UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL FOREST RESOURCE COALITION, 600 New Hampshire Avenue NW, Suite 500, Washington, D.C. 20037; **AMERICAN FOREST RESOURCE COUNCIL**, 5100 SW Macadam, Suite 350, Portland, OR 97239; **BLUERIBBON COALITION**, 4555 Burley Drive, Suite A Pocatello, ID 83202; **CALIFORNIA ASSOCIATION OF 4 WHEEL DRIVE CLUBS**, 8120 36th Ave., Sacramento, CA 95824; **PUBLIC LANDS COUNCIL**, 1301 Pennsylvania Ave. NW, Suite 300, Washington, D.C. 20004; **NATIONAL CATTLEMEN'S BEEF ASSOCIATION**, 1301 Pennsylvania Ave. NW, Suite 300, Washington, D.C. 20004; **AMERICAN SHEEP INDUSTRY ASSOCIATION**, 9785 Maroon Circle, Suite 360, Englewood, CO 80112; **ALASKA FOREST ASSOCIATION,** 111 Stedman Street, Suite 200, Ketchikan, AK 99901; **RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC.,** 121 West Fireweed, Suite 250, Anchorage, AK 99503; **MINNESOTA FOREST INDUSTRIES, INC.,** 324 West Superior Street, Suite 903 Duluth, MN 55802; **MINNESOTA TIMBER PRODUCERS ASSOCIATION,** 324 West Superior Street, Suite 903, Duluth, MN 55802; **CALIFORNIA FORESTRY ASSOCIATION,** 1215 K Street, Suite 1830 Sacramento CA 95814; and **MONTANA WOOD PRODUCTS ASSOCIATION, INC.**, P.O. Box 1967, Missoula, MT 59806

Plaintiffs,

vs.

THOMAS J. VILSACK, Secretary of Agriculture, 1400 Independence Ave., SW, Washington, DC 20250, and **UNITED STATES FOREST SERVICE**, 1400 Independence Ave., SW, Washington, DC 20250,

Defendants

Civil No. 12-1333

Action for Declaratory and Injunctive Relief to Remedy Violations of the Organic Administration Act of June 4, 1897, 16 U.S.C. § 475, Multiple-use Sustained Yield Act, 16 U.S.C. §§ 528-31; National Forest Management Act, 16 U.S.C. §§ 1604-1612; and Administrative Procedure Act, 5 U.S.C. §§ 551-706

COMPLAINT

For their complaint herein, plaintiffs allege as follows:

INTRODUCTION

1. Plaintiffs, Federal Forest Resource Coalition (FFRC) *et al.*, challenge the final rule (hereafter "Planning Rule") adopted by defendants Thomas J. Vilsack and the United States Forest Service (Forest Service) establishing nationwide requirements for developing, amending and revising land management plans (also referred to as forest plans) for units of the National Forest System, as required by the Forest and Rangeland Renewable Resources Planning Act of 1974, as amended by the National Forest Management Act of 1976 (16 U.S.C. § 1600 *et seq*.) (NFMA). 77 Fed. Reg. 21162 (April 9, 2012). The Planning Rule is codified at 36 C.F.R. Part 219 (2012). Plaintiffs seek to remedy violations of the Organic Administration Act of June 4, 1897 (OAA), 30 Stat. 34, 16 U.S.C. § 473 *et seq.*, Multiple-Use Sustained-Yield Act (MUSYA), 16 U.S.C. §§ 528-31, the NFMA, 16 U.S.C. §§ 1604-1612, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 553, 702 and 706.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory relief) and 28 U.S.C. § 2202 (injunctive relief). Plaintiffs commented on the forest Planning Rule, and there is an actual justiciable controversy between plaintiffs and defendant that the Court can redress. The forest Planning Rule is final agency action under 5 U.S.C. § 704. Plaintiffs' requested relief is proper under 28 U.S.C. §§ 2201, 2202 and 5 U.S.C. §§ 702 and 706.

3. Venue is proper in this district under 28 U.S.C. § 1391(e) because the defendants reside in this district, defendants' decision adopting the challenged rule was made in this district, and a substantial part of the events or omissions giving rise to the claims occurred in this district. Defendant Vilsack was personally involved and personally participated in the decision challenged

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in this case. The challenged rule affects Forest Service lands throughout the United States.

PARTIES

4. The Federal Forest Resource Coalition (FFRC) is a national coalition of small and large companies and regional trade associations whose members manufacture wood products, paper, and renewable energy from national forest timber resources. FFRC is a Washington D.C. non-profit corporation. FFRC has members in more than two dozen states throughout the country and is a national voice for sound management of Federal forests. FFRC seeks healthy national forests that contribute to local economies through prompt and efficient management. Coalition members employ over 350,000 workers in over 650 mills, with payroll in excess of $19 billion. FFRC submitted comments on the draft and final Planning Rule. FFRC collectively represents companies that purchase at least 75% of timber sold by the national forests each year.

