IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

FOREST GUARDIANS, SANTA FE FOREST WATCH,	)	
	)	
Plaintiffs,	)	
	)	No. CV 04-11-MCA/RHS
vs.	)	
	)	
UNITED STATES FOREST SERVICE and UNITED STATES FISH AND WILDLIFE SERVICE,	)	
	)	
Defendants.	)	

MEMORANDUM BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER

I. Introduction

Plaintiffs Forest Guardians and Santa Fe Forest Watch (collectively referred to as "Forest Guardians") hereby move this Court for a Temporary Restraining Order to enjoin ground-disturbing work in connection with a timber sale in the Santa Fe National Forest known as the Lakes and BMG Wildfire Timber Salvage Sale ("Lakes Sale"). Forest Guardians has pursued all available administrative remedies to no avail. Specifically, Forest Guardians filed an administrative appeal in which it raised the legal issues that are now the subject of this lawsuit. In its administrative appeal, Forest Guardians contended (amongst other things) that the Lakes Sale would have an adverse effect on a threatened species -- the threatened Mexican spotted owl -- which has not been sufficiently analyzed and accounted for during the planning and decision-making process for the timber sale.

The appeal deciding officer acting on behalf of the United States Forest Service ("USFS") denied

Forest Guardians' appeal on November 7, 2003, stating that "[v]isits and surveys to the area . . . since the fire have not recorded any occupancy by an MSO [Mexican spotted owl]."[1] This statement is plainly erroneous. As discussed more fully below, USFS biologists have confirmed that a pair of Mexican spotted owls continue to inhabit the Lakes Sale area, even after the wildfires of 2002. Moreover, the resident pair of Mexican spotted owls continues to have reproductive success in the Lakes Sale area and fledged two or three juveniles, or owlets, this past summer. This information shows that the Lakes Sale area continues to provide important habitat for the Mexican spotted owls, even after the wildfires of the summer of 2002.

The information regarding the presence of a pair of breeding Mexican spotted owls in the Lakes Sale area was known to the USFS at the time that it denied Forest Guardians' administrative appeal, but the information was not taken into account. Rather, as noted above, the USFS denied the administrative appeal on the basis of a demonstrably false factual predicate. Accordingly, the denial of Forest Guardians' appeal was arbitrary and capricious, and simply cannot withstand judicial scrutiny.

Having exhausted its administrative remedies, Forest Guardians commenced this lawsuit on January 6, 2004. For the reasons explained herein, Forest Guardians respectfully submits that issuance of a Temporary Restraining Order is warranted in this case.

II. <u>The claims in this lawsuit</u>

This case arises from allegedly illegal government actions and omissions in connection with planning

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[1] The USFS did not disclose that there is a resident pair of breeding Mexican spotted owls in the Lakes Sale area until late December of 2003, despite the fact that it was aware of this information in July of 2003. Based upon this information, Forest Guardians decided that it was compelled to file this lawsuit as soon at the earliest possible date to prevent immediate and irreparable harm to the Mexican spotted owls and the Mexican spotted owl habitat within the sale area.

and decision-making for the Lakes Sale. Specifically, Forest Guardians alleges in this case that Defendants USFS and United States Fish and Wildlife Service ("USFWS") violated their mandatory statutory duties under Section 7 of the Endangered Species Act ("ESA"), 16 U.S.C. §1536, when they jointly determined that the Lakes Sale is "not likely to adversely affect" Mexican spotted owls ("MSOs"). The agencies made this "not likely to adversely affect" determination, and thereby dispensed with Section 7's "formal consultation" requirement, despite the fact that the agencies were aware of the fact that the Lakes Sale area is the home of a pair of MSOs.

The agencies' initial violation of Section 7 was compounded, and exacerbated, after they learned that the pair of MSOs that reside in the Lakes Sale area are successfully reproducing, and fledged two or three owlets in the summer of 2003. The acquisition of this significant new information required the agencies to reinitiate Section 7 consultation on the effects of the Lakes Sale on MSOs to account for the new information. Nonetheless, the USFS and the USFWS failed to reinitiate consultation, in violation of the ESA.[2]

Insofar as the non-ESA claims in this lawsuit are concerned, Forest Guardians alleges that the USFS violated its mandatory duties under the National Forest Management Act ("NFMA") in connection with the Lakes Sale because the timber sale project is inconsistent with the Santa National Forest Land and Resource Management Plan ("Forest Plan") which prohibits timber sale activities in an MSO Protected Activity Centers ("PAC") if the PAC is occupied by MSOs. 16 U.S.C. §1604(i). Here, the USFS proposes substantial timber cutting and removal in a PAC which is occupied by a successfully breeding pair

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[2] The reinitiation claim against the USFS requires a 60 day notice of suit before the claim can be the subject of a lawsuit. Accordingly, Forest Guardians intends to pursue its reinitiation claim only against the USFWS at this time.

of MSOs. Finally, Forest Guardians alleges that the USFS violated the National Environmental Policy Act ("NEPA") in connection with the Lakes Sale because it failed to prepare an Environmental Impact Statement ("EIS") to assess the environmental impacts of the timber sale, despite the fact that the Lake Sale is associated with the likelihood of significant and adverse environmental impacts. 42 U.S.C. §4332.

III. The need for a Temporary Restraining Order

Forest Guardians acknowledges that the issuance of a TRO is extraordinary relief, and is appropriate only in those cases where there is a real risk of imminent and irreparable harm. Forest Guardians respectfully submits that this is one such case. The USFS has authorized its timber sale contractor to commence immediate timber cutting and removal activities in connection with the Lakes Sale. Once trees are cut in the Lakes Sale area, the habitat for the resident pair of MSOs will be irreversibly destroyed and this injury can only be prevented by issuance of a TRO. On the other side of the balance, no irreparable harm will result if the Lakes Sale is temporarily enjoined.

