal, the panel of this Court reversed, holding that Lands Council had demonstrated a probability of success on the merits and a possibility of irreparable injury. Add. at 7,791. Under the NFMA, the panel reasoned, the Forest Service must “demonstrate the reliability of its scientific methodology” Add. at 7,783 (quoting *Ecology Ctr. v. Austin*, 430 F.3d 1057, 1064 (9th Cir. 2005).<sup>3</sup> To do so, the agency must “‘verif[y] [the methodology] with observation’ and ‘on the ground analysis.’” *Id.* (quoting *Lands Council I*, 395 F.3d at 1035).

Applying that standard, the panel concluded that plaintiffs were likely to succeed on their claim that the Forest Service had violated the NFMA because

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<sup>3</sup> The panel cited no statutory provision supporting this requirement.

“[t]he Forest Service has not proven the reliability of its scientific methodology with regard to wildlife habitat restoration.” Add. at 7,783. The panel stated that “[i]n particular, the Service has failed to demonstrate that the Project will not harm the flammulated owl, the northern goshawk, the fisher, and the western toad, all of whom the Forest Service has designated as ‘sensitive species.’” *Id.* Instead, the panel found, the Forest Service was relying on “the ‘unverified hypothesis’ that ‘treating old-growth forest is beneficial to dependent species.’” Add. at 7,784 (quoting *Ecology Center*, 430 F.3d at 1064). The panel dismissed the Forest Service’s reliance on a 2006 study (the Dawson Ridge Flammulated Owl Habitat Monitoring Study) of an area that had recently been harvested and was proximate to the Project area because researchers heard only one owl. Add. at 7,784-85. The panel noted that the Study did not conclude that “treating old-growth forest is beneficial to dependent species,” but merely that the presence of an owl “‘impl[ied]’ that the harvesting practices ‘are at least *maintaining* suitable habitat.’” *Id.* (quoting Dawson Ridge Study) (emphasis in original). The panel dismissed out-of-hand the other studies on which the Forest Service relied because they did not include first-hand “observation . . . of the actual dependent species in order to determine whether the species will use the habitat if the Forest Service engages in the process it proposes.” Add. at 7,785. The panel rejected other

documents cited in the SFEIS because they were “position papers and ‘conservation plans’” that contained no “on the ground analysis.” Add. at 7,786.

The panel also held that plaintiffs were likely to succeed on their claim that the Forest Service violated NEPA because “the Forest Service failed to include a full discussion of the scientific uncertainty surrounding its strategy for improving wildlife habitat.” Add. at 7,787.

Judge Smith “reluctantly” concurred because *Ecology Center* “is binding law in this circuit and dictates the outcome of this case.” Add. at 7,791. However, Judge Smith believed that *Ecology Center* “was wrongly decided” and “would (if the occasion arises) reverse [it].” Add. at 7,801. Judge Smith faulted *Ecology Center* for extending the *Lands Council I* fact-bound holding that the Forest Service needed to provide “on-site spot verification” of its soil analysis based on spreadsheet models to circumstances in which “there is a reasonable scientific basis to uphold the legitimacy of modeling.” Add. at 7,793 (quoting *Ecology Center*, 430 F.3d at 1073 (McKeown, J., dissenting)). Under the *Ecology Center* approach, Judge Smith reasoned, the court of appeals, contrary to the APA, has no “obligation to defer to the scientific expertise of the Forest Service and to overrule only determinations that are ‘arbitrary and capricious.’” Add. at 7,795. Judge Smith stated that had the panel not been bound by *Ecology Center*, it might

have upheld the agency's decision. Add. at 7,795-96. However, Judge Smith observed that the panel "summarily dismissed" one study for lack of on-site observation "simply because it is a survey of the flammulated owls' habitat in British Columbia" and despite its documentation of "a flammulated owl presence within logged old-growth stands." Add. at 7,795-96. Furthermore, the panel rejected various conservation plans, again notwithstanding that those plans "demonstrate that flammulated owls can inhabit selectively-logged stands." Add. at 7,796. Judge Smith observed that "[i]f we do not grant the Forest Service appropriate deference in areas of scientific expertise, we defeat the purpose of permitting the Forest Service to make administrative decisions in the first place, and we intrude into areas far beyond our competence." Add. at 7,797.

## **ARGUMENT**

### **THE PANEL'S OPINION CONFLICTS WITH THE SUPREME COURT'S DEFERENTIAL JUDICIAL REVIEW OF AGENCIES' SCIENTIFIC DETERMINATIONS**

The panel's opinion conflicts with two principles of judicial review of final agency action: (i) it displaces the APA's arbitrary and capricious standard with a heightened standard of proof, and (ii) it imposes procedural and substantive requirements on the Forest Service that are not in the applicable substantive statutes. In particular, the panel erred when it imposed this heightened burden of

proof to require the agency to verify its scientific determinations, or “hypotheses,” regarding the Project’s effects on wildlife with “on the ground analysis,” rejecting reliance on other sources of data on which scientists routinely rely. The panel further erred by requiring the Forest Service not to harm “sensitive species,” a substantive requirement not found in the NFMA or NEPA.

**A. The Panel’s Scrutiny of Forest Service Decisionmaking Exceeded That Allowed under the APA’s Arbitrary and Capricious Standard of Review.**

The panel applied a level of scrutiny to the agency’s analysis regarding the effect of the Project on wildlife habitat that is inconsistent with arbitrary and capricious review. Under the APA, agency action may only be overturned if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right.” *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 376 (1989). A reviewing court may not base its judgment on whether it would have made an administrative decision differently. Instead, the court’s role is to determine whether “the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Where an agency’s particular technical expertise is involved, the reviewing court should be particularly zealous in

guarding the agency's discretion. *Marsh*, 490 U.S. at 376-77. Furthermore, where an agency "is making predictions at the frontiers of science," and a reviewing court is called on to examine "this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Baltimore Gas*, 462 U.S. at 103. The court need not determine whether the agency employed the best scientific methodology available nor resolve disagreements among scientists as to methodology. *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9<sup>th</sup> Cir. 1985).

When agency action is reviewed under the arbitrary and capricious test, record-based factual conclusions are reviewed for whether they are supported by "substantial evidence." *Zurko*, 527 U.S. at 164. That standard of review requires the court to ask whether a "reasonable mind might accept" a particular evidentiary record as "adequate to support a conclusion." *Id.* at 162 (quotation marks and citations omitted). The standard is less strict than the "clearly erroneous" standard. *Id.* Under the substantial evidence test, the agency's decision must be sustained unless a reasonable fact-finder would have to conclude to the contrary. *See INS v. Elias-Zacarias*, 502 U.S. 478, 481 (1992). The evidence must be enough, in terms of sufficiency, "to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for

the jury.” *NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *see also Zurko*, 527 U.S. at 162.

The Forest Service analyzed the Project area for wildlife species potentially impacted. SER 189-204. The description of habitat needs of the analyzed species in the SFEIS is based on and references numerous scientific studies. The Forest Service also used wildlife habitat capability models for species or species guilds, and Forest Service personnel validated these models by conducting site visits to representative capable habitat for these species. SER 193. The SFEIS also examined the effects of the proposed alternatives on the habitat of wildlife species. SER 262-300. The agency based this analysis on recent field surveys, scientific literature, wildlife databases, habitat evaluations, and professional judgment. SER 262.

Notwithstanding these various sources of data supporting the agency’s analysis, the panel essentially disregarded this record support for agency determinations because it did not constitute “on the ground analysis.” Add. at 7,783, 7,786; *see also* 7,795-96 (Smith, J., concurring). Thus, the panel concluded, “the Forest Service is relying on an ‘unverified hypothesis’” that “treating old-growth forest is beneficial to dependent species.” Add. at 7,784 (quoting *Ecology Ctr.*, 430 F.3d at 1064).