5. The American Forest Resource Council (AFRC) is an Oregon nonprofit corporation and trade association. It represents approximately 60 lumber and plywood manufacturers and private forest landowners throughout the West that obtain raw material for their mills from national forests and other forest lands. AFRC represents the forest industry in matters relating to the federal laws, regulations, policies, and administration of the national forests by the Forest Service. AFRC and its predecessor associations have actively participated in forest planning since NFMA was enacted in 1976. AFRC does this through the participation of its association staff and its members in rulemaking, the forest planning process, and forest plan implementation and monitoring on individual national forests. AFRC submitted comments on the draft and final Planning Rules. AFRC members regularly purchase timber from national forests and include companies that are some of the largest purchasers of national forest timber in the country. AFRC members own land intermingled with the national forests and are concerned about the spread of insect, disease, and wildfire from national forests to their private lands. AFRC members also depend on access across

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national forest land to reach their private land.

6. The BlueRibbon Coalition (BRC) is a national recreation group organization that champions responsible recreation, and encourages individual environmental stewardship. BRC is an Idaho non-profit corporation. With members in all 50 states, BRC is focussed on building enthusiast involvement with organizational efforts through membership, outreach, education, and collaboration among recreationists. BRC members use motorized and nonmotorized means, including off-highway vehicles, horses, mountain bikes, and hiking, to access Forest Service and other public lands throughout the United States. BRC has a long-standing interest in the protection of the values and natural resources provided by national forests, and regularly works with land managers to provide recreation opportunities, preserve resources, and promote cooperation between public land visitors. BRC members' past, present, and existing concrete future plans for access to the National Forest System have been and will be affected by Forest Plans and other agency decisions made under the Forest Service Planning Rule. BRC members' access has already been adversely affected based on the perceived direction of agency policy and planning requirements announced through the final rule. BRC and its members additionally have a concrete interest in the substance and procedure for creation of any planning rule under NFMA. BRC, through its staff and members, vigorously participated in all aspects of the procedure by which the final rule was promulgated

7. California Association of 4 Wheel Drive Clubs (Cal4) is a California mutual benefit corporation representing over 8,000 members and 160 clubs in the State of California. Cal4 members use motorized means to access and enjoy lands managed by the Forest Service throughout the National Forest System but particularly in California. Cal4 members share a common interest in owning, maintaining, and operating customized 4-wheel drive vehicles such as Jeeps and Broncos on dirt roads and trails. Members' interest in these vehicles has rewards in meeting mechanical and

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navigational challenges, but also facilitates various outdoor activities, such as picnicking, camping, sightseeing, wildlife and nature study, hunting and fishing, and similar activities. Many Cal4 members, due to age, physical condition, or other factors, would be unable to enjoy meaningful participation in their chosen activities without vehicular access to the lands managed by the Forest Service. Cal4 is an organizational member of BRC. Like BRC, Cal4 members' past, present, and existing concrete future plans for access to the National Forest System have been and will be affected by Forest Plans and other agency decisions made under the Forest Service Planning Rule. Cal4 members' access has already been adversely affected based on the perceived direction of agency policy and planning requirements announced through the final rule. Cal4 fully participated in the process leading to the final rule, and Cal4 and its members' procedural interests have also been adversely affected through the promulgation of the final rule

8. The Public Lands Council (PLC) is a domestic nonprofit corporation incorporated in the State of Colorado whose membership consists of state and national cattle, sheep, and grasslands associations. Since 1968, PLC has been representing livestock ranchers who use and preserve public lands and the natural resources thereon while simultaneously preserving the unique heritage of the West. Public land ranchers own nearly 120 million acres of productive private land, and they also manage vast areas of public lands, thereby acting as stewards for significant acreage of critical wildlife habitat. PLC strives to maintain a stable business environment in which livestock producers can continue to conserve public lands, natural resources and the nation's western heritage while also feeding the nation and the world. PLC provides assistance to the livestock industry by disseminating information to the public, meeting with interested parties, including regulatory agencies, drafting and commenting on legislation and agency rules germane to its interests and, when necessary, participating in litigation to protect its interests. The ability to graze livestock on federal lands, including federal lands managed by the U.S. Forest Service, is vitally important to PLC, its

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membership and the industries and businesses that provide goods and services to livestock ranchers. PLC thus actively participated in the process leading up to promulgation of the final rule, including by submitting written comments during the rulemaking process. The past, present and existing concrete future plans of PLC's members for access to National Forest System lands have been and will be affected by Forest Plans and other agency decisions made under the forest Planning Rule, and PLC and its membership also have a concrete interest in the substance and procedure embodied in the Planning Rule.

9. The National Cattlemen's Beef Association (NCBA) is a domestic nonprofit corporation incorporated in the State of Colorado. NCBA's direct membership consists of about 30,000 cattle producers, but through its affiliates NCBA represents the interests of approximately 140,000 cattle producers, including producers in every state and at all levels of production. Many of NCBA's members hold grazing permits and leases authorizing livestock grazing on federal lands, including lands managed by the Forest Service. The ability to graze livestock on public lands, including those on our national forests, is vitally important to NCBA's members, as well as to industries and businesses that provide goods and services to livestock growers. NCBA is proud to have been representing America's cattle producers since 1898, working to preserve the heritage and strength of the industry through education and sound public policy. As the oldest and largest national association of cattle producers, NCBA works to create new markets and increase the demand for domestic beef to the betterment of our nation. NCBA provides assistance to its members by disseminating information to its members and to the public, meeting with interested parties, including regulatory agencies, drafting and commenting on legislation and agency rules germane to its interests and, when necessary, participating in litigation to protect its interests. NCBA actively participated in the process leading up to promulgation of the final rule, including by submitting written comments during the rulemaking process. The past, present and existing concrete future

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plans of NCBA's members for access to National Forest System lands have been and will be affected by Forest Plans and other agency decisions made under the forest Planning Rule. NCBA and its membership also have a concrete interest in the substance and procedure embodied in the forest Planning Rule.

