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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
ALBUQUERQUE DIVISION

WILD WATERSHED, MULTIPLE CHEMICAL SENSITIVITIES TASK FORCE, Dr. ANN MCCAMPBELL, M.D., and JAN BOYER, Plaintiffs, vs. SANFORD HURLOCKER, District Ranger, Santa Fe National Forest, JAMES MELONAS, Supervisor, Santa Fe National Forest, CAL JOYNER, Southwest Regional Forester, U.S. Forest Service, and VICTORIA CHRISTIANSEN, Chief of the U.S. Forest Service, an agency of the U.S. Dept. of Agriculture, Defendants.	**1:18-cv-00486** **PLAINTIFFS' *OLENHOUSE* BRIEF**

I. Introduction

This case involves Plaintiffs' challenge to final agency actions pursuant to the Administrative Procedures Act, 5 U.S.C. §§ 701 *et seq*. Olenhouse v. Commodity Credit Corp., 42 F.3d 1560, 1579-80 (10th Cir. 1994). Specifically, Plaintiffs are challenging two smaller projects in the Santa Fe National Forest that are part of a much larger effort by the Forest Service and various collaborators "to change conditions" across a forested landscape adjacent to the city

of Santa Fe, NM. HP03526.[1] Plaintiffs assert that a programmatic environmental impact statement is called for in this matter to address their long-standing concerns over the potentially significant impacts of proposed treatments on roadless areas, the development of old growth habitat, wildlife diversity, and air quality in the neighboring communities.

II. Legal Standards of Judicial Review

Plaintiffs raise claims in this case pursuant to the National Environmental Policy Act, 42 U.S.C. 4331 *et seq.*, (NEPA), as well as directly under the 2014 Farm bill Categorical Exclusion amendment to the Healthy Forest Restoration Act, 16 U.S.C. § 6501 *et seq*. Under section 603 of the Farm bill, "an insect and disease project may be categorically excluded from documentation in an environmental assessment or an environmental impact statement…" PC0633. However, NEPA still applies to agency discretion to take advantage of such a shortcut, as Congress did not choose to create a statutory exception for such projects from NEPA entirely. Infra., at p. 7.

NEPA has two broad aims: "First, it places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process." Forest Guardians v. U.S. Fish & Wildlife Service, 611 F.3d 692, 711 (quoting Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc., 462 U.S. 87, 97 (1983)) (internal quotation marks omitted); *see also* New Mexico ex rel. Richardson, 565 F.3d at 703 ("By focusing both agency and public attention on the environmental effects of proposed actions, NEPA facilitates informed decisionmaking by agencies and allows the political process to check

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[1] Record citations are to the Hyde Park ("HP0xx") and Pacheco Canyon ("PC0xx") administrative records submitted to the Court in this case.

those decisions.") Through the NEPA process, "the agency must take a 'hard look' at information relevant to its decision." Ibid. The requirements of NEPA "have been augmented by longstanding regulations issued by the Council on Environmental Quality ('CEQ')." New Mexico ex rel. Richardson, 565 F.3d at 703; see 40 C.F.R. pts. 1500–08.

The Court's determination of the merits in this case is controlled by the Administrative Procedures Act., pursuant to which "the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall: (1) compel agency action unlawfully withheld or unreasonably delayed; and (2) hold unlawful and set aside agency action, findings, and conclusions found to be: (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law…" 5 U.S.C. § 706. As the Circuit Court has directed:

> In determining whether the agency acted in an arbitrary and capricious manner, we must ensure that the agency decision was based on a consideration of the relevant factors and examine whether there has been a clear error of judgment. We consider an agency decision arbitrary and capricious if the agency . . . relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Colo. Envtl. Coal. v. Dombeck, 185 F.3d 1162, 1167 (omission in original) (citations omitted) (10th Cir. 1999) (quoting Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983)). Accord: The Ecology Center v. U.S. Forest Serv., 451 F.3d 1183, 1188-89 (10th Cir. 2006). The standard of review requires the district court "to engage in a substantive review of the record to determine if the agency considered relevant factors and articulated a reasoned basis for its conclusions." Olenhouse v. Commodity Credit Corp., supra., at 1580.

III. Factual & Legal Background

The Hyde Park Project Area is located on the Espanola Ranger District of the Santa Fe National Forest ("SFNF"), approximately 10 miles northeast of Santa Fe, within elevations approximately between 8,000 and 10,000 feet. HP03437. This area is popular with recreation enthusiasts. HP03438. The northern project boundary is marked by the Santa Fe National Scenic Byway, with many recreational opportunities along this road, and attracts numerous visitors from Santa Fe and beyond throughout the entire year. Ibid. The Hyde Park area is mostly roadless, and the forest is at least 180 years old, dominated by older ponderosa pine and mixed conifer species that include Douglas fir and white fir. Ibid.

The Pacheco Canyon Project is situated approximately three miles due north of the Hyde Park Project, at similar elevations. Similar to Hyde Park, these forests are predominantly ponderosa pine, along with white pine, in the upper canopy, with mixed conifers underneath, mostly Douglas fir and white fir. PC01199. No age is disclosed for the oldest trees in Pacheco Canyon.

The Hyde Park Project is highly controversial, having been first proposed in January of 2006. HP0713 *et seq*. In March 2006, a decision was made to implement a thinning and prescribed fire project to address a "high potential for ignition" of a wildfire. HP0721. Upon formal review, that decision was reversed due to a lack of documentation regarding roadless area impacts. HP03307. Later that same year, the Forest Service again scoped the project, HP03529, and by 2009 it had prepared a draft environmental assessment. HP02232 *et seq*. This document received a number of comments, similar to those received in 2006, and the project was once again abandoned - again, largely due to concerns over roadless area impacts. HP03529.