The panel's analysis did not address whether the agency failed to consider relevant factors or whether record evidence contradicted the agency's decision. Instead, the panel held that the Forest Service's scientific methodology supporting its decisions would be insufficient unless supported by "on the ground" analysis, regardless of whether the agency's decisions are supported by scientific literature, modeling, or other scientific data.<sup>4</sup> This requirement that the agency's scientific analysis and determinations be supported by a type of data specified by the court is inconsistent with arbitrary and capricious review, greatly exceeds the scrutiny to be imposed under a "substantial evidence" test, and substitutes the court's judgment for that of the agency. *See, e.g.*, Add. at 7,783 ("The Forest Service has not proven the reliability of its scientific methodology with respect to wildlife habitat restoration in the . . . Project."). An agency's decision is entitled to a presumption of regularity; it is a plaintiff's burden to establish the unreasonableness of the agency's determination. *See Overton Park*, 401 U.S. at 415-16.

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<sup>4</sup> For example, the support for agency conclusions regarding the Project's impact on the flammulated owl included scientific literature discussing the species' preferred habitat (SER 198-99, 276, 623-25), a study of the owl in previously harvested forests in southern British Columbia (SER 602-07), and conservation plans by bird conservation organizations that supported forest treatments similar to those in the Project (SER 598-601, 611-620).

**B. The Panel Erred in Requiring That the Forest Service Implement a Specified Procedure, “On the Ground Analysis,” as the Sole Means To Demonstrate the Reliability of its Scientific Predictions.**

The panel’s ruling that the Forest Service must have on the ground data to back up its scientific predictions is directly contrary to the principle that “[c]ourts must be reluctant to mandate that a federal agency step through procedural hoops in effectuating its administrative role unless such procedural requirements are explicitly enumerated in the pertinent statutes or otherwise necessary to address constitutional concerns.” *Wilderness Soc’y*, 918 F.2d at 818; *see also Vt. Yankee*, 435 U.S. at 525; *Churchill County*, 276 F.3d at 1081 (“We could certainly ‘fly-speck’ this chapter of the [EIS] and find instances where the inclusion of quantitative data would benefit the [agency] and the public. . . . [I]f we were preparing the [EIS], we might insist on additional detail. That is not our role, of course. Rather, we review the legal sufficiency of the [EIS].”); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 762 (9<sup>th</sup> Cir. 1996) (“We believe that an analysis that uses all the scientific data currently available is a sound one.”). Neither NEPA nor the NFMA requires “on the ground” data before the Forest Service acts.<sup>5</sup>

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<sup>5</sup> NEPA regulations merely require that “[agencies] shall identify any methodologies used and make explicit reference by footnote to the scientific and other sources relied upon for conclusions.” 40 C.F.R. § 1502.24. The Project

(continued...)

The panel's requirement that all "hypotheses" be supported by on the ground analysis is not only unsupported by the relevant statutes, it also imposes a potentially extreme burden on the Forest Service. The agency manages 2,310,000 forested acres in the IPNF, and 192 million acres nationwide. SER 242; *Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F.Supp. 2d 1059, 1064 (N.D. Cal. 2007) (acreage of National Forest land). Nationally the agency makes decisions with respect to thousands of projects each year subject to NEPA and NFMA, with each project containing extensive determinations regarding the expected effects of the project. In this Project, the agency made scientific determinations regarding the impact of the project on several wildlife species, as well as on soil, aquatics, and other environmental features. The agency based its conclusions on a variety of scientific data sources routinely relied on by experts, including modeling, peer-reviewed studies and other scientific literature, photographic evidence, and field observations. The panel's holding that all Forest Service "hypotheses" about the environmental impacts of projects must be supported by "on the ground" data has no scientific basis and imposes the court's view of what constitutes sufficient scientific support for undertaking action in place of the views of agency scientists. The holding significantly burdens an agency charged with managing almost 200

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<sup>5</sup> (...continued)  
analysis clearly met this standard.

million acres in the National Forest by prohibiting it from utilizing relevant and scientifically accepted data in agency decisionmaking.

**C. The Court Erred in Applying a “No Harm” Standard.**

The panel erroneously interpreted NFMA’s requirement to “provide for diversity of plant and animal communities,” 16 U.S. C. § 1604(g)(3)(B), as a requirement of causing no harm to any species. As it did with the standard of review, the panel then compounded this error by holding that the agency’s failure to disclose its inability to insure that no species might suffer harm violated NEPA. This holding cannot be supported under either statute. The panel’s apparent imposition of a “no harm” requirement for wildlife species potentially impacted by the Project has no basis in the NFMA and the relevant regulations. The panel held:

The Forest Service has not proven the reliability of its scientific methodology with regard to wildlife habitat restoration . . . . In particular, the Service has failed to demonstrate that the Project *will not harm* the flammulated owl, the northern goshawk, the fisher, and the western toad, all of whom the Forest Service has designated as “sensitive species” . . . .

Add. at 7,783 (emphasis added); *see also* Add. at 7,784 (In *Ecology Center*, “[w]e concluded that the Forest Service did ‘not offer proof that the proposed treatment benefits—or at least did not harm—old growth dependent species.’”).

NFMA provides that the Forest Service shall “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives.” 16 U.S.C. § 1604(g)(3)(B). The Forest Service Manual calls for the agency to manage the habitat of sensitive species to prevent declines in population which could lead to federal listing under the Endangered Species Act. SER 190. The agency analyzed the effects of the Project on wildlife species and their habitat, reaching conclusions consistent with NFMA and the Manual. *See, e.g.*, SER 286 (with respect to northern goshawk, the alternative “may impact individuals or habitat, but will not likely contribute to a trend towards Federal listing or loss of viability to the population or species.”).

Requiring that a project not “harm” any species not only imposes a requirement not found in NFMA, but also seriously undermines the agency’s ability to manage forests to meet Congress’ multiple-use mandate. Different species may have different habitat needs, and the agency may choose to manage forest structure to increase suitable habitat for one species while reducing the habitat of another, in order to provide for diversity of resources. The agency also must, pursuant to its multiple-use mandate under NFMA, manage lands for other purposes, such as recreation or timber production. *C.f. Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004) (“[m]ultiple use management’ is a

deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put . . . .”). While changes in forest structure may harm individual members of a species, the Project should be permissible under NFMA so long as it provides for diversity of animal communities while meeting overall multiple-use objectives.

### CONCLUSION

For the foregoing reasons, the United States’ petition for rehearing and rehearing en banc should be granted in order to maintain and secure the uniformity of this Court’s decisions. As Judge Smith explains, the panel has “displaced” the appropriate standard of review and departed from established principles of administrative law.

Respectfully submitted,

RONALD J. TENPAS  
Acting Assistant Attorney General

Date: September 14, 2007

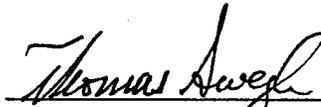
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90-1-4-12002

**CERTIFICATE PURSUANT TO CIRCUIT RULE 40-1(a)**

Pursuant to Ninth Circuit Rule 40-1, I certify that the foregoing Federal Defendant-Appellee's Petition for Panel Rehearing and Petition for Rehearing En Banc is proportionally spaced, has a typeface of 14 points, and contains 4199 words.



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CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

No. 07-35000

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**THE LANDS COUNCIL**, a Washington nonprofit corporation,  
**WILDWEST INSTITUTE**, a Montana nonprofit corporation,

Plaintiff-Appellants,

v.

