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Cutting Science, Ecology, and Transparency Out of National Forest Management: How the Bush Administration Uses the Judicial System to Weaken Environmental Laws

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The Defenders of Wildlife Judicial Accountability Project—undertaken with the assistance of the Vermont Law School Clinic for Environmental Law and Policy—seeks to fill a data void on the environmental record of President George W. Bush and his Administration by analyzing all reported environmental cases in which the Bush Administration has presented legal arguments regarding an existing environmental law, regulation, or policy before federal judges, magistrates, or administrative tribunals. By examining judicial decisions and legal briefs for federal cases, the aim is to identify quantifiable trends on whether, or to what degree, President Bush and members of his Administration are working to preserve, protect, and defend the U.S. Constitution and laws of the United States as sworn in their oaths of office.¹

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This is the second Article of the Judicial Accountability Project to appear in *ELR's News & Analysis*. The first, *Weakening NEPA: How the Bush Administration Uses the Judicial System to Weaken Environmental Protections*, 33 ELR 10682 (July 2003), detailed the Bush Administration's attempts to weaken NEPA in federal court litigation.

1. The full methodology utilized for the project and report is contained in Appendix A.

The focus of this Article is the laws, regulations, and rules that govern the management of national forests. The National Forest System is composed of 155 national forests and 20 national grasslands. These lands cover roughly 8% of the country, 191 million acres in 42 states. They provide a wide range of values and services, including vital wildlife habitats, ecosystem services like clean water and air, irreplaceable recreation opportunities, and timber and nontimber resources. The National Forest System includes a wide range of natural plant and animal communities, including some of the most significant and important examples of native ecosystems. More than 17% of federally threatened and endangered species and over 25% of species not federally listed but recognized by scientists as imperiled reside on national forests, more than on any other category of federal lands.² In addition to providing necessary habitat for rare species, national forests support populations of many more common species, providing an opportunity to assure their long-term viability through proper forest management. National forests are particularly important for species such as wolves, grizzly bears, elk, lynx, wolverines, and migratory birds that require large and relatively intact blocks of habitat.

The laws, regulations, and policies governing management of national forests represent the culmination of decades of management experience and experimentation. A delicate balance has been struck between competing interests of ecological, commercial, and recreational values through a transparent governmental process in which public participation is encouraged and respected. Most notably, the requirements of the National Forest Management Act (NFMA) and its implementing regulations require the U.S. Forest Service (Forest Service) to “provide for the diversity of plant and animal communities,” “maintain viable populations of existing native and desirable non-native vertebrate species,” and provide for and encourage public input into Forest Service decisions. True political conservatism would behave very cautiously with regard to altering the legal framework that protects such important national reservoirs of ancient trees, clean water, and abundant wildlife.

The current Forest Service, however, under the leadership of former timber industry lobbyist Mark Rey, who now oversees the agency in his appointed position as U.S. Department of Agriculture (USDA) Undersecretary for Natural Resources and Environment, has systematically sought to evade or minimize the requirements of the NFMA and

2. PRECIOUS HERITAGE: THE STATUS OF BIODIVERSITY IN THE UNITED STATES 280 (Bruce A. Stein et al. eds., Oxford University Press 2000). See also DEFENDERS OF WILDLIFE, BIODIVERSITY AND NATIONAL FORESTS (2002) available at <http://www.defenders.org/forests/bioforest.pdf>.

other forest laws and regulations. The Forest Service was the defendant in lawsuits challenging forest policy or management decisions 61 times in the first 2 years of the Bush Administration. In the 46 decided cases in which the Administration presented arguments that reached substantive forest management issues, the Bush Administration presented arguments hostile to accepted interpretations of forest law, regulation, or rules 31 times or 67% of the time. Despite the high degree of deference that administrative agencies receive from reviewing courts, the Bush Administration prevailed in only three of its forest-law-hostile arguments. This represents a 90% failure rate by the Bush Administration when it presents forest-law-hostile arguments and displays with some clarity the unlawfulness of the vast majority of the Administration's actions and arguments.

By contrast, the Bush Administration won all of the 15 cases in which it presented arguments consistent with (neutral or positive to) forest law, regulation, and rules—a 100% success rate when the Administration acts to uphold forest law. Twelve of these arguments (26%) were neutral in that the Bush Administration merely followed the law despite an outcome that did not demonstrably further the goals of forest management. Only 3 of these arguments (7%) were positive in that the Bush Administration actively defended the goals of forest management.³

In sum, the arguments of the Bush Administration in court are overwhelmingly hostile to most rules protecting national forests and the many natural resources in them. At the same time, the Bush Administration is currently engaged in a broad, coordinated, sustained effort to rewrite decades of federal forest policy in order to eliminate requirements that the Forest Service has been held accountable and to promote an industry-friendly ideology.⁴ The Administration has made largely forest-hostile arguments in court, and when these arguments have been rejected by the courts, it has proposed changes in the law to the U.S. Congress and initiated many administrative changes for which congressional approval is unnecessary. The sweeping changes being proposed and implemented by the Bush Administration represent a comprehensive and radical shift in our nation's forest policies and the end of the modern era of forest management, which began in the 1970s and emphasizes a greater appreciation of nontimber values and accountability to the public. The emphasis of these changes is on weakening the laws, regulations, and policies related to biodiversity, ecological protections, environmental impacts, sci-

ence, and public participation. This Article concludes that the Bush Administration has already substantially advanced its forest-law-hostile agenda by pursuing changes in all three branches of our federal government: the courts, Congress, and executive agencies.

Legal Framework for National Forests

National forests must be managed in accordance with a broad range of laws, a subset of which deals specifically with forest resources. A brief overview of the legal, regulatory, and policy landscape overlaying national forest management follows.

Forest Service Organic Act

The Organic Administration Act (Organic Act) of 1897 created the National Forest System out of a system of forest reserves authorized in 1891.⁵ The Organic Act set the original purposes of national forests: "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of the citizens of the United States."⁶

Multiple Use Sustained Yield Act (Multiple Use Act)

Congress enacted the Multiple Use Act in 1960 to improve management of the National Forest System and to further clarify its purposes. The Multiple Use Act builds on the purposes set in the Organic Act: "National Forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes."⁷ The Multiple Use Act requires national forests to be managed in such a way that the productivity of the land is not impaired, the values of all resources are considered, economic returns are not emphasized to the exclusion of other values, and all resources are managed in a sustainable manner.

The NFMA

Not satisfied with the limited changes brought about by the Multiple Use Act and facing growing public concern over aggressive clearcutting practices by the Forest Service, Congress enacted the NFMA in 1976 as further reform legislation.⁸ Congress sought to address many issues through the NFMA, specifically clearcutting and the protection of biological diversity.⁹

3. These results are consistent with the results from the first Article of the Judicial Accountability Project on the National Environmental Policy Act (NEPA). William Snape & John Carter, *Weakening NEPA: How the Bush Administration Uses the Judicial System to Weaken Environmental Protections*, 33 ELR 10682 (July 2003). That Article found that of the 172 applicable NEPA-decided cases argued by Bush Administration lawyers and not overturned on appeal, the Administration's arguments prevailed 95 times, or 55% of the time. In 94 cases, or 54% of the total, the Bush Administration presented arguments that could best be defined as NEPA-hostile in that they were contrary to established statutory, regulatory, or judicial interpretations of NEPA. The Bush Administration lost 73 out of 94 of its NEPA-hostile arguments, or 78% of the time. When the Bush Administration presented NEPA-consistent arguments, it was successful in 75 out of 78 cases, or 96% of the time. See Appendix A. For a more complete discussion of the numerical results of the study, see generally Appendix B.

4. See DEFENDERS OF WILDLIFE, PROPOSED BUSH NFMA REGULATIONS MIRROR LOGGING COMPANIES' AGENDA (2002), available at <http://www.defenders.org/forests/forest/new/wishlist.html>.

5. Forest Reserves Act of March 3, 1891, ch. 561, §24, 26 Stat. 1095, 1103 (repealed at 16 U.S.C. §471 (1976)).

6. Organic Administration Act of 1897, 16 U.S.C. §475 (2003).

7. Multiple Use Sustained Yield Act of 1960, 16 U.S.C. §528 (2003).

8. 16 U.S.C. §§1600-1687, ELR STAT. NFMA §§2-16. Charles F. Wilkinson & H. Michael Anderson, *Land and Resource Planning in the National Forests*, 64 OR. L. REV. 69 (1985).

9. See, e.g., *id.* at 70 (quoting 122 CONG. REC. 5619 (1976)) (NFMA sponsor Sen. Hubert Humphrey (D-Minn.) stated: "The days have ended when the forest may be viewed only as trees and trees viewed only as timber. The soil and the water, the grasses and the shrubs, the fish and the wildlife, and the beauty that is the forest must become integral parts of resource managers' thinking and actions."; Sen. Floyd Haskell (D-Colo.) stated: the protection of nontimber resources "must be assigned as great a priority in any forest management policy as the production of timber").

One of the issues Congress faced was extraordinary Forest Service autonomy, a “Trust us!” philosophy at the agency that held that only agency officials had the knowledge and expertise to make decisions about forest management. The public was largely left out of the process, while the agency experts “managed” forests with massive clearcuts. Most old growth forests were sold off and razed, many species were driven away—sometimes toward extinction—and many waterways were clogged as a result of erosion, to mention just a few painful legacies of the “Trust us!” approach.

Congress set out to offset agency independence by opening up forest management to the public. The NFMA democratized national forest management, allowing the public to participate in not just individual projects such as timber sales, but also in the overall management direction for a national forest. The main tool employed by NFMA authors to increase agency accountability was the forest plan. The NFMA requires each national forest to develop, maintain, and implement—with public input—a forest plan that governs how the forest will be managed for up to 15 years.¹⁰ Forest plans and the public’s participation in developing them were given meaning with a “consistency” requirement that all actions on the forest comply with the plan.¹¹

Another way Congress reformed national forest management through the NFMA was by providing direction for how forest resources were to be managed. With regard to wildlife and biodiversity, the NFMA specifically requires the Forest Service to maintain biodiversity on national forests. The NFMA requires implementing regulations that “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.”¹² Both the Carter and Reagan Administrations relied on the recommendations of a Committee of Scientists to craft final regulations for implementing the NFMA. The Reagan Administration recognized that the “diversity of plant and animal communities” could not be maintained if the individual species making up those communities are lost. President Ronald Reagan therefore adopted the “population viability” rule that the Forest Service must “maintain viable populations of existing native and desirable non-native vertebrate species” on each national forest.¹³ The viability rule tells the Forest Service it cannot do such a poor job managing national forests that it drives native species away. The 1982 regulations also established a mechanism to measure compliance with the viability standard and gauge the impacts of implementing forest plans by requiring surveys of representative “management indicator species” that “indicate the effects of management activities” and “best represent the issues, concerns and opportunities to support recovery of Federally-listed species, provide continued viability of sensitive species, and enhance management of wildlife and fish.”¹⁴

The NFMA’s positive effect was not immediate, and significant forest degradation occurred in the 1980s. But over time, as forest plans were finalized, implemented, amended, and slowly revised, the reform objectives of the NFMA began to be realized. The reforms could be seen in substantial public involvement in forest plan development, and in forest plans that increasingly recognized and valued nontimber forest resources in addition to timber. Many other factors and laws contributed heavily to changes in forest management, but the requirements of the NFMA, particularly to involve the public in long-range forest planning and to maintain biodiversity and other nontimber resources, were important factors in bringing about positive change.

In 1997, the USDA, which includes the Forest Service, called upon a new Committee of Scientists to guide a revision of the regulations. After three years of public and scientific input and meetings, regulations based on consideration of the committee’s recommendations were finalized in 2000.¹⁵ The timber industry railed heavily against them, calling them a “tyranny of science” and, among other criticisms, complaining that the “proposed rules create far too many ‘thou shall’ edicts that will lead to greater judicial interference in national forest management.”¹⁶ Five months after entering office and seven months after the regulations took effect, the Bush Administration summarily suspended the 2000 regulations without prior public notice or comment.¹⁷ In December 2002, the Bush Administration proposed rewritten NFMA regulations that responded directly to at least eight of the timber industry’s specific concerns.