10. The American Sheep Industry Association (ASI) is a domestic nonprofit corporation incorporated in the State of Colorado to protect, promote and assert business, economic, social and educational interests of its national membership. ASI's roots trace back to the 1865 formation of the National Wool Growers Association. Currently, ASI represents the interests of 45 state sheep associations joined by individual members who collectively comprise more than 82,000 sheep producers located throughout the United States. Because about half of the nation's sheep are raised on ranches that rely on federal land grazing, the ability of ASI members to graze sheep on public lands, including federal lands managed by the Forest Service, is critically important to ASI, its members, the U.S. sheep industry as a whole and to industries and businesses that provide goods and services to wool and lamb growers. Many of ASI's members hold grazing permits and leases authorizing livestock grazing on federal lands, including National Forest System lands. ASI provides assistance to its members, and to the wool and lamb growing industry generally, by disseminating information to its members and to the public, meeting with interested parties, including regulatory agencies, drafting and commenting on legislation and agency rules germane to its interests and, when necessary, participating in litigation to protect its interests. ASI actively participated in the process leading up to promulgation of the final rule, including by submitting written comments during the rulemaking process. The past, present and existing concrete future plans of ASI's members for access to National Forest System lands have been and will be affected by Forest Plans and other agency decisions made under the forest Planning Rule. ASI and its membership also have a concrete interest in the substance and procedure embodied in the forest Planning Rule.

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11. The Alaska Forest Association (AFA) is one of the oldest trade associations in the State of Alaska and represents more than 120 members sharing an interest in the timber industry and public lands of Alaska. AFA is an Alaska non-profit corporation. Its mission is to advance the restoration, promotion and maintenance of a healthy, viable forest products industry that contributes to the economic and ecological health in Alaska's forests and communities. AFA is committed to ensuring a reliable and sustainable supply of forest products from the Tongass National Forest, and believes that the management of lands on the Tongass National Forest ultimately will dictate not only the health of Alaska's natural resources but also the viability of AFA members' businesses and the economic health of their local communities.

12. Resource Development Council for Alaska, Inc. (RDC) is a statewide business association comprised of individuals and companies from Alaska's oil and gas, mining, forest products, tourism and fisheries industries. RDC is an Alaska non-profit corporation. RDC's membership includes Alaska Native Corporations, local communities, organized labor, and industry support firms. RDC's purpose is to encourage a strong, diversified private sector in Alaska and expand the state's economic base through the responsible development of our natural resources. Because forest planning determines the mix of uses allowed on particular areas of the national forests including the Tongass and Chugach National Forests, RDC is concerned that the Planning Rule will restrict uses that contribute to economic development. Some advocacy groups have suggested that restriction on management of the Tongass National Forest could serve to mitigate global climate change and increase carbon sequestration. RDC is concerned that the emphasis on climate change in the final rule will adversely affect its members. RDC submitted comments on the draft Planning Rule.

13. Minnesota Forest Industries, Inc. (MFI) represents forest products producers and landowners that are committed to conservation, quality forest management, and industry

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development that fosters sound environmental stewardship, multiple use of timberlands, and a dependable long-term timber supply. MFI is a Minnesota nonprofit corporation. Many of MFI's members purchase sawtimber and pulpwood from the Forest Service and other lands. MFI members were involved in the process that led to the development of the Superior and Chippewa forest plans and MFI submitted comments on the draft Planning Rule.

14. The Minnesota Timber Producers Association (MTPA) is a Minnesota nonprofit corporation representing loggers, small sawmills, truckers and forest products manufacturers. MTPA members obtain raw material from the Superior and Chippewa National Forests. MTPA also submitted comments on the draft Planning Rule.

15. The California Forestry Association (CFA) is a trade association whose members consist of forest products producers and biomass power producers, forest landowners, and natural resource professionals committed to environmental sound policies, responsible forestry, and sustainable use of natural resources. CFA is a California nonprofit corporation. CFA's members process over 90 percent of the wood products manufactured in the state of California. CFA has been extensively involved on behalf of its members in forest planning matters for decades. We have submitted comments on the various forest planning rules including the 2012 final rule. The association and its members also have been involved in the forest planning process for individual plans and for the Sierra-wide plan amendment referred to as the Sierra Nevada Framework.

16. The Montana Wood Products Association, Inc. (MWPA) is a Montana nonprofit corporation promoting healthy forests and healthy communities through management of Montana's forests. MWPA's membership includes companies and individuals involved in all facets of Montana's wood products industry. This includes sawmills, manufacturers of plywood, particle board, fiberboard, pulp and paper, posts and poles, log homes, as well as timberland owners and managers and logging contractors. MWPA provides over 7,500 direct jobs for Montana families.

