



MANTI-LA SAL NAT'L FOREST
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05-04-00-0015

**BEFORE THE REGIONAL FORESTER OF REGION
FOUR OF THE UNITED STATES FOREST SERVICE**

**In Re: Appeal of Decision Notice/
Finding of No Significant Impact
And Final Environmental Assessment
Prepared for the Crandall Canon Mine
Modification of Federal Coal Lease
UTU-6882 on the Manti-
La Sal National Forest**)
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**UTAH ENVIRONMENTAL CONGRESS
1817 South Main, Suite 10
Salt Lake City, UT 84115**

APPELLANT

APPEAL NO. _____

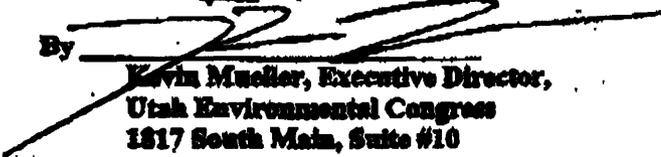
INTRODUCTION

STATEMENT OF FACTS

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REQUEST FOR RELIEF

DATED this 14 day of January, 2005

By 

**Kevin Mueller, Executive Director,
Utah Environmental Congress
1817 South Main, Suite #10
Salt Lake City, UT 84115
(801) 466-4110**

on behalf of appellant

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Introduction

NOTICE IS HEREBY GIVEN that the Utah Environmental Congress (UEC) appeals pursuant to 36 CFR § 215.7 to the Regional Forester of Region Four from the Decision Notice/Finding of No Significant Impact and associated Final Environmental Assessment on the Manti-La Sal National Forest signed by Forest Supervisor Alice B. Carlton on November 23, 2004.

The UEC is a non-profit organization dedicated to maintaining, protecting, and restoring the native ecosystems of Utah. The UEC has an organizational interest in the proper and lawful management of National Forests in Utah, including the Manti-La Sal National Forest. The UEC's members, staff, and board of directors participate in a wide range of recreational activities on the Manti-La Sal National Forest, including the area in and surrounding the coal lease and mine expansion on the roadless land west of Huntington Creek on the Wasatch Plateau.

The UEC represents 240 individual members, 26 organizations, and 46 businesses representing approximately 30,000 people, many of whom frequently use, recreate, hunt, visit and otherwise enjoy this project area and effects area on the Manti-La Sal National Forest, and have a direct interest in its management.

The UEC claims standing to participate in the public land decision-making process on the grounds that it has been involved in forest management issues since its founding. Our members have hiked, fished, hunted deer and elk, recreated, enjoyed, and photographed the Manti-La Sal National Forest, including the project and affected area, located about ¼ mile upstream of Huntington Creek, in Huntington canyon. Our collective membership includes professional photography businesses and freelance photographers who make their living in part by photographing Utah's National Forests, including the Wasatch Plateau portion of the Manti-La Sal National Forest. The direct and indirect impacts associated with this decision detract from the rugged, natural splendor, biodiversity, and wilderness values that make these lands appealing to both professional photographers and our members who find enjoyment from, fish, and hunt in the project area and affected portion of the Huntington Creek watershed. Procedural harm also resulted from the signing of this decision document.

In addition, the UEC's members are taxpayers that are required to pay for the activities, monitoring, and mitigation that would be needed because of the decision approved in the November 23, 2004 Decision Notice/Finding of No Significant Impact (DN/FONSI). The irretrievable commitments of financial resources associated with this project are also borne by the American people as a whole. The UEC claims partial ownership of the public lands covered by this decision and consequently has legal standing to participate in the process and challenge those decisions it finds legally unacceptable.

Appellant is appealing the November 23, 2004 DN/FONSI and supporting Final Environmental Assessment on the grounds the decision is legally indefensible. Appellant

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argues that the Manti-La Sal National Forest (MLSNF) has violated the National Environmental Policy Act (NEPA), the Appeals Reform Act (ARA), the National Forest Management Act (NFMA) as well as the Administrative Procedures Act (APA).

Appellant desires and will request relief in the form of a reversal of the decision made to implement Alternative 3 in the DN/FONSI signed by Forest Supervisor Alice B. Carlton on November 23, 2004.

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Statement of Facts

A Final Environmental Assessment (EA) and DN/FONSI has been prepared to approve a 120 acre Federal Coal Lease modification (addition) to UTU-68082. The addition to the existing coal lease will be subsidence mined by Garwall company. The estimated irreversible subsidence and loss of elevation in parts of the area on the surface is about 3.5 feet.

The modification area is in part of T 15 S, R 7 E, section 32. Refer to the maps in the Final EA for more detail.

The project was scoped with a Legal Notice of opportunity to submit substantive comment on the Proposed Action from May 4 to July 8, 2004. The Final EA included three alternatives. Alternative one is the no action alternative. Alternative 2 is the Proposed Action. Alternative three is another action alternative. Alternative 3 was not provided for public comment, but it was selected in the DN/FONSI. Wetlands, riparian areas, intermittent streams, ephemeral streams will be impacted.¹ Five springs/seeps will be impacted, reducing their flow by up to 5 gpm. Castlegate sandstone is on part of the surface, and some escarpment failure is a possibility. Most of the area to be subsided is in the black hawk formation, and this is where the springs and seeps are located.

The location is about 5. to 1.0 mile up-slope from Huntington creek, and the coal lease modification area includes a portion of the streams in shingle canyon and blind canyon (Final EA page 16-map). Forests on the surface consist of mostly Aspen and grass/sage meadow habitat. There also is mixed conifer forest with some Douglas fir.

The appellant has participated in the public comment and involvement process at all points in this process. This consisted of one opportunity to comment pursuant to the ARA regulations on the Proposed Action. The Legal Notice that the appellant responded to (attachment 1) was short. The only really site-specific information in the Legal Notice was the legal description of the location of the Proposed Action. That legal description was not correct. It put the Proposed Action six miles south of the actions analyzed in the Final EA, in Crandall canyon. The issues raised in this appeal were raised in comments. However there was not a response to all of the appellant's comments in the Final EA.

Appellant was not permitted to comment on any part of the EA, even though that was requested. The Final EA (incorporated by reference) was provided to the appellant a couple weeks into the appeal period. All of the appellant's comments are incorporated by reference.

This DN/FONSI was published in the Sun Advocate, Newspaper Of Record in a Legal Notice on November 30, 2004.

¹ Final EA page 11

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ARGUMENTS

The ensuing arguments will demonstrate the Manti-La Sal National Forest (MLSNF) has violated National Environmental Policy Act (NEPA), the Appeals Reform Act (ARA), the National Forest Management Act (NFMA), its Forest Plan as well as the Administrative Procedures Act (APA).

I. The Manti-La Sal National Forest (MLSNF) violated the National Environmental Policy Act (NEPA) by failing to make NEPA's Environmental Assessment, with its summary of the scientific analysis of the effects of the range of alternatives, available for public review and comment before the decision was made.