Subject to designation of appropriate areas by the Secretary of Agriculture, the 2014 Farm Bill established a categorical exclusion for qualifying insect and disease projects under 3,000 acres in size, provided that such projects maximize the retention of old growth and large trees and consider the "best available scientific information to maintain or restore the ecological integrity" of the forest. 16 U.S.C. § 6591b (b)(1). An insect and disease project that may be categorically excluded under this authority is one that is designed to reduce the risk or extent of, or increase the resilience to, insect or disease infestation. 16 U.S.C. § 6591a (d)(1). Armed with this new authority, on December 19, 2016 the Forest Service issued a memorandum to file, the subject of which was: "*Greater Santa Fe Fireshed Project(s) Initiation*." PC0766. Commenting on its discretion under the Farm Bill, the Service noted that "[i]f the results of the initial analysis for either of these projects leads to a finding that does not allow use of a CE, this team would move forward with the more detailed analysis necessary in an EA or EIS." Ibid. Subsequently, on February 14, 2017, the Forest Service issued a scoping letter for the two projects at issue here. PC0799. As the Service made clear to the public at that time, "[t]hese two projects are part of a larger effort sponsored by the Greater Santa Fe Fireshed Coalition…" (of which it is a member). Ibid.

Of particular note, the Forest Service submitted a map as part of a 'WorkPlan' to its partners in the Greater Santa Fe Fireshed Committee in September of 2017 which reveals that there are 75,953 acres (approximately 120 sq. mi.) of SFNF lands within the 107,626 acre (168 sq. mi.) Santa Fe Fireshed. HP03291. At the time this work plan was submitted, there were already **21,896 acres** of USFS projects (34 sq. mi.) either ongoing or planned - approximately twenty percent of the entire fireshed - including 4,383 acres (6.8 sq. mi.) from the Hyde Park and Pacheco Projects (cumulatively).

In spite of NEPA's prohibition against segmenting larger projects to avoid more comprehensive review, infra., and the Farm Bill's 3,000 acre limitation on categorically excluding projects from such review, supra., and in spite of the two projects being scoped together with the same stated purpose and need pursuant to the same larger effort, both projects have been categorically excluded from the requirements to prepare an environmental assessment (EA) or impact statement (EIS) under the National Environmental Policy Act (NEPA). The larger Greater Santa Fe Fireshed Project itself has never been subjected to NEPA, thus prompting this litigation.

Plaintiffs provided scoping comments in a timely manner on both projects. These scoping comments represented the only opportunity for providing public input into the decision-making process, and were required to be submitted prior to release of any supporting documentation from Forest Service experts concerning the potential environmental impacts from the proposed thinning and burning. In the exercise of its discretion, the Forest Service determined that the Projects do not present any of the extraordinary circumstances listed in Forest Service Handbook 1909.15 (Ch 30) which could preclude them from being categorical excluded, and on the basis of that finding issued decision memoranda approving the Projects. HP03526; PC01238.

IV. The New Mexico Designation of eligible lands violated NEPA.

The Agricultural Act of 2014 (P.L. 113-79, the 2014 Farm bill) was signed into law on February 7, 2014. PC0623. Congress in the Farm bill provided two opportunities for designating treatment areas eligible for categorical exclusion (CE). The first opportunity appears to have been limited to demonstration-type projects, with no discretion left with the agency:

> Not later than 60 days after the date of enactment of the Agricultural Act of 2014, the Secretary shall, if requested by the Governor of the State, designate as part of an insect and disease treatment program 1 or more landscape-scale areas, such as

> subwatersheds (sixth-level hydrologic units, according to the System of Hydrologic Unit Codes of the United States Geological Survey), in at least 1 national forest in each State that is experiencing an insect or disease epidemic.

16 U.S.C. §6591a (b)(1). The statute then creates discretionary authority: "After the end of the 60-day period described in paragraph (1), the Secretary may designate additional landscape-scale areas under this section as needed to address insect or disease threats."

On May 20, 2014 - 98 days after the date of enactment of the Farm bill - the Forest Service Chief designated National Forest lands in New Mexico, including the lands at issue in this litigation, for eligibility to be excluded from NEPA study and analysis pursuant to the Farm bill CE.[2] The Secretary's designation thus fell well outside the 60-day period for *non-discretionary* designations of one or more landscape-scale areas in at least one national forest. This discretionary designation of "Treatment Areas" pursuant to 16 U.S.C.§ 6591a(b)(2) for inclusion in the Forest Service's insect and disease treatment program clearly falls under NEPA's definition of a "major federal action." 40 C.F.R. §1508.18(b)(3); Bennett v. Spear, 520 U.S. 154, 157 (1997). Because the objective of the designation of treatment areas is "to address insect or disease threats," 16 U.S.C. §6591a(b)(2), it follows that it is reasonably foreseeable that treatment projects will occur in designated treatment areas to achieve that objective. Since these treatment projects, such as the projects at issue in this case, unquestionably have ecological and aesthetic effects, as mentioned in 40 C.F.R. §1508.8, those effects are a reasonably foreseeable result of treatment area designation. Nonetheless, ignoring NEPA's applicability to programmatic decisions, the Chief did not conduct any NEPA analysis of the foreseeable cumulative, indirect

[2] Avail. at: https://www.fs.fed.us/managing-land/farm-bill/area-designations (viewed 1/14/2019).

impacts[3] this designation could precipitate - a violation of law that taints the whole program. See, e.g.: California Wilderness Coal. v. U.S. Dep't of Energy, 631 F.3d 1072, 1098 (9th Cir. 2011); N. Alaska Envtl. Ctr v. Kempthorne, 457 F.3d 969, 973 (9th Cir. 2006).

