ENVIRONMENTAL LITIGATION AND THE HEALTHY FORESTS INITIATIVE

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INTRODUCTION

The Bush administration proclaimed the Healthy Forests Initiative in 2002, ostensibly to address the wildfire problem in the western National Forests. In so doing, it eliminated longstanding requirements for environmental review and public participation in National Forest management. This article provides an overview of the Healthy Forests Initiative and summarizes the federal lawsuits filed in response to it. The article concludes that although the outcome of the litigation is uncertain, the future of millions of acres of National Forests depends upon it.

I. DESCRIPTION OF THE HEALTHY FORESTS INITIATIVE

A. Precursors to the Healthy Forests Initiative

> The 2000 fire season . . . was one of the worst in 50 years. Approximately 123,000 fires burned more than 8.4 million acres. The total acreage burned was more than twice the 10-year national average. At times, nearly 30,000 personnel were on the fire lines, including military and firefighters from other countries. More than $2 billion from Federal accounts was spent suppressing wildland fires. This amount does not include State and local firefighting suppression costs, direct and indirect economic losses to communities, loss of property, and damage to ecosystems.[1]

In response to the 2000 fire season, the Clinton administration directed the Secretaries of Agriculture and the Interior to begin an effort designed to

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1. National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 67 Fed. Reg. 77,038, 77,039 (Dec. 16, 2002). More information on the 2000 fire season and statistics for fire seasons from 1998 to 2002 are available from the National Interagency Fire Center at http://www.nifc.gov/stats (last visited Apr. 13, 2005).

lessen the impacts of fire on communities and ensure effective firefighting capacity, which led to the National Fire Plan.[2] The cornerstone of the National Fire Plan is a report entitled "Managing the Impact of Wildfires on Communities and the Environment: A Report to the President in Response to the Wildfires of 2000," issued September 8, 2000.[3] Among its recommendations, this report sets forth ways to reduce the impacts of fires on rural communities,[4] a short-term plan for rehabilitation of fire-damaged ecosystems,[5] and ways to limit the introduction of invasive species and address natural restoration processes.[6]

Congress supported the National Fire Plan through appropriations language in the fiscal year 2001 Appropriations Act for the Department of the Interior and related agencies.[7] As part of its direction, Congress mandated the creation of a coordinated national 10-year comprehensive strategy.[8] This led to the publication of "A Collaborative Approach for Reducing Wildland Fire Risks to Communities and the Environment 10-Year Comprehensive Strategy," which was completed in August of 2001 "by Federal, State, tribal, and local government and non-governmental representatives."[9] In May of 2002, these same parties completed the Implementation Plan for the 10-Year Comprehensive Strategy.[10] The 10-year Implementation Plan establishes a performance-based framework for

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2. U.S. DEP'T OF AGRIC. & U.S. DEP'T OF THE INTERIOR, A COLLABORATIVE APPROACH FOR REDUCING WILDLAND FIRE RISKS TO COMMUNITIES AND THE ENVIRONMENT: 10-YEAR COMPREHENSIVE STRATEGY 3 (Aug. 2001) [hereinafter 10-YEAR COMPREHENSIVE STRATEGY], *available at* http://www.fireplan.gov/reports/7-19-en.pdf.

3. U.S. DEP'T OF AGRIC. & U.S. DEP'T OF THE INTERIOR, MANAGING THE IMPACT OF WILDFIRES ON COMMUNITIES AND THE ENVIRONMENT: A REPORT TO THE PRESIDENT IN RESPONSE TO THE WILDFIRES OF 2000 (Sept. 8, 2000), *available at* http://www.fireplan.gov/reports/8-20-en.pdf.

4. *Id.* at 1.

5. *Id.* at 2.