NEPA's mandated range of alternatives, scientific analysis, environmental information, and summary of the analysis of the effects of this Modification of Federal Coal Lease UTU-68082, Crandall Canyon Mine project (hereafter called "this Project") are located in the Final Environmental Assessment. The EA is the central Environmental Document prepared for the NEPA analysis of the effects of the project. NEPA regulations require circulation of the environmental information, scientific analysis, and summary of the analysis of the direct, indirect and cumulative effects of the range of alternatives contained in the EA for public circulation and comment at the same time, and before a decision is made. Appellant requested this opportunity in comments. Appellant was also informed by Carl Boyer on July second, 2014 (contact person listed in the Legal Notice of opportunity to comment on the Proposed Action) that a second public comment period would be provided on some form of the EA before the Final EA and DN/FONSI is made public (see comments and project record of this phone conversation). Appellant hesitated to take Mr. Boyer on his word, and that opportunity to comment on the EA did not happen. By failing to provide the EA for this Project for public review and comment before a decision was made (with the signing of the DN/FONSI), the MLSNF violated NEPA.

"Environmental Document" is defined at 40 CFR§1508.10 to include not just the Environmental Impact Statement, but also NEPA's document, "specified in § 1508.9 (environmental assessment)." 40 CFR§1508.9 states that the Environmental Assessment, "(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2) (E), of the environmental impacts of the proposed action and alternatives, and a listing of the agencies and persons consulted." (Emphasis added.)

The NEPA regulations mandate that the analysis of the environmental impacts/effects² shall be circulated for public review. 40 CFR § 1501.2 states, "Each agency shall:" ... "(b) Identify environmental effects and values in adequate detail so they can be compared to economic and technical analyses. Environmental documents and appropriate

² 40 CFR§1508.8 states that the words, "Effects and impacts as used in these regulations are synonymous."

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analyses shall be circulated and reviewed at the same time as other planning documents" (Emphasis added.)

Furthermore, "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 CFR § 1500.1(b) (Emphasis added.) The scientific analysis, environmental information, and analysis of the effects of the range of alternatives is clearly mandated by NEPA to be made available to the public for review and comment before decisions have been made. The EA is the central Environmental Document for this Project. It contains the environmental information, scientific analysis and discussion of the effects of the range of alternatives that the NEPA regulations require to be circulated for public review and comment before any decisions are made. By failing to circulate the Environmental Assessment for this project for public comment before the decision was made, the MLSNF violated NEPA. The details below outline the extent of this NEPA violation.

Legal Notice of the opportunity to comment on the Proposed Action was published in the Newspaper of Record on May 4, 2004 (see attachment 1). The Legal Notice description of the proposed action states, "The proposed lease modification area involves national forest System lands administered by the Manti-La Sal National Forest in Emery County, Utah described as follows: T. 16 S., R 17 E., SLM, UT Section 32, W1/2 NW ¼; NW 1/4 SW ¼. Gerwall's application would add the described lands to the current lease to acquire additional coal reserves for their Crandall Canyon Mine that may otherwise never be mined." In response to this Legal Notice, appellant submitted comments on June 2, 2004 (Incorporated by reference). While preparing these comments, appellant contacted Carl Boyer (the contact person listed in the Legal Notice for more information) to ask for additional information describing all of the proposed action. Mr. Boyer explained that this is "just scoping" and that the Forest will provide an opportunity to comment on the EA before any decisions are made. (see appellant's comment of 6-2-2004). Appellant also told Mr. Boyer that it was the UBC's understanding that Michael Davis' policy was to not provide any version of the EA for public review until after a decision document is signed. Mr. Boyer did not seem to be aware of that, but insisted this was "just scoping" and that an opportunity to comment on the EA would be provided.

There was no additional comment opportunity. Appellant also subsequently learned that the description of the Proposed Action that was provided to the public in the Legal Notice was incorrect. The proposed action described in the Legal Notice is six miles south of the actual action. The evidence is below:

The Legal Notice of opportunity to comment on the Proposed Action (attachment 1) states that the Proposed Action is located at T. 16 S., R 17 E., SLM, UT Section 32, W1/2 NW ¼; NW 1/4 SW ¼. Arbitrarily, page 1 of the EA (as well as page 1 of the DN/FONSI) disclose that the Proposed Action is actually located six miles to the north in township 15 south. The Proposed Action provided to the public in the Newspaper of Record was in the Left Fork of Rilda Canyon, whereas the Proposed Action analyzed in

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the EA is in Blind and Shingle Canyons to the north. Different issues pertain to these different locations such as: Blind and Shingle Canyons are in our citizen's wilderness proposal and Rilda Canyon is not, there are different springs/scoops and streams in Rilda Canyon, the geology is somewhat different, and the habitats are different. Furthermore, Opportunity to comment on this proposed action in Shingle and Blind Canyons was not granted. As stated in the Final EA, the comment period closed on July 8. Furthermore, 36 CFR§215.6 states that there shall be no extensions of the 30 day comment period. This in and of itself violates NEPA because the Legal Notice of opportunity to comment on the Proposed Action was for an area different from that analyzed in the Final EA and DN/RONSI.

In comments appellant also raised this following issue:

"Disclosure of Environmental Documents is now inadequate, and the public's ability to provide substantive comments on the effects of the proposed action and associated range of alternatives has been effectively denied. In projects such as this, the EA is the central environmental document that analyzes and assesses the degree of effect that the proposed action and alternatives would have on the environment." ... "By withholding the EA until after the decision has been made, the public and other Agencies will no longer be able to provide substantive comment on (or even know) how the proposed action and alternatives may affect the multiple resources and the environment until after the decision has been made and implementation may already be underway."

There was no response to this issue, and the MLSNF chose to not provide any of the EA to appellant until about 2 weeks after the Decision Notice was signed. The EA received was for an action in a location that is six miles away from that which was noticed for comment in the Newspaper of Record. Details on the several NEPA violations that resulted are below.

A. Failure to provide the EA for comment before a decision was made violated NEPA:

Failure to circulate the EA, the central Environmental Document prepared for this NEPA analysis, to appellant for review and comment before a decision was made constitutes a violation of NEPA. In light of the fact that Carl Boyer informed the appellant that he expected a public comment period to be provided on the EA before a decision is made, when no opportunity was provided indicates that this is a particularly arbitrary and capricious violation of the NEPA. The Forest failed to implement NEPA procedures and involve the public in good faith. NEPA is clear in outlining the contents of its Environmental Assessment. The Environmental Assessment, "(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2) (E), of the environmental impacts of the proposed action and alternatives, and a listing of the agencies and persons consulted."³ The Legal Notice of opportunity to comment on the Proposed Action (attachment 1) does not constitute NEPA's Environmental Assessment

³ 40 CFR§1508.9

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because it did not contain: (1) a description of the *entire* proposed action, (2) a discussion or description of the alternatives required by section 102(2)(E) [of the Act], (3) a discussion or analysis of the environmental impacts of the proposed action and alternatives and, (4) contained a different location for the Proposed Action that was actually the subject of this project. By neglecting to meet NEPA's mandate to circulate the Environmental Assessment (which is the Environmental Document prepared to summarize and disclose environmental information and scientific analysis the effects of this Project) to the public and interested persons for review and comment and before the decision was made, the MLSNF has violated NEPA. 40 CFR § 1500.1(b) states, "Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents" ... "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." Supervisor Carlton failed to act in accordance with this clear NEPA mandate. This is especially clear given that: (1) The description of the Proposed Action in the Legal Notice indicated the project was 6 miles south from the Proposed Action that was the subject of the Final EA and, (2) the Proposed Action (alternative 2 in the Final EA) was not selected in the DN/FONSI. This means that the Forest failed to provide opportunity to comment on both the Proposed Action that is analyzed in the Final EA and also filed to provide opportunity to comment on the alternative that was selected in the DN/FONSI.