Here, as in Sierra Club v. Bosworth, 510 F.3d 1016, 1019 (9th Cir. 2007), "no cumulative impacts analysis was performed" prior to the §602 designation. Thus, the designation is not in compliance with applicable law. As the Court in *Bosworth* explained, such analysis "is of critical importance in a situation such as here, where the categorical exclusion . . . has the potential to impact a large number of acres." *Id.* Thus here, just as in *Bosworth,* "[i]n order to assess significance properly, the Forest Service must perform a programmatic cumulative impacts analysis" for the HFRA §602 designation. Ibid.

V. The Forest Service improperly excluded the challenged projects from more careful environmental review.

Instead of amending NEPA, Congress chose in the Farm bill to create a new categorical exclusion under NEPA. According to the Forest Service, "Under section 603, an insect and disease project may be categorically excluded from documentation in an environmental assessment or an environmental impact statement…" if it meets the statutory criteria. PC0633. In implementing this new categorical exclusion, the Forest Service, on its official web site setting forth its designations of eligible lands under the Farm bill, includes an affirmative interpretation of the effect of its exercising the authority delegated to it under the statute:

> [T]hese designations do not change or exempt the Forest Service from complying with any other existing law, regulation and policy such as the National Environmental

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[3] "Indirect effects" are those effects "which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable." 40 C.F.R. § 1508.8.

> Policy Act, Endangered Species Act, Clean Water Act, National Historic Preservation Act, agency Roadless Rules, and any other applicable law, regulation, and/or policy that affects the designated areas.

Supra., fn. 1. This interpretation of the Farm bill is entitled to *Chevron* deference. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 468 U.S. 837 (1984)

In this context, it is important to point out that while the Farm Bill creates a new categorical exclusion under NEPA, Congress nowhere defines (or re-defines) that term in the Healthy Forest Restoration Act which the Farm Bill amends. The term is only defined in NEPA's implementing regulations, and has been part of the NEPA lexicon since 1978. 40 C.F.R. §1508.4. Significantly, §1508.1 provides that "[t]he terminology of this part shall be uniform throughout the Federal Government," which Congress is presumed to have been aware of. Thus, the CEQ's definition of "categorical exclusion" and all it entails under the regulations applies to the Farm bill CE, since the law provides for uniform terminology by its express terms and "it is a cardinal rule of statutory construction that, when Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken[.]" F.A.A. v. Cooper, 566 U.S. 284, 292 (2012) (internal quotations omitted).

A categorical exclusion is defined under CEQ regulations as:

> …a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a federal agency in implementation of these regulations (§1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. An agency may decide in its procedures or otherwise, to prepare environmental assessments for the reasons stated in §1508.9 even though it is not required to do so. Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.

40 C.F.R. §1508.4.

In addition to borrowing the term "categorical exclusion" from NEPA regulations, the Farm bill also borrows the term "scoping." 16 U.S.C. §6591b(f). 'Scoping' is defined under NEPA's implementing regulations as the "early and open process for determining the scope of the issues to be addressed and for identifying the significant issues related to a proposed action." 40 C.F.R. §1501.7. The Forest Service's Handbook (which is persuasive authority only) clarifies this terminology in a manner that is directly on point:

> Scoping is required for all Forest Service proposed actions, including those that would appear to be categorically excluded… Scoping is important to discover information that could point to the need for an EA or EIS versus a CE. Scoping is the means to identify the presence or absence of any extraordinary circumstances that would warrant further documentation in an EA or EIS. Scoping should also reveal any past, present, or reasonably foreseeable future actions with the potential to create uncertainty over the significance of cumulative effects.

FSH 1909.15_30, Sec. 31.3.[4]

As the Ninth Circuit explained in Alaska Ctr. for the Env't v. USFS, 189 F.3d 851, 858 (1999), "[i]f extraordinary circumstances having a significant effect on environment are revealed during scoping, then the Forest Service conducts an EA." Thus, because the Farm bill requires scoping, which the Forest Service uses to assess whether there are any extraordinary circumstances that warrant further analysis in an EA or EIS, 16 U.S.C. §6591b should be read to require the consideration of both extraordinary circumstances and the significance of any potential cumulative impacts. In short, Congress chose to borrow NEPA's terminology – "categorically excluded" and "scoping" – and consequently, it chose the "cluster of ideas"

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[4] Available on-line at: https://www.fs.fed.us/cgi-bin/Directives/get_dirs/fsh?1909.15

attached to those borrowed term. Supra. While Plaintiffs maintain it was incumbent on the Forest Service Chief to consider the potential for significant cumulative effects *before* designating landscapes eligible for treatment, supra., in the absence of such a finding the potential for cumulative effects should have been considered as part of the extraordinary circumstances analysis for the challenged projects before determining whether it was appropriate to take advantage of the Farm bill CE for multiple related projects.

"Categorical exclusions, by definition, are limited to situations where there is an insignificant or minor effect on the environment." Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 865 (9th Cir. 2004); *see also* 40 C.F.R. §1508.4. Agencies must make an independent determination for normally excluded actions to determine whether any extraordinary circumstances are present which "may have a significant environmental effect," and can only bypass more detailed environmental statements for "categories of actions which do not individually *or cumulatively* have a significant effect on the human environment." (emph. added). Sierra Club v. Bosworth, supra., at 1019. In point of fact, the Forest Service may not take advantage of a categorical exclusion absent *certainty* that the project being considered will not cause significant direct, indirect or cumulative effects to the environment. 36 C.F.R. §220.6(c).