Appeals Reform Act

The Forest Service has had an appeals process almost since its inception.¹⁸ Appeals of agency decisions to higher-ups within the agency give the agency and interested parties an opportunity to resolve disputes without resorting to formal court action. In 1992, however, the USDA stopped taking administrative appeals of Forest Service decisions.¹⁹ This decision drew sharp congressional and public criticism, including more than 30,000 public comments.²⁰ Congress quickly moved to reinstate Forest Service appeals by enacting the Appeals Reform Act, signed into law on October 5, 1992, by President George H.W. Bush.²¹

10. 16 U.S.C. §1604.

11. *Id.* §1604(i); *see, e.g.*, Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151, 28 ELR 21044 (9th Cir. 1998); Idaho Sporting Congress v. U.S. Forest Serv., 31 F. Supp. 2d 1236, 1239 (D. Idaho 1996), *aff’d*, 122 F.3d 1071 (9th Cir. 1997) (“[A forest plan] establishes forest-wide and area-specific standards and guidelines to which all projects within that National Forest must adhere for up to 15 years.”).

12. 16 U.S.C. §1604(g)(3)(B).

13. 36 C.F.R. §219.19 (2003).

14. *Id.* §219.19(a)(1); Forest Service Manual 2621.1.

15. U.S. Department of Agriculture (USDA), National Forest System Land and Resource Management Planning; Final Rule, 65 Fed. Reg. 67513 (Nov. 9, 2000) (to be codified at 36 C.F.R. pts. 217, 219).

16. Testimony of Steven P. Quarles, American Forest and Paper Association, May 10, 2000, Before the Senate Energy and Natural Resources Committee; American Forest and Paper Association, comments on draft NFMA regulations, Feb. 2, 2000 (also complaining that the 2000 rules “reflect every scientist’s desire for the best quality data”; disparaging an ecological sustainability standard as “alien to the history and tradition of the Forest Service”; and arguing timber production should not be limited to “achieving social or economic purposes,” but can continue “up to a point of ‘substantial and permanent impairment of the productivity of the land.’”).

17. USDA, National Forest System Land and Resource Management Planning; Extension of Compliance Deadline, 66 Fed. Reg. 27551 (May 17, 2001); 66 Fed. Reg. 27554 (May 17, 2001); 67 Fed. Reg. 35431 (May 20, 2002) (all to be codified at 36 C.F.R. §219.35(b)).

18. Bradley C. Bobertz & Robert L. Fischman, *Administrative Appeal Reform: The Case of the Forest Service*, 64 U. COLO. L. REV. 371, 375 (1993).

19. *Id.* at 392-93.

20. *Id.* at 394.

21. Pub. L. No. 102-381, §322, 106 Stat. 1373, 1419 (1992).

Congress has historically advocated on behalf of forest appeals in order to guarantee the public, as well as the agency itself, an opportunity for oversight of agency decisions and a chance to resolve disputes and correct mistakes without hiring a lawyer and going to federal court. Congress realized the opportunity to comment on agency decisions, while extremely important, was not sufficient by itself to provide the desired level of public involvement in national forest management; an action-forcing component was needed. Congress therefore required not only notice-and-comment procedures on all forest management actions, but also an appeals process. The Bush Administration has recently announced restrictive changes to the present appeals rules that are discussed in the public participation section, below.

National Environmental Policy Act (NEPA)

NEPA requires federal agencies to take a “hard look” at the environmental consequences of their actions and to consider reasonable alternatives to proposed actions.²² NEPA “law” derives from three main sources: NEPA itself, which is a rather brief statute; Council on Environmental Quality (CEQ) regulations, which contain provisions for implementing NEPA and action-forcing mechanisms to ensure agency compliance; and NEPA-implementing regulations and guidelines promulgated by individual federal agencies such as the Forest Service.

In some instances, the culmination of the NEPA process is the preparation of an environmental impact statement (EIS), which is supposed to be a thorough and searching review of all of the reasonably foreseeable environmental impacts associated with a contemplated federal agency action. An EIS requires the generation and review of all available relevant scientific evidence and the formulation and consideration of alternatives and makes such information available to the public. Where applicable regulations do not mandate the agency’s preparation of an EIS for a certain type of action, the agency must still review the proposed action to determine whether the environmental impacts are significant enough to require the preparation of an EIS. This process normally begins with an environmental assessment (EA). Although generally not as detailed as an EIS, an EA must provide a thorough examination of the environmental impacts of a proposed action and provide and evaluate alternatives. If the EA concludes the impacts of the proposed action will be significant, an EIS must be prepared. If not, a finding of no significant impact is issued, and the action can proceed without further NEPA analysis unless that conclusion is successfully challenged.

In certain instances, agencies may avoid the preparation of either an EA or an EIS in considering the environmental impacts of a proposed federal action. An agency may adopt a “categorical exclusion” where it has made a specific determination that the category of action at issue will have no appreciable effect individually or cumulatively on the environment.²³ This determination must provide for “extraordinary circumstances” in which a normally excluded action

might have a significant impact and require further NEPA analysis.²⁴ The categorical exclusion clause was enacted as part of NEPA to allow small, routine projects with no significant environmental impacts to proceed without being subject to the environmental impact analyses otherwise required under NEPA. The Bush Administration has recently attempted to increase the use and scope of categorical exclusions as discussed in the wildfire section, below.

Endangered Species Act (ESA)

The ESA generally mandates that federal agencies conserve threatened and endangered wildlife, and that they not act in a manner that puts listed species at risk.²⁵ Section 7(a)(1) of ESA requires that federal agencies act to further the goals of ESA. Section 7(a)(2) requires federal agencies proposing an action that “may affect” an endangered species to “consult” with either the U.S. Fish and Wildlife Service (FWS) or the National Marine Fisheries Service (NMFS), depending on the species, on potential unacceptable impacts to the species and ways to mitigate those impacts. The first step is for the agency proposing the action to request information about the presence of any listed species within the proposal area. If a listed species is found within the proposal area, the action agency must prepare a biological assessment (BA). If it is found through the BA that the project is likely to adversely affect a protected species, the action agency must then engage in formal consultation with the FWS or the NMFS. After formal consultation, the FWS or the NMFS must issue a biological opinion assessing the impact of the project on the species. If the determination of the biological opinion is that the activity will jeopardize an endangered species or degrade its critical habitat, the FWS or the NMFS makes a “jeopardy determination.” This determination is significant in that once it is issued, the action agency must develop reasonable and prudent alternatives, or measures, to help conserve the species. The Bush Administration has proposed changes that would substantially weaken the Forest Service’s §7 obligations under the ESA.²⁶

The Bush Administration’s Anti-Forest Agenda

The Bush Administration has embarked on an across-the-board campaign to remake federal forest policy to reflect its industry-friendly ideology. The forest law court cases argued by the U.S. Department of Justice since the Bush Administration took office in many instances foreshadow the on-the-ground and policy actions of the Forest Service. Many of the specific rules that the Bush Administration is attempting to rewrite are rules that have been successfully enforced in federal court to prevent the Forest Service from carrying out actions that violate federal environmental laws. The court arguments and policy actions by which the Bush Administration has attempted to rewrite forest law have been placed into four categories for this Article: (1) Rolling Back NFMA Planning Rules; (2) Using Wildfires to Eliminate Environmental Protections; (3) Denying Meaningful Public Participation; and (4) Gutting Roadless Area and Wilderness Protections.

22. 42 U.S.C. §§4321-4370d, ELR STAT. NEPA §§2-209. *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21, 6 ELR 20532 n.21 (1976) (citing *Natural Resources Defense Council v. Morton*, 458 F.2d 827, 837, 2 ELR 20029 (D.C. Cir. 1972)).

23. 40 C.F.R. §1508.4 (2003).

24. *Id.*; *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1446, 27 ELR 20455 (9th Cir. 1996).

25. 16 U.S.C. §§1531-1544, ELR STAT. ESA §§2-18.

26. *Id.* §1536.

Rolling Back NFMA Planning Rules

The Bush Administration's most comprehensive and far-reaching proposal is the revision of the rules for implementing forest planning and projects under the NFMA. These regulations govern every action on every acre of the 191-million-acre National Forest System. Forest planning is the cornerstone of the NFMA, the mechanism through which the reforms embodied in that law are to be realized and the main avenue for public involvement in public forest management. The regulations proposed by the Bush Administration undercut the purpose and language of the NFMA by attempting to eliminate all mandatory requirements that a plaintiff or court could enforce against the agency. The proposed regulations would allow forest managers unfettered discretion to manage the public's forests however they see fit, with only vague, unenforceable guidelines to direct their actions. The proposed regulations mark a return to the "Trust us!" days when the agency was wholly unaccountable to the public for its actions. Two examples—pertaining to wildlife management and forest plans—bear this out.

Eliminating the Wildlife Viability Requirement

As discussed above, one of the NFMA's most important provisions is the requirement to maintain the natural diversity of plant and animal communities on national forests.²⁷ This has always been interpreted as requiring the maintenance of the "viability" of individual species that make up those communities.²⁸ The management of land in such a way that native species are not driven off is a baseline requirement that should apply to all public land management. It sets a floor below which public land management should not fall. Surveys for representative species that indicate the likely impacts of forest management have also always been required, providing a helpful shortcut for gauging the effectiveness of forest management without having to monitor all species.²⁹ These requirements provide early warning of species that may be in decline and a mechanism to adjust management practices and arrest declines before species decline to a point where they need to be listed under the ESA and more drastic and costly recovery actions must be taken. These regulations also seek to maintain species on all national forests where they naturally occur, lowering the risk a species will be reduced to a fraction of its range as wolves and grizzlies, for example, have been.

The requirement to retain populations of native wildlife on national forests was put in place by the Reagan Administration. The Clinton Administration modified the viability rule to make it more flexible and easier for the Forest Service to meet.³⁰ The Clinton Administration's changes were not enough to satisfy industry critics or the Bush Administration, however, which is intent on eliminating all minimum standards for wildlife management. The Bush Admin-

istration has proposed to do away with the viability rule and eliminate all mandatory requirements to maintain or monitor wildlife on national forests beyond those required under the ESA for the most troubled species.³¹ Ironically, these forest management changes make it far more likely that growing numbers of species will require ESA protection.

The Forest Service repeatedly attempted to avoid adherence to the viability rule and related wildlife surveys in court, even before the Bush Administration moved formally to eliminate the legal requirement of viability. These attempts have largely been rejected by the courts. For example, the Forest Service has attempted to short-circuit the viability rule requirements in an effort to meet industry demand for old growth trees by magically converting sections of young forest to old growth forest for monitoring purposes.

In *Idaho Sporting Congress, Inc. v. Rittenhouse*,³² the Forest Service was sued by environmental groups who alleged that the Lightning Ridge and Long Prong timber sales in the Boise National Forest were approved in violation of NEPA and the NFMA. The environmental groups argued that the Forest Service failed to comply with the NFMA standard for assessing the viability of populations of old growth-dependent species potentially affected by the sales. Specifically, they contested the Boise Forest Plan's "proxy on proxy" shortcut to monitoring the viability of old growth-dependent species: monitoring only habitat used by management indicator species without ascertaining actual population data. Plaintiffs further asserted that the Forest Service's survey efforts violated even this invalid standard. The Forest Service claimed that it could continue approving logging activities despite any failure to comply with the invalid proxy on proxy standard in the forest plan because of a clause in a forest plan monitoring report, which stated that "unless habitat was extensively changed through wild-fire or management activities viability for old growth-dependent species was not threatened." The U.S. Court of Appeals for the Ninth Circuit rejected this argument on the basis of a factual record that showed substantial changes in the amount of old growth habitat available. The court stated:

[T]he Monitoring Report shows that *the Forest Service's methodology does not reasonably ensure viable populations of the species at issue*. . . . the Forest Service's methodology for dedicating old growth is so inaccurate that it turns out *there is no old growth at all in management area 35, where the Forest Service has purported to dedicate 1,280 acres of old growth*.³³

Because the blocks of habitat chosen for monitoring by the Forest Service in fact contained 40% less old growth than indicated, the court held that monitoring such habitat as a proxy for determining the population of species dependent on old growth was invalid. The court set aside both sales.

The Bush Administration has also stretched the meaning of "salvage sale" in order to cut more healthy trees from public forests. Frequently such salvage sales are approved to cut both damaged and undamaged trees in an area. Salvage sales are timber sales by another name and frequently

27. 16 U.S.C. §1604(g)(3)(B).

28. 36 C.F.R. §219.19 (2003).