B. Failure to: (1) allow comment on integral components of the proposed action and, (2) failure to provide the EA until half a month after the FONSI was circulated constitutes two additional violations of NEPA:

The Forest failed to: (1) provide a complete description of basic, integral components of the proposed action for public comment and, (2) waited more than two weeks after making a decision before providing this information (contained only in the Final EA) to the appellant. These two events each constitute additional violations of the NEPA.

1. Failure to allow comment on integral components of the proposed action for comment:

The Proposed Action that is outlined in the Final EA includes significance-reducing mitigation measures in the form of stipulations, and alternative 3 (chosen in the DN/FONSI) incorporates an additional mitigation measure "designed to lessen anticipated environmental effects." Arbitrarily, none of these basic integral components of the Proposed Action were disclosed to the public until after a decision was made with the signing of the Decision Notice. Failure to circulate an accurate description of basic, integral significance reducing components of the proposed action or the selected action for public review and comment before a decision was made is arbitrary, capricious, and constitutes another violation of NEPA. Appellant raised this issue in comments. In

* Final EA page 10

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response the Forest states in the Final EA, "It is Forest Service policy to develop stipulations and mitigations during the NEPA process; therefore, the Forest Service does not identify mitigations at the time of scoping."³ Appellant agrees with the response. Mitigation measures should be developed in the NEPA process. However, the Forest failed to make diligent efforts to involve the public (including appellant) in implementing its NEPA procedures for this Project, as evidenced by the fact that the selected action, including its stipulations or mitigations developed in the NEPA process was not made available for comment. It also was not even made public until the signing of the DN/FONSI. This is in violation of NEPA and 36 CFR§1506.6.

2. Failure to provide the EA in a timely manner even after issuing the DN/FONSI:

The Forest did not provide the EA to appellant until at least 2 weeks after the Decision Notice was signed. This literally shortened the appeal period from the expected 45 days to about 30 days, and is in violation of NEPA and the Forest Service's implementing procedures in its FSM/FSH. Appellant asserts an additional violation of NEPA has resulted from the failure of the MLSNF to provide the Final EA for this Project to appellant as early as practicable and in a timely manner - even after the decision was made.

40 CFR § 1500.1(b) states, "Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents" ... "The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." Furthermore, 40 CFR § 1506.6 states, "Public involvement. Agencies shall ... (a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures. (b) Provide public notice of NEPA related hearing, public meetings and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." CEQ's 40 Most Asked Questions (Question 38) clarify this by stating, "Section 1506.6 requires agencies to involve the public in implementing their NEPA procedures, and this includes public involvement in the preparation of EAs and FONSI's." By denying the public access to read and review the environmental information and analysis contained in the Environmental Assessment until over two weeks after the FONSI and DN had been circulated, the MLSNF has violated the requirements set forth in these NEPA regulations. This is especially arbitrary in light of the fact that appellant was a known interested party who had asked the Forest verbally and in writing to provide all of NEPA's documents, including the EA as soon as they were available.

All of the above asserted violations of NEPA and its binding implementing regulations are specific to the NEPA. Appellant's asserted NEPA violations in this section of this administrative appeal have absolutely nothing to do with any portion the Appeals Reform Act (ARA) or its 2003 regulations at 36 CFR§215, including 36 CFR§215.5, §215.6 because these are violations of the NEPA, not the ARA regulations. Having established

³ Final EA page 37

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this, appellant reminds the Appeal Reviewing and Deciding Officers that the 2003 ARA regulations at 36 CFR § 215 do not trump or invalidate the Forest Service's obligation to comply with the CEQ's regulations implementing NEPA (40 CFR § 1500-1508). In fact, 36 CFR § 215.1(b) states, "The rules of this part complement, but do not replace, numerous other opportunities to participate in and influence the agency's project and activity planning, such as those provided by the National Environmental Policy Act of 1969 (NEPA) implementing regulations and procedures at 40 CFR parts 1500-1508..." (Emphasis added.) Conversely, NEPA and its implementing regulations are binding on the Forest Service. 40 CFR § 1507.1 states, "All agencies of the Federal Government shall comply with these regulations."

In conclusion, taken together, the NEPA regulations at:

- 40 CFR § 1500.1(b) ("Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents" ... "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."),
- § 1500.2(d) ("encourage and facilitate public involvement in decisions..."),
- § 1501.2(b) ("Environmental documents and appropriate analyses shall be circulated and reviewed at the same time as other planning documents."),
- § 1501.4(b) ("The agency shall involve environmental agencies, applicants, and the public to the extent practicable in preparing assessments required by § 1508.9(a)(1)" and,
- § 1506.6 ("Agencies shall ... Make diligent efforts to involve the public in preparing and implementing their NEPA procedures"

... set forth the unambiguous mandate that the central Environmental Document⁶ that is prepared to analyze the effects of this Project that contains the scientific analysis, environmental information, description of the range of alternatives and analysis of the effects of the alternatives⁷ is the EA. Furthermore, NEPA directs that the EA shall be diligently circulated by the Forest Service as early as practicable in the NEPA process for comment by interested parties, Agencies, and those who requested it before⁸ a decision is made. By making the contents of the Environmental Assessment available only after the decision was made, the Forest violated NEPA. Further NEPA violations were incurred

⁶ "Environmental Document includes the documents specified in § 1508.9 (environmental assessment)" 40 CFR § 1508.10

⁷ "Environmental assessment" ... "(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2) (B), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted." 40 CFR § 1508.9

⁸ "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 CFR § 1500.1(b) (Emphasis added.)

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Skinner, 907 F.2d 23, 24 (2d Cir. 1990) (per curiam); see also Hanly v. Kleindienst, 471 F.2d 823, 836 (2d Cir. 1972) ("Before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision.")

The above situation applies directly to this Project because the Forest violated NEPA by denying appellant's right under NEPA to see and comment on the Environmental Assessment and the environmental information and scientific analysis of the effects of the range of alternatives contained therein before a decision was signed.

In regards to the argument that the Responsible Official violated NEPA by failing to provide appellant the EA until over half a month after making her decision, and the courts have also ruled on this issue. NEPA requires federal agencies to in the fullest extent possible, "[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment." 40 CFR. § 1500.2(d); see also *National Park and Conservation Ass'n v. Federal Aviation Admin.*, 998 F.2d 1523, 1531 (10th Cir. 1993) ("Congress, through . . . NEPA, has determined that the public has a right to participate in actions affecting public lands."); *Sierra Club v. Hodel*, 848 F.2d 1068, 1093 (10th Cir. 1988) (NEPA "provides for broad-based participation" and requires "a cross-pollination of views."). Specifically, NEPA's public participation regulations require the Forest Service to "(a) [m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures" and to "(b) [p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected." 40 CFR. § 1506.6(b). The Tenth Circuit further held that the regulations (cited above) implementing this mandate require "that agencies "shall involve environmental agencies, applicants, and the public, to the extent practicable, in preparing [environmental] assessments." *Sierra Club v. Hodel*, 848 F.2d at 1093 (quoting 40 CFR. § 1501.4(b)).

