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

In Re Appeal of Record of Decision,)
based upon Pines Tract Project EIS)
prepared in 1999 and signed by)
Manti-La Sal National Forest Supervisor)
Elaine Zieroth on October 9, 2002)

UTAH ENVIRONMENTAL CONGRESS

APPELLANTS

APPEAL NO. _____

INTRODUCTION

STATEMENT OF FACTS

ARGUMENTS

REQUEST FOR RELIEF

DATED this 22 day of November 2002

By Craig Axford
Craig Axford

Program Director, Utah Environmental Congress
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F.S. RECEIVED R-4

Introduction

NOTICE IS HEREBY GIVEN that the Utah Environmental Congress (UEC) hereby appeal pursuant to 36 C.F.R. 215.7 to the Regional Forester of Region Four, from the Decision Notice for the Link Canyon Breakout Record of Decision (ROD) based on the Pines Tract Project FEIS (1999) signed by Manti-La Sal National Forest Supervisor Elaine J. Zieroth on October 9, 2002.

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 Utah's national forests, including the Manti-La Sal National Forest. UEC's members participate in a wide range of recreational activities on the Manti-La Sal National Forest, including the area impacted by this action.

The UEC represents more than 200 individual members, 11 organizations and 34 businesses. The organizations that are a member of the UEC represent about 30,000 individuals, many of whom have visited the Manti-La Sal National Forest or have a direct interest in its management.

The UEC claims standing to participate in the public land decision-making process on the grounds it has been involved in forest management for more than three years. Its members have hiked, fished, hunted and photographed the Manti-La Sal National Forest, including areas impacted by the Link Canyon Breakout. UEC members include professional photographic businesses and freelance photographers that make their living in part by photographing Utah's national forests, including the Manti-La Sal National Forest. The impacts associated with this action detract from the beauty and biodiversity that makes these lands appealing to UEC's members that recreate, photograph, hunt or participate in other activities within the affected area.

In addition, UEC's members are taxpayers that provide, in part, the financial resources used to manage the National Forest System. The irreplaceable commitment of resources associated with this financial burden is also borne by the American people as a whole. The UEC claims partial ownership in the public lands covered by this decision and consequently has legal standing to participate in the process and challenge those decisions it finds unacceptable.

The decision to open the Link Canyon Portal significantly affects the appellants for the reason that the appellant is a conservation group whose members regularly engage in diverse forms of recreation and in other uses of the Manti-La Sal National Forest, including the Project Area. The proposed action will degrade critical wildlife habitat and adversely affect the members' recreational use and enjoyment of the area.

The UEC has participated in the comment process for the Link Canyon Breakout proposal prepared by the Manti-La Sal National Forest. In addition, the UEC has commented on and participated in meetings with the Manti-La Sal National Forest regarding a variety of other projects on that national forest and has spent considerable time and resources surveying the roadless resources contained within the Manti-La Sal National Forest.

The UEC is appealing the ROD and the Pines Tract Project FEIS (1999) that it is tiered to on the grounds the decision is legally indefensible. The UEC believes the Manti-La Sal National Forest has violated the National Environmental Policy Act (NEPA), the National Forest Management Act

(NFMA), the Multiple Use and Sustained Yield Act (MUSYA), the Endangered Species Act (ESA), and the Administrative Procedures Act (APA).

The Appellant desires and will request relief in the form of a remand of the Link Canyon Breakout ROD signed by Manti-La Sal National Forest Supervisor Elaine J. Zieroth on October 9, 2002.