**RANOTTA MCNAIR**, Forest Supervisor of the Idaho Panhandle  
National Forests, U. S. Forest Service, and the **UNITED STATES FOREST SERVICE**, an  
agency of the United States Department of Agriculture,

Defendant-Appellees,

and

**BOUNDARY COUNTY, CITY OF BONNERS FERRY, CITY OF  
MOYIE SPRINGS, EVERHART LOGGING, INC.**, an Idaho  
corporation, and **REGEHR LOGGING, INC.**, an Idaho corporation

Defendant-Intervenor-Appellees,

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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF IDAHO  
Case No. CV06-0425-EJL

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**DEFENDANT-INTERVENOR-APPELLEES' PETITION FOR REHEARING  
AND PETITION FOR REHEARING EN BANC**

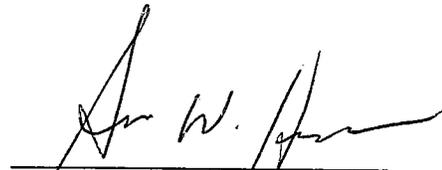
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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, there are no parent corporations or any publicly held corporations that own 10% or more of the stock of any of the defendant-intervenor-appellees.

  
\_\_\_\_\_  
Scott W. Horngren

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## **I. INTRODUCTION.**

Pursuant to Rules 35 and 40 of the Federal Rules of Appellate Procedure, defendant-intervenor-appellees Boundary County, City of Bonners Ferry, City of Moyie Springs, Everhart Logging, Inc., and Regehr Logging, Inc. (collectively “Boundary County”) respectfully petition for rehearing and for rehearing *en banc* of the panel decision in this case. Because the decision conflicts with precedent established by the Supreme Court and this Court, it involves questions of exceptional importance that an *en banc* panel should address to affirm that the courts in this Circuit must reasonably defer to agency natural resource expertise rather than proceed as if the standard of review requires scientific certainty supported by on-site research. This case also involves a question of exceptional importance because the panel imposes substantive and procedural requirements regarding wildlife viability and on-site research not found in the National Forest Management Act (NFMA), 16 U.S.C. § 1604, nor the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et. seq., as a prerequisite to forest harvest for the purpose of improving forest health and reducing wildfire risk. This issue is important not only to Boundary County, where fires have burned thousands of acres, but also to counties throughout the west that desire timely implementation of fuel reduction projects on federal forestlands rather than 20 years of on-site research

while the forests go up in smoke.

## **II. REASONS FOR GRANTING REHEARING OR REHEARING EN BANC.**

### **A. Under Supreme Court and This Circuit’s Law, the Standard of Review of an Agency Decision is Not Whether the Decision is Based on Site-Specific Scientific Research.**

Judicial review under NFMA and NEPA is obtained through the Administrative Procedures Act (APA), which authorizes courts to set aside agency action found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In the face of scientific uncertainty, deference to the Forest Service must be at its maximum rather than at its minimum. The panel’s nondeferential approach to reviewing the Forest Service’s land management decision in this case represents a significant departure from the Supreme Court’s admonition that a reviewing court should “be at its most deferential when the agency is making predictions, within its area of special expertise at the frontiers of science.” Baltimore Gas & Elect. Co. v. NRDC, Inc., 462 U.S. 87, 103 (1983) (internal quotation marks omitted). When “analysis of the relevant documents ‘requires a high level of technical expertise,’ we must defer to ‘the informed discretion of the responsible federal agencies.’” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989) (quoting Kleppe v. Sierra Club, 427 U.S. 390, 412 (1976)). See also Central Arizona Water Conservation Dist.

v. U.S. EPA, 990 F.2d 1531, 1539-40 (9th Cir. 1993) (a court must “defer to the agency’s interpretation of equivocal evidence, so long as it is reasonable”) (citation omitted), cert. denied, 510 U.S. 828 (1993). The opinion also conflicts with Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 543-44 (1978), which emphasized that it is the agency, not the reviewing court, that determines the methods of inquiry necessary for the agency to discharge its multitudinous duties. Here, as the concurrence noted, the panel “compounds already serious errors of federal law” by essentially extending the limited deference approach to agency review set forth in Lands Council v. Powell, 379 F.3d 738 (9th Cir. 2004), amended, 39 F.3d 1019, 1024 (9th Cir. 2005), and Ecology Center v. Austin, 430 F.3d 1057 (9th Cir. 2005), cert. denied sub nom., Mineral County v. Ecology Ctr., Inc., 127 S. Ct. 931 (2007). The panel does so by displacing the arbitrary and capricious standard of review for natural resource decisions with a standard that requires on-site verified research demonstrating that the forest treatment will cause no harm.<sup>1</sup> Opinion at 7792-93.

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<sup>1</sup> The panel’s use of an on-site scientific verification review standard also conflicts with the law of other circuits. See, e.g., Earthlink, Inc. v. FCC, 462 F.3d 1, 12 (D.C. Cir. 2006) (“[A]n agency’s predictive judgments about areas that are within the agency’s field of discretion and expertise’ . . . need not rest on ‘pure factual determinations.’”) (citation omitted); Cellnet Commc’ns, Inc. v. FCC, 149 F.3d 429, 441 (6th Cir. 1998) (“[U]nder the arbitrary and capricious standard of review, an agency’s predictive judgments about areas that are within the agency’s field of discretion and expertise are entitled to particularly deferential review.”).

**B. Neither NFMA Nor NEPA Impose a Substantive or Procedural Requirement to Complete On-Site Research Before the Forest Service can Manage Forests in an Uncertain World.**

In reviewing the Forest Service's old growth management decision, the panel imposes a scientific research requirement from Lands Council and Ecology Center exceeding anything found in NFMA, NEPA or the APA. The concurrence noted that the on-site scientific research requirement had no statutory basis, stating that "there is no legal basis to conclude that the NFMA requires an on-site analysis where there is a reasonable scientific basis to uphold the legitimacy of modeling. NFMA does not impose this substantive requirement, and it cannot be derived from the procedural parameters of NEPA." Opinion at 7793 (citing Ecology Center, 430 F.3d at 1073). Management of public lands would grind to a halt if land managers could not act prior to satisfying an on-site scientific research prerequisite. Forest science is constantly evolving, and federal land managers must be able to make decisions based upon the best information available, whatever form it takes.<sup>2</sup>

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<sup>2</sup> Given the multitude of unresolved scientific issues in the realm of natural resources management, neither NEPA nor NFMA can be interpreted to require the cessation of all land management activities pending definitive on-site scientific research results. See, e.g., Clinton T. Moore et al., *Forest Management Under Uncertainty for Multiple Bird Population Objectives*, in USDA Forest Service Gen. Tech. Rep. PSW-GTR-191 373-80 (2005), available at [http://www.fs.fed.us/psw/publications/documents/psw\\_gtr191/Asilomar/pdfs/373-380.pdf](http://www.fs.fed.us/psw/publications/documents/psw_gtr191/Asilomar/pdfs/373-380.pdf); James D. Nichols et al., *Managing North American Waterfowl in the Face of Uncertainty*, 26 *Annu. Rev. Ecol. Syst.* 177-99 (1995), available at [4](http://www.fws.gov/migratorybirds/reports/ahm02/nichols-johnson-williams-</a></p></div><div data-bbox=)