In light of all of the above NEPA violations and in light of the fact that 40 CFR § 1507.1 states, "All agencies of the Federal Government shall comply with these regulations." It is clear that this decision signed by Supervisor Carlton to implement alternative 3 resulted in multiple arbitrary and capricious violations of the NEPA, and therefore also violated the APA.

II. The Manti-La Sal National Forest violated the National Forest Management Act (NFMA) requirements for Management Indicator Species and Diversity monitoring.

The NFMA and the MLSNF Forest Plan were violated as a result of the failure to: (1) gather required quantitative Management Indicator Species (MIS) population trend data and, (2) determine the relationship of that quantitative MIS population trend data to management activities or habitat changes.

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The NFMA regulations at 36 C.F.R. § 219.12(d) require that, "each Forest Supervisor shall obtain and keep current inventory data appropriate for planning and managing the resources under his or her administrative jurisdiction." In addition, "population trends of the management indicator species will be monitored and relationships to habitat changes determined." 36 C.F.R. § 219.19 requires the Forest Service to monitor the population of MIS. 36 C.F.R. § 219.19 requires the Forest Service to monitor the relationship of MIS to habitat changes. 36 C.F.R. § 219.26 requires the Forest Service to gather and keep quantitative data for MIS. 36 C.F.R. § 219.26 also requires the Forest Service to use quantitative data to assess the Forest Plan's effects on diversity: "Forest planning shall provide for diversity of plant and animal communities and tree species consistent with the overall multiple use objectives of the planning area. Such diversity shall be considered throughout the planning process. Inventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition." The MLSNP has failed to meet this Forest Plan and NFMA requirement for its macroinvertebrates MIS and golden Eagle MIS because quantitative population trend data for these MIS has not been maintained and they have not been used to determine effects of this forest management activity or habitat changes on those MIS population trends. This lack of data for certain MIS exists forest-wide and/or at the project level. The Forest Service must collect population trend data for MIS at the project level. See *Colo. Wild v. United States Forest Serv.*, 299 F. Supp. 2d 1184, 1188 (D. Colo. 2004). The Federal District Court of Utah has ruled against this Forest for violating NFMA's MIS monitoring mandate:

Section 219.19 specifically states that "[p]opulation trends of the management indicator species will be monitored and relationships to habitat changes determined." 36 C.F.R. 219.19(a) (6). Section 219.26 similarly requires the Forest Service to use quantitative data to measure a project's impact on forest diversity. In reviewing these regulations, the court agrees with the analysis of the Martin court:

MIS are proxies used to measure the effects of management strategies on Forest Diversity; Section 219.19 requires that the Forest Service monitor their relationship to habitat changes. Section 219.26 requires the Forest Service to use quantitative inventory data to assess the Forest Plan's effects on diversity. If Section 219.19 mandates that MIS serve as the means through which to measure the Forest Plan's impact on diversity and Section 219.26 dictates that quantitative data be used to measure the Forest Plan's impact on diversity, then, taken together, the two regulations require the Forest Service to gather quantitative data on MIS and use it to measure the impact of habitat changes on the Forest's diversity. To read the regulations otherwise would be to render one or the other meaningless..." Martin, 168 F.3d at 7. Utah Environmental Congress v. Zieroth, 190 F. Supp. 2d 1265, 1271 (D. Utah 2001)

The 10th Circuit Court of Appeals also ruled on this issue in 2004. This Circuit Court ruled that the NFMA regulations do apply to forest management activities implementing the Forest Plan, and that the collection and analysis of hard quantitative MIS population

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trend data is mandated before approving an activity such as this Project that implements the Forest Plan:

In keeping with the reasoning of the Eleventh Circuit and the district courts of this circuit, we conclude that § 219.19 requires the Forest Service to use actual, quantitative population data to effectuate its MIS monitoring obligations. Section 219.19 mandates that as part of forest planning, "[f]ish and wildlife habitat shall be managed to maintain viable populations of existing native and desired nonnative vertebrate species." Further, forest management "[p]lanning alternatives shall be stated and evaluated in terms of both amount and quality of habitat and of animal population trends of the management indicator species," § 219.19(a)(2); similarly, "[p]opulation trends of the management indicator species will be monitored and relationships to habitat changes determined," § 219.19(a)(6). Plainly the regulations require that the Forest Service monitor population trends of the MIS in order to evaluate the effects of forest management activities on the MIS and the viability of desired fish and wildlife populations in the forest more generally.

Our reading of the requirements of § 219.19 is strengthened by § 219.26, which provides that to ensure diversity of plant and animals in forest planning inventories which "include quantitative data making possible the evaluation of diversity in terms of its prior and present condition" shall be taken. We agree with the Eleventh Circuit in Martin that these two sections of regulation 219 "are harmonious when read together." Martin, 168 F.3d at 7. Because,

MIS are proxies used to measure the effects of management strategies on Forest diversity . . . [and because §] 219.26 requires the Forest Service to use quantitative inventory data to assess the Forest Plan's effects on diversity. . . . then, taken together, the two regulations require the Forest Service to gather quantitative data on MIS and use it to measure the impact of habitat changes on the Forest's diversity. Id.

Similarly, the court in Forest Guardians reasoned that the language of § 219.19 required the Forest Service "to acquire and analyze hard population data of its selected management indicator species" before approving a timber sale, because these regulations clearly preclude reliance "solely on habitat trend data as a proxy for population data or to extrapolate population trends." 180 F. Supp. 2d at 1281. Likewise, we agree that a reading of § 219.19 as requiring only habitat analysis is "inconsistent with the regulation's plain meaning," Yustler, 994 F.2d at 738. Accordingly, we conclude that in order to effectuate its MIS monitoring duties under the language of its regulations, the Forest Service must gather quantitative data on actual MIS populations that allows it to estimate the effects of any forest management activities on the animal population trends, and determine the relationship between management activities and population trend changes. Utah Environmental Congress v. Bosworth, 372 F.3d 1219, 1230 (10th Cir. 2004). (Emphasis added.)

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Appellant has found that the Forest has failed to meet its mandate under the Forest Plan and NFMA to collect required quantitative population trend data and determine relationships between management activities or habitat changes on quantitative population trend changes for macroinvertebrates MIS and golden eagle MIS. The evidence is below.