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Since about 60 percent of Montana's forest land base is owned by the federal government, much of which is intermingled with MWPA member's private timberland, road access to and through these lands is vital to maintaining healthy forests, producing timber, and protecting lands from wildfire. MWPA and its members commented on the Forest Planning rule and have actively participated for over 30 years in the forest planning process for Montana National Forests.

17. Defendant Thomas J. Vilsack is the Secretary of Agriculture and exercises supervisory control over the United States Forest Service. Defendant Vilsack is sued in his official capacity.

18. The United States Forest Service is a federal agency within the Department of Agriculture that is responsible for management of the National Forest System. The Forest Service was the lead agency in preparing the environmental impact statement for the Planning Rule.

BACKGROUND ALLEGATIONS

19. The National Forest System includes 155 national forests and 20 national grasslands covering approximately 190 million acres of forest and rangeland throughout the United States. Congress first described the purposes of national forests in the 1897 OAA, which states: "No national forest shall be established, except to improve and protect the forest within the boundaries, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States …." In MUSYA, 16 U.S.C. §528, Congress further stated that "[i]t is the policy of the Congress that the national forests are established and shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes," and directed the Secretary of Agriculture "to develop and administer the renewable surface resources of the national forests for multiple use and sustained yield of the several products and services obtained therefrom." 16 U.S.C. §529. In the NFMA, Congress required the Secretary of Agriculture to "assure" that national forest plans "provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use

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Sustained-Yield Act of 1960, and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness." 16 U.S.C. §1604(e). In planning for these lands, the NFMA directed the Secretary of Agriculture to "promulgate regulations, under the principles of the Multiple-Use Sustained-Yield Act of 1960, that set out the process for development and revision of the land management plans and [adopt] guidelines and standards prescribed by this [Act]." 16 U.S.C. § 1604(g).

20. In 1979, the Department of Agriculture issued the first planning regulations to comply with the NFMA. The 1979 regulations were superseded by the 1982 planning rules, which have formed the basis for most existing Forest Service land management plans. However, a series of internal and external reviews found that these rules were unduly complex, had significant costs, were too long, and made it cumbersome for the public to provide input. In 2000, 2005, and 2008, the Forest Service adopted new land management planning rules, but each set of rules was litigated, enjoined or abandoned, effectively leaving the 1982 planning rules in place.

21. In a speech on August 14, 2009, defendant Vilsack outlined his vision for the future of the national forests, setting forth a new direction for conservation, management, and restoration of those lands, and announcing the beginning of a new process to adopt revised planning rules to implement his vision. The Planning Rule challenged in this case represents the conclusion of that rulemaking effort.

22. The Planning Rule is causing current and threatened injury to the Plaintiffs.

Claims for Relief

FIRST CLAIM

(Violation of OAA – Unlawful establishment of "ecological sustainability" as primary purpose of national forest management)

23. Plaintiffs reallege the allegations in paragraphs 1-22 as if fully set forth herein.

24. The Organic Administration Act of 1897 (OAA), 16 U.S.C § 475, as interpreted by the

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Supreme Court, directs that national forests are to be "as far as practicable controlled and administered" for only two purposes -- to conserve water flows, and to furnish a continuous supply of timber for the American people -- and not for aesthetic, environmental, recreational, or wildlife-preservation purposes. As the Supreme Court also found, Congress' intent in OAA was that the national forests were not to be set aside for non-use. MUSYA recognized certain additional purposes of the national forests, but provided that the additional purposes are supplemental to, but not in derogation of, the two purposes for which the national forests were to be established and administered under the OAA. 16 U.S.C. § 528.

25. Contrary to the OAA, the Planning Rule establishes achievement of "ecological sustainability" the primary purpose of every national forest. The Planning Rule, 36 C.F.R. § 219.8(a), creates an unprecedented new requirement that every forest plan "must provide for social, economic, and ecological sustainability." The section prescribes detailed provisions that establish "ecological sustainability" as the overriding objective of national forest management, while relegating "social and economic sustainability" to an inferior and insignificant position. Section 219.8(a) (1) of the Planning Rule requires unconditionally that for the purpose of achieving "ecological sustainability" all plans must "maintain or restore the ecological integrity of terrestrial and aquatic ecosystems and watersheds in the plan area, including plan components to maintain or restore structure, function, composition, and connectivity ...." All plans must also "maintain or restore: (i) Air quality. (ii) Soils and soil productivity, including guidance to reduce soil erosion and sedimentation. (iii) Water quality. (iv) Water resources in the plan area, including lakes, streams, and wetlands; ground water; public water supplies; sole source aquifers; source water protection areas; and other sources of drinking water (including guidance to prevent or mitigate detrimental changes in quantity, quality, and availability)," must "maintain or restore the ecological integrity of riparian areas in the plan area," and must "establish width(s) for riparian management zones around all lakes,

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perennial and intermittent streams, and open water wetlands." The rule requires the Forest Service to write national "best management practices for water quality" outside the national forest planning process, with no provision for notice to the public or opportunity to comment, and then directs that plans "must ensure implementation of these practices." Section 219.8(a)(2), (3), (4).