The same result is reached by considering 36 C.F.R. §220.4, which applies generally to all Forest Service proposals that are "not statutorily exempt from the requirements of section 102(2)(C) of the NEPA (42 U.S.C. 4332(2)(C))." §220.4(a).[5] That regulation requires scoping "for all Forest Service proposed actions, including those that would appear to be categorically excluded from further analysis and documentation in an EA or an EIS," §220.4(e), and also

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[5] Note that categorical exclusions are part of NEPA's process, and not exempted therefrom.

requires consideration of cumulative effects for all agency proposals not exempted from NEPA. §220.4(f). Accordingly, it is incumbent on the Forest Service to document the reasons why a project's potential impacts are considered to be insignificant, since the "threshold question in a NEPA case is whether a proposed project will 'significantly affect' the environment, thereby triggering the requirement for an EIS." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998) (citing 42 U.S.C. §4332(2)(c)).

The Tenth Circuit noted the relationship between cumulative impacts and extraordinary circumstances review in Utah Envtl. Cong. v. Dale Bosworth, 443 F.3d 732, 741 (2006):

> We agree that it may be conceptually possible for a large number of small projects to collectively create conditions that could significantly effect the environment. But the regulation itself contains a provision to address that concern, namely the extraordinary circumstances exception. And the extraordinary circumstances safety-valve is more than capable of addressing specific harms allegedly created by specific projects….

Similarly, in Alliance for the Wild Rockies v. Weber, 979 F. Supp. 2d 1118, 1129 (D. Mont. 2013), aff'd sub nom. AWR v. Weber, 639 F. App'x 498 (9th Cir. 2016), the Court held that "extraordinary circumstances analysis includes consideration of whether a normally excluded action may have cumulatively significant environmental effect." (citing 40 CFR §1508.4).

NEPA regulations are clear that the potential significance of an environmental impact "cannot be avoided by terming an action temporary or by breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7). "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a singe course of action, shall be evaluated in a single impact statement." 40 C.F.R. § 1502.4(a). An agency must consider both "connected actions" and "cumulative actions" in this context. Connected actions are "closely related [actions] and

therefore should be discussed in the same [NEPA document]," such as the two projects at issue in this case, 40 C.F.R. § 1508.25(a), while actions are connected if they "are interdependent parts of a larger action and depend on the larger action for their justification," 40 C.F.R. §1508.25(a)(1)(iii), which applies to the larger fireshed project in this case. Both the Hyde Park and Pacheco Canyon projects are intended to reduce and/or eliminate the potential for wildfire, and only make sense as part of a larger effort in the contiguous forested landscape. HP03173) (the two projects "are integral to the [Greater Santa Fe Fireshed Coalition's] landscape strategy.")

Consistent with this legal context, the Forest Service in fact attempted to demonstrate the absence of significant effects from the two projects when it considered the presence or absence of "extraordinary circumstances listed in Forest Service Handbook 1909.15 (Ch 30)." (HP03528; PC01241). It is also the case that the Forest Service has never pretended that the two projects are *not* part of a larger, ongoing effort "to change conditions across a landscape of more than 100,000 acres." HP03526. It has even designated a "Santa Fe Fireshed Project Area" that includes the two challenged decisions. HP03291. However, the Forest Service has never conducted NEPA on the larger project, and it failed to consider the potential cumulative effects of such broad scale treatments on the resources affected by the two projects - including but not limited to the dramatic effects of extensive thinning and burning on roadless areas (infra.). Given the state purpose and need of the projects to prevent wildfire in the Greater Santa Fe Fireshed, the efficacy of these two projects clearly depends on a continuation of similar projects. HP03173.

The need for a programmatic EIS for the Greater Santa Fe Fireshed Project can be appreciated by considering the regulatory criteria established by CEQ for agency determinations

of "significance" under NEPA's action-forcing scheme. Significance is determined, in part, by considering:

> ***
> (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
>
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

40 C.F.R. §1508.27(b). Since NEPA does not permit an agency to piecemeal a project in order to avoid a significance determination, and since Congress is presumed to have had a valid reason for limiting the size of such treatments to 3,000 acres - for example, in order to avoid cumulatively significant impacts from thinning and burning on vast roadless expanses of wildlife habitat - it is incumbent on the Forest Service to render a decision of potential significance in this matter for the entire GSFF initiative to 'change conditions' across a landscape of more than 150 square miles. "Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action." Kleppe v. Sierra Club, 427 U.S. 390, 410 (1976). The challenged decisions are therefor not in accord with NEPA, and must be set aside pending the preparation of a more detailed analysis at the appropriate scale for determining significance.

VI. The Forest Service failed to take a hard look at roadless area impacts.

Inventoried Roadless Areas constitute one of the "extraordinary circumstances" the Forest Service must consider in determining whether or not to categorically exclude a project from further NEPA analysis. HP03529. Of the 1,840 acre Hyde Park project area, almost all (1,711 acres) are situated within one of two IRAs. Ibid. As the Regional Forester determined in 2006 for Hyde Park, "the actions to be taken were inconsistent with policy regarding the use of

[CE] #10 *and extraordinary circumstances*." (emph. added) HP01948. Nothing has really changed between then and now in this regard. The two projects challenged here seek to log and/ or burn: 1,711 acres in the Black Canyon and Thompson Peak IRAs; 616 acres in the Pacheco Canyon IRA; and, 192 acres in the Tesuque Creek and Juan de Gabaldon IRAs, cumulatively accounting for sixty-six percent (66%) of the acres at issue in this case. HP03529; PC01241.