Subsequent to the filing of the Complaint, counsel for Forest Guardians telephoned Ms. Lisa Russell — a Department of Justice attorney who often represents the USFS and the USFWS in cases of this nature — to inform her of the filing of the Complaint. In various telephone conversations on January 7, 2004, counsel for Forest Guardians told Ms. Russell of his concerns that timber sale activities in the Lakes Sale area would proceed prior to the time that this case could be heard on a Motion for Preliminary Injunction, and asked Ms. Russell to ascertain the extent to which timber cutting activities are presently on-going. Forest Guardians' counsel also proposed to Ms. Russell that timber sale activities be deferred until this matter could be heard on a Motion for Preliminary Injunction, so as to avoid the necessity of proceeding on a Motion for TRO.

On January 8, Ms. Russell informed Forest Guardians' counsel that "test cuts" have already been

performed in the Lake Sale area, and that full-scale logging in the area will begin as early as January 9. This information was confirmed by Ms. MaryAnn Joca on January 9. On January 10, Ms. Russell called counsel for Forest Guardians to tell him that timber cutting activities would commence that day. Ms. Russell has not yet responded to Forest Guardians' counsel's proposal for an arrangement whereby the necessity of proceedings on a Motion for Temporary Restraining Order could be obviated. Accordingly, Forest Guardians is constrained to seek emergency injunctive relief in the form of a TRO.

A TRO is properly granted where the plaintiff demonstrates:

> (1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest.

Greater Yellowstone Coalition v. Flowers, 321 F.3d 1250, 1255-56 (10th Cir. 2003), Federal Lands Legal Consortium v. United States, 195 F.3d 1190, 1194 (10th Cir. 1999) (citation omitted). However, "[i]f the movant has established the other three requirements . . . the movant may satisfy requirement (1) by showing that questions going to the merits are so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." Greater Yellowstone, 321 F.3d at 1255-56.

In a case arising from violations of the ESA, like this one, the standard test for issuance of a TRO or preliminary injunction is different. As Judge Parker of this District has held, "when a preliminary injunction concerns the ESA, the traditional balancing of hardships is inapplicable because Congress, in enacting the ESA, decided that the balance of hardships and the public interest tips heavily in favor of protected species." Rio Grande Silvery Minnow v. Keys, No. CV 99-130 (D.N.M.) (Docket #446, Sept. 23, 2002), p. 27, citing National Wildlife Federation v. Burlington Northern R.R., Inc., 23 F.3d 1508,

1511 (9th Cir. 1994), Strahan v. Coxe, 127 F.3d 155, 160 (1st Cir. 1994).

As discussed in this memorandum brief, Forest Guardians is entitled to issuance of a TRO under the applicable legal standards.

IV. The applicable legal standards for purposes of this Motion for TRO

A. The Endangered Species Act

The Endangered Species Act "is the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." Tennessee Valley Auth. v. Hill, 437 U.S. 153, 180 (1978). A review by the Supreme Court of the Act's "language, history, and structure" convinced the Court "beyond a doubt" that "Congress intended endangered species to be afforded the highest of priorities." Id. at 174. As the Court found, "the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." Id. at 184. To these ends, Congress established a variety of statutory requirements – both procedural and substantive – that, together, are designed to protect and recover threatened and endangered species.

1. The consultation process under the ESA

The ESA is a relatively simple statute. The ESA creates a system for listing species as threatened or endangered and guarantees several substantive and procedural protections to species once they are listed. See 16 U.S.C. §1533. The ESA's major substantive protections are provided in two sections. First, section 7 prohibits federal agencies from jeopardizing the continued existence of listed species, or adversely modifying their designated critical habitat. See 16 U.S.C. §1536(a)(2) (jeopardy and adverse modification prohibitions). "Critical habitat" is defined as the areas actually occupied by the species at the time it is listed, which contain the physical or biological features essential to the conservation of the species, as well as unoccupied areas necessary to the recovery of the species. Id. §1532(5). Second, section 9

prohibits any "person" -- including federal agencies, state agencies, and private parties -- from "taking" individual members of listed species.[3] See 16 U.S.C. §1538(a)(1)(B) (taking prohibition); 16 U.S.C. §1532(13) (definition of "person").

The ESA achieves the substantive section 7 and section 9 goals through the procedural section 7 consultation process. Section 7(a)(2) of the ESA provides that, "[e]ach federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species" or adversely modify designated critical habitat. 16 U.S.C. §1536(a)(2). This "look before you leap" element requires federal agencies to "consult" with and obtain the expert opinion of the lead federal wildlife agency -- the USFWS -- before they take any agency action that may adversely affect a listed species or its designated critical habitat. The USFWS renders its expert opinion regarding actions that may adversely affect a listed species in a "biological opinion." See 16 U.S.C. §1536(b)(3)(A) (agency must provide biological opinion to federal agency); 50 C.F.R. §402.14(g)-(l) (describing contents of biological opinions); 50 C.F.R. §402.02 (definition of "biological opinion").

Through the ESA's section 7 consultation process, the USFWS decides whether the "agency action" will violate the no-jeopardy duty of subsection 7(a)(2) and determines the permissible level of taking "incidental to the agency action." 16 U.S.C. §§1536(b)(4)(A), 1536(b)(4)(i)-(iv). If the USFWS determines that the agency action will violate the no-jeopardy prohibition in section 7(a)(2), the ESA requires the USFWS to suggest "reasonable and prudent alternatives" to the action that would avoid

[3] "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19); see Babbitt v. Sweet Home Chapter of Communities, 515 U.S. 687, 698 (1995) (describing take prohibition).

jeopardy. See 16 U.S.C. §1536(b)(3)(A).