26. The Planning Rule, § 219.10, establishes achievement of the "ecological sustainability" mandates in § 219.8 as the prime objective of every national forest. The Rule directs that all the statutorily-prescribed multiple use outputs on national forests are subject to, and can only be provided after, "meeting the requirements of §§ 219.8." The National Marine Fisheries Service's biological opinion approving the Planning Rule recognized, and relied upon, the "substantial effects" of § 219.8 to constrain Forest Service multiple-use management: "The Forest Service has a broad multiple-use mandate. A wide variety of activities occur on the various units of the National Forest System, and some of those activities precludes [*sic*] opportunities to undertake other activities. Therefore, by placing constraints on land management plans and NEPA alternatives developed for those plans, the Planning Rule has substantial effects on the environment, endangered species and threatened species ...." *Id*. at 92-93.

27. The Planning Rule violates OAA by establishing and administering national forests for "ecological sustainability," which is a not a purpose set forth in the OAA, and is inconsistent with the purposes set forth in the OAA. These violations of OAA are arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

SECOND CLAIM
(Violation of NFMA - Unlawful establishment of "ecological sustainability" as overriding objective of national forest management)

28. Plaintiffs reallege the allegations in paragraphs 1-22 and 25-26 as if fully set forth herein.

29. Section 219.8 of the Planning Rule violates NFMA, 16 U.S.C. §1604(e), by mandating

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"ecological sustainability" – through the maintenance and restoration of "ecological integrity," "diversity of ecosystems" and similar measures – as the highest priority of national forest management, taking precedence over the multiple use objectives of the national forests that are to drive forest planning as prescribed by Congress in NFMA. This violation of NFMA is arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

THIRD CLAIM
(Violation of MUSYA– Unlawful establishment of "ecological sustainability" as overriding objective of national forest management)

30. Plaintiffs reallege the allegations in paragraphs 1-22 and 25-26 as if fully set forth herein.

31. The MUSYA requires that national forests shall be administered for outdoor recreation, range, timber, watershed, and wildlife and fish purposes under the complementary management standards of multiple use and sustained yield. 16 U.S.C. §§ 528-31.

32. The Planning Rule violates MUSYA by requiring national forests to provide "ecological sustainability" before providing any of the five statutorily-designated purposes of national forests. Providing "ecological sustainability" is not a permitted purpose of national forest management under MUSYA.

33. Defendants' violations of MUSYA in the Planning Rule as alleged in this claim are arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

FOURTH CLAIM
(Violation of OAA – Unlawful mandate to provide "ecosystem services")

34. Plaintiffs reallege the allegations in paragraphs 1-22 and 24 as if fully set forth herein.

35. The Planning Rule establishes an entirely new category of national forest uses and purposes– "ecosystem services." Drawing from a recent United Nations-sponsored report, the

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Planning Rule defines this new term to include such diverse components as long term storage of carbon, climate regulation, disease regulation, pollination, seed dispersal, and educational, aesthetic, spiritual and cultural heritage values. Section 219.19. The Planning Rule directs that national forests "must provide for ecosystem services and multiple uses." Section 219.10 (underlining added). The plan must also include "standards and guidelines, for integrated resource management to provide for ecosystem services and multiple uses in the plan area." Section 219.10(a) (underlining added).

36. The Planning Rule violates OAA by establishing and administering national forests to provide "ecosystem services," which is a not a purpose set forth in the OAA, and is inconsistent with the purposes set forth in the OAA. These violations of OAA are arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

FIFTH CLAIM

(Violation of NFMA– Unlawful mandate to provide extra-statutory "ecosystem services")

37. Plaintiffs reallege the allegations in paragraphs 1-22 and 35 as if fully set forth herein.

38. In NFMA, Congress mandated that the Secretary assure that forest plans provide for multiple use:

> (e) Required assurances. In developing, maintaining, and revising plans for units of the National Forest System pursuant to this section, the Secretary shall assure that such plans—
>
> (1) provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 [16 U.S.C. §§ 528 et. seq.], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness; and
>
> (2) determine forest management systems, harvesting levels, and procedures in the light of all of the uses set forth in subsection (c)(1), the definition of the terms "multiple use" and "sustained yield" as provided in the Multiple-Use Sustained-Yield Act of 1960 . . . and the availability of lands and their suitability for resource management.

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16 U.S.C. § 1604(e).

39. Congress further directed the Secretary to "promulgate [planning] regulations, under the principles of the Multiple-Use Sustained-Yield Act of 1960." 16 U.S.C. § 1604(g).

40. By requiring that forest plans must provide "ecosystem services" as well as multiple-uses, the planning rule introduces new resource uses and management requirements not specified in NFMA, preventing management of the national forests for the multiple uses required by NFMA.

41. Defendants' violations of NFMA in the Planning Rule as alleged in this claim are arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

SIXTH CLAIM

(Violation of MUSYA– Unlawful mandate to provide extra-statutory "ecosystem services")

42. Plaintiffs reallege the allegations in paragraphs 1-22, 31 and 35 as if fully set forth herein.

43. The Planning Rule violates MUSYA by requiring national forests to provide "ecosystem services" in addition to the five statutorily-designated purposes of national forests. Providing "ecosystem services" is not a permitted purpose of national forest management under MUSYA. By mandating "ecosystem services" as a category separate from "multiple uses," the Planning Rule further violates MUSYA because it does not subject the provision of "ecosystem services" to the management standard of multiple-use, although all national forest outputs are governed by the multiple-use mandate under MUSYA.