29. *Id.* §219.19(a)(1).

30. The 2000 regulations required a "high likelihood" of "supporting over time the viability of native and desired non-native species well distributed throughout their ranges within the plan area," with lower standards for situations beyond the agency's control, naturally rare species, and previously degraded landscapes. 65 Fed. Reg. at 67575 (to be codified at 36 C.F.R. §219.20(b)(2)).

31. See USDA, National Forest System Land and Resource Management Planning; Proposed Rules, 67 Fed. Reg. 72769, 72799 (Dec. 6, 2002) (to be codified at 36 C.F.R. pt. 219.13) (presenting two options for maintaining diversity, neither of which require any species to be maintained or monitored).

32. 305 F.3d 957, 33 ELR 20031 (9th Cir. 2002).

33. *Id.* at 968 (emphasis added).

require the same equipment and infrastructure, remove many of the same live trees, and have the same impacts as “regular” timber sales.

In *Utah Environmental Congress v. Zieroth*,³⁴ the Forest Service was sued over its approval of the South Manti timber sale in the Manti-La Sal National Forest in Utah. The timber sale was described as a salvage project to log spruce trees killed by spruce beetles. NFMA regulations required the Forest Service to assess the viability of species dependent on mature trees prior to approving the sale. Plaintiffs challenged the absence of adequate population data for the blue grouse, the designated management indicator species for mature timber-dependent species within the forest. The Forest Service first argued that the dead spruce to be harvested under the sale did not meet the definition of “mature timber” and therefore categorically could have no effect on the viability of the mature timber-dependent grouse. The court, however, noted that the sale would include healthy mature timber interspersed with the dead spruce and rejected this argument. Next the Forest Service attempted to change the management indicator species it was required to monitor from the blue grouse to the northern goshawk, which would not be significantly impacted by the sale, on the basis that it could not gather data on the “reclusive” blue grouse. The court rejected this argument as well, stating: “The court concludes that the data was available, the Forest Service just decided not to collect it.”³⁵ Accordingly, the court reversed the Forest Service’s approval of the timber salvage project.

The Bush Administration has also sought to render timber sale challenges moot by temporarily withdrawing them without committing to cancel the project or address plaintiff concerns. The Forest Service has approved unlawful timber sales and allowed cutting to commence, withdrawing approval in the face of legal challenges in order to avoid court decisions. Sometimes, the cutting is concluded before a court may hear the case, leaving litigants without an effective remedy. Often, the Bush Administration attempts to re-submit the challenged sales once the threat of litigation has abated. The goal of this strategy is to allow unlawful timber sales to proceed while perpetually evading judicial review.³⁶

In *Bighorn Forest Users Coalition, Inc. v. Thompson*,³⁷ the Forest Service was sued over its decision to authorize a timber sale for which it had not gathered or considered data on management indicator species within the sale area or determined a valid allowable sale quantity of timber that could be cut from the forest. The Forest Service responded by voluntarily withdrawing its approval of the timber sale and moved to dismiss the action as moot. In order for the case to be legally moot, the court found that it must be “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.”³⁸ The Forest Service’s evidence of the plan’s mootness was a declaration by the regional for-

ester that he “may or may not reissue a decision” on the Sourdough Timber Sale and that he has “no present schedule for issuing a new decision.”³⁹ The court held that this evidence did not support a finding of mootness, asserting that the regional forester at no point indicated that he would remedy the omission alleged in the plaintiff’s complaint. The court found “the Forest Service’s withdrawal of its Sourdough Timber Sale decision does not preclude it from reissuing a decision with the exact same alleged failings once this action is dismissed. Under these circumstances the action is not moot.”⁴⁰

Making Forest Plans Unenforceable, Meaningless

The NFMA requires that “[r]esource plans and permits, contracts, and other instruments for the use and occupancy of National Forest System lands shall be consistent with the land management plans.”⁴¹ Both the 1982 and 2000 regulations interpreted this NFMA “consistency” requirement as written: that all agency actions must be consistent with the governing forest plan.⁴² The consistency requirement has been regularly enforced by courts to hold the Forest Service accountable to forest plans established with public input.⁴³ The Bush Administration has responded with regulation changes to make compliance with forest plans optional. Its proposed regulations state that forest plan “[s]tandards should be adaptable,”⁴⁴ and seek to allow projects inconsistent with forest plans to go forward by granting the Forest Service authority to exempt projects from plan standards or modify plan standards through a project.⁴⁵ The Bush Administration further seeks to establish the unenforceability of forest plans by parroting U.S. Supreme Court language in its proposed rule. The Court held that specific provisions in one forest plan were not ripe for court review because they did not “command anyone to do anything or to refrain from doing anything; they do not grant, withhold, or modify any formal legal license, power or authority; they do not subject anyone to any civil or criminal liability; they create no legal rights or obligations.”⁴⁶ The Bush Administration is at-

34. 190 F. Supp. 2d 1265, 32 ELR 20535 (D. Utah 2002).

35. *Id.* at 1271 (emphasis added).

36. In *Willow Creek Ecology v. U.S. Forest Serv.*, 225 F. Supp. 2d 1312, 33 ELR 20072 (D. Utah 2002), the unlawful authorization of a timber sale was found moot because trees had already been cut. In *Conservation Action Project v. Moore*, No. 02-193-JD, 2002 U.S. Dist. LEXIS 24351 (D.N.H. Dec. 18, 2002), the Forest Service withdrew its authorization of a timber sale and the court dismissed NEPA challenges as moot.

37. 170 F. Supp. 2d 1091 (D. Colo. 2001).

38. *Id.* at 1093.

39. *Id.*

40. *Id.* (emphasis added).

41. 16 U.S.C. §1604(i).

42. The 1982 regulations require that forest managers “shall ensure that . . . all outstanding and future permits, contracts, cooperative agreements, and other instruments for occupancy and use of affected lands are consistent with the plan.” 36 C.F.R. §219.10(e). The 2000 regulations required that “all site-specific decisions, including authorized uses of land, must be consistent with the applicable plan.” 65 Fed. Reg. at 67571 (to be codified at 36 C.F.R. §219.10).

43. See, e.g., *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971, 991, 32 ELR 20618 (N.D. Cal. 2002); *Northwoods Wilderness Recovery v. U.S. Forest Serv.*, 323 F.3d 405 (6th Cir. 2003) (discussed below); see also *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151, 28 ELR 21044 (9th Cir. 1998); *Idaho Sporting Congress v. U.S. Forest Serv.*, 31 F. Supp. 2d 1236, 1239 (D. Idaho 1996), *aff’d*, 122 F.3d 1071 (9th Cir. 1997) (“[A forest plan] establishes forest-wide and area-specific standards and guidelines to which all projects within that National Forest must adhere for up to 15 years.”).

44. 67 Fed. Reg. at 72796 (to be codified at 36 C.F.R. pt. 219.4)

45. “If a proposed site-specific project or action would not be consistent with the standards of the plan, the Responsible Official may . . . [a]s part of the project decision, amend the plan to modify one or more standards or to exempt application of one or more standards to the project or action to allow for its implementation.” 67 Fed. Reg. at 72798 (to be codified at 36 C.F.R. §219.10(d)) (emphasis added).

46. *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 28 ELR 21119 (1998).

tempting to administratively expand this limited holding to make entire forest plans unreviewable by writing it into regulation: “The direction in a plan does not normally create, authorize, or execute any ground-disturbing activity. A plan, in and of itself, does not grant, withhold, or modify any contract, permit, or other legal instrument, does not subject anyone to civil or criminal liability, and creates no legal rights.”⁴⁷

In a recent decision that displays the Bush Administration’s vision of the future, the Forest Service argued that in approving a timber sale the only requirement it had to comply with was the allowable sale quantity, which sets an upper limit on the amount of trees that can be cut from a national forest. So long as it does not exceed this maximum amount of timber it is allowed to remove from a forest, the Bush Administration argues it is bound by no restrictions on the manner in which the timber is removed.

In *Northwoods Wilderness Recovery v. U.S. Forest Service*,⁴⁸ the Forest Service approved a timber sale in the Ottawa National Forest in Michigan’s Upper Peninsula. Environmental groups asserted that the sale violated the forest plan by greatly exceeding the annual acreage limitations on timber harvests within the specific area of the forest it would impact. The Forest Service argued that despite any inconsistencies with the forest plan’s requirements for managing the area the timber sale was in, the total amount of timber to be removed from the forest as a whole still fell below the allowable sale quantity authorized by the plan. Because the sale would not exceed the total allowable sale quantity for the forest, any further requirements under the plan were irrelevant. The U.S. Court of Appeals for the Sixth Circuit rejected this approach stating: “*In our view, the Allowable Sale Quantity was not meant to be the only limitation on timber production in the Forest. Allowable Sale Quantity does not measure the impacts of logging on wildlife, vegetation, soils, and water quality, as required by the Forest Act.*”⁴⁹ Although ultimately overturning the decision of the district court, the Sixth Circuit approved the lower court’s discussion of the goal of the forest plan:

*This plan does not have as its objective simply producing a number of board feet of wood for sawmills. It also has as its objective protecting the water quality, the soil quality, the vegetation, the birds, the fish, the deer, whatever else is in there. To simply say we can go in and do whatever we want as long as we don’t exceed a certain number of board feet would seem to make 90 percent of all of the analysis in the plan unnecessary surplusage.*⁵⁰

The Sixth Circuit reversed the district court and remanded with instructions for the district court to enter summary judgment in favor of the environmental groups challenging the timber sale.

The Bush Administration has gone so far as to propose allowing forest managers to categorically exclude entire forest plans, as well as plan amendments, from the analysis of

their environmental impacts required by NEPA.⁵¹ All previous administrations and courts have understood NEPA to clearly apply to forest plans and significant amendments.⁵² Categorical exclusions, as discussed earlier, were created so agencies would not have to spend resources analyzing the environmental impacts of small, insignificant projects that clearly have no significant environmental effects.⁵³ The Forest Service’s list of categorical exclusions currently (and historically) includes such usually minor actions as resurfacing parking lots, authorizing short-term use permits, and maintaining administrative buildings.⁵⁴ By contrast, the Bush Administration has proposed the categorical exclusion of entire forest plans—plans that determine every action on every acre of a national forest, which average over 1.2 million acres in size. This is an extreme position flatly inconsistent with congressional intent behind the categorical exclusion process.

In reality, all forest plans create significant environmental impacts that must be analyzed in an EIS. Land allocations, allowable activities, levels and locations of activities, and cumulative impacts are established in the forest plan. Analysis of the impacts of these decisions can only be realistically done at the forest plan level by analyzing the overall impacts stemming from a forest plan rather than relying solely on piecemeal assessments of individual projects implementing the plan. Exempting forest plans from NEPA would allow many of the most significant forest management decisions to forever escape environmental review. It would also mean the Forest Service would only present to the public its preferred forest plan rather than having to consider alternative approaches as required under NEPA.

Prior to proposing to allow forest plans to be exempted entirely from NEPA environmental analysis, a Bush Administration attempt to downplay the significance of forest plan decisions and avoid analysis of their impacts was rejected in court. The court recognized the importance and impact of forest plan decisions and their cumulative environmental impacts.

In *Native Ecosystems Council v. Dombeck*,⁵⁵ the Forest Service was sued for violating NEPA and the NFMA in approving the Darroch-Eagle timber sale in the Gallatin National Forest in Montana. This sale was one of many proposed for the forest that included road construction, which cumulatively would result in more roads than the forest plan permitted. Rather than amend the forest plan and comprehensively consider the impacts of opening new roads, the Forest Service was approving new road construction for individual timber sales by merely waiving the plan’s road density standards for each individual sale. Without a road density waiver, the Forest Service would have been required to close 11 miles of roads within the forest to offset the new roads created pursuant to the Darroch-Eagle sale alone. The

47. 67 Fed. Reg. at 72795 (to be codified at 36 C.F.R. §219.2(d)).

48. 323 F.3d 405 (6th Cir. 2003). This case was decided March 21, 2003, and fell outside of the dates covered in this survey. Although it has been included in the narrative summary to illustrate recent trends in the litigation tactics of the Bush Administration, it has not been included in the case review database and is not reflected in the numeric assessment.

49. *Id.* at 410 (emphasis added).

50. *Id.* (emphasis added).

51. 67 Fed. Reg. at 72797 (to be codified at 36 C.F.R. §219.6).