Statement of Facts

The Link Canyon Breakout Project (hereafter referred to as the Link Canyon Project) is the result of a proposal by Canyon Fuel Company, LLC to amend the Mining and Reclamation Plan by proposing to reopen the west portal of the abandoned Link Canyon Mine. The Link Canyon Project is tiered to the Pines Tract Project FEIS completed in 1999. The purpose of reopening the Link Canyon Portal is to provide an additional emergency exit, an additional source of fresh air, and an additional source of electricity for the adjacent SUFCO mine.¹

The Link Canyon Project includes: 1) Construction of an earthen portal pad (0.14 acres); 2) A pad access road approximately 100 feet in length (0.09 acres) and; 3) Approximately 420 feet of overhead power lines from an existing substation to the pad (temporary disturbance of 0.04 acres).²

The Record of Decision (ROD) states, "Water flowing from the abandoned Link Canyon Mine portals supports a riparian vegetation area in Link Canyon below the portals that totals approximately 0.5 acres." The construction of the portal pad will eliminate approximately 0.08 acres of this riparian habitat.³

The Project Area is located approximately 20 miles south of the Joes Valley area where a threatened Canada lynx has recently been confirmed.⁴ Other wildlife known or suspected to exist within the area include, but are not limited to elk, mule deer, cougar, bobcat, Townsend's big-eared bat, spotted bat, golden eagle, American kestrel, sharp-shinned hawk and sage grouse.⁵ There are an additional 14 TES plant species within the Pines Tract Project Area, which includes the Link Canyon Project Area.⁶

In this case, the Forest Service examined only two alternatives in detail, the proposed action and the "No Action Alternative" required by NEPA. This does not amount to a reasonable range of alternatives as defined by NEPA and the CEQ's implementing regulations. Nor does such a limited range of alternatives meet the mandate set forth in the Forest Service Handbook. According to the Forest Service Handbook, the purpose and intent of alternatives is to "ensure that the range of alternatives does not foreclose prematurely any option that might protect, restore and enhance the environment."⁷

¹ Record of Decision, page 1

² Ibid

³ Ibid

⁴ Manti-La Sal National Forest press release, September 3, 2002

⁵ Pines Tract Project FEIS, pages 3-107-112

⁶ Link Canyon Project BE/BA

⁷ Forest Service Handbook, chapter 20, § 23.2

Arguments

The ensuing arguments will show the Manti-La Sal National Forest has violated the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), the Endangered Species Act (ESA), and the Administrative Procedures Act (APA).

I. The Manti-La Sal National Forest has violated the mandate of the National Environmental Policy Act:

A. The Manti-La Sal National Forest misapplies NEPA's tiering provisions and must develop a programmatic EIS:

The courts have ruled, "NEPA may require a comprehensive impact statement in certain situations where several proposed actions are pending at the same time... Thus, when several proposals for coal-related actions that will have cumulative or synergistic environmental impact upon a region are pending concurrently before an agency, their environmental consequences must be considered together. Only through comprehensive consideration of pending proposals can the agency evaluate different courses of action."⁸ The Appellant has on several occasions commented on the number of coal and oil/gas related actions within the Wasatch Plateau that have been independently analyzed within separate environmental documents issued by the Manti-La Sal National Forest. The Appellants comments on the Link Canyon Project are no exception.

In response to the Appellant regarding this issue, the Forest Service states, "The Forest Plan (LRMP for the Manti-La Sal National Forest, as amended) and Final Environmental Impact Statement are programmatic documents that address coal activities in conjunction with other activities on the Forest." The Forest Service also adds, "In addition, cumulative effects of coal leasing, reasonably foreseeable coal development activities, and other past, present, and reasonably foreseeable actions were considered cumulatively in the Pines Tract Project FEIS, 1999."⁹

The cumulative effects analysis offered in the Manti-La Sal National Forest's FEIS for the current Forest Plan offers five pages of analysis regarding potential impacts associated with coal exploration and mining on the Forest.¹⁰ The LRMP FEIS analysis is not site specific, in depth, or up to date. The Pines Tract FEIS does offer a short list of past, present and potential future actions, but the list is limited to activities within the approximately 7,300 acres of the Pines Tract project area. The numerous projects now in various stages of planning or implementation across the Wasatch Plateau are ignored within the FEIS.¹¹