The panel’s opinion, which compels new Forest Service research, conflicts with Supreme Court precedent emphasizing that “the only procedural requirements imposed by NEPA are those stated in the plain language of the Act,” Vermont Yankee Nuclear Power Corp. v. NRDC, Inc., 435 U.S. 519, 548 (1978) (citing Kleppe v. Sierra Club, 420 U.S. 390, 405-06 (1976)), and that NEPA imposes no substantive requirements upon an agency. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 352-53 (1989). The opinion also conflicts with Seattle Audubon Soc’y v. Moseley, 80 F.3d 1401 (9th Cir. 1996), in which this Court upheld the federal agencies’ multiple-use tradeoffs concerning wildlife viability in the face of imperfect knowledge about the spotted owl, including how the harvest of certain old growth under the Northwest Forest Plan, and the retention of other old growth in reserves, would affect the species. The Moseley Court deferred to the analysis because “the record demonstrate[d] that the federal defendants considered

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1995.pdf; Jonathan Thompson, *Acting on Uncertainty in Landscape Management-Options Forestry*, 78 Science Findings Pacific Northwest Research Station 1, 5 (2005) (“In the end, we hope that forest management can be viewed as a never-ending set of questions rather than a series of disconnected truths.”), available at <http://www.fs.fed.us/pnw/sciencef/scifi78.pdf>; *Scientific Personnel & Current Studies*, Rocky Mtn. Research Station., RWU-RM-4251 1, 5 (2006) (“Research Problem #1: Understand ecological tradeoffs of vegetation management options for managing wildfires and reducing risks on wildlife.”), available at [http://www.rmrs.nau.edu/lab/4251/FY06\\_book.pdf](http://www.rmrs.nau.edu/lab/4251/FY06_book.pdf).

the viability of plant and animal populations based on the current state of scientific knowledge.” 80 F.3d at 1404 (emphasis added).

Here, as in Moseley, the Forest Service based its land management decision for the Mission Brush Project on the current state of scientific knowledge, particularly focusing on how it could maintain old growth habitat used by wildlife. This justifiable focus on old growth habitat for the Project’s environmental analysis supports the Forest Service’s reliance on studies assessing the relationship between silvicultural treatments in old growth stands and the maintenance of old growth habitat conditions. The Forest Service considered how the prior removal of suppressed and invasive shade tolerant trees in dry site old growth stands has improved and perpetuated old growth habitat. SER 241 (Supplemental Final Environmental Impact Statement (“SFEIS”) 4-31). The Forest Service also examined studies assessing whether old growth habitat was maintained after removal of the understory suppressed trees, finding that “old growth trees had increased sap flow, higher foliar nitrogen content, and higher foliage production, indicating improve[d] tree vigor and increase[d] resistance to insects and disease.” Id. See also SER 515, 523-24.

In addition, the Forest Service considered the old growth habitat research of Arno & Fielder, which considers whether silvicultural “treatments [can] perpetuate

uneven-aged forests with large old pines, and their associated ecological and scenic values, while also yielding some timber products?” SER 584. In answering that question, the researchers describe the problem of younger trees competing for resources in old growth stands, explaining that old growth trees with low growth rates “are unable to marshal enough resources to manufacture adequate chemicals for their defense. Large old trees growing among a dense layer of smaller trees are especially vulnerable to attack, underscoring the importance of maintaining reasonable growth rates [of old trees].” SER 586. The results of more than 20 years of study found that compared to the control stand, where none of the younger trees were thinned from the understory, “large trees in the two selection cutting treatments are growing nearly three times faster on average than those in the control, while four times as many large trees have died in the control as compared to the treated area.” Id. Other studies similarly have found that removing the competitive understory trees from old growth ponderosa pine and Douglas-fir stands improves the health and vigor of the remaining trees, suggesting greater resistance to insects and disease compared with untreated controls. SER 589.

The panel opinion ignores this research, deriding the Forest Service’s reliance on changes in habitat to assess effects on wildlife instead of properly deferring to agency expertise. In an internally inconsistent footnote, the panel states in one

breath that the Forest Service cannot assume wildlife subsequently will occupy any commercially harvested habitat, while in the next breath – citing Circuit law – states that the Forest Service can assume that ““*maintaining* the acreage of habitat necessary for survival would in fact assure a species’ survival.”” Opinion at 7786 n.3 (citing Envtl. Prot. Info. Ctr. (EPIC) v. U.S. Forest Serv., 451 F.3d 1005, 1017 (9th Cir. 2006) (emphasis in original)). The panel entirely misses the point that this Circuit’s cases regarding the relationship between habitat and wildlife viability all necessarily involve agency actions that occur in and manage habitat. Even in EPIC, all of the spotted owl critical habitat being harvested was either being converted to non-habitat, would be slightly degraded, or would maintain its habitat function post-harvest. EPIC, 451 F.3d at 1010. As in EPIC, the Forest Service in this case concluded that the partial harvesting practices in old growth were “at least maintaining suitable habitat.” ER 77. This on-site analysis, coupled with the long-term research upon which the Forest Service relied, is sufficient to meet any substantive or procedural requirement of NFMA or NEPA. The panel, however, rejects the Forest Service’s approach because it fails to prove that treating the Forest would benefit dependent species. Id. at 7785. In reality, nothing in NFMA or NEPA requires that forest treatments benefit wildlife. See infra part C.<sup>3</sup>

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<sup>3</sup> The Forest Service’s analysis appropriately focused on habitat, rather than wildlife populations, because this was not a case in which the Forest Service

The Forest Service also assessed effects on flammulated owl habitat and use by analyzing plots in the Project area that had been treated over the last thirty years at Dawson Ridge. ER 75-83. The monitoring study found owl responses in an area that had been harvested in 2000 and underburned in 2002, which is similar to the silvicultural treatment approved for the Mission Brush Project area. ER 75.<sup>4</sup> The Forest Service's assessment of how prior harvest in old growth ponderosa pine and dry site habitat has maintained and improved old growth conditions, and the monitoring that has occurred in connection with prior forest treatments on the

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had failed to comply with the old growth wildlife standards in the governing Forest Plan. The Forest Service concluded the Project was consistent with the Idaho Panhandle Forest Plan that requires retention of at least 10% of the forest in each Ecosystem Management Area to maintain sufficient habitat for old growth wildlife. SER 148-49 (SFEIS 3-11 to 3-12), SER 217-20 (SFEIS 4-7 to 4-10), SER 847-48. Cf. Rittenhouse, *supra*, 305 F.3d at 968 (40% of the Boise National Forest analysis areas did not meet the Forest Plan old growth standard); Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059, 1069 (9th Cir. 2002) (large portions of the Payette National Forest had fewer stands of old growth than required by the Forest Plan).

<sup>4</sup> In the analysis area, only about 364 acres meet suitable flammulated owl habitat conditions. SER 199 (SFEIS 3-62). "The lack of suitable habitat is due to the combination of relatively young stands, and older stands that have a dense secondary canopy layer that can prohibit foraging by flammulated owls." *Id.* The 364 acres of suitable flammulated owl habitat did not occur by accident. Rather, forest management was used to thin trees, and "[t]he majority of the 364 acres of currently suitable habitat in the project area were commercially thinned or partially regenerated in the past 30 years, which created and maintained suitable habitat conditions for the flammulated owl." *Id.*

ranger district at issue, distinguish this case from Ecology Center. In Ecology Center, the Court was critical because the Forest Service “has not yet taken the time to test its theory with any ‘on-the-ground analysis,’ despite the fact that it has already treated old-growth forest elsewhere and therefore has had the opportunity to do so.” Id. at 1064. Here, the Forest Service based its treatment on the best available information, which included the effects of prior forest treatments.<sup>5</sup>

The Project area contains minimal habitat for the flammulated owl, and what habitat does exist was created through past thinning and stand treatments. SER 199 (SFEIS 3-62). The panel dismisses this analysis and takes the flammulated owl use and habitat assessment out of context, misreading the conclusion in the Dawson Ridge study. Opinion at 7784-85. The surveys that obtained positive flammulated owl responses correlated with stands that were previously harvested, thinned, and burned. ER 77. The Forest Service did not conclusively determine that habitat would be improved, “however, these positive responses do imply that our dry forest

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<sup>5</sup> Ecology Center also is distinguishable because there was no claim in this case that a particular management indicator species was imperiled, as there was for the black-backed woodpecker in Ecology Center. In Ecology Center, there was a dearth of dead tree habitat for black-backed woodpeckers on the Lolo National Forest, the challenged project proposed to remove thousands of prime woodpecker habitat in the form of fire-killed trees, and the project did not address future habitat availability for the species. Just the opposite occurs in this case, where the Forest Service is trying to create – not remove – overgrown dry site ponderosa pine habitat which is “virtually non-existent” because of the ingrowth of shade tolerant tree species. SER 56 (SFEIS 1-9).

silvicultural practices are at least *maintaining suitable habitat.*” Id. (emphasis added). That was the same agency conclusion upheld by this Court in EPIC.