44. Defendants' violations of MUSYA in the Planning Rule as alleged in this claim are arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

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SEVENTH CLAIM
(Violation of NFMA - Unlawful mandate to maintain viable populations of plant and animal species of conservation concern before meeting multiple use objectives)

45. Plaintiffs reallege the allegations in paragraphs 1-22 as if fully set forth herein.

46. The NFMA, 16 U.S.C. §1604 (g)(3)(B), requires forest plans to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives ...." Section 219.9 of the Planning Rule violates this section of the NFMA by establishing mandatory plan requirements, which are not subject to "overall multiple-use objectives," to "provide the ecological conditions necessary to: contribute to the recovery of federally listed threatened and endangered species, conserve proposed and candidate species, and maintain a viable population of each species of conservation concern within the plan area." Section 219.9 (b). By requiring each forest plan to contribute to the recovery of every federally listed species found on the forest, to seek to avoid listing of candidate species, and to seek to maintain viable populations of all species of conservation concern – without any consideration of "overall multiple-use objectives" – the Planning Rule goes far beyond the diversity provision of NFMA, rendering multiple-use management of the national forests impossible. The National Marine Fisheries Service recognized the effect of § 219.9 to constrain Forest Service multiple-use management in its biological opinion (pages 96-97): "[T]he draft final Planning Rule commits land management plans to contribute to the recovery of endangered and threatened species [which] exceeds the commitment inherent in the 'viability' language of the 1982 Rule. ... [T]he new commitment imposes important constraints on the range of decisions available to Forest Service officials as they develop, revise, or amend land management plans ... and when they sign records of decision to conclude NEPA evaluations of land management plans."

47. As NMFS correctly stated, § 219.10 makes the provision of all multiple use outputs on

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national forests subservient to the mandate in § 219.9. Only after meeting, or attempting to meet, the "viable populations" and other species conservation duties can forest plans determine whether and to what extent the five statutorily-prescribed multiple use outputs will be provided. As with "ecological sustainability," the requirement to maintain and recover "viable populations" of wildlife species must be met before multiple-use management can be conducted.

48. Section 219.9 of the Planning Rule violates the NFMA, 16 U.S.C. §1604(g)(3)(B), by elevating species recovery, conservation, and viability as mandatory national forest management objectives above the five statutorily prescribed multiple use objectives, and by preventing multiple-use management of the national forests. This violation of NFMA is arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

EIGHTH CLAIM

(Violation of NFMA – Unlawful limitation of information used for decision-making)

49. Plaintiffs reallege the allegations in paragraphs 1-22 as if fully set forth herein.

50. The NFMA, 16 U.S.C. § 1604(b) directs that "[i]n the development and maintenance of land management plans for use on units of the National Forest System, the Secretary shall use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences." The NFMA also directs that "the Secretary of Agriculture shall utilize information and data available from other Federal, State, and private organizations and shall avoid duplication and overlap of resource assessment and program planning efforts of other Federal agencies." 16 U.S.C. § 1610. The NFMA also directs that "[t]he Secretary of Agriculture shall take such action as will assure that the development and administration of the renewable resources of the National Forest System are in full accord with the concepts for multiple use and sustained yield of products and services as set forth in the Multiple-Use Sustained-Yield Act of 1960." 16 U.S.C. §

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1607.

51. Neither NFMA nor any other statute requires the Forest Service to base natural resource planning and management decisions on the "best available scientific information" or any other comparable standard. In other statutes, Congress has directed agencies to base certain types of decisions on the best available scientific information. For example, in the Endangered Species Act, 16 U.S.C. §§1531 et seq., decisions must be based on the "best scientific and commercial data available." 16 U.S.C § 1533(b)(1)(A) (underlining added).

52. The Planning Rule, §219.3, imposes on the Forest Service a duty to base its decisions on the best available scientific information that exceeds any congressional mandate in any statute:

> The responsible official shall use the best available scientific information to inform the planning process required by this subpart. In doing so, the responsible official shall determine what information is the most accurate, reliable, and relevant to the issues being considered. The responsible official shall document how the best available scientific information was used to inform the assessment, the plan decision, and the monitoring program as required in §§ 219.6(a)(3) and 219.14(a)(4). Such documentation must: Identify what information was determined to be the best available scientific information, explain the basis for that determination, and explain how the information was applied to the issues considered.

53. The Forest Service further explained in the Planning Rule preamble: "The Department never intended that the responsible official could have the discretion to disregard best available scientific information (BASI) in making a decision." 77 Fed. Reg. 21193. The Planning Rule, §219.3, unlawfully limits the information on which forest planning decisions can be based by requiring all decisionmakers to "use" the best available scientific information for every forest management decision. The rule precludes reliance on best available commercial data even though such data is statutorily mandated for use in ESA decisions. The rule effectively trivializes public participation by forbidding decisions based on non-scientific information, which is what the great majority of public comments will contain. Field professionals such as foresters, range

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conservationists, and biologists often make management decisions using professional judgment based on experience gained from the results of on-the-ground implementation of resource management practices. The rule gives "scientists" improper influence on natural resource management decisions, and skews multiple-use management by improperly elevating scientific information as the center-piece of forest management, contrary to the MUSYA's definition of "multiple-use" as "[t]he management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people," a determination that is not limited to scientific considerations but also includes many non-scientific factors. The rule is not "a systematic interdisciplinary approach" as required by NFMA.