The request for a programmatic EIS stems from the fact tens of thousands of acres across the Wasatch Plateau are currently being impacted, or may soon be impacted by coal exploration/development and oil and gas exploration/development. The Quarterly Schedule of Proposed Actions for the summer of 2002 published by the Manti-La Sal National Forest lists a total of

⁸ *Kleppa v. Sierra Club*, 427 U.S. 390, 409-410 (1976). See also *City of Tenakee Springs v. Clough*, 915 F. 2d 1308 (9th Cir. 1990)

⁹ ROD, Attachment 3

¹⁰ Manti-La Sal National Forest LRMP FEIS, pages IV-68-73. Note, no specific projects are discussed within the analysis. Coal mining and exploration impacts are discussed in general terms.

¹¹ Pines Tract FEIS, Appendix B

12 coal or oil and gas projects on the Ferron/Price Ranger District. These projects are currently in various stages of planning and cumulatively will have a significant impact on plant and wildlife habitat, water quality and soils. The continued use of environmental assessments, or in this case tiering to a 1999 EIS, guarantees the cumulative impacts analyses in each document will be limited to the project area in question, with little or no attention being given to the impacts to resources occurring across the wider landscape.

The Environmental Protection Agency (EPA) raised the issue of segmentation with regard to coal exploration and development in its letter to the Manti-La Sal National Forest regarding the Pines Tract DEIS. "The narrow scope of the [Pine Tracts] DEIS is of particular concern. The DEIS focus is on the 7,300 acre project area and potential future development within that area. The NEPA regulations at 40 CFR 1508.25 indicate that, in order to determine the scope of an EIS, agencies should consider three types of actions: connected, cumulative, and similar. There are several activities in the surrounding area that would contribute to significant adverse environmental impacts and should be addressed in the Pine Tract DEIS."¹²

Among the projects taking place within the area not analyzed in the Pines Tract FEIS the Link Canyon Project is tiered to is the Quitchupah Road proposed from the SUFCO Mine portal located in Quitchupah Canyon just south of Link Canyon on the Fishlake National Forest. Also, Muddy and Pines Area Coal Exploration and Drilling (Ark Land Company) is under consideration within the same township and range (sections 9, 13, and 17) as the Link Canyon Project, but receives no attention within the Pines Tract FEIS or the Link Canyon Project scoping letter or ROD.¹³

The Pines Tract FEIS does not allude to any possible activities within Link Canyon with the exception of the list provided in Appendix B, and does not analyze the potential cumulative effects that would result should any activity take place in Link Canyon. In order to legally tier a project to a past EA or EIS, that EA or EIS must actually consider the action.

The Pines Tract FEIS specifically states, "If Canyon Fuel obtains the Pines Coal Lease Tract, it would access it through an extension of underground workings in the active Quitchupah Lease. It would maintain their existing portal facilities in Convulsion Canyon on the Fishlake National Forest, and no new facilities would be needed."¹⁴ A breakout in Link Canyon is mentioned in Appendix B of the Pines Tract FEIS as a potential future action (to take place in 1998 or 1999) but the description makes no mention of the need for an escape route or additional ventilation, only the need to run additional power lines into the mine via a portal in Link Canyon. Given this potential future action receives no analysis within the FEIS, the Forest Service cannot now argue this action has been previously analyzed in the FEIS and can therefore be tiered to that document.

In addition, the ROD authorizing the actions discussed within the Pines Tract FEIS makes no mention to any developments within Link Canyon. Specifically, the Pines Tract ROD states, "Future resource management proposals within the area would have to be considered on their own merits in subsequent decisionmaking (sic)."¹⁵ Section VI of the ROD describing the decision makes no mention

¹² EPA comments re: Pines Tract DEIS, November 9, 1998.

¹³ Manti-La Sal National Forest Quarterly Report, July- September 2002

¹⁴ Pines Tract FEIS, page 1-14

¹⁵ Pines Tract ROD, page 2

of any action being deferred as part of the decision, and does not authorize activity within Link Canyon.