From Boundary County’s perspective, the Forest Service has been somewhat obsessed with ensuring that enough old growth habitat is retained to meet the Forest Plan requirements. The 2004 Idaho Panhandle National Forest Monitoring Report explained that “the IPNF does not do timber harvest that removes allocated old growth stands. We ceased regeneration harvest of allocated old growth stands a number of years ago.” SER 509; SER 142 (SFEIS 3-5). Consistent with this statement, the Mission Brush SFEIS provides that “none of the action[] alternative[s] would result in a net loss of allocated old growth.” SER 242 (SFEIS 4-32). Of the approximately 3,829 acres of vegetative treatment in the Project area, SER 446, only 277 acres even involve allocated old growth. SER 242 (SFEIS 4-32). The Forest Service concluded that the treatment on those acres would in fact maintain old growth habitat. Stands would be harvested so as to leave all large trees and maintain structure with some smaller trees, such that the stands would continue to provide old growth habitat after treatment. SER 142, 243 (SFEIS 3-5, 4-33).

The panel opinion cites no evidence that the proposed treatments harm old growth or old growth dependent species, rendering the decision to invalidate the Forest Service’s factually-supported action inexplicable and, respectfully, wrong.

See Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1099 (9th Cir. 2003) (“An agency’s actions need not be perfect; we may only set aside decisions that have no basis in fact, and not those with which we disagree”). Consistent with Ninth Circuit law, the record demonstrated that the Forest Service took a “hard look” at the effects of its actions on old growth wildlife given the current state of its knowledge. Neither NEPA nor NFMA impose a higher “on-site scientific research certainty” standard. In fact, the threshold requirement for preparation of an environmental impact statement under NEPA supports an interpretation that NEPA has no procedural or substantive on-site verified research requirement. The threshold for preparation of an EIS is whether the project “*may* have a significant effect on the quality of a human environment.” Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998) (emphasis added). NEPA does not place the burden on the Forest Service to provide scientific proof that there *may not* or *will not* be significant environmental effects.

**C. The Panel’s Interpretation of NFMA Conflicts With Circuit Precedent by Finding That the Statute Contains a Wildlife Viability Mandate That Transcends the Congressionally-Declared Multiple Uses of the National Forests and Limits Forest Management Practices to Only Those Confirmed by Research to Promote Wildlife Viability.**

The panel’s conclusion that the statutory language of NFMA embodies a viability mandate – one that cannot be satisfied unless the Forest Service

definitively determines through research that the effects of harvesting in old growth forest will benefit wildlife – conflicts both with NFMA and this Court’s decision in Seattle Audubon Society v. Moseley, 80 F.3d 1401 (9th Cir. 1996). The panel erroneously stated that NFMA contains a mandate to maintain wildlife viability:

“[T]he forest plan must comply with substantive requirements of the Forest Act designed to ensure continued diversity of plant and animal communities and the continued viability of wildlife in the forest.”  
Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 961 (9th Cir. 2002) (citing 16 U.S.C. § 1604(g)(3)(B)).

Opinion at 7783. The panel invalidated the Mission Brush Project because “the Forest Service has not proven the reliability of its scientific methodology with regard to wildlife habitat restoration in the Mission Brush Project. In particular, the Service has failed to demonstrate that the Project will not harm the flammulated owl, the northern goshawk, the fisher, and the western toad, all of whom the Forest Service has designated as ‘sensitive species’ whose viability is of special concern.”

Id.

In reality, NFMA’s statutory language does not contain a mandate to maintain wildlife viability, let alone a viability mandate that trumps all other multiple-use considerations. Rather, the section of the statute referenced in the panel opinion merely requires the Forest Service to “provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order

to meet overall multiple-use objectives.” 16 U.S.C. § 1604(g)(3)(B). And although the panel also cited to an earlier Ninth Circuit decision for the proposition that NFMA contains a viability mandate, see Opinion at 7782 (citing to Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 961 (9th Cir. 2002)), a careful reading of that case reveals that the Rittenhouse Court found a viability “mandate” in a since-eliminated 1982 NFMA implementing regulation, not in the statute itself.<sup>6</sup> Rittenhouse, 305 F.3d at 961-62 (relying on 36 C.F.R. § 219.19 (1999), which provided that “wildlife habitat shall be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area”).

In contrast with this case, in Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233 (9th Cir. 2005), the Court properly acknowledged that the viability consideration was found not in the statute but rather in the former implementing regulation. Id. at 1249 (citing to NFMA as the source of the “diversity” language and to NFMA’s implementing regulations as the source of the “viability” language). See also EPIC, 451 F.3d at 1017 (same). Thus in this case, particularly in light of the amended regulations eliminating the viability language, the panel erred in stating that NFMA contains a viability mandate.

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<sup>6</sup> In 2000, the Forest Service adopted a transition rule for forest planning; the rule was clarified in 2004 by an interpretative rule emphasizing that the 1982 rule containing the viability requirement no longer is in effect. 69 Fed. Reg. 58055, 58057 (Sept. 29, 2004) (stating that the “1982 rule is not in effect”).

In addition to containing no wildlife viability requirement, NFMA's diversity language in section 1604(g)(3)(B) is "so qualified that 'it is difficult to discern any concrete legal standards on the face of the provision.'" Sierra Club v. Robertson, 810 F.Supp. 1021, 1027 (W.D. Ark. 1992) (quoting Wilkinson & Anderson, Land & Resource Planning in the National Forest, 64 Or. L. Rev. 1, 296 (1985)), vacated on other grounds, 28 F.3d 753 (8th Cir. 1994). See also Glisson v. U.S. Forest Serv., 876 F.Supp. 1016, 1029 (S.D. Ill. 1993) (same), aff'd, 51 F.3d 275 (7th Cir. 1995). More than a decade ago, the Forest Service acknowledged that "the interpretation of the NFMA diversity provision as a goal rather than a concrete standard" was supported by NFMA's legislative history and relevant judicial opinions. 60 Fed. Reg. 18886, 18892 (April 13, 1995). Rather than creating a substantive diversity standard, section 1604(g)(3)(B) directs the Forest Service to "provide for" diversity in order to meet multiple-use objectives. Thus, regardless of whether the opinion's viability holding was premised on the former viability regulation or the statute itself, the majority erred in elevating viability above all other multiple-use considerations.

In Seattle Audubon Society v. Moseley, 80 F.3d at 1404, this Court acknowledged that NFMA's "diversity" language is subservient to multiple-use objectives, not an overarching consideration. In Moseley, the Court rejected a claim

that federal land management agencies should have adopted a forest management alternative that would assure the viability of what was considered an old growth dependent species, the northern spotted owl, because such an interpretation would have precluded “any multiple use compromises contrary to the overall mandate of NFMA.” Id. (citing 16 U.S.C. § 1604(g)(3)(B)). Thus, the panel’s conclusion in this case that the Forest Service could not manage old growth stands unless it could guarantee the viability of all wildlife species conflicts with the multiple use compromises permitted by NFMA, and with the Court’s Moseley decision.