54. The Planning Rule, §219.3, violates NFMA in the manner set forth in the previous paragraphs. These violations of NFMA are arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

NINTH CLAIM

(Violation of NFMA – Omission of statutorily-mandated planning requirement)

55. Plaintiffs reallege the allegations in paragraphs 1-22 as if fully set forth herein.

56. The NFMA, 16 U.S.C. §1604 g(3)(D), requires that the planning regulations include a provision to:

> permit increases in harvest levels based on intensified management practices, such as reforestation, thinning, and tree improvement if
> (i) such practices justify increasing the harvests in accordance with the Multiple-Use Sustained-Yield Act of 1960, and
> (ii) such harvest levels are decreased at the end of each planning period if such practices cannot be successfully implemented or funds are not received to permit such practices to continue substantially as planned ....

57. The Planning Rule does not include the provision required by 16 U.S.C. §1604 g(3)(D). The omission of this statutorily required provision is arbitrary and capricious, an abuse of discretion,

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not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

TENTH CLAIM

(Violation of NFMA – Unlawful restrictions on salvage and sanitation of timber)

58. Plaintiffs reallege the allegations in paragraphs 1-22 as if fully set forth herein.

59. The NFMA, 16 U.S.C. §§ 1604 and 1611(a), contains standards for timber removal on national forests. In 16 U.S.C. §§ 1604(k), 1604(m) and 1611(b), the NFMA provides three statutory exceptions from these standards for salvage and sanitation of timber. The Planning Rule does not incorporate any of the three statutory exceptions, and in each case prohibits salvage and sanitation of timber where expressly permitted by the NFMA.

60. The NFMA, 16 U.S.C. § 1604(k), prohibits timber harvesting on lands determined by the Forest Service to be "not suited for timber production." The Planning Rule incorporates this statutory prohibition. However, the statute contains an express exception for "salvage sales or sales necessitated to protect other multiple-use values."

61. The Planning Rule does not include the statutory exception. Instead, it provides, in § 219.11(d), "No timber harvest for the purposes of timber production may occur on lands not suited for timber production." The Planning Rule defines "Timber production" to mean "[t]he purposeful growing, tending, harvesting, and regeneration of regulated crops of trees to be cut into logs, bolts, or other round sections for industrial or consumer use." Section 219.19. Under this definition, salvage or sanitation of timber could be considered "for the purposes of timber production" because it may involve "the purposeful ... harvesting ... of regulated crops of trees to be cut into logs," and would be prohibited under §219.11(d). The Planning Rule thus prohibits salvage and sanitation logging on lands not suited for timber production, contrary to the NFMA.

62. Salvage and sanitation is also permitted when stands have not yet reached their culmination of mean annual growth. NFMA limits timber harvesting to stands that "generally have

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reached the culmination of mean annual increment of growth." 16 U.S.C. § 1604(m). However, the statute exempts salvage or sanitation harvesting from this rule along with "thinning or other stand improvement measures."

63. The Planning Rule, 219.11(d)(7) does not incorporate the statutory exception. Instead, it states: "Plan components may allow for exceptions, set out in 16 U.S.C. 1604(m), only if such harvest is consistent with the other plan components of the land management plan." This measure is much narrower than the statutory exception, because unlike the statute, the Planning Rule allows salvage or sanitation harvesting in younger stands only if an adopted plan for a national forest explicitly so provides, and even then only if the harvesting is consistent with all other plan components.

64. While the NFMA, 16 U.S.C. § 1611(a), limits timber harvest each year to the annual sustained yield timber harvest calculated in the governing plan (measured on a decadal basis), the NFMA, 16 U.S.C. § 1611(b) contains an exemption allowing salvage or sanitation harvesting in excess of the approved annual sustained-yield harvest level for a national forest. The Planning Rule, 219.11(d)(6), does not contain the statutory exemption.

65. The adoption of Planning Rule provisions inconsistent with NFMA exemptions for salvage and sanitation harvesting, or the omission of such statutory exemptions from the Planning Rule, is arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

ELEVENTH CLAIM

(Violation of NFMA and APA – lack of adequate opportunity to comment on the formulation of standards, criteria, and guidelines applicable to Forest Service programs)

66. Plaintiffs reallege the allegations in paragraphs 1-22 as if fully set forth herein.

67. The NFMA requires that the Secretary shall provide the public "adequate notice and

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opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs." 16 U.S.C. § 1612(a). The APA, 5 U.S.C. § 553, imposes comparable notice and comment requirements on a rulemaking. The Planning Rule is a rule under the APA. 5 U.S.C. § 551.

68. The final rule contains three new definitions critical to forest planning that were not contained in the draft rule and were never subject to public comment – ecological integrity, riparian zone and riparian management area. The final Planning Rule for the first time defines ecological integrity as "[t]he quality or condition of an ecosystem when its dominant ecological characteristics (for example, composition, structure, function, connectivity, and species composition and diversity) occur within the natural range of variation and can withstand and recover from most perturbations imposed by natural environmental dynamics or human influence." 36 C.F.R. § 219.19.