The Pines Tract FEIS does mention the need for a breakout to provide an emergency escape route and ventilation for the mine. However, the site for this proposed breakout is not the Link Canyon Portal. "Mining the Pines Coal Lease Tract would entail constructing a ventilation, escapeway and mine drainage breakout on the north end of the tract. The breakout would potentially be at the coal outcrop in Box Canyon about 1,000 feet up-canyon from the intersection with Muddy Canyon."¹⁶

Indeed, it is not even clear the Link Canyon Portal is within the Project Area delineated within the Pines Tract FEIS. Based on the maps provided within the FEIS and the map provided with the Link Canyon Project scoping letter, along with descriptions of township and range in both documents, it appears at best the Link Canyon Portal is right on the edge of the Pines Tract project area. What is clear, however, is that the power lines running from the substation do involve land outside the Pines Tract project area analyzed within the FEIS and that a portion of the road to the Link Canyon Portal is also likely outside the Project Area. This is further evidence the Link Canyon Project was not considered within the Pines Tract FEIS and should not be tiered to it.

The ROD for the Link Canyon Project attempts to justify the tiering of the proposed action to the Pines Tract FEIS. Referring to Alternative 2 (the selected alternative) the Forest Supervisor states within the ROD, "Construction of new portal facilities in Link Canyon was analyzed under both Alternatives C and D as part of the Reasonably Foreseeable Development Scenario (Pines EIS, Section 1.5, pages 1-12 through 1-14)." A review of the Pines Tract FEIS pages cited in the ROD reveals no such analysis. To the extent Link Canyon is mentioned, quite a different scenario is envisioned.

The Pines Tract FEIS states, "There is a potential need to temporarily discharge mine water for 2 years to 3 years into Link Canyon until a breakout in lower Box Canyon/Muddy Creek could be completed to receive potential future mine water discharge." The FEIS continues with regard to Link Canyon "discharge in Link Canyon would be approximately 1,000 gallons per minute."¹⁷

Continuing on to page 1-14 of the Pines EIS, "Mine water discharge into Link Canyon would entail placing approximately 1,500 feet of pipe in a trench and bench along the west side of Link Canyon from a breakout in Link Canyon from the existing SUFCO Mine." The EIS continues, "If another company obtains the Pines Coal Lease Tract, surface facilities for a new mine would be needed. These facilities would likely be located at the coal outcrop in Link Canyon."

The difference between what is being proposed in the Link Canyon Project ROD and potential future actions described in the Pines Tract EIS is incredible. The EIS describes discharge of 1,000 gallons per minute into Link Canyon and 1,500 feet of pipe needed to handle it until such time as a breakout in Box Canyon can be developed. Surface facilities in Link Canyon may be needed, but only if another company takes over the lease. The FEIS also mentions need to straighten the Link Canyon road, something the ROD for the current Link Canyon proposal makes no mention of.

¹⁶ Pines Tract FEIS, page 1-12

¹⁷ Pines Tract FEIS, page 1-12

The Manti-La Sal National Forest appears to simply be seeking a NEPA shortcut that avoids the need for a separate analysis for the Link Canyon Project. As the Appellant will show later in these arguments, the Pines Tract FEIS also fails to analyze impacts to threatened/endangered species within the area, and tying the Link Canyon Project to the Pines Tract FEIS compounds these violations of the ESA as well. For the above reasons, the ROD for the Link Canyon Project should be remanded, and either a separate EA/EIS prepared or a programmatic EIS should be prepared to look at the cumulative impacts associated with coal and oil and gas development on the Wasatch Plateau.