Macroinvertebrates

The MLSNF Forest Plan page IV-6 identifies macroinvertebrates as a Management Indicator Species (MIS). Forest Plan FEIS page III-34 states that the macroinvertebrates MIS, "are ecological indicator species in aquatic habitats and the ability of that habitat to support fisheries" ... "Aquatic habitat on the Forest consists of 680 miles of stream fisheries and 1,765 acres of lakes and reservoirs. Macroinvertebrates are found in these areas" ... "Changes in aquatic habitats, resulting from activities in the terrestrial habitat, are rapidly seen through changes in the species composition and biomass of macroinvertebrates." Forest Plan page II-34 states, "The following list of macroinvertebrate species is considered minimal to accomplish any meaningful assessment of the aquatic ecosystem, and may be utilized essentially as one MIS." The list identified includes epeorus species, zapada species, ephemera species, ephemera inermis, chronomidae species-Diperan. Forest Plan page IV-6 indicates that BCI and HCI as the quantitative data collection technique for establishing the MIS trend data, and that it is to be collected "for baseline stations or as needed for select project activities. A twenty percent variation would cause additional evaluation and/or a change in management direction. Additionally, Forest Plan Standard #1 for the macroinvertebrates MIS states, "Improve to and maintain a good or above Diversity Index (DAT) of 11-17, a standing crop of 1.6-4.0, and a Biotic Condition Index (BCI) of 75 or above"⁹ Given that the 10th Circuit Court of Appeals has ruled, "[I]n order to effectuate its MIS monitoring duties under the language of its regulations, the Forest Service must gather quantitative data on actual MIS populations that allows it to estimate the effects of any forest management activities on the animal population trends, and determine the relationship between management activities and population trend changes (Utah Environmental Congress v. Bosworth, 372 F.3d 1219, 1230 [10th Cir. 2004]), it is clear that the use of quantitative population trend data in the form of DAT, BCI and HCI data for this MIS is required to be analyzed in this affected area before approving this forest management activity that implements the Forest Plan. This has not happened.

The analysis of the current trends and the effects of this forest management activity on the trend data of this MIS consist entirely of a generic description of what macroinvertebrates are, and could have been taken directly out of a text book. The Final EA does mention that some survey was done early in 2004, but that data from one point in time is not presented, and it clearly is not quantitative trend data. There is no site specific presentation or analysis of the population trend data of this MIS in the Forest or project area. Appellant believes that the Final EA (and BE/BA) lacks this presentation and use of population trend data for this MIS because the Forest has simply failed to gather the

⁹ Forest Plan page III-20

mandated population trend data for this MIS. Because it has not been collected the data, it was not able to analyze the required DAT, BCI, and HCI data for this MIS. It is undisputed that BCI data, mandated by the Forest Plan for this MIS, is not only a highly reliable indicator of changes in aquatic habitat that result from adjacent terrestrial management activities, but it is also easy data to gather on a regular basis.¹⁰

It is important to note that the action alternatives would involve some impacts/effects to habitat for this MIS. The approved activities will disturb soils in the affected area. This is obvious given that the soils that compose the surface will be lowered in elevation,¹¹ possibly 3.5 feet in areas where the coal seam is as thin as 5 feet.¹² This drop in soil elevation will not be even, and it will not be at the same time. This is the nature of long wall mining with pillars between the long wall panels that are not removed at the same time. There are five springs/seeps located in the areas approved to be subsided that have less than 300 feet of overburden. Small riparian areas could be associated with these springs.¹³ Surface subsidence impacts/effects that could affect the flow of water to these springs/seeps are associated with similar projects of this type on the Wasatch Plateau.¹⁴ Discharge rates of these springs range from 0-10 gpm, with the action alternatives resulting in the loss of as much as 5 gpm flow in the springs. All of this means that there are likely to be some effects to the soils that may cause increases in sedimentation and other changes in the MIS habitat. Furthermore, "Subsidence could result in tension cracking and possible separation of blocks from the Castle Gate escarpment."¹⁵ This further indicates that additional erosion may result from the action alternatives that would change the macroinvertebrates MIS habitat. In light of this, the Final EA and BE/BA fail to use quantitative macroinvertebrates MIS population and trend data and analyze possible effects to the population trends of this MIS.

It is important to note that the Final EA discloses that the Forest knows that there are some types of macroinvertebrates MIS in the potential affected areas inside the lease modification area.¹⁶ However, absolutely no quantitative MIS trend data is presented or used anywhere in the Final EA or BE/BA and wildlife resources report. Indeed, results of the UEC's yearly FOIA requests for this data since 1999 confirms that the Forest has not collected the quantitative macroinvertebrates MIS trend data in this area. There are a few samples that have been collected in other unaffected parts of the Forest (generally 10-plus years out of date in the central Wasatch Plateau), but no quantitative macroinvertebrates MIS trend data has been collected in this affected area. Furthermore, the Forest Service must collect population trend data for MIS at the project level. See *Colo. Wild v. United States Forest Serv.*, 299 F. Supp. 2d 1184, 1188 (D. Colo. 2004).

¹⁰ Forest Plan FEIS page III-34. This is also an accepted fact that has been supported time and time again across the American West, and across the world more generally.

¹¹ DNFONSI page 7

¹² Final EA page 33

¹³ Final EA page 15

¹⁴ *Ibid*

¹⁵ Final EA page 17

¹⁶ Final EA page 23

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The macroinvertebrates MIS in this area are not elusive, hard to find, or hard to collect. The Forest has simply failed to gather the legally required quantitative population trend data for this MIS and use that data in the analysis of this (soil-disturbing) project that implements the Forest Plan. Given that the 10th Circuit has ruled that, "[T]he Forest Service must gather quantitative data on actual MIS populations that allows it to estimate the effects of any forest management activities on the animal population trends, and determine the relationship between management activities and population trend changes." (Utah Environmental Congress v. Bosworth, 2004 U.S. App. LEXIS 12441 (10th Cir. 2004)) and the Forest has failed to gather quantitative trend data (as specified in the Forest Plan as BCI, DAT, and HCI indices trends), appellant concludes that the Manti-La Sal National Forest decision approving this project is arbitrary, and in violation of the NFMA as well as its own Forest Plan.

Golden eagle

The Forest plan identifies "active nest site" surveys as the monitoring method to establish the quantitative population trend of this MIS. Neither the BE/EA nor the analysis in the Final EA present or use any quantitative population trend data for this MIS, as specified in the Forest Plan. Chapter 3 of the Final EA discloses that the area with its steep slopes and escarpments of castellate sandstone, is golden eagle MIS habitat. The irreversible subsidence effects of both alternatives that are disclosed in the Final EA and DN/FONSI indicate that there will be changes to this MIS habitat from this action. Furthermore, even the chosen alternative may result in cracking and failure of sandstone escarpments in the area. In fact, the effects to escarpment are the same in both action alternatives. In light of this it is clear that this forest management activity may result in changes to the habitat for this MIS. Arbitrarily, no quantitative golden eagle MIS population trend data was presented or analyzed in the Environmental Document that the DN/FONSI is based upon. This is in violation of the Forest Plan and NFMA.

Appellant also asserts that the Forest has failed to meet its mandate under NFMA to try to determine the relationship between management activities and quantitative MIS population trend changes for both the macroinvertebrates and golden eagle MIS.

As a result of these two separate Forest Plan violations, one for the macroinvertebrates MIS and one for the golden eagle MIS, this action and decision is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, and without observance of procedure required by law. This is in violation of the APA, 5 U.S.C. § 706(2). The failure and refusal to comply with the regulations and obtain the data constitutes agency action unlawfully withheld or unreasonably delayed, in violation of the APA, 5 U.S.C. § 706(1).

III. The Manti-La Sal National Forest violated the NEPA by failing to prepare an adequate analysis of the cumulative impacts (effects).