69. Ecological integrity is a term used at significant places throughout the final forest Planning Rule and is stated as the very purpose of the Planning Rule itself: "The purpose of this part is to guide the collaborative and science-based development, amendment, and revision of land management plans that promote the ecological integrity of national forests and grasslands and other administrative units of the NFS." 36 C.F.R. § 219.1(c). The Planning Rule further provides that each forest plan "must include plan components, including standards or guidelines, to maintain or restore the ecological integrity of terrestrial and aquatic ecosystems and watersheds in the plan area . . . ." 36 C.F.R. § 219.8(a).

70. The term ecological integrity was not defined in the draft rule. The public thus had no opportunity to comment on the definition of ecological integrity, despite the fact that the concept will drive the development of all forest plans and is central to all plan components.

71. The final rule defines riparian areas as "[t]hree-dimensional ecotones of interaction that include terrestrial and aquatic ecosystems that extend down into the groundwater, up above the

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canopy, outward across the floodplain, up the near-slopes that drain to the water, laterally into the terrestrial ecosystem, and along the water course at variable widths." 36 C.F.R. § 219.19. This definition was not in the draft rule.

72. The final rule defines the riparian management zone as "[p]ortions of a watershed where riparian-dependent resources receive primary emphasis, and for which plans include plan components to maintain or restore riparian functions and ecological functions." *Id*. There was no definition of riparian management zone in the draft rule.

73. The definition of riparian areas in the Planning Rule can be construed unduly expansively and is extremely significant because streams on national forests comprise a major part of the landscape. For example, "riparian reserves" cover over 50% of the national forests in the Northwest Forest Plan area according to the Forest Service's own analysis. The ill-defined definition of riparian reserves in the Northwest Forest Plan to include "potential unstable areas" led one court to conclude that riparian reserves encompassed a vast area from ridge top to ridge top.

74. The public had no opportunity to comment on the definition of riparian areas as "[t]hree dimensional ecotones of interaction," which term is likely to encompass a vast area of the national forests where riparian resources receive primary emphasis over all other resources.

75. The definitions of ecological integrity, riparian zone and riparian management area, and the use of these terms elsewhere in the final forest Planning Rule, constitute significant standards, criteria, and guidelines applicable to Forest Service programs.

76. The significant changes to the Planning Rule after the comment period deprived the public of the opportunity to comment upon the formulation of standards, criteria, and guidelines applicable to Forest Service programs in violation of 16 U.S.C. § 1612, and also violates the rulemaking requirements of the APA, 5 U.S.C. § 553.

77. Defendants' denial of an opportunity for public comment on these key definitions

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in violation of 16 U.S.C. § 1612 and 5 U.S.C. § 553 is arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

TWELFTH CLAIM

(Violation of MUSYA and NFMA – Unlawful definition of "sustainable recreation")

78. Plaintiffs reallege the allegations in paragraphs 1-22 as if fully set forth herein.

79. In MUSYA Congress determined that outdoor recreation is one of the permissible uses of the national forest system, and one of the proper purposes of national forest management. The Planning Rule, §219.19, creates a new category of recreation – "sustainable recreation"– and defines the term as "[t]he set of recreation settings and opportunities on the National Forest System that is ecologically, economically, and socially sustainable for present and future generations." The Planning Rule, §219.8(b)(2) requires consideration of "sustainable recreation" as part of "social and economic sustainability," and in §219.10(b)(1) requires plan components only for "sustainable recreation," with no recognition of any form of recreation that does not meet the definition of "sustainable recreation." The Planning Rule does not contain any requirement for consideration of the recreation resource as a whole, although the 1982 planning rules had an entire section dedicated to that subject. Former 36 C.F.R. §219.21.

80. The Planning Rule's definition of "sustainable recreation" is significantly and unlawfully narrower than MUSYA and NFMA. While the term "socially sustainable for present and future generations" is far from clear, it appears to authorize the Forest Service to rely on public opinion to bar individual forms of outdoor recreation from the national forests if the Forest Service believes the activity is not "socially sustainable." Hunting and off-road vehicles are two forms of outdoor recreation that are often targeted by urban opponents of national forest use. The Forest Service has no legal authority to determine that any individual form of outdoor recreation is no longer a permissible use of the national forests because a segment of the population may be

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philosophically opposed to it. The "sustainable recreation" definition violates MUSYA and NFMA.

81. Defendants' limitation of outdoor recreation to a vaguely-worded subset of "sustainable recreation" in violation of MUSYA and NFMA is arbitrary and capricious, an abuse of discretion, not in accordance with law, without observance of procedure required by law, in excess of statutory authority and short of statutory right under 5 U.S.C. §706(2).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that this Court:

A. Declare that the Forest Service has violated OAA, NFMA, MUSYA and the APA.

B. Enter an order setting aside, vacating and remanding the Planning Rule.

C. Enjoin the Defendants from taking any action to begin or continue plan revisions under the invalid planning rule.

D. Award plaintiffs their attorney fees and costs under the Equal Access to Justice Act.

E. Grant plaintiffs any further relief that the Court deems just and equitable.

DATED this 13th day of August, 2012.

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