B. The Manti-La Sal National Forest has failed to prepare a cumulative effects analysis:

"Cumulative impact" is "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonable 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."¹⁸

In this case, the Forest Service didn't simply fail to prepare an adequate cumulative effects analysis, but prepared none at all. As stated in the above arguments, the Link Canyon Project is tied to the Pines Tract FEIS, which analyzed no actions in Link Canyon. Furthermore, the Link Canyon Portal is barely in the Pines Tract project area, and may technically be just outside the project area. Regardless, the power lines proposed to run from the substation to the Portal and at least a portion of the road to be built to the portal are outside the Pines Tract project area, a clear indication no analysis for this project took place in the Pines Tract FEIS. Therefore, the Link Canyon Project cannot honestly be said to have been analyzed within the Pines Tract FEIS.

Because no cumulative effects analysis has been prepared for this particular action, the ROD is clearly issued in violation of NEPA. An EA or EIS must be prepared. It is precisely because the Forest Service is attempting to push through so many coal and oil and gas developments on the Wasatch Plateau in such a short period of time that these types of mistakes are being made. A programmatic EIS looking at the big picture would better serve both the public and the agency.

II. The Forest Service has failed to meet the mandate of the National Forest Management Act

A. The Manti-La Sal National Forest has failed to collect monitoring data as required by NFMA:

NFMA requires that "each Forest Supervisor shall obtain and keep current inventory data appropriate for planning and managing the resources under his or her administrative jurisdiction."¹⁹ Also, "population trends for the management indicator species will be monitored and relationships to habitat changes determined."²⁰ The Forest Service has been aware for some time that it is failing to adequately monitor the management indicator species (MIS) under its jurisdiction. The record clearly shows in this case not only a lack of monitoring, but a total failure to use monitoring data to determine cumulative effects of the proposed action on the MIS/TES species within the area.

¹⁸ 40 C.F.R. § 1508.7

¹⁹ 36 C.F.R. § 219.12(d) (Emphasis added)

²⁰ 36 C.F.R. § 219.12(6)

Obviously, in the absence of any site specific analysis, it is almost impossible to determine what if any monitoring has been done within the area. The Manti-La Sal National Forest has prepared a separate BE/BA for the current proposal, but these fail to offer a complete analysis. The BA opens with the statement, "The purpose of this biological assessment (BA) is to evaluate the potential effects of the Canyon Fuel Company Amendment to the SUFCO Mine Permit proposal for reopening the west portal of the old abandoned Link Canyon Mine in Link Canyon on Threatened, Endangered, Proposed, and Candidate plant and animal species that may occur within or near the project area."

The BA goes on to provide a list of threatened, endangered and proposed species "potentially occurring within the Pines Tract Project Area." Conspicuously absent from this list is the threatened Canada lynx.²¹ Likewise, the original Pines Tract BA failed to mention the possible presence of the Canada lynx, though at the time the species was not listed under the ESA.

In September of 2002 the Manti-La Sal National Forest issued a press release acknowledging Canada lynx had been documented on the Forest about 20 miles north of Link Canyon. The failure to include even so much as a mention of the possible presence of Canada lynx, when other TEP species known to exist much further from the project area (Utah prairie dog, Black-footed ferret) are listed, is a serious violation of NFMA's monitoring requirements, the ESA's section 7 consultation requirements, and NEPA's requirement that documents be scientifically sound. It is clear the Forest failed to incorporate recent data regarding the Canada lynx into the BA. Given the failure to consider this species in preparation for the Pines Tract EIS, this is a significant issue that has never been analyzed or considered in connection to coal tract development in the area.

The failure to either incorporate existing data or collect required monitoring data extends beyond the example of the Canada lynx provided above. For example, blue grouse, an MIS species on the Manti-La Sal National Forest, receives no mention within the Pines Tract EIS. Ironically, blue grouse was used by the Utah District Court recently as an example of failure on the part of the Manti-La Sal National Forest to conduct required monitoring. The court ruled:

Although the Forest Service's methodology is entitled to deference, its actions must be in accord with the governing regulation. 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 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

²¹ 2002 BA, page 3

on the Forest's diversity. To read the regulations otherwise would be to render one or the other meaningless... Martin, 168 F 3d at 7.²²

The failure to include blue grouse, Canada lynx and other resources within the analysis is a violation of NFMA. Furthermore, the failure to demonstrate any monitoring data that has been gathered, been analyzed to determine population status and trend, or the relationship of management decisions to population changes also is a serious violation of NFMA. The decision should therefore be remanded.