52. The 1982 regulations require, for example, development of the forest plan “and associated [EIS] required pursuant to the planning process.” 36 C.F.R. §219.5(a)(5). The 2000 regulations required a “Notice of Intent to prepare an [EIS] to add, modify, remove, or continue in effect the decisions embodied in the plan.” 65 Fed. Reg. at 67571 (to be codified at 36 C.F.R. §219.9(d)).

53. 40 C.F.R. §1508.4 (2003).

54. Forest Service Handbook 1909.15, 31.1 & 31.2 (1992).

55. 304 F.3d 886, 33 ELR 20042 (9th Cir. 2002).

Forest Service argued that it need not consider the road density amendments it made for other sales in the EA for the Darroch-Eagle timber sale because the amendments were spread throughout the Gallatin National Forest and did not affect conditions within the specific sale area. The court rejected this attempt by the Forest Service to ignore both the road density standards contained in the forest plan and the impacts of new road construction, stating:

[T]he national forest was the geographic unit within which the Forest Service chose to set forth binding road density standards in the Forest Plan. All of these sales are proposed within the Gallatin National Forest and will necessarily have additive effects within that management unit. *Unless the cumulative impacts of these amendments are subject to analysis even though distantly spaced throughout the Forest, the Forest Service will be free to amend road density standards throughout the forest piecemeal, without ever having to evaluate the amendments' cumulative environmental impacts.*⁵⁶

The court found both the EA and the biological assessment for the sale inadequate, reversed the lower court ruling upholding the sale, and remanded with instructions to enjoin the sale.

Arguing Against the Viability Rule and Forest Plans Simultaneously

The Bush Administration has simultaneously pursued its dual goals of rendering the wildlife viability rule and forest plans themselves unenforceable on a number of occasions. Courts have repeatedly rejected these arguments, but they highlight a shell game the Forest Service plays to avoid environmental and judicial review. The agency argues that environmental review of forest plans is not warranted because plans themselves do not actually result in any impacts. The agency claims that environmental impacts related to management decisions guided by a forest plan will be reviewed at the project level, and plan provisions can be challenged at a later date through project challenges. Then, when defending its failure to comply with NFMA or forest plan requirements in approving a specific project, the agency argues that such requirements are not reviewable because they apply only to plans, not projects. Under this defense, any project-level challenge to NFMA requirements or forest plan standards would therefore be an unreviewable programmatic challenge to the forest plan. Using this circular logic, forest plans and plan decisions could never be reviewed, and the wildlife viability rule could never be enforced, which seems to be precisely the intent. The Administration relies heavily on its expansive interpretation of the Court's holding in *Ohio Forestry Ass'n v. Sierra Club*⁵⁷ to bolster its claim that forest plans are wholly unreviewable. The Bush Administration appears to read *Ohio Forestry* to mean forest plans are not reviewable except in rare circumstances. The Court in *Ohio Forestry*, however, held that the very specific provisions of the Wayne National Forest plan in Ohio that were challenged were not ripe for court review yet, but clearly acknowledged that other forest plan determinations with more direct effect could be.

In *Neighbors of Cuddy Mountain v. Alexander*,⁵⁸ environmental groups sued the Forest Service alleging violations of the NFMA and NEPA in approval of the Grade/Dukes timber sale in the Payette National Forest in Idaho. The plaintiffs argued that the timber sale would not adequately protect old growth-dependent species because the Forest Service had not collected sufficient population data to comply with the NFMA. The Bush Administration argued that the challenge to the timber sale alleging violations of the NFMA's viability requirements was actually a challenge to forestwide monitoring duties and unreviewable pursuant to *Ohio Forestry*. The Forest Service attempted to interpret *Ohio Forestry* to render its failure to comply with forestwide viability and population monitoring requirements in approving individual timber sales unreviewable. On appeal, the Ninth Circuit rejected this argument, stating:

Compliance with NFMA's forest-wide species viability requirements is relevant to the lawfulness of any individual timber sale. To hold otherwise would permit the Forest Service to don blinders to the overall condition of a national forest each time it approved a sale, quite literally losing sight of the forest for the trees. This would contravene "one of the fundamental purposes of Congress in enacting [the NFMA]: that the National Forest System be managed with "a systematic interdisciplinary approach."⁵⁹

The Ninth Circuit accordingly reversed the dismissal of the lower court and remanded the case for adjudication on the merits.

In *Oregon Natural Resources Council Fund v. Forsgren*,⁶⁰ the Forest Service failed to include any specific standards or directions for protection of the federally threatened lynx in the forest plan for the Wallowa-Whitman National Forest in Northeast Oregon. In approving three timber sales in the forest, the Forest Service claimed that its ESA and NFMA viability responsibilities were satisfied by a separate document, the nationwide Lynx Conservation Assessment and Strategy (LCAS), even though that document was specifically never intended to satisfy any legal requirements and was created without any public involvement. When the failure to even consider any impacts to the lynx was challenged in federal court, the Forest Service claimed that this challenge to the timber sales was actually a programmatic challenge to the forest plan and barred under *Ohio Forestry*. The court held that the agency could not sidestep the NFMA with unrelated documents, but rather had to incorporate the LCAS into the forest plan. The court stated: "*The Revised LCAS and new mapping direction are procedurally flawed under NFMA because of the lack of public involvement. Defendants' determination of viability based on these procedurally-flawed agency actions, therefore, was not reasonable.*"⁶¹ The court enjoined the three timber sales at issue.

In *Forest Guardians v. U.S. Forest Service*,⁶² environmental groups challenged authorization of the McGaffey

58. 303 F.3d 1059, 33 ELR 20043 (9th Cir. 2002).

59. *Id.* at 1069-70 (emphasis added).

60. 252 F. Supp. 2d 1088, 33 ELR 20184 (D. Or. 2003). This case was decided March 11, 2003, and fell outside of the dates covered in this survey. Although it has been included in the narrative summary to illustrate recent trends in the litigation tactics of the Bush Administration, it has not been included in the case review database and is not reflected in the numeric assessment.

61. *Id.* at 1103 (emphasis added).

62. 180 F. Supp. 2d 1273 (D.N.M. 2001).

56. *Id.* at 897 (emphasis added).

57. 523 U.S. 726, 28 ELR 21119 (1998).

Timber Sale in the Cibola National Forest in New Mexico, alleging the Forest Service had not collected sufficient data about the population trends of various management indicator species to fulfill the NFMA's viability regulations. The Forest Service argued that the NFMA viability regulations applied only to the establishment of forest plans and did not apply to site-specific actions like timber sales. The court found that the Forest Service's obligations under the population monitoring requirements continued throughout the plan's existence to assure compliance with the plan: "*To avoid an absurd result . . . the National Forest Management Act and the implementing regulations at issue apply to site specific projects.*"⁶³ The court also rejected the Bush Administration's attempt to skip surveys for management indicator species (MIS) and rely only on habitat data, finding that MIS surveys are already a shortcut for assessing wildlife viability and that the agency specifically picked MIS species for the purpose of surveying populations:

*The Forest Service was obligated as a matter of law to acquire and analyze population data (both actual and trend) for the five management indicator species in the McGaffey Sale project area before rendering a decision on the project . . . consequently, there is generally no reason to further short-cut the management monitoring process by relying only on habitat trends to project management indicator species population data.*⁶⁴

The court found that the record contained insufficient hard population data, only unsupported conclusory statements, and rejected the Forest Service's attempt to ignore its responsibilities.

Other Proposed NFMA Regulation Changes

The Bush Administration has proposed a number of other changes to the NFMA planning regulations, which reflect an agenda of reducing environmental protections, public oversight, and scientific input. The Bush regulations would turn management of forest uses on its head by creating an explicit presumption that all national forest lands are open to all uses except those specifically prohibited.⁶⁵ This "open unless posted closed" policy would undermine the efforts of many local forest managers to manage such contentious issues as motorized recreation with "closed unless posted open" policies.

The Bush Administration's proposed NFMA regulations are also noteworthy for what they leave out. The proposed rule rejects the Committee of Scientists' recommendation to make ecological sustainability the cornerstone of forest management by eliminating the priority given to ecological

sustainability in the 2000 regulations.⁶⁶ This approach was based on a recognition that economic and social sustainability cannot be achieved in national forest management if the ecosystems on which they depend are not sustained. The proposed regulation leaves out a simple cost-benefit assessment in the 2000 regulations that required the costs of timber production to be justified by ecological, social, or economic benefits, contending "this requirement goes far beyond the statutory language of [the] NFMA."⁶⁷ A provision in the 2000 regulations allowing forest managers the flexibility to give roadless areas on their national forests a level of protection short of wilderness designation but greater than roaded areas was left behind.⁶⁸ Another promising provision of the 2000 regulations that will be discarded requires a "reasonable expectation that anticipated funding is adequate to complete any required monitoring and evaluation prior to authorizing a site-specific action."⁶⁹ The 1982 regulations requiring that "off-road vehicle use shall be planned and implemented to protect land and other resources, promote public safety, and minimize conflicts with other uses of the National Forest System lands" would be repealed, as would requirements that "forest planning shall evaluate the potential effects of vehicle use off-roads and . . . classify areas and trails of National Forest System lands as to whether or not off-road vehicle use may be permitted."⁷⁰

Using Wildfires to Eliminate Environmental Protections

The Bush Administration is using the fear of inevitable and frequently positive wildfires as cover to pursue a long-held industry goal of eliminating environmental protections and public oversight on national forests. This Administration has come up with an innovative way to "fight" wildfires by cutting the public out of forest management decisions. In fact, rather than proposing an on-the-ground strategy, President Bush's flagship forest policy—the Healthy Forests Initiative (HFI)—focuses almost exclusively on eliminating public involvement and government transparency in forest management decisions as a means of fire prevention. Further, there is no effort on the part of this Administration to focus limited fire prevention resources in and around communities where they will be most effective in protecting lives and property. Instead, there is an insistence on allowing fire-prevention projects deep in forests far from communities where they are likely to be ineffective unless based on carefully developed ecological criteria, which they are not.

The Administration pursues this misguided strategy in spite of numerous reports documenting that public participation is not the cause of the Forest Service's inability to adequately manage wildfires.⁷¹ To the contrary, public in-

63. *Id.* at 1280 (emphasis added).

64. *Id.* at 1281-82 (emphasis added).

65.

National Forest System lands are generally suitable for a variety of uses such as outdoor recreation, livestock grazing, timber harvest, energy resource development, mining activities, watershed restoration, cultural and heritage interpretation, and other uses. Rather than determine the suitability of all lands for all uses, a plan should assume that all lands are potentially suitable for a variety of uses except when specific areas are identified and determined not to be suited for one or more uses.

67 Fed. Reg. at 72796 (to be codified at 36 C.F.R. §219.4).

66. The 2000 regulations state "the first priority for stewardship of the national forests and grasslands is to maintain or restore ecological sustainability to provide a sustainable flow of uses, values, products, and services from these lands." 65 Fed. Reg. at 67574 (to be codified at 36 C.F.R. §219.19).

67. 67 Fed. Reg. at 72790.

68. 65 Fed. Reg. at 67571 (to be codified at 36 C.F.R. §219.9(b)(8)).

69. *Id.* at 67572 (to be codified at 36 C.F.R. §219.11(b)).

70. 36 C.F.R. §219.21(g).

71. U.S. GENERAL ACCOUNTING OFFICE (GAO), FOREST SERVICE: INFORMATION ON DECISIONS INVOLVING FUELS REDUCTION ACTIVITIES (2003) (GAO-03-689R) (more than 95% of fuel reduction projects were ready for implementation within the standard 90-day review period); U.S. GAO, FOREST SERVICE: APPEALS AND LITI-

volvement serves as a screen to weed out inappropriate projects, for example those that will exacerbate rather than reduce the threat of fire or those that cause unnecessary environmental damage. Legitimate projects will most likely not be challenged or easily survive any challenges with minimal delay, while illegitimate projects may get sent back for reworking.

The HFI's seemingly exclusive focus on eliminating public involvement rather than addressing real fire management issues appears to stem from frequent court rejections of flawed timber sales and an inability to sneak commercial logging projects through the court system disguised as fire prevention projects. Although the idea that reducing trees in forests reduces the risk of wildfire has a certain simplistic logic, it is not necessarily true.⁷² In fact, the types of reductions proposed by the Bush Administration may actually increase the risk of wildfires in many instances.