### **III. CONCLUSION.**

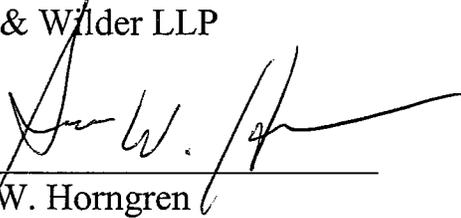
Boundary County respectfully requests that the panel grant rehearing, or that this Court grant the petition for rehearing *en banc*, to clearly establish that NFMA permits the Forest Service to make multiple-use compromises in its land management decisions, that concerns over wildlife viability do not preclude those multiple-use compromises, and that NFMA and NEPA permit the Forest Service to make land management decisions based on the scientific information available

rather than imposing a procedural or substantive requirement to conduct on-site research as part of the decision-making process.

DATED this 14<sup>th</sup> day of September, 2007.

Respectfully submitted,

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**FILED**

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CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**Case No. 07-35000**

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THE LANDS COUNCIL, a Washington nonprofit corporation, WILD  
WEST INSTITUTE, a Montana nonprofit corporation,

Plaintiffs-Appellants,

v.

RANOTTA MCNAIR, Forest Supervisor of the Idaho Panhandle National  
Forests U.S. Forest Service, and the UNITED STATES FOREST  
SERVICE, an agency of the United States Department of Agriculture,

Defendants-Appellees,

and

BOUNDARY COUNTY, CITY OF BONNERS FERRY, CITY OF MOYIE  
SPRINGS, EVERHART LOGGING, INC., an Idaho corporation, and  
REGEHR LOGGING, INC., an Idaho corporation,

Intervenors-Appellees.

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On Appeal from the United States District Court for the District of Idaho

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**PLAINTIFFS-APPELLANTS' RESPONSE TO PETITION FOR  
REHEARING AND FOR REHEARING EN BANC**

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## I. INTRODUCTION

The Lands Council and the Wild West Institute appreciate the opportunity to respond to the petitions for rehearing in this case. Merely, the petitions are thinly veiled attempts to rehash the issues raised, and denied, in *Ecology Center v. Austin*, 430 F.3d 1057 (9<sup>th</sup> Cir. 2005), *cert den. Mineral County v. Ecology Center*, 127 S. Ct. 931, 166 L.Ed.2d 702 (2007). Just as in *Ecology Center*, the Forest Service (FS) and the Intervenors have unsuccessfully argued here that a merits panel for the Ninth Circuit adopted an “overly expansive view of the requirements of NEPA and NFMA.” Specifically, the FS argues that the panel’s conclusion – that reliable scientific methodology must include “on the ground analysis,” and data that was “verified with observation,” in order to comply with NFMA – is inconsistent with arbitrary and capricious review. Moreover, the FS argues that the panel imposed an improper “harm” standard when interpreting NFMA and the Forest Plan’s requirements for Project implementation.<sup>1</sup>

Although similar issues were raised and denied in *Ecology Center v. Austin*, it appears that Petitioners’ hopes were buoyed by the special concurrence in this case. In a special concurrence, Judge Smith, Jr. wrote, “[b]ecause I respectfully

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<sup>1</sup> The Petitioners have not challenged the panel’s conclusion that the FS violated the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, et seq., by failing to include a full discussion of the scientific uncertainty surrounding its strategy for improving wildlife habitat. *Lands Council v. McNair*, 494 F.3d 771, 778 (9<sup>th</sup> Cir. 2007).

contend that it was wrongly decided, I would (if the occasion arises) reverse the majority's holding in *Ecology Center*." Moreover, the special concurrence noted:

Following *Ecology Center* in this instant matter, compounds already serious errors of federal law because 'the majority's extension of *Lands Council v. Powell*, 379 F.3d 738 (9<sup>th</sup> Cir. 2004), amended by 395 F.3d 1019, 1024 (9<sup>th</sup> Cir. 2005), [to *Ecology Center*] represents an unprecedented incursion into the administrative process and ratchets up the scrutiny we apply to the scientific and administrative judgments of the Forest Service.'

*Lands Council v. McNair*, 494 F.3d at 780.

The special concurrence is flat wrong. Not only is the present decision firmly grounded in a long line of precedent of this Court, but the United States Supreme Court denied certiorari in *Ecology Center*. Neither the special concurrent nor the Petitioners have provided this Court with solid legal support as to why this case should be reheard.

## **II. THE DECISION IS CONSISTENT WITH PRIOR PRECEDENT**

The merit panel's review of the agency's methodologies for insuring species viability in this case is an appropriate application of a series of precedents from this Court. It holds that NFMA's substantive mandates are not satisfied where the record reveals that the challenged decisions are based upon unreliable science. See *Lands Council v. Powell*, 395 F.3d 1019, 1035 (9<sup>th</sup> Cir. 2005)(scientific conclusions based upon unverified data or invalidated models failed to meet NFMA's mandate to insure soils productivity); *Nat'l. Wildlife Federation v. Nat'l. Marine Fisheries Service*, 422 F.3d 782, 798 (9<sup>th</sup> Cir. 2005)(deference accorded an

agency's scientific or technical expertise is not unlimited); *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059 (9<sup>th</sup> Cir. 2002); *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 972 (9<sup>th</sup> Cir. 2002)(methodology "so inaccurate" that it failed to meet NFMA's mandate to insure viability); *Seattle Audubon Society v. Espy*, 998 F.2d 699, 703-05 (9<sup>th</sup> Cir. 1993)(no deference due to determination based upon reliable science); *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149-50 (9<sup>th</sup> Cir. 1998)(allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions). See also *Burlington Truck Lines v. United States*, 83 S.Ct. 239, 245-246 (1962)("[U]nless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion"); *State of N.Y. v. U.S.*, 342 U.S. 882, 884 (1951)("Absolute discretion, like corruption, marks the beginning of the end of liberty"); *Graham v. U.S.*, 96 F.3d 446, 450 (9<sup>th</sup> Cir. 1996)("We should not confuse agency expertise in matters peculiarly entrusted to the agency with rubber-stamping an after-the-fact rationalization of a mistake. While the former is owed deference under *Chevron, id.*, the latter is not").<sup>2</sup>

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<sup>2</sup> See also *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 482 (W.D. Wash. 1998), *Tennessee Gas Pipeline Co. v. FERC*, 926 F.2d 1206, 1211 (D.C. Cir. 1991)(courts will not blindly defer to agency expertise, and agencies may not use

The level of review applied by the merits panel is also firmly based in enforceable regulations promulgated under NEPA. NEPA mandates that agency decisions be based on “high quality” information and “accurate scientific analysis.” 40 C.F.R. §1500.1(b). More specifically, NEPA requires agencies to insure the “scientific integrity” of their analyses, including identification of methodologies with “explicit reference” to their scientific validity. 40 C.F.R. §1502.24.

### **III. THE DECISION IS FIRMLY ROOTED IN THE RECORD**

#### **A. The Mission Brush Project**

The underlying facts in this case are critical as they undeniably contradict the Petitioners’ arguments that the merits panel “displaced the APA’s arbitrary and capricious standard with a heightened standard of proof.” In actuality, the scientific methodology relied upon by the Forest Service, in support of its decision to log for the purpose of improving wildlife habitat, is so lacking that even the most conservative review employing the arbitrary and capricious standard would have stopped this project.