Courts have been clear that the decision to harvest timber on a previously undeveloped tract of land is considered to be "an irreversible and irretrievable decision" which could have "serious environmental consequences." See, e.g.: California v. Block, 690 F.2d 753, 763 (9th Cir. 1982); National Audubon Soc. v. U.S. Forest Service, 46 F.3d 1437, 1448 (9th Cir. 1993). In the present case, while the Forest Service now considers the cutting and burning projects to be insect and disease "treatments" rather than "timber harvest," it is still intended to change the character of the affected forest by removing up to 90% of the trees in a given area,[6] and timber harvest would still be "a small component of the project focusing on small diameter trees in the form of limited amounts of personal and commercial fuelwood use." HP03343.

As noted previously, the potential for significant impacts to IRAs is the reason that the Forest Service withdrew the Hyde Park treatment project twice previously. According to the Forest Service, the treatments approved in the IRAs include hand thinning using chain saws, mechanical piling using a tracked excavator along ridges, and prescribed burning, and these kinds of treatments would need to be repeated every 5-10 years. HP03527; PC0801. In spite of the heightened recreational value of the Hyde Park area in particular, the Forest Service still

[6] Vegetation Report shows approx. 65% trees over 9 inches diameter would be removed in mixed conifer forest, while 75-90% trees over 9 inches would be removed in ponderosa pine forest.

refuses to take a hard look at the potential impacts of the proposed treatments on the wilderness character of the affected IRAs.

Projects affecting roadless areas must disclose the environmental consequences, including the effects on roadless area attributes and on their potential for designation as wilderness under the Wilderness Act of 1964. Smith v. U.S. Forest Service, 33 F.3d 1072, 1073-74 (9th Cir. 1994). This analysis must consider the effects to the entire roadless expanse – that is both the roadless area and the unroaded lands contiguous to the roadless area. See, e.g., Lands Council v. Martin, 529 F.3d 1219 (9th Cir., 2008). While the Forest Service acknowledges that the two projects at issue here are part of a much larger landscape-level project, and while that landscape includes portions of a significant roadless expanse, HP03310, the Service has yet to consider the potential precedent-setting effect of aggressive thinning and burning for the entire roadless area expanse included within the Greater Santa Fe Fireshed area. And while they provide a cursory and rather conclusory analysis of the potential impacts to those portions of the IRAs included in the two projects (HP03305; PC01075), nowhere does the Forest Service discuss the potential impacts to the wilderness character of the affected IRAs. Nor has the Service discussed the potential effects this change in the character of the IRAs might have on the potential for recommending them as wilderness in the upcoming forest plan revision process, which is already the subject of the "Pecos Wilderness expansion proposal" submitted by the Wilderness Society. HP03123. At a bare minimum, it was incumbent on the Forest Service to provide the public with "before-and-after" photographs that would reasonably disclose the dramatic aesthetic impacts the proposed treatments will have on these popular primitive recreation areas. See, e.g., Hitt Declaration, para. 13, 14.

VII. The Projects are not consistent with the Santa Fe National Forest Plan.

Under the Farm Bill CE, “All projects and activities carried out under this section shall be consistent with the land and resource management plan established under section 1604 of this title for the unit of the National Forest System containing the projects and activities.” 16 U.S.C. §6591b (e). In addition, treatments must be designed in a manner that “maximizes the retention of old growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insects and disease;” and must be based upon a consideration of “the best available scientific information to maintain or restore the ecological integrity, including maintaining or restoring structure, function, composition, and connectivity” of habitats. 16 U.S.C. §6591b (b)(1).

Due in part to the extensive IRAs affected by the Greater Santa Fe Fireshed Project - areas that have never been commercially logged - there is heightened public concern over the potential impacts of extensive thinning on wildlife associated with older forest. The Santa Fe National Forest Plan’s old growth standards begin with an admission of uncertainty, followed by a commitment to learn and include old growth concerns in all project planning:

> Old growth is not well understood in the Southwest. Consequently, as knowledge is gained the characteristics and inherent values of old growth stands will be better defined. Site specific identification of old growth will occur during ecosystem area analysis or project planning.

HP02641. The Plan goes on to specify detailed criteria for assessing the old growth character of such forests. No old growth characteristic is more critical than age of the forest, and those criteria establish the minimum age of old growth forest as 180 years for ponderosa pine forest, and 150 years for Douglas fir. HP02643. According to the Forest Service, the Hyde Park IRAs include

"many" 180-year-old ponderosa pines, HP03438, while no ages are disclosed for trees in IRAs in the Pacheco Canyon project area.

No old growth analysis is included in any of the project documentation.

It is a fundamental principle of administrative law that an agency is required to "articulate a satisfactory explanation for its action." Turtle Island Restoration Network, 878 F.3d 725, 732 (9th Cir. 2017) (quoting *Motor Vehicle Mfrs. Ass'n of U.S.*, 463 U.S. at 43); 36 C.F.R. §219.15(d) ("A project or activity approval document must describe how the project or activity is consistent with applicable plan components . . . ."). Since Plaintiffs maintain that the failure to consider the forest plan's detailed old growth management criteria and standards means that the decisions are not "based on a consideration of the relevant factors" and represents a failure "to consider an important aspect of the problem," Colo. Envtl. Coal. v. Dombeck, supra., at 1167, we submit herewith a supporting declaration from a former Forest Service planner that details the forest plan's old growth strategy, examines the discussions of old growth in the relevant decision documents, and concludes that the Forest Service has not demonstrated the required consistency with their forest plan. See: Fairbanks Dec. Courts may consider extra-record evidence where supplementation is necessary to determine if the agency has considered all factors and adequately explained its decision. Southwest Ctr. for Biological Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996). A district court may also consider extra-record evidence "to develop a background against which it can evaluate the integrity of the agency's analysis," San Luis & Delta-Mendota Water Auth. v. Locke, 776 F.3d 971, 993 (9th Cir. 2014).