In *Sierra Club v. Bosworth*,⁷³ the Forest Service was sued for its failure to adequately consider the environmental impacts of post-fire salvage logging projects in the Six Rivers National Forest. The Forest Service attempted to justify the project on the basis of an imminent threat of fire in the project area. Plaintiffs contended that the EIS failed to reveal that no scientific evidence or studies agreed with its conclusion that logging a previously burned stand would reduce future fire intensity, and that it also failed to reveal scientific studies that concluded that the logging project would actually increase the risk of fire. The Forest Service contended that it could not take the time to prepare a more adequate EIS because it had to begin the logging immediately to reduce the risk that surrounding communities would be placed in danger by another catastrophic wildfire. Based in part on the Forest Service's own admissions, the court found the urgency argument unpersuasive.

*The Forest Supervisor admits, however, that there is no significant risk of another intense wildfire within the next five years. . . . In fact, implementation of the Phase 1 project may actually increase fire risk in the short-term. . . . The No Action alternative would have the lowest hazard in the short-term. . . . Thus, the Forest Service has failed to demonstrate that it would be unable to prepare an adequate EIS and implement its plan before communities are placed at risk of an intense fire.*⁷⁴

Accordingly, the court enjoined the Forest Service from implementing any of the proposed salvage logging.

In *Land Council v. Vaught*,⁷⁵ environmental groups sought to stop a salvage timber sale in the Idaho Panhandle and Colville national forests. The lower court had found the plaintiffs likely to succeed on the merits, but denied their

motion for injunctive relief on the grounds that the sale served the public interest by reducing the risk of catastrophic wildfires within the forests. The Ninth Circuit rejected this argument, finding that, contrary to the government's assertion that the sale would reduce the risk of fire, the record indicated that the salvage project would actually increase the likelihood and intensity of catastrophic wildfires. The Ninth Circuit stated:

*The risk of fire during the first few years of timber harvest under the Project will actually be greater than the risk of fire if no action is taken and the beetle-damaged timber is not removed from the IPNF [Idaho Panhandle National Forest]. The government has even conceded that the Project would increase the short-term risk of fire.*⁷⁶

Based on this finding, the Ninth Circuit reversed the district court and remanded the case to allow the district court the opportunity to decide the case "without relying on that clearly erroneous finding of fact," i.e., that timber harvest would reduce the risk of wildfires.⁷⁷

Finding its attempts to justify logging operations as fire prevention projects rejected by the courts, the Bush Administration has moved to make these types of projects more difficult to challenge. The Administration created two new classes of categorical exclusions. One exempts timber sales up to 1,000 acres from NEPA environmental impact analysis as long as they are carried out in the name of preventing fires.⁷⁸ Separately, the Bush Administration created a categorical exclusion from NEPA for all timber sales up to 70 acres, salvage timber sales up to 250 acres, and associated road construction up to one-half mile.⁷⁹ This is more than double the limits set by previous administrations.⁸⁰

The significance of these exemptions from environmental impact analyses cannot be overstated. A substantial portion of Forest Service timber sales are conducted as fire prevention projects. Many of these are less than 1,000 acres, while many more could be designed to be less than 1,000 acres. Also troubling is the failure to limit or require analysis of the cumulative impact of these categorically excluded sales, two or many more of which could occur in close proximity to one another but still be exempted from NEPA under the Bush Administration's new categorical exclusions.

Following a case in which the Forest Service narrowly won a NEPA challenge, the Bush Administration weakened longstanding protections requiring projects that could otherwise be categorically excluded from NEPA to undergo environmental analysis if they would impact sensitive or rare resources, including "threatened and endangered species or their designated critical habitat, wilderness areas, inventoried roadless areas, wetlands, and archeological or historic sites."⁸¹

GATION OF FOREST SERVICE PROJECTS 2 (2001) (GAO 01-1114R) (only 1% of fuel reduction projects from 2001 were appealed by private industry interests, recreation groups, individuals, and environmental groups); ECOLOGICAL RESTORATION INSTITUTE, NORTHERN ARIZONA UNIVERSITY, ANALYZING USDA FOREST SERVICE APPEALS (2003) (appeals by wide range of interest groups on a downward trend since 1998).

72. See, e.g., HENRY CAREY & MARTHA SCHUMANN, MODIFYING WILDFIRE BEHAVIOR—THE EFFECTIVENESS OF FUEL TREATMENTS (Southwest Community Forestry Research Center of the Forest Trust Apr. 2003), available at <http://www.theforestrust.org/images/swcenter/pdf/WorkingPaper2.pdf> (last visited Aug. 21, 2003).

73. 199 F. Supp. 2d 971, 32 ELR 20618 (N.D. Cal. 2002).

74. *Id.* at 992-93 (emphasis added).

75. 16 Fed. Appx. 768 (9th Cir. 2001).

76. *Id.* at 769-70 (emphasis added).

77. *Id.*

78. USDA & U.S. Department of the Interior (DOI), National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33814 (June 5, 2003).

79. USDA, National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44598 (July 29, 2003).

80. USDA, Forest Service National Environmental Policy Act; Revised Policy and Procedures, 57 Fed. Reg. 43180 (Sept. 18, 1992).

81. USDA, National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 67 Fed. Reg. 54622 (Aug. 23, 2003) (to be codified at Forest Service Handbook 1909.15, ch. 30.3).

In *Utah Environmental Congress v. U.S. Forest Service*,⁸² plaintiffs sued the Forest Service for categorically excluding from NEPA environmental analysis issuance of a permit authorizing a 400-vehicle all-terrain vehicle jamboree on the Fishlake National Forest in Utah even though three “extraordinary circumstances” were potentially affected: endangered species, steep slopes, and a watershed. Plaintiffs argued that the plain language of the Forest Service handbook required NEPA analysis whenever extraordinary circumstances were present. The Forest Service argued that ambiguous language in the definition of “extraordinary circumstances” rendered the plain language of the handbook optional. The court agreed with both parties and deferred to the Forest Service’s interpretation of its own regulations because it was not “plainly erroneous or inconsistent with the handbook.”⁸³ The court concluded: “[T]he Forest Service argues the mere presence of sensitive environmental conditions does not constitute ‘extraordinary circumstances.’ From a plain reading of the handbook, such an interpretation is reasonable.”⁸⁴

The Bush Administration prevailed in court with its argument that the relevant policies allowed Forest Service officials to categorically exclude projects from NEPA even when these sensitive resources were potentially affected. However, the decision revealed that while not clearly erroneous, there was some question of whether the agency had the discretion to categorically exclude a project that might impact sensitive or rare resources. To make it crystal clear that the agency could avoid NEPA review even where an action might impact sensitive or rare resources, the Forest Service changed its policies.

The Bush Administration is pursuing many other changes to federal forest policy under the auspices of the HFI. Most significantly, the Administration aggressively advocated for new “stewardship contracting” authorities allowing the Forest Service to pay for national forest management obligations directly with trees instead of congressional appropriations; to merge commercial timber sales with service contracts; to keep any money made on these projects; to give contractors more control over timber sale design, including which trees to cut; and to grant contractors concessions to manage tracts of national forests for up to 10 years. These new powers create incentives for the Forest Service to increase logging in order to increase its budget and offer opportunities for unscrupulous contractors to take advantage of the reduced federal role in federal timber sales. Stewardship contracting is an untested, fundamental shift in Forest Service operating procedures, a “major reinvention effort,”⁸⁵ yet, at the request of the Bush Administration, it was authorized on an unlimited basis for 10 years by a rider added to the 2003 Interior Appropriations bill during conference between the U.S. House of Representatives and the U.S. Senate.⁸⁶

82. No. 2:01-CV-00390B, 2001 U.S. Dist. LEXIS 24752 (D. Utah June 19, 2001).

83. *Id.* at *21.

84. *Id.*

85. PINCHOT INSTITUTE FOR CONSERVATION, IMPLEMENTATION OF MULTI-PARTY MONITORING AND EVALUATION: THE USDA FOREST SERVICE STEWARDSHIP CONTRACTING PILOT PROJECTS FY 2001 REPORT TO THE USDA FOREST SERVICE 2 (2002).

86. Pub. L. No. 108-7, Consolidated Appropriations Resolution, 2003, Div. F, §323.

The Bush Administration is also altering its wildlife management obligations through the HFI. The Administration has provided guidance to its wildlife and fisheries agencies to “adopt a long-term view” when reviewing fuel treatment projects that may affect federally endangered or threatened species.⁸⁷ This guidance tells these agencies that all fire prevention projects should be automatically deemed to benefit listed species over the long term except “in some very rare situations” where “long-term benefits of a project may not be sufficient to offset short-term adverse effects to a species.” With this guidance the Administration seeks to preclude wildlife managers from unbiased consideration of the risks to endangered species stemming from any timber sale or other activity falling under the broad banner of “fire prevention.” The guidance also urges agencies to “avoid proposing conservation measures that are overly restrictive from a fire management perspective,” that is, conservation measures that might limit logging in the name of fire prevention.

Most recently, the Bush Administration has proposed a rule exempting the Forest Service from consultation with the FWS or the NMFS on any timber sale or other project carried out under the national fire plan that the Forest Service determines may, but is not likely to, adversely affect a listed species or its critical habitat.⁸⁸ The duty to consult on the impacts of projects on endangered and threatened species with the agencies charged with their protection is a fundamental provision of the ESA. It exists because fish and wildlife agencies have the expertise and incentive to properly assess the likely impacts of a project on a listed species, whereas other federal agencies may have less expertise or conflicting priorities, such as timber production. Review of an agency’s “not likely to adversely affect” determination by the FWS or the NMFS is usually done quickly and informally and is not a significant bar to project implementation. Allowing the Forest Service to proceed without consultation on the basis of its own determination that an action is not likely to adversely impact an endangered species is likely to lead to substantial and unnecessary impacts to ESA listed species.

Denying Meaningful Public Participation

The Bush Administration has proven itself willing to pursue extreme measures to avoid meaningful public participation in, and oversight of, its activities above and beyond all of the efforts to avoid environmental and judicial review previously described.

In *Friends of the Clearwater v. McAllister*,⁸⁹ the Forest Service issued an environmental analysis and finding of no significant impact for a proposed timber sale, then solicited bids for a much different timber sale. The sale proposed for public comment was for three million board feet of timber. The plan the Bush Administration secretly authorized was for the sale of 9.5 million board feet, significantly increasing

87. Memorandum From Steve Williams, U.S. Fish & Wildlife Service, & Dr. William T. Hogarth, National Oceanic and Atmospheric Administration, on Evaluating the Net Benefit of Hazardous Fuels Treatment Projects (Dec. 10, 2002) (also available from the ELR Guidance & Policy Collection, ELR No. AD04796).

88. U.S. DOI & U.S. Department of Commerce, Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. 33806 (June 5, 2003) (to be codified at 50 C.F.R. pt. 402).

89. 214 F. Supp. 2d 1083, 33 ELR 20040 (D. Mont. 2002).

the ecological impacts of the sale. When sued by environmental organizations, the Forest Service argued that the change was not significant and required no further NEPA review. The district court cited evidence in the record indicating that the Forest Service had planned to authorize the larger sale all along while intentionally misleading the public. The Forest Service had frustrated NEPA's public notice-and-comment requirements by proceeding publicly as though the alternatives in the environmental analysis were still the ones in consideration even after deciding to proceed with a different sale. The court held "[t]he bait-and-switch tactic the Forest Service employed defeats the purpose and intent of NEPA to allow the public opportunity to participate in the decision-making process."⁹⁰ The court remanded the matter to the Forest Service to prepare an environmental analysis for the amended sale.

In addition to extralegal efforts to avoid public input on individual projects, the Bush Administration has put forth a number of policies and proposals to reduce opportunities for active public participation in national forest management.

Suppressing Project Appeals

The Bush Administration has rewritten the rules for public appeals of Forest Service projects to make it much more difficult for a citizen or organization to have any meaningful input regarding a project. Public participation provides valuable input that decreases ecological risks, increases the benefit and public acceptance of projects, and gives the public a voice in decisions that may impact it directly. Without a citizen right to appeal the agency's final decision, however, this important right is rendered meaningless. The Bush Administration seems willing to accept public input, but not public oversight. The apparent result sought by the Bush Administration is a public participation regime in which the public may comment, but the agencies are free to completely disregard those comments. This "right without remedy" scheme for public participation is a dramatic step backwards.