"Cumulative impact" is defined in NEPA as, "the impact on the environment which results from the incremental impact of the action when added to other past, present, and

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reasonably foreseeable future action regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time."¹⁷

The Courts are clear on what they expect from Agencies when preparing legally sufficient, meaningful, cumulative effects analysis. A "meaningful" analysis of cumulative effects, "should identify (1) the area in which effects of the proposed project will be felt; (2) the impacts that are expected in the area from the proposed project; (3) other actions- past, proposed, and reasonably foreseeable - that have had or are expected to have impacts on the same area; (4) the impacts or expected impacts from these other actions; and (5) the overall impact that can be expected if the individual impacts are allowed to accumulate."¹⁸

"Significance" is defined by NEPA as an action that includes: "impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial"; 40 C.F.R. §1508.27(b)(1), "Unique characteristics of the geographic area such as proximity to.....ecologically critical areas", 40 C.F.R. §1508.27(b)(3) "The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks", 40 C.F.R. §1508.27(b)(5) "Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." 40 C.F.R. §1508.27(b)(7). "Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment" 40 C.F.R. §1508.27(b)(10).

This project lacks a meaningful analysis of the cumulative impacts by failing to disclose, list and describe how the effects of each past, present and reasonably foreseeable project may or may not contribute to the current degree of effects that cumulatively, may be significant. Conducting meaningful cumulative effects analyses is critical in EAs because impacts from this project that may not be significant alone may result in cumulatively "significant" when considered in light of a meaningful cumulative effects analysis. Without a comprehensive, meaningful and accurate cumulative effects analysis, an EA is insufficient under NEPA, and the resulting FONSI is indefensible. The Federal Courts have been clear in confirming that FONSI based on an EA with insufficient cumulative effects analyses are insufficient under NEPA.

A federal agency's Environmental Assessment "must give a realistic evaluation of the total impacts and cannot isolate a proposed project, viewing it in a vacuum." ... "[E]ven a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory ... may represent the straw that breaks the back of the environmental camel." *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339, 342 (D.C. Cir. 2002). "To support an EA/FONSI, an agency must produce 'a convincing statement of reasons to explain why a project's

¹⁷ 40 CFR 1508.7

¹⁸ *City of Council Bluffs v. U.S. Department of Transportation*, 95 F. 2d 892, 902 (9th Cir. 1996).

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impacts are insignificant." *Pacific Marine Conservation Council, Inc., v. Evans*, 200 F.Supp.2d 1194, 1204 (N.D.Cal. 2002). Furthermore, an EA is inadequate if it is "couched in very general and vague terms," if it does not contain "enough evidence or analysis ... to determine whether an EIS is necessary," or if it spends "more time describing the proposed alternative and the requirements of NEPA than [it does] analyzing the proposed alternative and complying with the requirements of NEPA." *American Oceans Campaign v. Daley*, 183 F.Supp.2d 1, 20 (D.D.C. 2000).

Furthermore, in *Lands Council V. Powell* (No. 03-35640 C.C. No. CV-02-00517-EJL, 9th Cir, 2004, the Circuit Court of Appeals found that cumulative effects analysis is insufficient when it:

"[C]ontains only vague discussion of the general impact of prior timber harvesting, and no discussion of the environmental impact from past projects on an individual basis, which might have informed analysis about alternatives presented for the current project" it is, "inadequate" because the cumulative effects analysis, "Must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment. ...Although the agency acknowledged broad environmental harms from prior harvesting, the data disclosed would not aid the public in assessing whether one form or another of harvest would assist the planned forest restoration with minimal environmental harm. For the public and agency personnel to adequately evaluate the cumulative effects of past timber harvests, the Final Environmental Impact Statement should have provided adequate data of the time, type, place, and scale of past timber harvests and should have explained in sufficient detail how different project plans and harvest methods affected the environment. The Forest Service did not do this, and NEPA requires otherwise."

Here, appellant argues that the MLSNF failed to adequately catalogue the past, present and reasonably foreseeable impacts, describe the current effects from each, and then evaluate the cumulative effects of each of these other activities in a meaningful way such that NEPA is satisfied and the FONSI is adequately supported.

Chapter 2, page 11 of the Final EA tells the reviewer that the cumulative effects of past present and reasonably foreseeable future actions for all resource categories are addressed in chapter 4 of the Final EA. It also claims that, "Estimates of residual, current, or anticipated effects are discussed. The sum of the effects, in addition to the anticipated direct and indirect effects of the proposed action will form the basis for the cumulative effects analysis." Arbitrarily, chapter 4 of the Final EA does not catalogue, and discuss the degree and type of residual, current or anticipated effects of past present and reasonably foreseeable future actions to each resource category. As such, the cumulative effects analysis is not informed and is inadequate. This has also resulted in an unsupported statement of reasons in the FONSI.

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The cumulative effects analysis to macroinvertebrates MIS population trends in chapter 4 of the Final EA fails to catalogue or discuss any estimates of the residual effects, current effects, or anticipated effects to the population trends of this MIS. The cumulative effects analysis to water resources, soil resources, PS Sensitive spotted bat, and golden eagle MIS population trends are all similarly inadequate. There is no meaningful attempt to disclose the existing cumulative effects to these resources. Many of the cumulative effects sections consist only of 1 or 2 sentences stating what a cumulative effect is under NEPA, and does not contain meaningful analysis. "[E]ven a slight increase in adverse conditions that form an existing environmental milieu may sometimes threaten harm that is significant. One more factory ... may represent the straw that breaks the back of the environmental camel." *Grand Canyon Trust v. Federal Aviation Administration*, 290 F.3d 339, 342 (D.C.Cir. 2002) In failing to account for the existing cumulative effects to this resource in any meaningful manner, the Final EA is legally inadequate, and the FONSI is inadequately supported.

Furthermore, page 6 of appellant's comments raised an issue that should have been addressed in the indirect effects and cumulative effects analyses. However this issue was completely avoided in the Final EA. UBC commented:

"Subsidence coal mining is also known to impact soils and other large woody plants on the surface. Maintenance of the sustainability and diversity of these biotic and abiotic resources (some of which are not renewable) must be demonstrated. Subsidence of the surface may disrupt the soils, hydrology and physiological integrity of the plants that comprise the mixed conifer forest on the surface, making the forest more susceptible to insect and disease. Stressed and insect-infested coniferous forests may or may not present greater risk of wildfire (in terms of ignitability and intensity of burn). These cumulative effects should be disclosed and analyzed. This is important because actions that indirectly increase the probability or risk of hot crown fire on the surface may involve additional, subsequent cumulative effects that result from loss of species habitat, soils, sedimentation and damage to the blue ribbon trout fishery/sensitive aquatic resources immediately downstream from this area." (Emphasis added.)

This substantive issue was not addressed in the Final EA, and there was no attempt to disclose cumulative effects of subsidence (that will be about 3.5 feet) to the physiological integrity of woody plants on coniferous forest on the surface. There was no attempt to disclose the indirect and cumulative effects of this and other subsidence in the east mountain roadless area to the stress levels and healthy growth of the forest resource on the surface. There was no attempt to disclose the indirect and cumulative effects that stressed forests may involve, such as increased susceptibility to insects, disease, as well as increased ignitability and intensity of fires that are known to exist in stressed, droughty forest that may result from damage to root systems that result from subsidence.

Failure to respond to this substantive comment is in violation of the ARA and the APA.

Failure to address this issue that directly relates to indirect and cumulative effects of the proposed action in the Final EA also violated NEPA because: (1) the Forest ignored a substantive issue raised in comments and, (2) the resulting cumulative effects analysis is not complete and is insufficient and, (3) the resulting statement of reasons in the FONSI is premature, arbitrary, and inadequately supported.