One of the primary purposes of the Mission Brush Project was to “promote the long-term persistence and stability of wildlife habitat and biodiversity by trending toward an ecosystem with vegetation that is composed of more diverse

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“expertise” as a cloak for judgment by fiat); *Brower v. Evans*, 257 F.3d 1058, 1067 (9<sup>th</sup> Cir. 2001)(a court may refuse to defer to the agency expertise if the decisions are not well reasoned).

forest structures in the treated areas, including larger patch sizes with less fragmentation.” ROD at 2. As the merits panel recognized, “[d]ue to decades of unsustainable forestry practices, however, the area has deviated significantly from its historical composition and structure.” *Lands Council v. McNair* at 774.

In this case, the Project area is home to numerous Management Indicator Species (MIS)/Sensitive Species. The MIS present in the Project area include the marten, pileated woodpecker, northern goshawk, and white-tailed deer. FSEIS 3-53. The Sensitive Species in the Project area include black-backed woodpecker, flammulated owl, Northern goshawk, fisher, and western toad. SFEIS 3-60. There is nothing in the administrative record that demonstrates the Forest Service 1) analyzed the acreage needed for the MIS and Sensitive Species in the Project area, 2) conducted an accurate evaluation of how much suitable habitat will remain in the Project area after the Project is completed, or 3) conducted an accurate survey of present viability of the MIS/Sensitive Species in the Project area.

The FS assessed the available habitat for the MIS and Sensitive Species *not through the use of population surveys* but through a habitat capability and suitability model. FSEIS 3-56. The FS thus reached conclusions on how much capable/suitable habitat currently existed for the MIS/Sensitive Species through the use of a model. However, the minimal surveys conducted by the FS in the past demonstrate that actual population surveys do not support FS conclusions that the

MIS/Sensitive Species are actually using this habitat, nor does the model accurately reflect reality.

Unfortunately the FS has minimal and spotty surveys to corroborate its habitat suitability model. In fact, the *only surveys* in the administrative record are for the flammulated owl and Northern goshawk. Appellants' SER 1-63. The surveys conducted for the Northern goshawk and flammulated owl found minimal numbers of birds in the Project area. *No surveys exist in the administrative record for the black-backed or pileated woodpeckers, the fisher, the Western toad, the white-tailed deer or the marten.*

A close review of the Northern goshawk surveys demonstrates that, in the surveys conducted in 1998, no goshawks were located. SER 46-47. In 2002, no goshawks were located. SER 44. In 2003, no goshawks were detected. SER 40-41. In 2004, attempts to locate goshawks were conducted on three different occasions, and a goshawk was only detected on one of those attempts. SER 25, 36, 38. Finally, surveys conducted in 2006 found a very limited presence of Northern goshawks. SER 1-3, 57, 63.

A review of the spotty surveys for the flammulated owl in the administrative record reveals that surveys were conducted in 1997, 1999, 2000, and 2006. During the several attempts to locate flammulated owls in 1997, only *one owl was possibly* heard. SER 7-12. In 1999, no owls were located. SER 15. In 2000, no owls were

located. SER 16-18. In 2006, no owls were located. SER 23. According to the SFEIS, “subsequent research has indicated that the boxes may have been placed too low on trees to be attractive nesting sites for flammulated owls.” FSEIS 3-62.

In spite of the fact that the Forest Service really doesn't know the viability of species including the marten, pileated woodpecker, Northern goshawk, white-tailed deer, black-backed woodpecker, flammulated owl, Northern goshawk, fisher, and Western toad, the FS boldly asserts that Project implementation may adversely impact some of these species, “but will not likely contribute towards Federal listing or cause a loss of viability to the population species.” SFEIS 4-66 (Black-Backed Woodpecker), 4-70 (Flammulated Owl), 4-76 (Northern Goshawk), 4-80 (Fisher), 4-82 (Western Toad). Such a judgment is arbitrary and capricious.

Regarding the viability of the Northern goshawk, the SFEIS states:

*In general*, regeneration treatments would move stands out of suitable nesting conditions, but *may* still provide, or even enhance, foraging conditions on the periphery of the units.

....

However, most of the currently capable acres treated by selective harvest *should* move into suitable habitat conditions over time.

SFEIS at 2-67 (emphasis added).

In addition, the SFEIS concedes that the proposed treatments will “reduce the number of 30 acre contiguous nesting stands to 12.” SFEIS at 4-74.

Regarding Project impacts upon the fisher, the SFEIS states, “While this management strategy *may* temporarily reduce fisher habitat at the local scale,

habitat *should* improve for this species with time and *should* be maintained on a landscape scale.” SFEIS at 4-80 (emphasis added).

Regarding the Project’s impacts upon the western toad and its breeding habitats (wetlands) and terrestrial habitats, the SFEIS states:

*May* result in temporary disturbance within treatment areas; however the changes in vegetation structure *should* have no long-term effect.

SFEIS at 2-67. Moreover, “[t]he proposed project recreation improvements may result in occasional direct mortality to dispersing Western toads.” SFEIS at 4-82.

**B. NFMA, the IPNF Forest Plan and the FS’ Duty to Insure Viable Populations of Indicator Species.**

Petitioners fault the merits panel for “imposing procedures on the FS that have no basis in the applicable substantive statutes” and for applying a “no harm” standard. In reality, it is NFMA and the IPNF Forest Plan that require proof that FS activities won’t harm species viability. The panel therefore imposed no requirements upon the Forest Service other than the clear standards contained in the IPNF Forest Plan, as required by NFMA. 16 U.S.C. § 1604(i). Moreover, the Petitioners’ “no harm” argument should be cursorily dismissed, as requiring the FS to demonstrate “no harm” is the equivalent of the mandates set forth in the IPNF Forest Plan.

The Idaho Panhandle National Forests (IPNF) Long Range Management Plan (LRMP) Forest-Wide Management Direction Standards requires that the

Forest Service “[m]aintain at least minimum viable populations of management indicator species distributed throughout the Forest.” IPNF Forest Plan, Standard 7(a), II-28. Regarding sensitive species, the Forest Service is required to “[m]anage the habitat of species listed in the Regional Sensitive Species List *to prevent further declines in populations* which could lead to federal listing under the Endangered Species Act.” IPNF Forest Plan Standard 9, II-28 (emphasis added). Finally, the IPNF Forest Plan requires that the FS conduct “annual measurements of population trends of indicator species.” IPNF Forest Plan, IV-11.

The law in the Ninth Circuit permits the FS to utilize the “proxy on proxy” approach to ensure species viability without directly monitoring species populations, as long as FS methodology for monitoring habitat is sound. *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 972 (9<sup>th</sup> Cir. 2002). When the USFS uses the “proxy on proxy” approach, its methodology must be reliable (*see Lands Council v. Powell*, 395 F.3d 1019, 1036 (9<sup>th</sup> Cir. 2005), meaning that the methodology must “reasonably ensure that the proxy results mirror reality.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1066, *amended by* 387 F.3d 968 (9<sup>th</sup> Cir. 2004). That is, in permitting the FS to utilize the “proxy on proxy” method, the Ninth Circuit must insist that the FS’ methods for measuring habitat are sound. The FS has made no such showing here.

**C. The FS Has Not Proven the Reliability of its Scientific Methodology with Regard to Wildlife Habitat Restoration.**

The Petitioners' arguments regarding the panel's holding on the FS' failure to demonstrate the reliability of its scientific methodology on wildlife habitat restoration is belied by the facts. The FS argues that the merits panel requires "on the ground analysis," rejecting reliance by the FS on other sources of data on which scientists routinely rely. The reality is that the FS failed to provide *any relevant surveys or scientific data* supporting one of the Project's primary purposes: logging for the purpose of restoring wildlife habitat. As the panel accurately noted, "[n]one of the documents it cites, however, demonstrates the reliability of the Forest Service's hypothesis that restoration treatment will benefit dependent species." *Lands Council v. McNair*, 494 F.3d at 776.