The Santa Fe National Forest Plan ("Plan") carefully explains the planning rules under which project activities are to be carried out:

- Standards and guidelines direct the timing, intensity, and quality of planned activities, specific policies that apply to activities in each prescription, and mitigation measures and coordinating requirements needed to protect resources and the environment.

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- An environmental analysis and evaluation **must** be conducted on all proposed projects to determine consistency with the prescription and applicability of the standards and guidelines.

(emphasis added) HP02621. In addition to the standards quoted earlier, the Plan includes the following mandatory Forestwide Standards and Guidelines for managing old growth:

- Stands managed for old growth should be at least 40 acres in size, with a preference for larger stands.
- The amount of old growth can be provided and maintained will be evaluated at the ecosystem management area level and be based on forest type, site capability, and disturbance regimes.
- Strive to create or sustain as much old growth compositional, structural, and functional flow as possible over time *at multiple-area scales*.
- Seek to develop or retain old growth function on at least 20 percent of the forested area by forest type *in any landscape*.
- Forested sites should meet or exceed the structural attributes to be considered old growth in the five primary forest cover types in the southwest as depicted in the table on the following page [referenced, supra.].
- Thinning is permitted in stands being managed for old growth when the result will enhance attainment of the old growth characteristics. No treatments should occur in a stand managed for old growth once the stand has achieved minimum structural characteristics of old growth.

HP02642. This last standard, an express limitation on the kinds of treatments at issue here, is an unambiguous recognition not only that old growth habitat is most valuable when left in its natural state, but also that once habitat reaches its climax stage, the kind of decadence the Farm bill ostensibly seeks to prevent is *beneficial* (for wildlife) - not something to be "treated."

Neither of the challenged decisions explain how the intensive treatment prescriptions are consistent with the Forest Plan old growth definitions, direction, or standards. In fact, those

definitions, direction and standards are nowhere discussed.[7] Without disclosing existing old growth levels in the Project Areas and analyzing the potential impacts of extensive treatments on the habitat characteristics of those stands and their ability to develop old growth characteristics, in comparison to the detailed forest plan criteria, the Forest Service is not able to demonstrate consistency with the Plan. See, generally: Fairbanks Dec. Nor, for that matter, has it articulated a rational strategy for maximizing the retention of such valued habitats.

Assuming the older forest has not been previously logged - certainly a reasonable assumption in the IRAs - such 180-year-old ponderosa pine forests certainly have the potential to constitute, or at least be managed as, old growth habitat; that is, a centuries-old, complex forest ecosystem that is both precious to wildlife and all-too-rare in the U.S. due to the economic value historically placed on large, old trees. Absent detailed surveys that include core-sampling and measurements against Plan criteria, it only stands to reason that the IRAs surrounding the Pecos Wilderness are valuable to diverse species commonly associated with old growth. And, in fact, Bill West - an experienced birder and resident of Hyde Park - has documented bird species found in and around the Hyde Park Project Area. His surveys from May/June of 2015, and May/June of 2016, submitted to the Forest Service as part of the record in this case, documented the following resident species:

> Western Screech Owl, Common Nighthawk, Northern Goshawk, Cooper's Hawk, Sharp-shinned Hawk, Grace's Warbler, White-winged Dove, Gray Flycatcher,

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[7] The Court may wish to take judicial notice of the USFS SW Region's definition of old growth: "Forested sites distinguished by old trees and related structural attributes. Old growth encompasses the later stages of stand development that typically differ from earlier stages in a variety of characteristics which include tree size, accumulations of large dead woody material, number of canopy layers, species composition, and ecosystem function…" (FSH 2090.11) (excerpted from the "Glossary" to the Region 3 FEIS FP Amend supporting the SFNF standards).

> Western Tanager, Flammulated Owl, Violet green Swallow, Black-throated Gray Warbler, Warbling Vireo, Orange-crowned Warbler, Yellow-rumped Warbler, Hermit Thrush, Plumbeous Vireo, Cordilleran Flycatcher, Common Poorwill, Ash-throated Flycatcher, Western Wood Pewee and Townsend's Solitaire.

Hitt Dec., ¶ 8; HP02431. Clearly, these Project Areas are biologically diverse and vibrant wildlife habitats. The Northern Goshawk and Flammulated Owl are two species commonly associated with old growth habitat. The Hairy Woodpecker, a cavity-nester also associated with older forests, has been observed in the Hyde Park project area, and is at risk from thinning and burning. Hitt Dec., ¶ ¶ 9-12.

Thus, the most pertinent question posed by the challenged projects, in light of the statutory requirement to maximize retention of old growth and the detailed definitions of old growth set forth in the SFNF Plan, is whether or not these areas will *retain* their old growth habitat values *after* treatments that aim to remove up to 90% of the younger trees, surpa., followed by prescribed burns that could result in mortality of 30% of the larger trees. PC01106. Remarkably, <u>the challenged decisions are silent on the impacts of treatments in relation to the old growth standards and definitions of the SFNF Plan</u>. The Biological Evaluations simply state that "retention of existing old growth in accordance with forest plan old growth standards and guidelines" would be required - but nowhere disclose existing old growth conditions in the Project areas, as required by the forest plan as part of project design. Supra.[8]

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[8] Similarly, in relation to the large tree retention requirement, the Forest Service fails to adequately explain why trees under the 16-inch cut-off could not be retained, would not be considered "large," or what effect removing all trees smaller than 16 inches would have on old growth characteristics specified in the Plan. A 15-inch diameter ponderosa pine is a large, older tree in a low productivity forest like the Santa Fe, where trees grow more slowly than in moist climates with deeper soil. Thus, one could certainly argue that "maximizing" large tree retention would include 15-inch trees, absent convincing reasons to the contrary.