B. The Manti-La Sal National Forest has failed to follow its Forest Plan:

The National Forest Management Act (NFMA) requires each Forest to be in compliance with its Land and Resource Management Plan (LRMP).²³ Any deviations, especially those which could result in impacts greater in significance than was generally considered in the LRMP, must be accompanied with a site specific amendment, complete with proper NEPA compliance. The EA has violated Forest Plan standards and, in light of the fact no Forest Plan amendments were considered, is therefore in violation of the mandate and intent of NFMA and the Forest Plan.

The Manti-La Sal National Forest LRMP states, with regard to minerals management and leases:

Negative recommendations, denials, or consent for leasing, permitting, or licensing will be based on site specific environmental assessments using appropriate standards and guidelines. Stipulations for these actions should minimize and/or mitigate effects or conflicts with other resource uses and should return disturbed lands to conditions compatible with the emphasis of the management unit or adjacent management unit.²⁴

The LRMP's standards and guidelines used to enforce the above quoted mandate state, "Any lease, license or permit may be denied or limited by standard or additional stipulations where proposed activities could result in irreparable damage, may preclude existing uses or be contrary to management direction."²⁵ In addition, "Coal leases may be denied or limited by special stipulation where: Operations would result in unacceptable or unmitigateable impact on wildlife or fisheries."²⁶

As the Appellant will show later in these arguments, "unmitigateable impact" to the threatened Canada lynx may occur in this case. Regardless of whether these impacts will occur, the Forest Service, by failing to analyze Canada lynx (threatened); blue grouse (MIS) or other species in either the Pines Tract EIS, Link Canyon Project ROD or revised BE/BA makes it impossible to determine what impacts may occur to these resources or what, if any, mitigation has been applied to protect them.

The Manti-La Sal National Forest has clearly failed in this case to prepare the site-specific analysis required by NEPA and by the Forest Plan. It has failed to demonstrate "unacceptable or unmitigateable impact" will not occur to at least two species, and has generally failed to collect adequate quantitative data for many species under its jurisdiction. The Manti-La Sal National Forest

²² Utah Environmental Congress v. Zieroth, U.S. District Court for the District of Utah, March 13, 2002

²³ 36 C.F.R. § 219.10(e)

²⁴ Manti-La Sal National Forest LRMP, page III-35 (Emphasis added)

²⁵ Ibid.

²⁶ Manti-La Sal National Forest LRMP, page III-36

has therefore violated NFMA through repeated violations of the implementing regulations and its own Forest Plan.

III. The Forest Service fails to meet the mandate of the Endangered Species Act

A. The Manti-La Sal National Forest failed to consult with the USFWS regarding the threatened Canada lynx:

The Endangered Species Act (ESA) declares as its purpose "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such species."²⁷ Section 79(a)(2) of the ESA requires all federal agencies to insure that actions it authorizes are not likely to jeopardize the continued existence of threatened or endangered species. The procedural mechanism for insuring the protection of listed species is formal consultation with the Fish and Wildlife Service.

The courts have ruled on this matter, and upheld the importance of consultation under Section 7 of the ESA. "The ESA's procedural requirements call for a systematic determination of the effects of a federal project on endangered species. If a project is allowed to proceed without substantial compliance with those procedural requirements, there can be no assurance that a violation of the ESA's substantive provisions will not result."²⁸

In September of this year the Manti-La Sal National Forest announced the presence of threatened Canada lynx had been confirmed in the Joe's Valley area about 20 miles north of Link Canyon.²⁹ In spite of this discovery, the biological assessment prepared for this project made no mention of the Canada lynx, even within a list of species known or suspected to occur within the area. Given this oversight, it cannot reasonably be assumed consultation regarding possible impacts to Canada lynx took place.