Of course, in discharging its consultation obligations under the ESA the USFWS must not act in an arbitrary and capricious fashion. Judge Parker of the United States District Court for the District of New Mexico has recently held as follows:

> A BO [biological opinion] is arbitrary and capricious if the agency has entirely failed to consider an important aspect of the problem or has offered an explanation for its decision that runs counter to the evidence before the agency . . . . The Court cannot affirm a BO unless it is convinced the agencies relied on the "best scientific data available" and fully considered all options for avoiding jeopardy.

Rio Grande Silvery Minnow v. Keys, No. CV 99-130 (D.N.M.) (Docket #446, Sept. 23, 2002), pp. 24-25, affirmed 333 F.3d 1109 (10th Cir. 2003) and vacated as moot 2004 WL 25310 (10th Cir. 2004).[4] See also Center for Biological Diversity v. Rumsfeld, 198 F.Supp.2d 1139, 1152-56 (D.Ariz. 2002) (holding that a USFWS biological opinion was arbitrary and capricious), Defenders of Wildlife v. Babbitt, 130 F.Supp.2d 121 (D.D.C. 2001) (same).

In keeping with the "look before you leap" principle implicit in the ESA's consultation process, the ESA, its regulations, and the Courts all have recognized that federal actions that "may affect" a listed species or its critical habitat may not proceed without completion of the consultation process. See 16 U.S.C. §1536(a); 50 C.F.R. §§402.14, 402.13; Conner v. Burford, 848 F.2d 1441, 1455 (9th Cir. 1988) (BLM could not issue oil and gas leases until FWS analyzed consequences of all stages of leasing plan in Biological Opinion). The federal courts have repeatedly stressed the importance of complying the ESA's procedural consultation requirements before an action is taken. As the court explained in one case:

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[4] In vacating its decision on mootness grounds, the Tenth Circuit expressly did not vacate Judge Parker's decision which had granted a preliminary injunction in favor of the plaintiffs.

> the strict substantive provisions of the ESA justify more stringent enforcement of its procedural requirements, because the procedural requirements are designed to ensure compliance with the substantive provisions. … If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result. The latter, of course, is impermissible.

Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985) (emphasis in original); see also Natural Resources Defense Council v. Houston, 146 F.3d 1118, 1128-29 (9th Cir. 1998) (the consultation process "offers valuable protections against the risk of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress") (emphasis added).

2. The role of informal consultation

When an agency action "may affect" a listed species, there is only one "off-ramp" to the consultation process – so-called "informal consultation." Understanding informal consultation and the role it plays in the consultation process is critical to understanding why the USFS and the USFWS have failed to live up to their consultation duties under the ESA in this case.

Informal consultation consists of, "all discussions, correspondence, etc., between the Service and the [action] agency …designed to assist the [action] agency in determining whether formal consultation…is required." 50 C.F.R. §402.13(a). If the action agency determines that the action – though it "may affect" the listed species – is "not likely to adversely affect" the species, it will submit this finding to FWS. If the Service responds with a written concurrence, accepting the action agency's "not likely to adversely affect" determination, then consultation will be concluded and completed. Though a formal biological opinion will not be prepared during informal consultation, the Service may condition its concurrence on mitigation measures to be implemented by the action agency. See 50 C.F.R. §402.13 (b). The Forest Service typically uses a Biological Assessment ("BA") as the vehicle for delivering its determination whether an

action may affect listed species to the FWS. BAs generally contain a description of the proposed action, the listed species that may be affected by it, and the anticipated effects of the action.

The USFWS's guidance on the informal consultation process explains that a "not likely to adversely affect" finding is only appropriate if the effects on the species are de minimis. The USFWS's ESA Consultation Handbook explains that a "not likely to adversely affect" determination in informal consultation is only appropriate "where the effects on listed species are expected to be discountable, insignificant, or completely beneficial." See Exhibit 1. "Insignificant" impacts are such that "never reach the scale where take occurs," and that a person would not "be able to meaningfully measure, detect or evaluate." Id. "[D]is countable effects are those extremely unlikely to occur." Id. On the other hand, a "likely to adversely affect" finding, which triggers formal consultation, is "the appropriate conclusion if any adverse effect to a listed species may occur as a direct or indirect result of a proposed action or its interrelated or interdependent actions…" Id.

Additionally, the final rule implementing the ESA's implementing regulations states that "[t]he threshold for formal consultation must be set sufficiently low to allow Federal agencies to satisfy their duty to "*insure*" under Section 7(a)(2) [that their actions do not jeopardize the species or adversely modify critical habitat]. Therefore the burden is on the Federal agency to show the absence of likely adverse effects to listed species or critical habitat as a result of its proposed action in order to be excepted from the formal consultation obligation." 51 F.R. 19,926, 19,949.

Of course, an action agency's BA must be neither arbitrary or capricious. "We will find a BA inadequate . . . where the agency entirely failed to consider an important aspect of the problem or to consider[] the relevant factors and articulate[] a rational connection between the facts found and the choice made." Native Ecosystem Council v. Dombeck, 304 F.3d 886, 901 (9th Cir. 2002). If the contents of

a BA do not adequately support the “not likely to adversely affect” or “no effect” finding, that finding must be overturned. See for example House v. U.S. Forest Service, 974 F. Supp. 1022 (E.D. Ky. 1997).

3. Reinitiation of consultation under the ESA

Even after an action and the USFWS finish their Section 7 consultation over the effects of a project, their procedural duties under Section 7 of the ESA continue for so long as the action agency has any discretionary control over the project. Environmental Protection Information Center v. Simpson Timber Co., 255 F.3d 1073, 1075 (9th Cir. 2001). Specifically, the ESA and its implementing regulations require both the action agency and the USFWS to reinitiate Section 7 consultation in certain circumstances. Id. Insofar as the reinitiation obligation is implicated in this case, the ESA regulations mandate that the action agency and the USFWS reinitiate consultation when the acquisition of new information shows that the proposed action may have effects that were not previously considered:

> Reinitiation of formal consultation is required and shall be requested by the Federal [action] agency or by the Service [USFWS], where discretionary Federal involvement or control over the action has been retained or is authorized by law and: . . . (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered . . .

50 C.F.R. §402.16(b). Failure to reinitiate consultation when such new information exists is arbitrary and capricious. Sierra Club v. Marsh, 816 F.2d 1376, 1386-88 (9th Cir. 1987).

Importantly, courts have held that interpreted this regulation to require reinitiation of consultation upon the acquisition of new information, even if the initial Section 7 consultation was an "informal consultation." See for example Hawksbill Sea Turtle v. FEMA, 11 F.Supp.2d 529, 550 n. 31 (D.N.J. 1998) ("given that informal consultation possesses less procedural safety precautions than formal consultation, immunizing conclusions reached after informal consultation from potential reinitiation seems completely illogical").

B. The National Forest Management Act

In Colorado Environmental Coalition v. Dombeck, 185 F.3d 1162, 1168 (10th Cir. 1999), the Tenth Circuit succinctly set out the requirements of NFMA, insofar as they are relevant to this case:

> The National Forest Management Act directs the Forest Service to develop Land and Resource Management Plans ("Forest Plans") by which to manage each National Forest under principles of "multiple-use" and "sustained yield." 16 U.S.C. §1604. Forest management occurs at two distinct levels. At the first level, the Forest Service develops the Forest Plan, a broad, programmatic document, accompanied by an environmental impact statement and public review process conducted in accordance with the National Environmental Policy Act. 42 U.S.C. §4331 *et seq.; see also* 16 U.S.C. §1604(d); 36 C.F.R. § 219.10(b). The Forest Plan must incorporate multiple forest uses, and thus coordinate the management of "outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U.S.C. §1604(e)(1). The Forest Plan must also "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." *Id.* at §1604(g)(3)(B).
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> At the second level, the Forest Service implements the Forest Plan by approving (with or without modification) or disapproving particular projects . . . . Proposed projects must be consistent with the Forest Plan, *id.* at §1604(i), 36 C.F.R. §219.10(e), and are subject to further National Environmental Policy Act review.

(Internal citations omitted.) By adhering to the multiple use and sustained yield management principles that are incorporated into each Forest Plan, the USFS can assure the conservation and protection of all the various natural resources of the national forests, including threatened species such as the Mexican spotted owl.

C. The applicable standard of review

Because the ESA and NFMA do not incorporate a standard of review, the Court's review of the violations alleged in this case is governed by the arbitrary and capricious standard of the Administrative Procedures Act ("APA"). 5 U.S.C. §706. Friends of the Bow v. Thompson, 124 F.3d 1210, 1217 (10th Cir. 1997) (reviewing ESA claim), Colorado Environmental Coalition, 185 F.3d at 1167 (reviewing

NFMA claim). Pursuant to the APA, "[t]he duty of a court reviewing agency action under the 'arbitrary or capricious' standard is to ascertain whether the agency examined the relevant data and articulated a rational connection between the facts found and the decision made." Cliffs Synfuel Co. v. Norton, 291 F.3d 1250, 1257 (10th Cir. 2002).

In conducting this inquiry, "the court must consider whether the [challenged] decision was based on a consideration of the relevant factors and whether there has been an error of judgment." Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). In order to fulfill its function under the APA arbitrary and capricious standard of review, the court must engage in a "thorough, probing, in-depth review" and the "inquiry into the facts is to be searching and careful." Id. at 415, 416. The Tenth Circuit has explained the relevant standard as follows:

> 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.

Colorado Environmental Coalition, 185 F.3d at 1167 (internal quotations and cites omitted).

V. The Mexican spotted owl, the USFWS Recovery Plan, and the USFS management standards

The USFWS listed the MSO as a threatened species entitled to the protections of the ESA on March 16, 1993. 58 Fed.Reg. 14248. One of the two primary reasons that the USFWS cited for the listing of the MSO as a threatened species is "[h]istorical alteration of its habitat as the result of timber management practices . . . and the threat of these practices continuing." 65 Fed.Reg. 45338 (July 21, 2000). In 1995, the USFWS completed a Recovery Plan for the MSO. The purpose of the Recovery

Plan is to "provide[] a basis for management actions to be undertaken by land management agencies . . . to remove recognized threats and recover the Mexican spotted owl" so that the MSO can be removed from the list of threatened species. See Exhibit 2 at p. ix.

Insofar as it is relevant to this lawsuit, the USFWS's MSO Recovery Plan proposes very significant constraints on timber cutting and removal activities within areas that are essential to the survival and the recovery of the MSO as a species. These essential areas are known as Protected Activity Centers — or PACs — and are defined as a formally designated area of at least 600 acres that contains a known Mexican spotted owl nest site. See Exhibit 2 at pp. 84, 86. In connection with post-fire timber cutting and removal activities, such as those proposed in connection with the Lakes Sale, the Recovery Plan states in pertinent part as follows:

> If a stand-replacing fire occurs within a PAC, timber salvage plans must be evaluated on a case-specific basis. In all cases, the PAC and a buffer extending 400 m from the PAC boundary must be surveyed for owls following the fire . . . . If the PAC is still occupied by owls or if owls are nearby (i.e. within 400 m of the PAC boundary), then the extent and the severity of the fire should be assessed and reconfiguration of the PAC boundaries might be considered through Section 7 consultation. If no owls are detected, then Section 7 consultation should be used to evaluate the proposed salvage plans.