Old growth habitat is more than just a few big old trees retained in open, park-like and fire-proofed conditions, as the criteria set forth in the forest plan clearly illustrate, supra. And old growth *necessarily* includes some level of "decadence," which conflicts on its face with the avowed purpose of the Farm Bill to remove "diseased" and "infested" trees. Given this tension between the purpose of the Farm Bill and the definitions of old growth in the Plan, it is simply not plausible to maintain that the Projects as designed will maximize the retention of old growth when there is no disclosure of existing old growth habitat levels, and no credible analysis in the record supporting Forest Service assumptions.

A careful review of the record does reveal, however, that it is likely old growth habitat will *never* develop in the treated areas. While no Silvicultural Specialist's Report was prepared for the Hyde Park Project, the Pacheco Canyon silvicultural report notes in passing that prescribed "treatment[s] would keep the area in a mid-seral stage, with fewer trees, and more grass and forbs, than at late seral stage." PC01109. "Late seral stage" is synonymous with old growth. As noted earlier, these treatments must be repeated periodically. Climate change further complicates the issue of developing old growth habitat in the presence of these treatments, according to that same report: "While the forest has had abundant regeneration in the past, the projected climate warming and drying could prevent regeneration in the future." This sounds like a *very* significant issue, and may help explain the Forest Service's silence on the consistency of wildfire prevention with the Plan's old growth development and maintenance standards.

VIII. Species Concerns

The northern goshawk was designated by the Forest Service as a sensitive species in 1982 to meet its duty under the Forest Act to provide for the diversity of animal communities,

HP03429, and the old growth amendments to the forest plans in the Southwest Region, including the Santa Fe National Forest Plan, was a result of litigation over the Forest Service's failure to protect the Mexican spotted owl and the northern goshawk's habitats. Large trees, high tree densities and dense canopies have been demonstrated to be important components of goshawk foraging habitat. HP03444; 1131. The SFNF Plan establishes a minimum of 40% average canopy cover in all mid-aged, mature and old growth forests (outside of Mexican spotted owl restricted and protected habitat). HP02816. To avoid applying these requirements, the Forest Service characterizes 180 year-old ponderosa pine forest as "young" based on the preponderance of smaller trees in the understory, utilizing the "Vegetative Structural Stage" methodology in spite of its "limited applicability for fuel reduction treatments." HP02255.

Canopy cover in the Project Area currently averages between 50-70%. HP03442. The intent of the Projects is to reduce average canopy cover levels below 40% in thinned areas (between 35-40%). Ibid. Only in Mexican spotted owl habitat does the decision provide that canopy closure will not be reduced below 40%. Ibid. The goshawk canopy closure requirement of 40% is considered by wildlife experts to be a *bare minimum.* HP01131. Arizona Game and Fish Department maintains that a denser canopy closure is needed by the non-hibernating, non-migratory prey species - such as Abert's squirrel - that Goshawks utilize for winter prey. Ibid.

Abert's squirrel is an indicator for the presence of interlocking canopies in ponderosa pine forests. HP01132. Patches of interlocking pine canopies, which are associated with mature and undisturbed ponderosa pine forests, are an increasingly rare habitat element on the national forests of the Southwest, and are targeted by most thinning operations. Ibid. Thinning of interlocking canopy trees in the Project Areas will reduce the basal area (a measure of overall

tree density) below what is required by the Abert's squirrel, a species that is also integral to the *proliferation* of ponderosa pine forests. Ibid. Because the SFNF does not monitor populations of Albert's squirrel, there is a high degree of uncertainty and serious questions concerning species viability when initiating these kinds of vegetative manipulative projects in undisturbed forests. In spite of this, and in spite of the issue being brought to the Forest Service's attention in relation to the Hyde Park Project in 2005, Ibid., the Biological Evaluations *do not evaluate* the potential impacts of thinning and prescribed burns on Abert's squirrel. This is yet another relevant factor the decision-maker failed to consider, and thus the decisions are arbitrary and capricious.

IX. Public Health Concerns

Because of the size of the Santa Fe Fireshed, and the 3,000 acre limit for projects eligible for categorical exclusions, simple math reveals that absent the kind of programmatic EIS Plaintiffs are seeking, the intensive management of the IRAs that the Forest Service intends will effectively include annual prescribed fires indefinitely as a substitute for the kind of mixed severity wildfire that would *naturally* occur once or twice in a person's lifetime. It will likely require 10-15 Hyde Park/Pacheco Canyon-sized project to accomplish the fuels reduction objectives of the Greater Santa Fe Fireshed Coalition, and such burns would need to "be repeated every 10-15 years, to remove dead wood, thin trees, and replicate the natural fire cycle" - meaning they'd need to begin again as soon as they accomplish their objectives. PC01111. A brief review of directly relevant scientific literature reveals that the Forest Service has attempted to sweep significant public health concerns under the rug in this case.

For the people of Santa Fe, including those with chemical sensitivities (16% of New Mexico's adult population) and others with certain disabilities, this kind of annual forest burning

presents a very real potential for significant adverse health effects. See, generally: McCampbell, M.D. Dec.[9] According to a recent (2015) study included in the National Institute of Health's Library of Medicine:[10]

> Given the increase in PM2.5 [particulate matter ≤ 2.5 microns in size] concentrations during smoke events, there is a need to understand the influence of prescribed burning smoke exposure on human health. This is important especially since adverse health impacts have been observed during wildfire events when PM2.5 concentrations were similar to those observed during prescribed burning events. Robust research is required to quantify and determine health impacts from prescribed burning smoke exposure and derive evidence based interventions for managing the risk.