6. *Id.* at 7. The report, and the accompanying budget requests, strategies, plans, and direction, have become collectively known as the National Fire Plan (NFP). "The NFP is intended to reduce risk to communities and natural resources from wildland fires through rehabilitation, restoration and maintenance of fire-adapted ecosystems, and by the reduction of accumulated fuels or highly combustible fuels on forests, woodlands, grasslands, and rangelands." Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. 68,254, 68,255 (Dec. 8, 2003) (codified at 50 C.F.R. pt. 402).

7. Department of Interior and Related Agencies Appropriation Act, Pub. L. No. 106-291, 114 Stat. 1006 (2000).

8. *See id.* at tit. IV, 114 Stat. at 1006–1010 (allowing necessary funds for the Department of the Interior to manage "fire suppression operations, burned areas rehabilitation, hazardous fuels reduction, and rural fire assistance.").

9. 10-YEAR COMPREHENSIVE STRATEGY, *supra* note 2, at 3.

10. DEP'T OF AGRIC. & DEP'T OF THE INTERIOR, A COLLABORATIVE APPROACH FOR REDUCING WILDLAND FIRE RISKS TO COMMUNITIES AND THE ENVIRONMENT, 10-YEAR COMPREHENSIVE STRATEGY: IMPLEMENTATION PLAN, (May 2002) [hereinafter 10-YEAR IMPLEMENTATION PLAN], *available at* http://www.fireplan.gov/reports/11-23-en.pdf.

improving the management of wildland fire and hazardous fuels, meeting the need for ecosystem restoration and rehabilitation, implementing protective measures to reduce the risk of wildland fire to communities and environments, and monitoring progress over time.[11]

B. Terms and Applications of the Healthy Forests Initiative

On August 22, 2002, the Bush Administration issued "Healthy Forests: An Initiative for Wildfire Prevention and Stronger Communities," commonly known as the Healthy Forests Initiative.[12] The Healthy Forests Initiative states that the western United States is threatened by catastrophic fires and environmental degradation "caused by a crisis of deteriorating forest and rangeland health, the result of a century of well-intentioned but misguided land management."[13] Further, "the forests and rangelands of the West have become unnaturally dense, and ecosystem health has suffered significantly. . . . Currently, 190 million acres of public land are at increased risk of catastrophic wildfires."[14] To address this problem, "[t]he Healthy Forests Initiative will implement core components of the National Fire Plan's 10-year Comprehensive Strategy and Implementation Plan."[15]

In the Healthy Forests Initiative, President Bush directed Agriculture Secretary Veneman and Interior Secretary Norton "to improve regulatory processes to ensure more timely decisions, greater efficiency, and better results in reducing the risk of catastrophic wildfires by restoring forest health."[16] They were to do this through improving procedures and streamlining environmental reviews.[17] The Healthy Forests Initiative also stated that "President Bush will work with Congress on legislation to further accomplish more timely, efficient, and effective implementation of forest health projects."[18] This legislation was also "to fulfill the original promise of the 1994 Northwest Forest Plan by: [r]emoving needless

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11. This summation of the 10-year Comprehensive Strategy and 10-year Implementation Plan comes from the Department of Agriculture and the Department of the Interior, which provide additional detail on them. National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 67 Fed. Reg. 77,038, 77,040 (Dec. 16, 2002).

12. THE WHITE HOUSE, HEALTHY FORESTS: AN INITIATIVE FOR WILDFIRE PREVENTION AND STRONGER COMMUNITIES (2002) [hereinafter HEALTHY FORESTS INITIATIVE], *available at* http://www.whitehouse.gov/infocus/healthyforests/toc.html.

13. *Id.* at 1.

14. *Id.*

15. *Id.* at 2.

16. *Id.* at 3.