Id. at p. 88. Thus, pursuant to the USFWS's Recovery Plan, post-fire timber cutting and removal activities in a PAC should only be permitted "[i]f no owls are detected" in a PAC which was burnt in a stand-replacing fire. Id.

As discussed above, each of the national forests under the management jurisdiction of the USFS is managed pursuant to a Forest Plan that specifically addresses resource conditions and opportunities within each national forest. 16 U.S.C. §1604. In 1996, the USFS amended the Santa Fe National Forest Forest Plan (as well as all the other Forest Plans for national forests in Arizona and New Mexico) to incorporate the provisions of the Recovery Plan. See Exhibit 3. The Forest Plan amendments essentially

adopt the management recommendations that the USFWS set forth in its Recovery Plan. In the Record of Decision adopting the 1996 amendments, the USFS stated that the new "standards and guidelines for the Mexican spotted owl [set forth in the Forest Plan amendments] are consistent with the Mexican Spotted Owl Recovery Plan." Id. at p. 6, see also 66 Fed.Reg. 8543 (Feb. 1, 2001) ("the FS amended their National Forest Plans in Arizona and New Mexico to conform with the Mexican Spotted Owl Recovery Plan").

In connection with post-fire timber cutting activities in a designated PAC, the Forest Plans governing national forest management in Arizona and New Mexico now state in pertinent part as follows:

> Allow no timber harvest except for fuelwood and fire risk abatement in established protected activity centers. For protected activity centers destroyed by fire, windstorm, or other natural disaster, salvage timber harvest or declassification may be allowed after evaluation on a case-by-case basis with the US Fish and Wildlife Service.

Id. at p. 87. Thus, consistent with the recommendations of the Recovery Plan, the Santa Fe National Forest Forest Plan now prohibits timber cutting activities in burned PACs that are inhabited by MSOs. Post-fire timber cutting activities can proceed in designated PACs only if the PACs are "destroyed" by fire.

In the planning process for other post-fire timber sales, USFS has acknowledged the prohibitory nature of those provisions of the Recovery Plan and the Santa Fe National Forest Forest Plan that address post-fire timber cutting activities in occupied PACs. For example, in connection with the planning of the Viveash Fire Timber Salvage Sale in the Santa Fe National Forest, the USFS stated as follows:

> The Recovery Plan for the Mexican spotted owl . . . sets forth the management direction of the salvage of PACs that are affected by stand-replacement fires. In brief, this document states that in the case of stand-replacement fires within a PAC, timber salvage plans must be evaluated on a case-specific basis. Surveys following specific guidelines to determine the presence of Mexican spotted owls within the burned PAC(s). If no owls are detected during the surveys, then ESA Section 7 consultation should be used to evaluate the proposed salvage plans.

See Exhibit 4 at p. 5-27. The planning documents for the Viveash Fire Timber Salvage Sale go on to state, in terms that could not be any clearer, that "[s]alvage logging is prohibited in . . . occupied spotted owl or goshawk habitats." Id. at p. C-7 (emphasis added).

As noted above, the USFWS has stated that one of the two primary threats to the MSO is habitat alteration associated with timber management. In particular, the USFWS Recovery Plan states that one of the most important "threats to be regulated" is "[t]imber harvest that either directly affects the habitat within a territory or indirectly affects the owl by collateral activity adjoining owl territories. See Exhibit 2 at p. 81. It is for this reason that the Recovery Plan and the Forest Plans are so restrictive with respect to the timber harvest activities that may occur within PACs. According to the USFWS Recovery Plan, "[t]he goal is to protect conditions and [forest] structures used by spotted owls where they exist and to set other stands on a trajectory to grow into replacement nest habitat or to provide conditions for foraging and dispersal." Id. at p. 82. The accomplishment of this goal is essential, because "[s]potted owl distribution is limited primarily by the availability of habitat types used for nesting and/or roosting." Id. at p. 83.

The protection of large trees in Mexican spotted owl PACs is particularly important. The USFS acknowledges that once large trees are removed, and as forested stands become more open, "habitat suitability increases for species such as great-horned owls and red-tailed hawks (potential predators on MSO)." See Exhibit at p. 6. Significantly, the USFS's BA on the Lakes Sale admits that "[p]roject activities will hasten creation of this more open habitat, with potential for earlier movement of these predators into the area." Id. Moreover, in the BA the USFS admits that "[i]n combination with the stand-replacing fire and the current proposal for salvage logging, numbers of large diameter snags and down woody debris could be lower than would normally be present post-fire." Id. at p. 14. The USFS goes on to state that this situation will adversely affect the MSOs by removing habitat for the owl's prey species:

"This could have some long-term effects. Because smaller diameter logs will not provide habitat for small rodents, salamanders, etc. for as long as larger diameter logs, there may be some period of time in the future when there is a lack of down logs . . ." Id. at p. 15.

With respect to timber sale activities in burned PACs in particular, the Recovery Plan and Forest Plan constraints are based on well developed biological observations which show that fire may have a beneficial effect on MSO habitat, and not an adverse effect. For example, the Recovery Plan provides the following explanation of the constraint:

> Salvage logging in PACs should be allowed only if sound ecological justification is provided and if the proposed actions meet the intent of this Recovery Plan, specifically to protect existing habitat and accelerate the development of replacement habitat. Fires within PACs are not necessarily bad. In many cases, patchy fires will result in habitat heterogeneity and may benefit the owl and its prey. In such cases, adjustments to PAC boundaries are probably unnecessary and salvage should not be done.