Failure to address these indirect and cumulative impacts in the Final EA that speak directly to the possibility that the action alternatives may result in decreased forest health and resiliency and possibly increased future fire hazard is particularly inappropriate given the national Forest Service focus on improving forest health by implementing projects that do exactly the opposite. Therefore, appellant also believes that this Final EA is not just insufficient under NEPA, but also is inconsistent with the objectives outlined in the National Fire Plan as well as the goals outlined in the administration's Healthy Forests Initiative. While this may not constitute a violation of a specific law such as the NEPA violations outlined above, it does run counter to national Forest Service policy direction, and it is disappointing that the Forest avoided this important issue in this Final EA and DN/FONSI.

IV. The MLNNE violated the Appeals Reform Act by failing to provide opportunity to comment on fundamental components of the proposed action, or comment on the selected action.

FSH 1909.15, chapter 05 defines the proposed action as, "A proposal made by the Forest Service to authorize, recommend, or implement an action to meet a specific purpose and need (see definition for proposal)." ... "Proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated ... A proposal may exist in fact as well as by agency declaration that one exists (40CFR§1808.3)". Similarly, the ARA regulations at 36 CFR §215.2, define the proposed action as, "A proposal made by the Forest Service that is a project or activity implementing a land and resource-management plan on National Forest System lands and is subject to the notice and comment provision of this part." 36 CFR§215.5(a) states that, "The Responsible Official shall: (1) Provide notice of the opportunity to comment on a proposed action implementing the land and resource management plan." Attachment 1 is the Forest's Legal Notice of opportunity to comment on the Proposed Action. While the fact that location provide and commented upon by appellant is different than that of the actual proposed action is in violation of the ARA, appellant also asserts here that another ARA violation resulted from the fact that the Proposed Action was not selected in the DN/FONSI. The DN/FONSI chose "alternative 3," not the Proposed Action. Failure to provide an opportunity for public comment or review of the actual alternative that was chosen in the DN/FONSI is inconsistent with the language and intent of the ARA.

The very purpose of the Notice Comment and Appeal procedures is to establish the, "process by which the public receives notice and is provided an opportunity to comment on proposed actions for projects and activities implementing a land and

resource management plan prior to a decision by the Responsible Official."¹⁹ The central assumption in the 2004 ARA regulations is that the Proposed Action is the action that will be selected. It is not reasonable under any circumstances to hold that in writing the ARA, Congress intended to mandate an opportunity for public review and comment only on an action that is other than the action that is actually implemented. Appellant argues here that by failing to provide an opportunity for public comment on the alternative that was selected in the decision documents, the MLSNF has acted in a manner that is contrary to the ARA and the intent of its implementing regulations.

Additionally, the failure to provide opportunity for review and comment on the fundamental, significance-reducing components of the proposed action (stipulations) or on the selected alternative before a decision is made is in violation of 36 CFR §215.1 (Purpose), §215.2 Definition of proposed action), and §215.5 (Legal notice of proposed actions). This arbitrary violation of the 2003 ARA regulations also constitutes a violation of the language and intent of the Act itself, as well as the APA.

V. The Manti-La Sal National Forest violated the Administrative Procedures Act (APA).

1. The New Notice, Comment and Appeal Regulations at 36 CFR § 215 are illegal.

We note the 2003 ARA notice, comment, and appeal regulations state:

"Determine the most effective timing for publishing the legal notice of the proposed action and opportunity to comment." 36 CFR § 215.5(a)(2).

Appellant argues this is illegal, and this violation of the APA is ripe with the implementation of this Project. For example, the colloquy the Forest Service extensively cited as justification for many changes to the appeal regulations make it clear that Congress intended a uniform comment period:

"Mr. LEAHY. I wholeheartedly concur with the Senator from Arizona. In fact, one of my suggested modifications to the appeal provision provides for a clearly defined public comment period for each individual Forest Service decision. I felt this was necessary because as the original Craig-DeConcini amendment was drafted, in order for a person to have standing, they must have participated in the public involvement process for the underlying decision. The problem with this is that current Forest Service practice does not require a uniform public involvement process for each individual decision. Therefore, my modification to the Craig-DeConcini amendment will add clarity to the appeals process by providing a statutorily mandated public comment period during which an individual's participation will establish standing to appeal. This will prevent confusion in the future on this issue." S15848-9.

¹⁹ 36 CFR § 215.1(a), "Purpose"

Allowing the Forest Service to pick and choose when to provide the comment period is not a uniform comment period. Likewise, it is not clearly defined. Therefore, the regulations are illegal. In this case, this has resulted in additional, separate violations of the ARA regulations themselves as well as the language and intent of the ARA (outlined above).

2. Determinations leading to, and the decision signed by Supervisor Carlton are inconsistent with 36 CFR § 215 and constitute additional violations of the APA

The Appeal Regulations state:

"Determine the most effective timing for publishing the legal notice of the proposed action and opportunity to comment." 36 CFR § 215.5(a)(2).

The Federal Register Explanation for the draft regulations stated:

"Proposed paragraph (a), 'Timing for publication of legal notice,' would incorporate and revise current paragraph (b)(2)(i) to give the Responsible Official discretion to determine the most effective timing for publishing the legal notice of the proposed action and opportunity to comment. There are instances when a proposed action is well developed, with sufficient information to allow for substantive public comment during the scoping phase of project planning. Other times, it might be more helpful to the Responsible Official for the comment period to occur prior to alternative development. In a third instance, a comment period after alternative development might be of most benefit. These are examples of how the rule's flexibility allows for the most effective use of the comment period significantly earlier in the project planning than the current rule permits. Timing for the comment period would be determined on a project-by-project basis, depending on the nature and complexity of the project. The flexibility with such discretion would allow the Responsible Official to provide an opportunity for early comment and meaningful public participation during project planning, at the stage when comments will be most helpful in developing public understanding and an effective project. The Forest Service expects to develop policy guidance with regard to the appropriate timing of the 30-day comment period following promulgation of a final rule." 67 FR 77454

Holding the single 30-day comment period before full development of the proposed action and before development of the selected action is not a permissible time

First, appellant points out that the FR explanation addressed the 30-day comment period at three times, scoping, before the alternatives are developed, and a complete EA before a decision has been made. Having the *single* 30-day comment period before full development of the proposed action and before development of the selected action was never a possibility. Therefore, having the single 30-day comment period before full development of integral components (stipulations) of the proposed action or development

of the action that was actually chosen in the decision document is illegal. Indications of the arbitrary nature of this violation include:

- Response to comment 1.3 ("There is no description of any restrictions, allowances, stipulations or mitigation that may or may not be associated with the proposed action") in the Final EA is, "It is Forest Service policy to develop stipulations and mitigations during the NEPA process; therefore, the Forest Service does not identify mitigations during scoping."²⁰ This makes it clear that the Forest Service arbitrarily confused NEPA's "scoping" with the ARA regulation's "opportunity to comment on the Proposed Action" that is to be noticed in the Newspaper of Record that the appellant was responding to. Refer to attachment 1 (Legal Notice of opportunity to comment on the Proposed Action) and note that there is nothing there referencing scoping. Scoping comments do not have to be substantive or specific to the Proposed Action. Substantive 36 CFR §215 comments must be specific to the Proposed Action. This was not the scoping opportunity. Because the Forest confused the two by clearly mixing 36 CFR §215 substantive comments with NEPA's very different scoping comments (40 CFR §1501.7), the ARA was arbitrarily violated, thus violating the APA.
- Appellant called Karl Boyer (contact person listed in the Legal Notice) on 6-2-2004 to learn what the other components of the Proposed Action are. Mr. Boyer explained that this is just scoping and that no issue statements had been developed yet, the Forest can not come up with stipulations until the draft EA is completed. Mr. Boyer also stated to appellant that the Forest will circulate a EA before a decision is made so long as that is not inconsistent with any regulations. Because no opportunity was provided for comment on the EA before a decision was made, this further indicates that the Forest arbitrarily confused NEPA's scoping with the ARA regulation's opportunity to submit substantive comments on the Proposed Action. This is arbitrary, capricious, and in violation of the APA.
- Because the DN/FONSI selected alternative 3 in the Final EA, and not the Proposed Action (alternative 2 in the Final EA), the Forest violated the the APA by arbitrarily and capriciously failing to provide an opportunity to comment on the action that was actually selected.

The Regulations Require a Determination

Second, the regulations require a determination. Under the APA, an unexplained determination is arbitrary and capricious, as the Forest Service is required to set forth a reasoned explanation for its decisions and actions. At the bare minimum, the Forest Service would need to give some explanation for the timing of a comment period. Since the EA and DN/FONSI fail to provide any evidence that there actually was a determination for the appropriate timing of the 30-day substantive comment period, this is arbitrary. In fact, evidence in the Final EA (outlined above) indicates that the Forest really didn't know what was going on with public involvement, saying one thing and doing another, circulating one Proposed Action for substantive comment only to select a

²⁰ Final EA for this Project, page 37

different Action alternative. Furthermore, because the Responsible Official failed to provide any explanation or supporting reasons for the (possibly non-existent) determination that the July 2004, 30-day opportunity to submit substantive comments specific to the Proposed Action (that wasn't actually chosen), this constitutes clear failure of the determination requirements mandated by 36 CFR 215.5(a)(2)), and is arbitrary, capricious, and inconsistent with the APA.

This was not the most effective timing for comment and is inconsistent with 36 CFR 215.5(a)(2)

Appellant further argues that June 2004 was not the "most effective timing" for the 30-day comment period on the Proposed Action, nor did it provide for "meaningful" public participation. 36 CFR§215.5(a)(2) states, "The Responsible Official Shall ... Determine the most effective timing for publishing the legal notice of the proposed action and opportunity to comment." The Responsible Official should have made the determination that a 30-day public comment period was needed after the EA was prepared, as promised by Carl Boyer, the contact person listed in the Legal Notice. The document circulated for the 30-day substantive comment period on the proposed action (attachment 1) does not contain a description of the integral components of the Proposed Action, and did not include the action that was actually selected. In light of these facts, appellant concludes that the Responsible Official for this Project acted in direct contradiction to 36 CFR§215.5(a)(2). This is arbitrary, capricious, and inconsistent with the APA.

The APA requires all agency actions to conform to general standards of regularity and rationality. The courts will overturn agency decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."²¹ The Supreme Court has held:

"Normally, an agency [action] would be arbitrary and capricious if the agency has relied on factors which Congress has 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."²²

The failures to comply with the Forest Plan, the NFMA, the ARA, and the NEPA are all in violation of the APA because they are arbitrary, capricious, or otherwise not in accordance with the law. Failure to maintain and use current quantitative population trend data on macroinvertebrates and golden eagle MIS, and failure to determine the effects of forest management activities (such as this Project) on the quantitative population trends of MIS in violation of the Forest Plan and NFMA is arbitrary and in violation of the APA.

²¹ 5 USC 706

²² *Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983)

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From Emery County Progress

Attachment #1

LEGAL NOTICE OF PROPOSED ACTION

Genwal Resources, Inc.

Proposed Modification of Federal Coal Lease UTU-68082

Notice of Opportunity for Comment

Genwal Resources, Inc. (Genwal), submitted an application to add 120 acres to Federal Coal Lease UTU-68082. The proposed lease modification area involves National Forest System lands administered by the Manti-La Sal National Forest in Emery County, Utah described as follows:

**T. 16 S., R. 7 E., SLM, UT
Section 32, W1/2 NW1/4; NW1/4 SW1/4**

Genwal's application would add the described lands to the current lease to acquire additional coal reserves for their Crawford Canyon Mine that may otherwise never be mined. The Manti-La Sal National Forest and BLM Utah State Office are jointly conducting an Environmental Analysis of the proposed lease modification. The Office of Surface Mining, Reclamation and Enforcement is participating as a cooperating agency.

The Utah State Director of BLM must decide whether or not to modify the lease. The Forest Supervisor of the Manti-La Sal National Forest must decide whether or not to consent to the lease modification by BLM, and prescribe lease stipulations needed to protect non-mineral resources. The Forest Supervisor would also consent to approval of any associated mine plan amendment by Utah Division of Oil Gas and Mining, which would involve including this lease modification in the permit area.

The public is invited to comment on the proposed action. Only those who submit timely and substantive comments will be accepted as appellants. Substantive comments are those within the scope of, are specific to, and have a direct relationship to the proposed action, and include supporting reasons that the Responsible Officials should consider in reaching a decision. Each individual, or representative from each organization, submitting substantive comments must either sign the comments or otherwise verify identity in order to attain appeal eligibility. Comments received in response to this solicitation, including names and addresses of those who comment, will be considered part of the public record for this project. Comments should include the information required pursuant to 36 CFR 215.6(a)(3), as published in the Federal Register on June 4, 2003.

Please send written comments to: Alice Carlton, Forest Supervisor, Manti-La Sal National Forest, 599 West Price River Drive, Price, UT 84501; phone: (435) 637-2817, fax: (435) 637-4940. Comments may also be delivered to the above address during regular business hours of 8:00 a.m. to 5:00 p.m., Monday-Friday; excluding Federal holidays. The opportunity to comment ends 30 days following the date of publication of this legal notice in the Sun Advocate.

If you have any questions please contact Karl Boyer at the above

http://www.publicnoticcads.com/UT/search/view.asp?T=PN&id=/647/5142004_2752297.... 5/17/2004

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address or by phone at (435) 636-9551.
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Request for Relief

Due to the violations of Federal laws, regulations, and the Forest Plan, appellant asserts that this project cannot be considered legal and the signing of the DN/FONSI was premature. The appellant requests relief in the form of a reversal of the decision made in the November 23, 2004 DN/FONSI signed by Supervisor Carlton.

comment ends 30 days following the date of publication of this legal notice in the Sun Advocate.

If you have any questions please contact Karl Boyer at the above

http://www.publicnoticelocal.com/UT/search/view.asp?T=FN&id=/647/5142004_2752297.... 5/17/2004



1817 South Main Street #10
Salt Lake City, Utah 84115



Regional Forester, Appeal Deciding Officer
Intermountain Region, USDA Forest Service
Federal Building
324, 28th Street
Ogden, UT 84401

TOTAL P.30

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JAN 20 2005

DIV. OF OIL & GAS MINING