17. *Id.*

18. *Id.*

administrative obstacles and providing authority to allow timber projects to proceed without delay when consistent with the Northwest Forest Plan."[19]

The devil is in the details, however. The Healthy Forests Initiative stated that it would "[a]uthorize agencies to enter into long-term stewardship contracts with the private sector."[20] These contracts would "allow contractors to keep wood products in exchange for the service of thinning trees and brush and removing dead wood."[21] This quid pro quo was met with alarm by environmentalists since it would allow logging companies to log the big, profitable trees in exchange for taking away the small ones that have little or no commercial value. Nevertheless, the Forest Service revised its standard timber contracts,[22] and, in 2003–2004, the Forest Service and the Bureau of Land Management entered into 145 stewardship contracts for 80,000 acres of treatment.[23]

The Healthy Forests Initiative states that "[t]he Forest Service and Interior Department are planning to treat more [sic] 2.5 million acres of land [in 2002] with thinning or prescribed burns that reduce the accumulation of hazardous fuels and restore forest health."[24] These thinning projects are not, however, limited to underbrush or even small trees. The 10-Year Implementation Plan defines "appropriate tools" to be used as including "crushing, tractor and hand piling, thinning (to produce commercial or pre-commercial products), and pruning."[25] Neither the 10-Year Implementation Plan nor the 10-Year Comprehensive Strategy, however, define the term "hazardous fuels" to which these methods will be applied. Nor does the Healthy Forests Initiative define this term. In practice, this has led to large-diameter trees being logged under the auspices of "hazardous fuel reduction."[26]

Nor are Healthy Forests Initiative projects limited to the Wildland Urban Interface (WUI), the area most critical to community protection.[27]

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19. *Id.*

20. *Id.*

21. *Id.*

22. Revision of Timber Sale Contract Forms FS–2400–6 and FS–2400–6T, 68 Fed. Reg. 70,758 (Dec. 19, 2003).

23. HEALTHY FORESTS REPORT 3 (Dec. 6, 2004) [hereinafter DECEMBER PROGRESS REPORT], *available at* http://www.healthyforests.gov/projects/healthy_forests_report_12-6-04.pdf.

24. HEALTHY FORESTS INITIATIVE, *supra* note 12, at 9.

25. 10-YEAR IMPLEMENTATION PLAN, *supra* note 10, at 18.

26. *See, e.g.*, *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1073–74, (E.D. Cal. 2004) (enjoining Red Star Restoration Project in Tahoe National Forest that provided for logging of trees with a diameter of ten inches or more in roadless area); Decision Memorandum, U.S. Dep't of Agric., Forest Serv., Battle DFPZ Project: Lassen National Forest (Sept. 7, 2004) (outlining procedures for a fuel reduction project in California that will retain "live trees larger than 30 inches diameter at breast height").

27. Under the 10-Year Implementation Plan, the "Wildland Urban Interface" is defined as

Under the 10-Year Implementation Plan projects can be implemented outside the WUI if they are in lands where fire suppression has altered fire frequency on the land and there is a risk of losing key ecosystem components.[28] In practice, there has been considerable logging outside the WUI under the justification of "hazardous fuel reduction."[29]

The Healthy Forests Initiative also contends that "[p]rocedural delays are stalling critical forest and rangeland management projects," and that "[t]he appeals process is complex, time consuming and burdensome."[30] Whether administrative appeals cause or contribute to the wildfire problem is questionable.[31] Nevertheless, the Healthy Forests Initiative calls for changes to the administrative appeals system to expedite fuel reduction projects.[32] In addition, it criticizes that "[i]n some judicial districts, courts have provided injunctive relief to litigants based on short-term grounds, without deference to expert assessments of long-term risks to property or potential long-term environmental harm from delaying forest health projects."[33] The Healthy Forests Initiative calls for judicial reform to

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"[t]he line, area, or zone where structures and other human development meet or intermingle with undeveloped wildland or vegetative fuel." 10-YEAR IMPLEMENTATION PLAN, *supra* note 10, at 20.