See Exhibit 2 at p. 89. Likewise, the USFS is well aware of the fact that MSOs do not leave their home PACs as a result of fire. For example, in a recent Biological Opinion, the USFS stated as follows:

> Bond et al. (2002) described short-term effects of wildfires on spotted owls throughout the species' range. The authors reported that relatively large wildfires that burned nest and roost areas appeared to have little short-term effect on survival, site fidelity, mate fidelity, and reproductive success of spotted owls, as rates were similar to estimates independent of fire . . . . The Forest Service (U.S. Department of Agriculture Forest Service, Southwestern Region 2003) reported similar results following the 2002 Lakes Fire in the Jemez Mountains of north-central New Mexico. Danny Salas ((Forest Service, personal communication, 2003) reported that all but one pair in the Scott Able Fire have returned to their previous territories. Salas (Forest Service, personal communication, 2003) also reported that all owls have returned and are reproducing within the Bridge Fire footprint . . . . Given historical fire regimes within its range, the spotted owl may be adapted to survive wildfires of various sizes and severities.

See Exhibit 6 at pp. 9-10. In recognition of the MSO's post-fire resilience and ability to make continued use of a burned PAC as a home territory, the USFWS's Recovery Plan and the USFS's Forest Plans prohibit post-fire logging in a burned PAC until the absence of MSOs in the PAC is confirmed by careful

monitoring. See also Declaration of Dr. Peter Stacey (attached hereto as Exhibit 7) at ¶10 (discussing how fire may actually have a beneficial impacts on MSOs).

VI. The Lakes Sale area contains a PAC which is the home of a breeding pair of Mexican spotted owls

With the Lakes Sale, the USFS proposes to allow timber cutting and removal activities in areas that burned in wildfires in the Jemez Mountains in the summer of 2002. According to the USFS, the sole purpose of the Lakes Sale is to recover the timber value of the standing dead trees. See Exhibit 8 at p. 1. The USFS has not stated that implementation of the Lakes Sale is necessary to accomplish any public safety or ecological health objective.

Within the Lakes Sale area is a formally designated PAC which is called the Fenton Lake PAC. Many of the trees in the Fenton Lake PAC were burned during the wildfires of the summer of 2002, and the USFS has authorized the cutting and removal of most of the large trees which were burned in the PAC. As required by the Recovery Plan and the Santa Fe National Forest LRMP, USFS biologists surveyed the PAC for the presence of Mexican spotted owls during the planning process for the Lakes Sale. See Exhibit 9. On the initial survey of the PAC "[w]ithin several weeks after the fire, a spotted owl was seen in the PAC." Id. During additional survey visits in the fall of 2002, no MSOs were detected but USFS biologists stated in a report for the Lakes Sale that this result was inconclusive insofar as MSO occupancy in the PAC is concerned:

> Discussions with Joe Ganey [a USFS research biologist] noted that negative responses to tape call surveys outside of the breeding season are not firm evidence that MSO are not present. He suggested that tape surveys should be repeated in March and April. If no responses are obtained, that would be a better indicator that the MSO has left the area.

Id.

In January of 2003, the USFS issued a Wildlife Effects analysis in connection with the Lakes Sale,

which was then in the planning process. Id. In the January 2003 Wildlife Assessment, the USFS first made its determination that post-fire timber cutting activities "would not be likely to adversely affect MSO." This determination was based on the inconclusive monitoring from the fall of 2002, and the stated assumption that "[b]ecause of high intensity wildfire in the Fenton Lake PAC, it is unlikely that owls will return their to breed." Id.

However, on April 9, 2003, USFS biologists returned to the Fenton Lake PAC to survey additional surveys for MSOs as suggested by the USFS research biologist. See Exhibit 10. On this survey visit, USFS biologists were able to determine that a pair (one male and one female) were using the Fenton Lake PAC. After this visit, the USFS biologists were still unable to determine whether the pair occupied a nest site within the PAC.

On April 22, 2003, USFS biologists prepared a Biological Assessment ("BA") of the Lakes Sale project, pursuant to the requirements of Section 7 of the ESA. See Exhibit 5. At the time that the BA was prepared, USFS biologists had still not been able to determine whether or not MSOs continued to nest within the Fenton Lakes PAC. Indeed, the BA states that "[a]t this time, it is unknown whether this PAC will remain viable, although consultation with MSO specialists . . . indicates that it is probable that this PAC will not be suitable breeding habitat until mixed conifer forest cover is once again re-established." Id. at p. 6. Despite the incomplete information concerning the nesting status of the MSOs that were found to be using the Fenton Lake PAC in early April, and despite the USFS's awareness that the cutting and removal of large trees impairs MSO breeding behavior, favors the MSO's predators, and adversely affects prey species abundance, the USFS's BA contained a final determination that the Lakes Sale is "not likely to adversely affect" MSOs. Id. This "not likely to adversely affect" determination was based on the USFS's unfounded assumption that MSOs did not continue to inhabit the Fenton Lake PAC.

The USFWS concurred in the USFS's "not likely to adversely affect determination" in a letter of May 1, 2003. See Exhibit 11. Just as the USFS's determination was based on unfounded assumptions regarding MSO occupancy in the Fenton Lake PAC, the USFWS concurrence was based on an assumption for which the USFWS had no basis in fact. In its concurrence letter, the USFWS stated that "we believe that the effects of the harvest of fire-killed trees for the Lakes and BMG Timber Salvage project will be minimal because the project site does not contain breeding habitat . . . ." Id. Accordingly, the USFS and the USFWS concluded an "informal consultation" in connection with the Lakes Sale based on incomplete and inconclusive information, and assumptions concerning the area's suitability as breeding habitat.

USFS biologists returned to the Fenton Lake PAC on July 29, 2003 -- during the breeding the MSO breeding season. On this visit, the USFS biologists were forced to acknowledge that all their assumptions regarding the PAC had been incorrect and that the MSO pair in the PAC had successfully fledged — or reproduced — two or three owlets at a nest site within the PAC.[5] See Exhibit 12. The discovery of the reproductive success within the Fenton Lake PAC was promptly communicated to the USFWS in an e-mail of August 1, 2003. Id. Thus, by August 1, 2003 the USFS and the USFWS knew that MSOs were nesting within the Fenton Lake PAC after the fire, and that the nesting pair was successfully reproducing owlets. Nonetheless, neither the USFS or the USFWS reinitiated a Section 7 consultation after learning that a pair of MSOs was nesting in the Fenton Lake PAC and successfully reproducing.