The Bush Administration's efforts to change the law to prevent project appeals started in the courts. In several cases the Bush Administration has used tactics harshly criticized by federal judges in its persistent effort to suppress meritorious challenges by the public.

In *Wilderness Society v. Rey*,⁹¹ following wildfires in the Bitterroot National Forest in Montana during the summer of 2000, the Forest Service developed a salvage logging project for the burned areas and released a draft EIS. After soliciting and reviewing public comment on the draft, the Forest Service approved a final EIS that selected a new preferred alternative not included in the draft EIS. By inserting the preferred alternative in the final EIS but not the draft EIS, the Forest Service effectively deprived the public of the opportunity to comment on the salvage project. Although the law and applicable agency regulations mandated the right to an administrative appeal of such decisions, the Forest Service attempted to deny environmental organizations an administrative appeal. In what the district court described as an "extra legal effort to circumvent the law," the Bush Administration attempted to argue that the final EIS was not a

decision from which an administrative appeal was authorized because it had been signed by the Undersecretary of Agriculture and was thus a decision of the USDA and not the Forest Service.⁹² The district court rejected this approach, stating that "[t]he notion that a signature by the Undersecretary transforms the action from Forest Service business to the business of some other agency is mystical legal prestidigitation."⁹³ The court found that the final EIS decision was a Forest Service decision regardless of who signed it, rejected the EIS, and enjoined the timber salvage operations until the Forest Service complied with the law.

Finding its attempts to avoid review of its actions rejected by the courts, the Bush Administration published a final rule on June 4, 2003, significantly modifying the regulations implementing the Appeals Reform Act. Without any legal authority in the Appeals Reform Act, the Administration published regulations giving the Secretary and Undersecretary for Natural Resources and Environment of the USDA the power to exempt projects from the appeals process, the very action previously rejected by the courts in *Rey*.

The new Bush Administration appeal regulations exempt all projects categorically excluded from NEPA from appeals,⁹⁴ even though the Appeals Reform Act is supposed to apply to all "proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans."⁹⁵ This allows many, perhaps most, Forest Service projects to be exempted from NEPA environmental analysis because, as discussed previously, the Bush Administration has created categorical exclusions from NEPA for wildfire-related timber sales up to 1,000 acres, salvage timber sales up to 250 acres, and regular timber sales up to 70 acres. A huge portion of the Forest Service's projects will no longer be analyzed for their environmental impacts and can no longer be administratively appealed by the public.

The new appeal regulations create a new economic emergency exemption allowing timber sales to go forward in spite of appeals if the appeal could cause a significant loss of economic value.⁹⁶ Previous administrations limited this emergency exemption to situations where human health or safety or natural resources were threatened. The new appeal regulations only allow appeals of specific violations of law, regulation, or policy.⁹⁷ Prior administrations accepted appeals based on such violations as well as appeals based on other considerations such as general disagreement with the project, legal but undesirable impacts, etc. And the new appeal regulations require the submission of much more detailed, substantive comments at all stages of a project before the appeal will be accepted.⁹⁸

Eliminating Forest Plan Appeals

As part of its effort to render forest plans meaningless, the Bush Administration plans to stop accepting public appeals

92. *Id.* at 1148.

93. *Id.* (emphasis added).

94. USDA, Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities; Final Rule, 68 Fed. Reg. 33582, 33600 (June 4, 2003) (to be codified at 36 C.F.R. §215.12(f)).

95. Pub. L. No. 102-381, 106 Stat. 1419 §322(a).

96. 68 Fed. Reg. at 33596 (to be codified at 36 C.F.R. §215.2).

97. *Id.* at 33600 (to be codified at 36 C.F.R. §215.14(b)(9)).

98. *Id.* (to be codified at 36 C.F.R. §215.13).

90. *Id.* at 1089 (emphasis added).

91. 180 F. Supp. 2d 1141, 32 ELR 20440 (D. Mont. 2002).

of forest plans.⁹⁹ In a case that foreshadows the Bush Administration's regulatory attempts to make forest plans completely unreviewable, the Forest Service began ignoring appeals even before legally proposing to eliminate its obligation to respond to those appeals.

In *Native Ecosystems Council v. Reese*,¹⁰⁰ an individual challenged the Forest Service decision adopting a revised forest plan (RFP) and EIS for the Targhee National Forest in Montana. After her administrative appeal was ignored for over a year, the plaintiff sued the Forest Service alleging, among other things, a de facto pattern and practice of the Forest Service not responding to administrative appeals of forest plans as required by law, and listing 14 other forests for which the Forest Service ignored appeals. The plaintiff sought to enjoin any ground-disturbing projects under the RFP-EIS. However, several projects had already relied on the RFP-EIS and had been concluded. The Forest Service argued that the plaintiff's claims were moot because the harm complained of had already come to pass and no injury remained to be averted. The court rejected this argument stating:

By refusing to rule on appeals of forest plans within the allotted time while at the same time approving projects tied to the forest plan, the Forest Service is preventing administrative appellants from developing full administrative records on the projects and from seeking judicial review of the forest plan, while concurrently enacting management directives tied to the plan.¹⁰¹

The court continued: "Now the Forest Service argues that this matter is moot, since the illegal activity complained of is no longer at issue. *This rationale, if adopted, would eviscerate the public's role in land use decisions and adopt a relativist public policy that would have broad implications in agency decision-making procedures.*"¹⁰² The court dismissed the Forest Service arguments and granted plaintiff's motion for summary judgment.

Other Public Participation Opportunities Eliminated

In its proposed regulations for forest planning under the NFMA, the Bush Administration has proposed to create a new entity—interim amendments—out of thin air.¹⁰³ These interim amendments would set forest management direction for up to four years without any public involvement, are not subject to the proposed objection process (that replaces the current appeals process), and could be renewed indefinitely as long as notice is given in a local newspaper and public comment is allowed.

These changes implicate another tactic the Bush Administration is using to make public participation more difficult: providing notice of important forest management decisions in local newspapers rather than official *Federal Register* no-

tices. The Bush Administration has proposed to provide public notice of three significant determinations in local newspapers rather than in the *Federal Register*: renewals of the interim amendments just described; forest plan revisions for which no EIS will be done; and approvals of forest plans, revisions, and amendments.¹⁰⁴ For citizens or groups interested in national forest management these are some of the most significant decisions that can be made. Missing notice of these processes would cause the interested party to miss the most important opportunities to engage in forest management. Yet to stay aware of changes and opportunities in forest management under the Bush rules, a party would have to subscribe to a local newspaper from the area of every national forest that party is interested in and read those papers every day. Parties interested in how all national forests are managed, such as national environmental organizations, would have to subscribe to as many as 155 local newspapers. The obvious intent of these provisions is to disenfranchise the national interest in national forest management under the theory that anyone who needs to know how a national forest is being managed, or who has input worth soliciting, must live close enough to subscribe to the local newspaper.

Sweetheart Settlements With Industry

In addition to its administrative attempts to deprive the public of any meaningful input into Forest Service actions, the Bush Administration has also employed a more direct route for avoiding accountability, namely the settlement of industry lawsuits to get rid of policies it does not support.

One prominent example is the Northwest (NW) Forest Plan that guides federal forest management throughout the range of many species including the northern spotted owl, which largely inhabits the forests on the western side of the Cascade Mountains. The NW Forest Plan was a response to successful litigation by environmental groups proving, among other things, that the Forest Service was failing to ensure viable populations of spotted owls on national forests. The Clinton Administration recognized the problems facing the spotted owl were symptomatic of problems facing many species in the region negatively impacted by intensive logging and road building and required a nationwide response, being much too large, complicated, interconnected, and important to risk addressing in haphazard fashion at the individual forest level. The NW Forest Plan includes many provisions to curb the impact of logging on the spotted owl and other species.

Following a successful Freedom of Information Act lawsuit filed by Earthjustice Legal Defense Fund attorneys, the Bush Administration grudgingly disclosed a novel method for dealing with industry lawsuits—giving industry everything it wants. In a secret "Global Framework for Settlement" agreement between the Department of the Interior, the USDA, and eight or so industry groups, the Bush Administration agreed to a wholesale revision of forest policy in the Pacific NW in return for a possible future dismissal of four industry lawsuits: *Douglas Timber Operators v. Secretary of Agriculture*,¹⁰⁵ which sought to weaken the NW Forest Plan survey and manage program for protecting old

99. The regulations would replace the existing appeals process with an unenforceable objection process, which amounts to a limited comment period. 67 Fed. Reg. at 72803 (to be codified at 36 C.F.R. §219.19). An objection process was adopted in the 2000 regulations but the impacts of that change were mitigated by the rest of the regulations, which were overall much stronger than the regulations proposed by the Bush Administration.

100. 212 F. Supp. 2d 1227, 32 ELR 20826 (D. Mont. 2002).

101. *Id.* at 1233 (emphasis added).

102. *Id.* at 1231 (emphasis added).

103. 67 Fed. Reg. at 72797 (to be codified at 36 C.F.R. §219.6(f)).

104. *Id.* at 72797, 72798, 72804 (to be codified at 36 C.F.R. §§219.7(f)(3), 219.8(b), 219.21(a)).

105. No. 01-CV-6378-AA (D. Or.).

growth-dependent species; *Western Council of Industrial Workers v. Secretary of the Interior*,¹⁰⁶ which was a challenge to the critical habitat designation of the northern spotted owl by timber and industry interests who sought a species status review and an elimination of the listing and critical habitat designation for the owl; *American Forests Resource Council v. Secretary of the Interior*,¹⁰⁷ which sought review and elimination of the listing and critical habitat designation for the marbled murrelet; and *American Forests Resource Council v. Clarke*,¹⁰⁸ a case twice dismissed by the district court that challenged the NW Forest Plan's set aside of old growth and riparian reserves on Oregon and California railroad grant lands.

In secretly settling these cases, the Bush Administration agreed to amend the NW Forest Plan in the following ways: to eliminate the requirements that it "survey and manage" national forests to protect certain species; to weaken the Aquatic Conservation Strategy by eliminating requirements that timber sales not degrade watershed conditions to the detriment of endangered species of salmon or their habitat; and to review the status of the northern spotted owl and marbled murrelet and to redesignate critical habitat for both based on an economic analysis. Finally, the Bush Administration agreed to amend the NW Forest Plan to eliminate old growth and riparian reserves on Oregon and California grant lands managed by the Bureau of Land Management and to affirm that timber production be the management priority for those lands.

In another case, *National Ass'n of Home Builders v. Evans*,¹⁰⁹ the Bush Administration agreed in a settlement to repeal and review the listings and critical habitat designations for 19 species of endangered salmon—much of which was on national forests. The suit alleged the critical habitat designation caused or would cause economic injuries to property owners, individuals, and small businesses through project delays, uncertainties, and biological analyses that could be required as part of a project approval process. In response to this suit, the NMFS agreed to put economics ahead of endangered species and submitted a proposed settlement agreement that would rescind its current critical habitat designations for the 19 salmon populations at issue and agreed to conduct further scientific research and economic analysis and make new critical habitat designations.

Gutting Roadless Area and Wilderness Protections

The Bush Administration settlement that gives away the most involves forests with no roads. On January 5, 2001, the federal government adopted the Roadless Area Conservation Rule protecting the remaining public forests in the United States that have not had roads built through them from new road building and commercial timber sales.¹¹⁰ This move came after decades of debate over the fate of roadless forests in America, after numerous attempts to end massive taxpayer subsidies for logging roads, and after three years of planning and public process that included 600

public meetings around the country and millions of public comments. Roadless lands have been reduced to a small percentage of the landscape in spite of their many benefits. Roadless areas provide critically important habitat for species that require intact forests, room to roam, and refuge from people. They offer unmatched backcountry recreation experiences. They sustain clean water and clean air.

On January 20, 2001, his first day in office, President Bush withdrew this and other environmental rules for review.¹¹¹ On May 3, 2001, nearly two months after the roadless rule was legally required to take effect, the Administration finally agreed to implement the rule as written, but also approved plans to rewrite it. The Administration was spared the trouble, at least temporarily, when a few days later a court enjoined the rule, primarily because the Administration failed to defend it in court even though U.S. Attorney General John Ashcroft swore before Congress he would uphold it.