28. 10-YEAR IMPLEMENTATION PLAN, *supra* note 10, at 12. The Implementation Plan indicates that projects are not limited to the WUI, but are allowed "in condition classes 2 or 3 in fire regimes 1, 2, or 3 outside the wildland urban interface, and [which] are identified as high priority through collaboration consistent with the Implementation Plan, in total, and as a percent of all acres treated." *Id.* The 10-Year Implementation Plan defines Condition Class 2 as: "Fire regimes on these lands have been moderately altered from their historical range by either increased or decreased fire frequency. A moderate risk of losing key ecosystem components has been identified on these lands." *Id.* at 18. It defines Condition Class 3 as: "Fire regimes on these lands have been significantly altered from their historical return interval. The risk of losing key ecosystem components from fire is high. Fire frequencies have departed from historical ranges by multiple return intervals. Vegetation composition, structure and diversity have been significantly altered. Consequently, these lands verge on the greatest risk of ecological collapse." *Id.*

29. In Oregon, for example, over 60% of the "hazardous fuels treatments" in FY 2004 were outside the WUI. In fact, the acreage of this logging outside the WUI more than doubled (a roughly 110% increase) from FY 2003 to FY 2004, while the acreage within the WUI treated only rose by about 11%. *See* HEALTHY FORESTS REPORT—OREGON, (Oct. 10, 2004), *available at* http://www.healthyforests.gov/projects/state_projects/oregon-healthy-forests-report-2004.pdf.

30. HEALTHY FORESTS INITIATIVE, *supra* note 12, at 13, 14.

31. The contention that administrative appeals contribute significantly to the wildfire problem is debunked by a General Accounting Office study that was summarized in a letter from the GAO. Letter from Barry T. Hill, General Accounting Office, to Larry Craig, Ranking Minority Member, Subcommittee on Forests and Public Lands (Aug. 31, 2001), *available at* http://www.gao.gov/new.items/d011114r.pdf. The letter stated that 1,671 hazardous fuel reduction projects were conducted by the Forest Service in 2001, of which only 1% of these projects were appealed and none were litigated. *Id.*

32. *See* HEALTHY FORESTS INITIATIVE, *supra* note 12, at 14 (reasoning that since "48 percent of all Forest Service mechanical fuels reduction projects were appealed," the appeals system is unnecessarily burdensome).

33. *Id.* at 15.

address this alleged problem, but it does not discuss the grounds for the injunctions or the merits of the cases in which they were issued.[34]

II. IMPLEMENTATION OF THE HEALTHY FORESTS INITIATIVE

A. The Healthy Forest Restoration Act of 2003

In keeping with the call for legislation in the Healthy Forests Initiative, on December 3, 2003, President Bush signed the Healthy Forests Restoration Act of 2003 (HFRA).[35] The HFRA authorized hazardous fuel reduction projects consistent with the 10-Year Implementation Plan.[36] It provided that "not less than 50 percent of the funds allocated for authorized hazardous fuel reduction projects" be spent for projects in the WUI.[37] It further provided that Environmental Assessments (EAs) or Environmental Impact Statements (EISs) would be done to comply with the National Environmental Policy Act (NEPA) and set forth the consideration of alternatives, public notices, and decision documents that would suffice.[38] The HFRA directed the Secretary of Agriculture to establish a special administrative review process for hazardous fuel reduction projects on Forest Service land.[39] Additionally, it also contained provisions on judicial review: limiting venue to the district where the project was to occur; limiting injunctions to sixty days in length (subject to renewal); and directing judges to balance the short- and long-term effects of the project in their weighing of the equities.[40]

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34. *See id.* at 15–16 (giving examples where court injunctions have had deleterious impacts on the Forest Service).

35. 16 U.S.C.A. §§ 6501–6591 (West Supp. 2004).

36. § 6512(a).

37. § 6513(d)(1)(A).