A general technical report prepared by the USDA Forest Service regarding lynx conservation and biology indicates many populations of Canada lynx that exist in the extreme southern portion of their range "may function as separate, isolated populations unto themselves, rendering each isolated population highly vulnerable to extirpation." The report continues, "...small changes in habitat quality can produce a sink (birth rates < death rates). Because southern lynx populations appear to exist close to this threshold, southern lynx habitat probably is a shifting mosaic of source and sink areas."³⁰

If the Forest Service believes the Link Canyon area offers no habitat for lynx, the place to offer support for this argument was within the Biological Assessment. The BA included black-footed ferret, even if only to dismiss it from further analysis. Why not the Canada lynx, a species now known to occur far closer to the project area than black-footed ferret or Utah prairie dog?

The Manti-La Sal National Forest has ignored its own technical report on lynx and has failed to evaluate possible impacts associated with potentially isolated populations located on within the

²⁷ 16 U.S.C. § 1531(b)

²⁸ *Thomas v. Peterson*, 753 F.2d 754 (9th Cir. 1985) (Emphasis added)

²⁹ Manti-La Sal National Forest press release, September 3, 2002

³⁰ USDA Forest Service Gen. Tech. Rep. RMRS-GTR-30, 1999, page 4 (Emphasis added)

southern portion of lynx range. This failure amounts to a serious violation of the ESA and warrants a complete remand of the ROD.

IV. The Manti-La Sal National Forest has failed to meet the mandate of the Administrative Procedures Act.

A. The Forest Service has acted arbitrarily and capriciously in violation of the APA:

The Administrative Procedures Act (APA) requires all agency actions to conform with general standards of regularity and rationality. The courts will overturn agency decisions that are "arbitrary, capricious, or an abuse of discretion."³¹ 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.³²

An administrative agency may not merely cite its own expertise in defending a decision it has made. It must provide adequate explanation of what it has done. If it fails to do that, its action is deemed arbitrary and capricious.³³ The Appellant has demonstrated the agency relied upon an EIS (Pines Tract FEIS) that did not analyze the proposed action in question. Also, the agency failed to consider a threatened species known to exist on the Wasatch Plateau north of the project area (Canada lynx). Therefore, the Forest Service cannot reasonably argue its rationale for the decision can be explained or justified by the analysis provided.

The NFMA and the ESA clearly require the agency to rely upon current quantitative data, not three year old environmental impact statements that do not deal directly with the action being proposed. The agency has failed to consider aspects of the problem (presence of TES species, cumulative effects, etc.) that Congress intended the agency to consider. The Forest Service has therefore acted arbitrarily and capriciously as defined by the APA and the Supreme Court of the United States. The ROD should therefore be remanded in its entirety.

³¹ 5 U.S.C. § 706

³² Motor Vehicle Manufacturers' Association v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983)

³³ Ibid

Request for Relief

Due to the violations of federal law and regulations cited above, the Appellant requests a full remand of the Record of Decision for the Link Canyon Breakout based upon the Pines Tract Project FEIS of 1999 signed by Forest Supervisor Elaine J. Zieroth on October 9, 2002.

In light of violations of the Forest Plan, failure to consider threatened Canada lynx or consult with the US Fish and Wildlife Service, and reliance upon a outdated EIS that did not consider the proposed action within its cumulative effects analysis and other sections of the document, a full remand is warranted in this case.

In addition, should the Manti-La Sal National Forest decides it is appropriate to move ahead with this project in spite of a remand, the Appellant requests a new EA/EIS be prepared, preferably in the form of a programmatic EIS considering all the impacts of the multiple coal and oil/gas developments taking place on the Wasatch Plateau.

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