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[5] It appears from USFS correspondence concerning the July 29, 2003 survey that the nest site within the Fenton Lake PAC had been found by USFS biologists earlier in the summer of 2003, but there is no documentation of this discovery in the administrative record.

On August 7, 2003, the District Ranger for the Jemez Ranger District -- where the Lakes Sale is located -- signed a decision approving the Lake Sale. See Exhibit 13. The August 7 decision authorized significant tree cutting and removal in the Fenton Lake PAC, despite the fact that the PAC was known at the time the decision was rendered to be the home of a breeding pair of MSOs. Significantly, the August 7 decision document does not even mention the Mexican spotted owl or acknowledge that the Lakes Sale authorizes timber cutting activities in a PAC. As noted above, in response to Forest Guardians' subsequent appeal of the Lakes Sale decision, the USFS disavowed any knowledge of MSO occupancy in the Fenton Lake PAC, and stated that "[v]isits and surveys to the area . . . since the fire have not recorded any occupancy by an MSO [Mexican spotted owl]."

VII. The USFS and the USFWS have acted in an arbitrary and capricious fashion in discharging their statutory duties in this case

A. Violations of the ESA

Clearly, in this case there is no "rational connection between the facts found and the decision made." Cliffs Synfuels Co., 291 F.3d at 1257. Moreover, it is clear in this case that the USFS and the USFWS both failed to "consider the relevant factors." Citizens to Preserve Overton Park, 401 U.S. at 416. Since the USFS and the USFWS "entirely failed to consider an important aspect of the problem" and "offered an explanation for [their] decision that runs counter to the evidence before the agency," the USFS and the USFWS have discharged their Section 7 obligations in an arbitrary and capricious manner. Colorado Environmental Coalition, 185 F.3d at 1167. In a nutshell, there is simply no evidence in the record to supports the USFS's and the USFWS's implicit conclusions that timber harvest in an occupied Mexican spotted owl "does not adversely affect" MSOs. Indeed, not even the USFS and the USFWS make that express claim here.

As discussed above, the initial decision of the USFS and the USFWS to conduct an "informal consultation" in connection with the Lake Sale was based on unwarranted assumptions. Based on USFS monitoring within the Fenton Lake PAC, the USFS knew within weeks after the wildfires of 2002 that MSOs continued to use the Fenton Lake PAC. This information was confirmed by monitoring in the PAC in April of 2003, when USFS biologists detected that a pair (one male and one female) of MSOs were present in the PAC. Even though owls were present in the area, the USFS stated that it was uncertain whether the PAC would "remain viable." Despite this uncertainty, the USFS arbitrarily and capriciously determined that the Lakes Sale "would not adversely affect" MSOs. In concurring with the USFS on this determination, the USFWS arbitrarily and capriciously assumed that the PAC did not contain breeding habitat, despite the fact that it knew that such a conclusion could not be made until further monitoring was performed during the breeding season. As discussed above, the threshold for "formal consultation" under Section 7 of the ESA has been purposefully set at a very low level. In this case, the USFS and the USFWS simply cannot carry their burden of showing that there was no likelihood of adverse affects to the MSOs at the time that they concluded their "informal consultation" because survey information was still incomplete.

The USFWS's violation of its duty to reinitiate consultation in this case is even more glaring that the USFS and USFWS violations discussed above. On August 1, 2003 -- before the USFS made the decision to authorize the Lakes Sale -- the USFWS learned definitively that the Fenton Lake PAC was inhabited by a breeding pair of MSOs that had recently reproduced two or three owlets. This new information disproved all the assumptions that the USFS and the USFWS had relied upon in deciding to conduct an "informal consultation" in this case. Morever, this information establishes without a doubt that the Fenton Lake PAC still constitutes important and viable habitat for Mexican spotted owls. Nonetheless,

even after the acquisition of this important new information, the USFWS failed to reinitiate consultation with the USFS over the effects of the Lakes Sale. There is absolutely nothing in this record which explains the USFWS's failure to reinitiate consultation and, indeed, Forest Guardians respectfully submits that there is no reasonable explanation for this failure.

B. Violation of NFMA

As discussed above, all site-specific actions in the Santa Fe National Forest must be consistent with the Forest Plan. The Forest Plan specifically prohibits cutting in a designated PAC unless the PAC has been "destroyed" by fire. In this case, the record establishes conclusively that the Fenton Lake PAC was not destroyed by fire. Indeed, the record shows that the Fenton Lake PAC continues to be the home territory of a breeding pair of Mexican spotted owls. The USFS was aware of this fact prior to the time that it rendered the decision to authorize the Lakes Sale, but simply ignored it during the decision-making process. Because the Lakes Sale decision is inconsistent with the provisions of the applicable Forest Plan, the decision was arbitrary and capricious, and constitutes a violation of NFMA.

VIII. Timber cutting activities that are implemented in connection with the Lakes Sale decision will result in immediate and irreparable harm

As discussed above, the USFWS and the USFS have both discussed the various ways in which timber cutting activities in a PAC harm MSOs. To recapitulate timber harvest activities modify habitat in a way that impairs nesting and breeding behavior, favors MSO predators, and adversely affects prey abundance. These adverse effects occur immediately upon the cutting of trees in a PAC and are, obviously, irreversible.