38. § 6514. This section would not, however, seem to prevent the establishment of categorical exclusions under 40 C.F.R. § 1508.4 (2004). These categorical exclusions bypass the EA or EIS requirement, since the HFRA at section 6517 states:

> Nothing in this subchapter affects, or otherwise biases, the use by the Secretary of other statutory or administrative authority (including categorical exclusions adopted to implement the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.)) to conduct a hazardous fuel reduction project on Federal land (including Federal land identified in section 6512(d) of this title) that is not conducted using the process authorized by section 6514 of this title.

§ 6517(a). In fact, the Forest Service would establish several categorical exclusions to carry out the Healthy Forests Initiative. *See infra* Part II.B.

39. § 6515.

40. § 6516.

B. New Regulations, Policies, and Procedures

The Healthy Forests Initiative is ultimately a statement of policies and goals, not a final agency action in itself. To implement the Healthy Forests Initiative it was, therefore, necessary to promulgate or change numerous regulations, policies, and procedures for the agencies involved. These actions provide the real means of carrying out the Healthy Forests Initiative.

The day after the issuance of the Healthy Forests Initiative, on August 23, 2002, the Forest Service issued its notice of adoption of a final interim directive.[41] This directive revised the Forest Service Handbook 1909.15, Chapter 30, to change the definition of "extraordinary circumstances" that preclude use of a categorical exclusion from NEPA documentation.[42] This alteration was significant because if "extraordinary circumstances" apply to a project it must undergo an EA or EIS, and if "extraordinary circumstances" do not apply, the Forest Service can forego that analysis.[43] Under the new directive "extraordinary circumstances" are not defined; rather the Forest Service provides a list of "resource conditions" for the officer to consider in deciding whether "extraordinary circumstances" are present.[44] This list includes such things as whether endangered or threatened species or their habitat are present, whether wilderness or wilderness study areas are involved, and whether the project involves an Inventoried Roadless Area.[45] This directive set the stage for the Forest Service's new slate of categorical exclusions, which would be established over the course of 2003.

On June 4, 2003 the Forest Service issued the final Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities.[46] Commonly known as the "new Appeals Rule," it revised the

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41. Clarification of Extraordinary Circumstances for Categories of Actions Excluded From Documentation in an Environmental Assessment or an Environmental Impact Statement, 67 Fed. Reg. 54,622, 54,622 (Aug. 23, 2002).

42. *Id.*

43. *See, e.g.*, Rhodes v. Johnson, 153 F.3d 785, 789–790 (7th Cir. 1998) (holding that because extraordinary circumstances were present, the removal of shrubs, which would normally be categorically excluded, requires the Forest Service to undertake an environmental assessment); California v. Norton, 311 F.3d 1162, 1177–78 (9th Cir. 2002) (holding that extraordinary circumstances preclude use of categorical exclusions to NEPA unless the United States adequately explains why this rule is not applicable).

44. U.S. FOREST SERV., FOREST SERVICE HANDBOOK: 1909.15—ENVIRONMENTAL POLICY AND PROCEDURES HANDBOOK, ch. 30 (July 6, 2004) [hereinafter FOREST SERVICE HANDBOOK], *available at* http://www.fs.fed.us/im/directives/fsh/1909.15/1909.15_30.doc.

45. *Id.* ch. 30.3.

46. Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 36 C.F.R. pt. 215 (2003).

Forest Service's administrative appeal procedures.[47] Now logging projects under appeal can be implemented immediately for "emergency" economic loss;[48] categorical exclusions are exempted from notice, comment, and appeal;[49] standing on appeal is limited to only those that submitted "substantive" comments to the agency;[50] "interested party" status is eliminated;[51] decisions signed by the Secretary or Undersecretary of Agriculture are exempt from appeal;[52] the appeal deciding officer is the next higher line officer (e.g., in a decision signed by the District Ranger, the appeal is decided by Forest Supervisor);[53] and, projects under categorical exclusions can be implemented immediately.[54]