In *Kootenai Tribe of Idaho v. Veneman*,¹¹² and *Idaho ex rel. Kempthorne v. U.S. Forest Service*,¹¹³ the Bush Administration refused to defend the roadless rules against an industry NEPA challenge, temporarily avoiding a court decision by pledging to reconsider and change the roadless rules. In *Idaho v. U.S. Forest Service*,¹¹⁴ and *Kootenai Tribe of Idaho*,¹¹⁵ after finding insufficient support for a change in the rules, the agency again refused to defend the roadless rules against an industry NEPA challenge. Instead, the Bush Administration handed victory to the wise-use and industry plaintiffs, stating "[t]he USDA shares plaintiff's concerns about the potential for irreparable harm in the long-term [sic] under the current rule."¹¹⁶ The "harm" referred to was the speculative harm that might befall the roadless forests if the Forest Service curtailed "management and maintenance" activities—basically timber sales—due to the lack of roads. The district court cited the Bush Administration's agreement with the concerns of industry groups and ruled to enjoin application of the roadless rule.

After this injunction, the Bush Administration implemented two interim directives for managing roadless areas until a court decided the fate of the rule or the Administration rewrote it.¹¹⁷ The interim directives effectively but quietly rolled back the roadless rule by returning management of roadless areas to the status quo before the rule was implemented with one exception—approval of a regional forester or the Chief of the Forest Service was required before roadbuilding or commercial logging could commence in a roadless area.

On appeal, the injunction rendered in the *Idaho* and *Kootenai* cases was dissolved by the Ninth Circuit, which stated: "[T]he Forest Service, now governed by a new presidential administration which is perhaps less sympathetic to

106. No. 02-CV-6100-AA (D. Or.).

107. No. 02-CV-6078-AA (D. Or.).

108. No. C94-1031-TPJ (D.D.C.).

109. No. 00-CV-2799 (D.D.C.).

110. USDA, Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3243 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

111. Memorandum from Andrew H. Card, White House Office, for the Heads and Acting Heads of Executive Departments and Agencies (Jan. 20, 2001).

112. 142 F. Supp. 2d 1231, 31 ELR 20617 (D. Idaho 2001).

113. 142 F. Supp. 2d 1248 (D. Idaho 2001).

114. No. 01-CV-11, 2001 U.S. Dist. LEXIS 21990 (D. Idaho Apr. 5, 2001).

115. 142 F. Supp. 2d at 1231.

116. 2001 U.S. Dist. LEXIS 21990, at *1.

117. USDA, Roadless Area Protection; Interim Direction, 66 Fed. Reg. 44111 (Aug. 22, 2001); USDA, Forest Transportation System Analysis; Roadless Area Protection, 66 FR 65796 (Dec. 20, 2001).

the Roadless Rule, expressed concern ‘about the potential for irreparable harm in the long term’ caused by the Roadless Rule.”¹¹⁸ The Ninth Circuit rejected such concerns stating: “*NEPA may not be used to preclude lawful conservation measures by the Forest Service and to force federal agencies, in contravention of their own policy objectives, to develop and degrade scarce environmental resources.*”¹¹⁹

In yet another collusive settlement agreement, the Bush Administration has undermined significant portions of the roadless rule in a settlement agreement with the state of Alaska and Alaskan timber interests. This settlement comes after the Bush Administration failed in its earlier attempt to rid itself of the roadless rule by refusing to defend it in court against a challenge by states, industry groups, and wise-use groups. In those cases, environmental groups won the right to intervene and defended the government against its will. In the Alaska roadless case, the government negotiated a settlement out of court to prevent environmental groups from successfully intervening to defend the public interest.

The Alaska roadless case settlement itself has, at least temporarily, accomplished two troubling things. First, it exempts the Tongass and Chugach National Forests in Alaska from the roadless rule. These two forests contain one-quarter of all Forest Service surveyed roadless areas. Exempting these two forests from the protections of the roadless rule severely undermines the protections of the rule. Second, the settlement creates a mechanism for state governors to request waivers from the roadless rule for certain reasons, such as an exemption to create and maintain roads for the purpose of “reducing hazardous fuels,” i.e., logging. Despite this clear evisceration of the roadless rule, the Bush Administration’s press release deceptively announced this settlement as “Retaining the National Forest Roadless Area Conservation Rule.”

Understanding the Implications and Conclusion

The constant stream of forest-hostile court arguments and the barrage of regulatory and policy changes analyzed in this Article are being carried out in a carefully orchestrated and systematic manner. The Bush Administration’s pattern and practice of working against forest laws and protection in the courts, through administrative changes and practices, and with recommendations to Congress, clearly show a carefully thought-out, well-organized attempt to undo forest protections in the United States. The Bush Administration is implementing the timber industry’s long-standing agenda of reversing those forest policies that put wildlife and the public on equal footing with extractive interests.

The breadth and scale of the changes being made to national forest policy cannot be fully appreciated by looking at individual proposals, but must be considered as a whole. In addition to direct cumulative impacts, many of the changes directly interact with one another, compounding their effect so that the whole is much greater than the sum of the parts.

For example, the Bush Administration took the position that roadless areas could be best protected or at least managed with local input provided through forest plans, and therefore a nationwide rule was not necessary. The Bush

Administration conveniently ignored the fact that the roadless rule was needed precisely because forest plans had proven ineffective in preventing the loss of roadless areas. Then, the Bush Administration set about gutting the very forest planning regulations through which it would have managed roadless areas. To its proposed forest planning regulations, the Administration has proposed to eliminate not only wildlife, environmental, and specific roadless area protections, but also the public participation processes through which local residents and other members of the public might influence management of the forests and actually protect roadless areas. Further, if roadless areas are successfully protected in a forest plan in spite of these barriers, those protections would be nonbinding under this Administration’s proposal to make forest plan standards effectively optional.

In rewriting the forest planning regulations, the Bush Administration asserts that environmental analysis is not needed on forest plans because it will be done on site-specific projects. However, not only has the Administration repeatedly argued in court that forest plan provisions do not apply to projects and cannot be challenged at the project level, it has also exempted huge categories of projects from all environmental analysis. The projects that will no longer be subject to environmental analysis include fire-related timber sales up to 1,000 acres, salvage timber sales up to 250 acres, and all timber sales up to 70 acres, even if many of these sales are in close proximity. In creating these new categorical exclusions, the Bush Administration asserted that any projects that affect sensitive resources will still be subject to environmental analysis, while simultaneously making environmental review in such “extraordinary circumstances” optional for forest managers.

Furthermore, the Bush Administration’s appeal regulations do not allow appeals of categorically excluded projects. Even for remaining appealable projects, the government may proceed with the project in spite of the appeal if it might result in a substantial loss of economic value to the government, thereby rendering the appeal moot. The government can now also avoid appeals by simply failing to respond to them, or having a USDA official exempt a project from appeal. A would-be appellant may still go to court to try to stop the project, but without the opportunity for an administrative appeal, the appellant will not likely have much of a record on which to build a case. Once in court, as this Article reveals, the plaintiff has a 67% chance of facing arguments that are hostile to accepted forest law. Worse, following the Bush Administration’s regulatory changes, the plaintiff will have to struggle to find any enforceable legal provisions with which to challenge questionable Forest Service practices.

In the cases surveyed for this Article, the arguments of the Bush Administration present an unmistakable trend. When the law requires the Bush Administration to consider ecological factors beyond removing board feet of lumber from a national forest, the Forest Service often responds by ignoring or breaking that law. Where the Forest Service’s unlawful actions or arguments are rejected by the federal courts, the Forest Service frequently proposes administrative changes to the rules, often in collusive settlements with timber-industry litigants.

Despite the deceptive rhetoric employed by Bush Administration environmental officials, the Forest Service is en-

118. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1124, 33 ELR 20130 (9th Cir. 2002).

119. *Id.* at 1123 (emphasis added).

gaged in the most dramatic revision of forest management policy in agency history. By eliminating environmental review of many timber sales, eliminating the requirement for compliance with comprehensive management plans, eliminating the requirement to preserve wildlife viability, and eliminating public participation, the Bush Administration has chosen to ignore the lessons of more than a century of forest management. Unchecked, the changes proposed by the Bush Administration in response to its litigation failures

will destroy the balance of ecological, commercial, and recreational values that has ensured the productivity and vitality of our national forests. Cumulatively, these changes signal the end of the modern era forest management, with its recognition of the values of nontimber resources and effective public involvement in public land management. Unless either Congress or the federal courts intervene, the Forest Service of President Bush may do permanent harm to this nation's irreplaceable forests.¹²⁰

Appendix A

Judicial Accountability Forest Law Project Methodology

The Judicial Accountability Project is intended to survey federal court cases involving federal environmental laws decided since the beginning of the Bush Administration. This Article covers the arguments made by the Bush Administration in federal court cases implicating statutory law, regulations, or rules related to our National Forests (hereinafter comprehensively referred to as forest law) decided from January 21, 2001, to January 21, 2003, and the results of these legal arguments. This Article considered decided cases in which the Bush Administration made substantive arguments where those arguments had some impact on national forest management. The project is intended to yield data about the arguments made by the Bush Administration in federal court proceedings and the results of those arguments during this period. The expectation is that these data will allow accurate analysis of the Administration's track record in federal litigation as it pertains to forest law issues.

Methodology for this project is best described in terms of: The Survey Process, which determines the cases to be included; the Case Review Database, which allows the incorporation of case information in a referenced and searchable format; Case Categorization, which determines the qualitative value of each argument made by the Bush Administration; Numerical and Narrative Reports; and the Judicial Voting Record Assessment, which summarizes information from the Case Review Database.

The Survey Process

Initial Survey of Federal Court Actions for Project Relevance

The initial review involves broad electronic searches on both Westlaw and Lexis, using key terms related to environmental law, to derive a comprehensive list of all federal court decisions with implications for forest law. The decisions covered in this Article may be either final dispositive decisions that ultimately resolve a case, or decisions on motions resolving important procedural or substantive aspects of a case. The survey is intended to canvass the universe of federal court decisions as comprehensively as possible.

Out of this universe of court decisions, relevant cases are selected or rejected for inclusion in the substantive review process on the basis of the presence or absence of two ele-

ments: federal government involvement in the case and presence of significant forest law issues. A description of these elements follows.

Is the Forest Service the Defendant in the Action?

National Forests are governed and impacted by many federal laws, regulations, and rules. Many agencies are charged with responsibilities under these laws. This Article is limited to those decided cases in which the Forest Service is either a defendant or co-defendant in a federal lawsuit.

Are Significant Forest Law Issues Presented and Decided?

Significant forest law issues are deemed presented when the Forest Service or the U.S. Department of Agriculture made arguments that could significantly affect national forests. Such arguments include interpretations of one or more of the major statutes governing forests, agency regulations or rules implementing forest policy, or arguments potentially affecting significant forest resources. The cases included in the database are those cases in which the reviewing court specifically reaches the Forest Service argument in its decision.

Following this methodology, 62 cases were selected as relevant and proceeded to the substantive review process.¹

Substantive Review of Applicable Cases

Cases making the first cut for relevance to the project described above are next carefully examined for inclusion within the Judicial Accountability Case Review Database. Generally, cases that are rejected during substantive review

120. See, e.g., Matt Weiser, *Giant Sequoias Could Get the Ax*, HIGH COUNTRY NEWS, June 29, 2003. The Forest Service is considering a logging project for up to 8,000 acres of the Sequoia National Monument, including clearcuts, that would allow up to 10 million board feet of lumber each year to be removed from the forest.

1. A number of cases were reviewed in which an agency other than the Forest Service was the defendant in a lawsuit with clear implications to forest law issues. See, e.g., *Cascadia Wildlands Project v. U.S. Fish & Wildlife Serv.*, 219 F. Supp. 2d 1142, 33 ELR 20020 (D. Or. 2002) (U.S. Fish and Wildlife Service Biological Opinion (BO) failed to ensure that timber sale would comply with Aquatic Conservation Strategy and would not jeopardize listed bull trout. The Forest Service was enjoined from implementing timber sales that relied on an invalid BO). These cases were not included in the database and are not reflected in the numerical assessment.

are cases in which the Bush Forest Service raises arguments that initially appeared to have forest law implications on cursory examination, but are found not to present such precise issues on closer examination.