In a declaration prepared for purposes of this case, Dr. Peter Stacey -- a preeminent Mexican spotted owl biologist -- discussed how the Lakes Sale will affect the MSOs in the Fenton Lake PAC. Dr.

Stacey visited the Lakes Sale area on December 30, 2003 and states as follows with respect to the significant, immediate, and irreparable harms that are associated with the Lakes Sale:

> 7. Even after the fire, a pair of owls has continued to live within the PAC.
>
> 8. Equally important, in the summer AFTER the fire, this pair of owls successfully bred, and produced 2-3 young. Mexican Spotted Owl populations throughout the southwestern United States have been declining due to a lack of reproduction and low survivorship. The fact that the owls in this PAC not only survived but reproduced successfully AFTER the fire means that this is a viable PAC and potentially an important area for the MSO population in the Jemez Mountains.
>
> 9. Contrary to the implications in the public record concerning this project, the continued occupation and successful reproduction of the owls in this PAC clearly demonstrates that the fire did not destroy the PAC, or render the PAC unsuitable for Mexican Spotted Owls . . . .
>
> 11. The timber harvest plan calls for removing most large trees from a large portion of the burned area of the PAC. While some large Douglas Fir trees will be left standing for the Jemez Salamander, a site visit on December 30, 2003, and after these trees had been marked, indicates that the standing trees will be widely spaced.
>
> 12. My concern over this action is that Mexican Spotted Owls are ambush hunters, and during hunting they usually sit on the branches of large trees before they swoop down on their prey. Foraging typically occurs in areas of high vertical structure and cover. Removing the large trees in the burned area will destroy this structure and cover, and likely render the area unsuitable for the birds. Even if an owl tried to sit on and hunt from an isolated douglas fire, such as those left during timber harvest (something I have never seen an MSO actually do), it would be very vulnerable to being attacked and killed by a Great Horned Owl (*Bubo virginianus*), a major predator of the MSO in open habitats.

See Exhibit 7 (citations omitted). Based upon these observations, Dr. Stacey has concluded that "it is very likely that if the planned timber harvest in [the Fenton Lake] PAC occurs, it will significantly alter and make less suitable the MSO habitat in this PAC." Id. at ¶14. Perhaps even more importantly, Dr. Stacey states that "since the PAC is currently occupied by a pair of owls that successfully reproduced after the fire in 2002, this activity is likely to have a significant negative impact on the survival and future reproduction of the Mexican Spotted Owls in the PAC." Id. at ¶15.

IX. There is no countervailing interest that weighs against issuance of a TRO

On the other side of the balance, there is no interest that weights against issuance of a TRO in this case. As stated at the outset of this memorandum, the USFS does not state that the Lakes Sale was approved for any reason other than to recover the economic value of the standing dead trees in the sale area. Any economic harm that may result from issuance of the TRO is not irreparable. Moreover, their is no public interest that would be impaired by issuance of a TRO. Indeed, Forest Guardians respectfully submits that the important public interest that is implicated by this case is the public interest in observance of environmental laws and the conservation and protection of threatened species and their habitat. As discussed above, this interest weighs in favor of issuance of a TRO.

X. Conclusion

In resolving this Motion for TRO, it is critical for the Court to remember that Congress, in enacting the ESA, has already struck the balance between the protection of threatened species and countervailing concerns. This balance has been struck clearly in favor of protecting threatened species, and in providing injunctive relief against federal actions that threaten to impair the accomplishment of this core objective. "Congress has spoken in the plainest of words, making it abundantly clear that the balance has been struck in favor of affording endangered species the highest of priorities, thereby adopting a policy which it described as 'institutionalized caution.'" TVA v. Hill, 437 U.S.153, 194 (1978). This Congressional policy of preserving endangered species from extinction outweighs nearly any other equitable consideration, including the expenditure of even "extraordinary" financial or practical resources. TVA v. Hill, 437 U.S. at 173, 186, 193-94.

Hence, absent "unusual circumstances," an injunction is the appropriate remedy for proven or likely violations of the ESA. Thomas v. Peterson, 753 F.2d 754, 765 (9th Cir. 1985); PRC v. Thomas, 30 F.3d

1050, 1056-57 (9th Cir. 1994), cert. denied 514 U.S. 1082 (1995); National Wildlife Federation v. Marsh, 721 F.2d 767, 786 (11th Cir. 1983).[6] Temporary and preliminary injunction will issue if the plaintiff shows that a violation of the ESA is "at least likely in the future." National Wildlife Federation, 23 F.3d at 1511; see also TVA v. Hill, 437 U.S. at 169-72 (imminent violation of the ESA requires injunctive relief).

In this case, Forest Guardians has shown that it is likely to succeed on the merits of its claims in this case. Moreover, Forest Guardians has shown that the violations of law which it will likely prove threaten immediate and irreparable harm. Furthermore, though it is not required to do so in an ESA like this one, Forest Guardians has shown that there is no countervailing interest that weights against issuance of a TRO. For these reasons, Forest Guardians respectfully submits that its Motion for TRO should be granted.

Dated:

Respectfully submitted,

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[6] In Sierra Club v. Marsh, 816 F.2d 1376, 1382-84 (9th Cir. 1987), the Ninth Circuit held that the district court erred by applying the traditional balancing test to plaintiff's motion for preliminary injunction under the ESA. The court stated that an injunction must issue where the Corps failed to complete consultation on a highway project, because "Congress has established procedures to further its policy of protecting endangered species. The substantive and procedural provisions of the ESA are the means determined by Congress to assure adequate protection. Only by requiring substantial compliance with the act's procedures can we effectuate the intent of the legislature."

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Memorandum Brief in Support of Plaintiffs' Motion for Temporary Restraining Order was served by e-mail on Ms. Lisa Russell of the United States Department of Justice at _____________ p.m. on January 9, 2004.

____
Steven Sugarman