This Circuit has long embraced the requirement that an agency action is arbitrary and capricious if it is not based upon reliable scientific methodology. *Ecology Center v. Austin* is merely the latest of a long line of cases holding the FS to this burden. In *Ecology Center*, the FS sought to engage in rehabilitative treatment of old growth stands "to correct uncharacteristic forest development resulting from years of fire suppression." *Ecology Center v. Austin*, 430 F.3d at 1063. This Court concluded that the Forest Service violated NFMA because the FS "did not offer proof that the proposed treatment benefits – or at least does not harm – old growth dependent species." *Id.* Further, this Court held that the FS's

methodology was unreliable since it had not been verified, and that the treatments therefore violated NFMA. *Id.* at 1063-64. Similarly, in *Lands Council v. Powell*, 395 F.3d at 1035, this Court concluded,

the Forest Service's basic scientific methodology, to be reliable, required that the hypothesis and prediction of the model be verified with observation.

...

The Forest Service, and consequently the public at large, has no way to know whether the projection of the Project area's soils was reliable. Was the Forest Service "dead on" or "dead wrong?"

Here, the Petitioners argue that by requiring on-the-ground-analysis, the panel's decision is "inconsistent with arbitrary and capricious review, greatly exceeds the scrutiny to be imposed under a 'substantial evidence' test, and substitutes the court's judgment for that of the agency." Additionally, the FS argues that this holding "significantly burdens an agency charged with managing almost 200 million acres in the National Forest by prohibiting it from utilizing relevant and scientifically accepted data in agency decisionmaking.

Apparently the FS believes it is entitled to absolute deference, in spite of the fact that on numerous occasions the Ninth Circuit has enjoined projects based upon a disturbing trend in the FS's recent timber-harvesting and timber-sale activities.

*See Earth Island Institute v. USFS*, 442 F.3d 1147, 1177 (9<sup>th</sup> Cir. 2006) ("We regret to say that in this case, like the others just cited, the USFS appears to have been more interested in harvesting timber than in complying with our environmental

laws”). The FS has asked this Court and the public at large simply to trust its habitat modeling and wildlife surveys in an area. However, history demonstrates that the public’s trust in the FS has been misplaced.

Here, the FS relies primarily on the Dawson Ridge Flammulated Owl Habitat Monitoring 2006 study, which, the panel noted, is “the only study it has conducted since our decision in *Ecology Center*.” *Lands Council v. McNair*, 494 F.3d at 776. The Dawson Ridge Flammulated Owl Monitoring Study of 2006 surveyed the flammulated owl’s use of managed forest. The survey consisted of **five 1/5 acre square plots (18 acres in size)**. ER 75-83. The survey concluded,

Although it is inappropriate at this time to assume that any of these silvicultural treatments improved (i.e., changed habitat from an unsuitable to suitable condition) flammulated owl habitat it is encouraging given the management history of Dawson Ridge that owls are using the area.

The merits panel properly concluded that this Dawson Ridge study was “insufficient to meet the requirements of *Ecology Center*.” *Id.* at 776. Moreover, the panel concluded that, “[t]he other studies fall even shorter of meeting the *Ecology Center* standards.” *Id.* at 777.

The other scientific studies in the record, which allegedly discuss the flammulated owls’ utilization of forests impacted by logging, include SER 602-607, Howie and Ritcey, “Distribution, Habitat Selection, and Densities of Flammulated Owls in British Columbia” (1987), and SER 611-620 Idaho Partners

in Flight, “Idaho Bird Conservation Plan – Version 1.0; Implementation Schedule” (2000). Regarding the 1987 Howie and Ritcey study from British Columbia, TLC submits (and the merits panel agreed) that the study does not support FS conclusions, for the Howie and Ritcey study itself concludes,

Historical data on Flammulated Owl populations in this province are lacking so it is impossible to say whether the selective cutting practices have resulted in a change of numbers. Several studies have noted a decline in populations following timber harvesting.

SER 606.

The studies in the administrative record which allegedly discuss the Northern goshawk’s utilization of forests impacted by logging include SER 626-653 Reynolds, et al., “Habitat Conservation of the Northern Goshawk in the Southwestern United States: Response to Greenwald et al. 2005” (2005), and SER 626-653 (extensive discussion of effects of tree-cutting on northern goshawk breeding and location at SER 632-33, 640-42).

Appellants point out that in 2005, in a *peer reviewed* study, Greenwald et al. reviewed the current literature on goshawk relationships with habitat in the Northern Rockies. Greenwald et al. concluded:

Across most of the western United States, mature and old-forests have declined to much less than 40% of the landscape. Given these declines and the lack of information on the amounts of mature and old-forest goshawks require, we recommend protecting existing mature and old-forest characteristics and ensuring that such forests are allowed to develop in proportions similar to presettlement conditions. This can be accomplished

by restricting cutting to small trees, *and prohibiting large reductions in canopy closure.*

Appellants' SER 65-67 (emphasis added).

The studies in the administrative record which allegedly discuss pileated woodpeckers' utilization of forests impacted by logging may be found at SER 610 Hutto, "USFS Northern Region Songbird Monitoring Program – Distribution and Habitat Relationships" (1995).

In response, TLC attests that the Hutto report does not in fact support the FS claims regarding improving habitat. In fact, the Hutto report states,

There's generally always an intact forest near where the birds are detected. Thus, detecting them in clearcuts and seed-tree cuts should **not** be taken to mean they can do with homogenous stands of those kinds.

SER 610.

In spite of the recommendation made by the Hutto Report, the FS here proposes to log some 2,000 acres of suitable pileated woodpecker habitat. SER 294 (FSEIS 4-84). Of those acres, 447 are presently characterized as mature stands. *Id.* The FSEIS concedes that the "proposed treatments in this area would have a minor immediate effect on pileated woodpecker habitat." *Id.*

The studies in the administrative record which allegedly discuss fishers' utilization of forests impacted by logging include SER 622 (actually SER 621) Powell et al. "The Fisher Life History, Biology, and Behavior" (1982).

TLC notes that this 1982 Powell et al. study provides no relevant information regarding fishers' use of commercially logged areas. In fact, the Powell study states,

The one clear characteristic of all habitats preferred by fishers is overhead cover, and, according to Kelly (1977), fishers selectively use habitats with high canopy closure (80% to 100% closure) and avoid areas with low canopy closure (less than 50%).

SER 622.

Had the FS utilized the proper methodology as required by NFMA, it could have provided the public at large with the information necessary to say if the commercial logging will further impact the sensitive species and MIS.

It was clear as a matter of record to the merits panel that the challenged decision had not demonstrated compliance with the relevant Forest Plan standards, let alone NFMA's viability insurance requirements. Petitioners' arguments that the panel was imposing some new requirement on them should be flatly rejected.

#### **IV. CONCLUSION**

NFMA and the IPNF Forest Plan impose substantive mandates on the Forest Service to guarantee that species viability is not threatened by timber harvest. Consistent with these mandates, NEPA imposes procedural requirements to demonstrate NFMA compliance utilizing high-quality scientific information, accurate data, and validated methodologies. Therefore, the merit panel's

conclusion that the FS violated NFMA by failing to prove the reliability of its scientific methodology is sound.

Respectfully submitted this 10<sup>th</sup> day of October, 2007.

*Karen Lindholdt*

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Karen S. Lindholdt