"Unlike wildfires that are of high intensity, prescribed fires are cool low-intensity burns and produce relatively short plumes… While low-intensity prescribed burns (low heat, light emissions) cause minimal risk to life and property, they can however emit large amounts of smoke particulates… As a result, smoke from prescribed burning can have a ***substantial impact*** on rural/regional areas, along with potential to impact urban airsheds due to long-range transport of smoke particles." (emph. added) *Heikerwal et al.*[11] This same study found that "adverse health impacts due to PM related wildfire smoke exposure have been observed at comparatively low PM concentrations, well within current air quality standards" and "*<u>there is no known safe level of</u>*

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[9] The court may consider this declaration solely for the purposes of appreciating complex subject matter and/or determining whether the agency considered all the relevant factors. *Southwest Ctr. for Biological Diversity v. U.S. Forest Serv.* 100 F.3d 1443, 1450 (9th Cir. 1996) (internal quotations omitted); Accord: *Love v. Thomas*, 858 F.2d 1347, 1356 (9th Cir. 1988) ("the court may consider, particularly in highly technical areas, substantive evidence going to the merits of the agency's action where such evidence is necessary as back- ground to determine the sufficiency of the agency's consideration."); *Earth Island Institute v. U.S. Forest Service*, 442 F. 3d 1147, 1162 (9th Cir. 2006), *cert. denied*, 549 U.S. 1278 (2007).

[10] See: https://www.ncbi.nlm.nih.gov/pubmed/25947317

[11] "Impact of smoke from prescribed burning: Is it a public health concern?" *Journal of the Air & Waste Management Assoc.*, Volume 65, 2015 - Issue 5. https://www.tandfonline.com/doi/full/10.1080/10962247.2015.1032445

pollutant exposure below which adverse health impacts are not observed." *Ibid*. While this issue has been brought to the Forest Service's attention since the Hyde Park Project was first proposed in 2005, their only response has been that they will comply with current air quality standards. See, e.g., HP03533-34.

According to the Forest Service itself, smoke from prescribed fires contains a number of toxic air pollutants and known carcinogens, and the "acute (short-term) effects of smoke exposure… can result in reduced lung function, even in healthy people… Respiratory complications of smoke exposure may be of particular concern in the very young, and in older individuals (Delfino *et al.* 2009)." NWCG Smoke Management Guide for Prescribed Fire, pp. 33-34.[12] The Forest Service acknowledges that smoke from prescribed burns can result in emissions of heavy metals to the atmosphere. Ibid., p. 126. According to the New Mexico Environment Department (2008), smoke from wildfires and prescribed burns account for the second highest total amount of mercury - a neurotoxin associated with brain, kidney and lung damage - released in New Mexico, with fetal development and young children being most at risk of adverse health effects. HP02427. In considering the potential significance of air pollution and release of toxic substances from prescribed fires so close to Santa Fe, the Forest Service failed to base their assessment on the best available scientific information currently available, raising substantial questions about the significance of prescribed fires on the human environment.

"'An agency's decision not to prepare an EIS will be considered unreasonable if the agency fails to supply a convincing statement of reasons why potential effects are insignificant.'" Blue Mountains Biodiversity Project, supra, at 1211 (quoting Save the Yaak Comm. v. Block,

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[12] https://www.nwcg.gov/publications/420-2

840 F.2d 714, 717 (9th. Cir. 1988)). An EIS *must* be prepared if "substantial questions are raised as to whether a project... *may* cause significant degradation of some human environmental factor." Greenpeace Action v. Franklin, 14 F.3d 1324, 1332 (9th Cir.1992); Sierra Club v. United States Forest Serv., 843 Fad 1190, 1193 (9th Cir.1988). To trigger this requirement a "plaintiff need not show that significant effects *will in fact* occur," raising "substantial questions whether a project may have a significant effect" is sufficient. Greenpeace, 14 F.3d at 1332. It is clear as a matter of science and fact that the kind of extensive prescribed burning project contemplated by the Forest Service with its partners in the Greater Santa Fe Fireshed Coalition will result in significant degradation of Santa Fe's prized air quality, with serious human health implications. Thus, a programmatic EIS is required to ensure that the public health and human environment are safeguarded to the maximum extent practicable, using the best science available.

VIII. Conclusion & Motion to Vacate Challenged Decisions

The Projects challenged in this litigation are part of a much larger program for aggressively altering the forested landscape in largely roadless, centuries-old ponderosa pine forests that are adjacent to, and quite popular with, the people of Santa Fe. For any or all of the reasons discussed above, the Forest Service owes it to the owners of these public lands to take a hard look at the risks and benefits of such a massive undertaking - including human health effects, wildlife impacts, recreation impacts, and consistency with the SFNF Plan's requirements for managing old growth habitat. This kind of hard look can only be accomplished with a programmatic EIS prepared under NEPA. Plaintiffs therefore respectfully request that the Court set aside the challenged agency decisions, and permanently enjoin project implementation until such time as NEPA is fully complied with.

Respectfully Submitted,

/s/ Thomas J. Woodbury
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Forest Defense, P.C.
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System, which in turn automatically generated a Notice of Electronic Filing (NEF) to all parties in the case, as all are registered users of the CM/ECF system at the time of this filing.

/s/ Thomas J. Woodbury
Thomas J. Woodbury