Clinton-Inherited Cases

A number of otherwise relevant cases originated under the Clinton Administration and carried over into the current Bush Administration. There are even some cases that originated under the previous Bush Administration, predating President Clinton. The methodology for determining which arguments are counted as attributable to the current Bush Administration from these overlapping cases focuses on the motion that proved dispositive of a particular case. Regardless of when the case was filed, if the current Bush Administration files the particular motion or a substantial revision of the motion upon which the court rules in a particular decision, it is counted as a Bush Administration argument.

Subsequent Appellate Decisions

A number of decided cases in which the Bush Administration presents arguments are subsequently the subject of appeals. In cases where the appellate court overturns the lower court, only the appellate case is reflected in the database in order to avoid the confounding effect of having a case reported with two different outcomes.

Judiciability Arguments

The Bush Administration makes a number of judiciability arguments in the surveyed forest law cases. The judiciability arguments that are counted for the purposes of this Article are judiciability arguments specifically pertaining to forest law issues and directly linked to substantive forest policy decisions.

Substantive review provides a more rigorous filter for database applicability and for the correct categorization of legal arguments and results. Out of the 62 cases reviewed pursuant to the above methodology, 44 were placed into the final database. Eighteen cases were determined not applicable to the survey as a result of the several screens we applied to eliminate cases not directly germane to our inquiry.

The Case Review Database

The following information is compiled in the Case Review Database: Database Tracking Number; Case Caption; Case Citation; Court; Date of Decision; Docket Number; Statute; Agency; Environmental or Industry Plaintiff; Statement of Case; Procedural Posture of the Case; Issues Presented in the Case; Whether the Government Argument Was Positive, Neutral, or Hostile; Court Holding; Quote; Whether the Court Agreed With the Bush Administration; Result of the Case; Whether the Case Originated Under Clinton; Deciding Judge(s); Year of Nomination; Whether It Was a Democrat- or Republican-Appointed Majority; Whether It Was an Administrative Court; Whether the Decision Was Overturned; and the Appellate Citation. The Database also tracked the following issues implicated in the case: National Forest Management Act Planning Regulations; Consistency Requirement; *Ohio Forestry* Argument; Viability Regula-

tions; Forest Plan Violations; Roads and Transportation; Roadless Area Conservation Rule; Motorized Recreation; Wilderness; Fire; Avoiding the National Environmental Policy Act; Avoiding the Appeals Reform Act; Regional Plans; Aquatic Conservation Strategy Consistency ; National Northwest Forest Plan Settlements; Water Rights; Clean Water Act and Total Maximum Daily Loads; and the Endangered Species Act.

Case Categorization

This Article placed all Bush Administration forest law arguments into one of three categories: hostile, consistent, or positive. Making this determination was central to this study, and we undertook the task carefully and conservatively.

Hostile

Forest Service arguments are categorized as hostile where substantial evidence exists, either within the government's arguments or the court's interpretation and reiteration of those arguments, that the Forest Service advocated a position avoiding or eroding forest law accepted precedent. Cases falling into this category include: cases where the Bush Forest Service used judiciability arguments rejected by the reviewing court to attempt to avoid judicial review of its failure to comply with applicable substantive forest law or regulatory forest plan consistency requirements; cases where the court rejected Bush Forest Service arguments that it was not required to comply with some provision of forest law or regulations; and cases in which the Bush Forest Service sought to defend decisions or interpretations of forest law found defective or incomplete by the reviewing court.

Neutral

Forest Service arguments are categorized as neutral where the evidence indicates the government advocated a position not tending to erode forest law or accepted precedent. Cases falling into this category include: those in which the Bush Administration argued, and the reviewing court agreed, that it had complied with the applicable requirements of forest law and based its arguments on the adequacy of the facts contained in the administrative record; and cases in which the Bush Administration defended its actions or decisions against petitioners asserting interests hostile to the goals and intent of applicable forest law. In a number of cases the Bush Administration presented arguments that appear contrary to sound forest management, but were labeled as forest-law-neutral. Where an argument comports with applicable forest law it is labeled neutral despite the fact that it may be inconsistent with overall forest health.

Positive

Forest Service arguments are categorized as positive where the evidence indicates that the government's position tended to promote or even advance the interests protected by the laws governing our forests.

Numeric Report

The numeric data discuss the total number of cases: in-

cluded in the survey; in which the Bush Administration presented forest-law-hostile arguments; in which the Bush Administration presented forest-law-neutral arguments; and in which the Bush Administration presented forest-law-positive arguments. The Numeric Report studies trends in the Bush Administration's arguments as well as the courts' responses to those arguments.

Narrative Report

The narrative report is a descriptive, qualitative summary of the arguments the Bush Administration presented in the cases included within the survey subject area. The intent is to analyze the legal arguments made by the Bush Administration and the ramifications of those arguments in order to illustrate trends in the Bush Forest Service's efforts to fulfill its statutory and regulatory responsibilities. The Article also discusses the consistency between the Bush Administration's interpretation of environmental laws and the interpretation of those laws by the federal courts. The narra-

tive report focuses on key cases in some detail to illustrate trends, themes, and patterns in the Bush Forest Service's legal arguments during federal litigation. The narrative also discusses forest law changes undertaken or proposed by the Bush Administration.

Judicial Voting Record Assessment

The Assessment of Judicial Voting Records tracks the trends of the judiciary in deciding cases when presented with Bush Forest Service forest-hostile arguments. Information is compiled on the judge or judges of record in each case, including who appointed the judge. Information is then compiled tracking the number of times judges appointed by Republicans or Democrats presented with forest-law-hostile arguments agreed with those arguments. For the district courts information is compiled on a straight partisan analysis. For the appellate courts, information is compiled for 100% Republican-appointed panels, 66.7% Republican-appointed panels, 66.7% Democrat-appointed panels, and 100% Democrat-appointed panels.

Appendix B

Numeric Assessment of Bush Forest Service Arguments

During the first two years of the Bush Administration, the Forest Service was the defendant in lawsuits challenging forest policy or management decisions 61 times. Of these 61 cases, we eliminated 15, 5 of which were overturned and 10 of which were eliminated because they either presented procedural issues that had no bearing on forest law or were cases inherited from the Clinton Administration in which the Bush Administration made no substantive arguments.

In the remaining 46 applicable cases, the Bush Administration presented arguments hostile to accepted forest law 31 times or 67% of the time. Despite the high degree of deference that administrative agencies receive from reviewing courts, the Bush Administration prevailed in only three of its forest-hostile arguments—a 90% failure rate.² By contrast, the Bush Administration presented arguments consistent with forest law 15 times or 33% of the time. Twelve of these arguments (26% of the total) were forest-law-neutral in that the Bush Administration merely followed the law despite an outcome that did not demonstrably further the goals of forest management. Three of these arguments (7% of the total) were forest-law-positive in that the Bush Administration actively defended national forest laws and promoted forest management policies. The Bush Administration pre-

vailed in all 15 cases in which it presented arguments consistent with the goals of applicable forest law and policy.

Of the 31 cases (67%) in which the Bush Administration presented forest-law-hostile arguments, 30 of these forest-law-hostile arguments were in response to challenges filed by environmental petitioners. The other case was a National Environmental Policy Act challenge to the Roadless Area Conservation Rule that the government refused to defend and, in fact, conceded to the industry plaintiffs. Nineteen of these cases were challenges to timber sales; three were challenges to grazing permits; three challenges to the development of roads; and the balance were challenges to pesticide use, land exchanges, and special use permits. *See* Figure B-2.

Of the 12 cases (26%) in which the Bush Administration presented neutral arguments, 9 of these were cases where the reviewing court upheld the Forest Service action against challenges by environmental petitioners. Of these nine cases, four upheld the government in challenges to timber sales, and five involved management decision related to grazing, motorized access, predator control, and a land swap.

The three cases (7%) in which the Bush Administration presented forest-law-positive arguments were all in response to industry challenges.³

2. *See* Willow Creek Ecology v. U.S. Forest Serv., 225 F. Supp. 2d 1312, 33 ELR 20072 (D. Utah 2002); Conservation Action Project v. Moore, No. 02-193, 2002 U.S. Dist. LEXIS 24351 (D.N.H. Dec. 18, 2002); and Superior Wilderness Action Network v. U.S. Forest Serv., No. 01-29, 2002 U.S. Dist. LEXIS 1703 (D. Minn. Jan. 30, 2002) (court agreed with the government that viability requirements were not applicable to individual projects).

3. *See* Utah Shared Access Alliance v. U.S. Forest Serv., 288 F.3d 1205, 32 ELR 20642 (10th Cir. 2002) (court upheld government over challenge to its decision to destroy roads to improve watershed condition); Central South Dakota Coop. Grazing Dist. v. Secretary of Agriculture, 266 F.3d 889 (8th Cir. 2001) (court upheld decision to reduce stocking level on grazing lease and held Forest Service was not required to consider higher level of grazing when reissuing lease); Montana Snowmobile Ass'n v. Wildes, 26 Fed. Appx. 762, 32 ELR 20479 (9th Cir. 2002) (court upheld Forest Service decision to close trails to snowmobile access).

Bush Forest-Law-Hostile Arguments	31
Total Number of Cases in Which Court Agreed With Bush	3
Bush Forest-Law-Neutral Arguments	12
Total Number of Cases in Which Court Agreed With Bush	12
Bush Forest-Law-Positive Arguments	3
Total Number of Cases in Which Court Agreed With Bush	3

Appendix C

Tracking the Federal Judiciary

The following provides a summary of the federal court record in deciding Bush forest-hostile arguments from January 21, 2001, to January 21, 2003.

The courts were fairly uniform in rejecting Bush forest-law-hostile arguments. Out of the 30 cases in which we categorized the Bush Forest Service arguments as hostile, the courts agreed with the forest-law-hostile arguments on only 3 occasions. All three decisions agreeing with Bush forest-law-hostile arguments were made by district courts. Two of the judges were Democrat-appointed and one was Republican-appointed. The courts unanimously accepted arguments made by the Bush Administration that were either forest-law-neutral or forest-law-positive regardless of the court's political persuasion.

Republican-appointed courts were presented with forest-law-hostile arguments four times, agreeing with the Bush Administration only once. Republican-appointed courts were presented with forest-law-neutral arguments seven times, agreeing with all of them. Republican-appointed courts were presented with no forest-law-positive arguments.

Democrat-appointed courts were presented with forest-law-hostile arguments 27 times, agreeing with the Bush Administration twice. Democrat-appointed courts were presented with forest-law-neutral arguments five times, and agreed with all of them. Democrat-appointed courts were presented with forest-law-positive arguments three times and agreed with all.

The real difference appears when the total numbers are compared. Republican courts were presented with Bush Forest Service arguments 11 times and agreed with 8 of them. Democrat courts were presented with Bush Forest Service arguments 35 times and agreed with 10 of them.

Figure B-1:

Bush Forest Hostile Argts

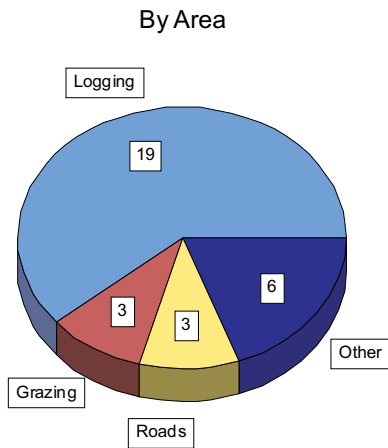


Figure B-2:

Bush Forest Arguments

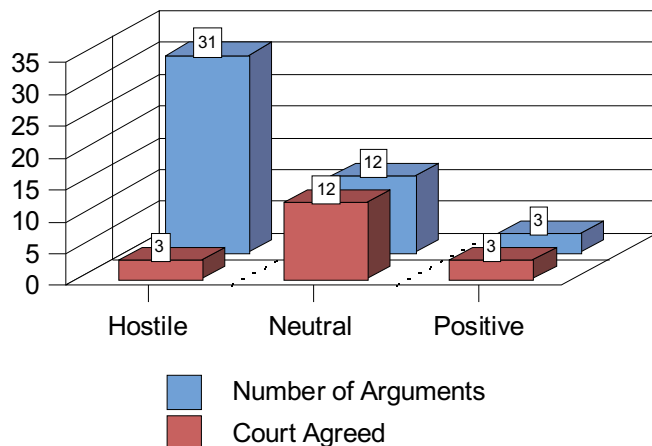


Figure C-1:

Agreement with Bush