On June 5, 2003, the Forest Service and Bureau of Land Management issued the notice of the final NEPA requirements for fire management.[55] This revised the Forest Service Handbook[56] and Department of Interior Departmental Manual,[57] and created categorical exclusions (Fuels CE).[58] Under the Fuels CE, hazardous fuels reduction and rehabilitation activities without an EA or EIS are permitted for up to 4,500 acres burning, 1,000 acres mechanical treatments, and 4,200 post-fire rehabilitation activities.[59] The projects carried out under the Fuels CE must be in the "Wildland Urban Interface Areas" or conditions 2 or 3 in Regime I, II, or III if outside the interface.[60] The projects are not allowed in wilderness, but they can be in wilderness study areas provided that they will not "impair [their] suitability . . . for preservation as wilderness."[61]

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47. § 215.1(a).

48. § 215.10.

49. § 215.12(f).

50. § 215.13(a); *see also id.* § 215.2 (defining "substantive comments" as those that "are specific to the proposed action, have a direct relationship to the proposed action and include supporting reasons for the Responsible Official to consider").

51. § 215.13(b).

52. § 215.20(b).

53. § 215.8(a).

54. § 215.9(c)

55. National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,814, 33,814 (June 5, 2003).

56. FOREST SERVICE HANDBOOK, *supra* note 44, at ch. 31.2.

57. U.S. DEP'T OF THE INTERIOR, DEPARTMENTAL MANUAL, pt. 516, ch. 2, app. 1 (2004), *available at* http://elips.doi.gov/elips/release/3612.htm. Part 516 is part of the Environmental Quality Programs Series in the Department Manual, which specifically addresses NEPA compliance and guidelines. *Id.*

58. National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. at 33,814.

59. *Id.*

60. *Id.* See *supra* notes 27–28 for definitions of these conditions.

61. FOREST SERVICE HANDBOOK, *supra* note 44, at ch. 31.2, pt. 10.

On July 29, 2003, the Forest Service issued another categorical exclusion.[62] This exclusion revised the Forest Service Handbook, 1909.15, Ch. 31.2 subsections 12, 13 and 14, and is commonly known as the "Small Timber CE."[63] The Small Timber CE permits, without the prerequisite of an EA or EIS, live tree harvest up to seventy acres with incidental live tree removal and 0.5 miles of temporary road construction; post-fire logging up to 250 acres and 0.5 miles of temporary road with incidental live tree removal for landings, skid trails, roads; and, "sanitation" (insects and disease) logging up to 250 acres and no more than one-half of a mile of temporary road with incidental live tree removal.[64]

On December 8, 2003, the Department of Interior and Department of Commerce issued their Joint Counterpart Endangered Species Act Section 7 Consultation Regulations.[65] This final "self-consultation" rule codified their joint counterpart regulations for consultation under section 7 of the Endangered Species Act to "streamline" projects implementing the National Fire Plan of 2000.[66] In effect, it reduces legal protections for endangered and threatened species by providing that many potentially harmful projects—including timber cutting and roadbuilding—no longer need to be reviewed by the Fish and Wildlife Service or National Marine Fisheries Service before proceeding.[67]

Next, on January 9, 2004, the Forest Service established the pre-decisional objection process for hazardous fuel reduction projects.[68] This interim final rule established the sole process by which the public may seek administrative review and file objections to proposed hazardous fuel reduction projects authorized under the Healthy Forests Restoration Act of 2003.[69]

Armed with the procedures set forth above, the Forest Service and Department of the Interior land management agencies have implemented the Healthy Forests Initiative on a massive scale.[70] In 2004, for example,

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62. National Environmental Policy Act Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44,598 (July 29, 2003).

63. *Id.*

64. *Id.*

65. Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. 68,254 (Dec. 8, 2003) (codified at 50 C.F.R. pt. 402 (2004)) [hereinafter Consultation Regulations].

66. *Id.*

67. *See id.* at 68,255 (stating that the goal of the Healthy Forests Initiative was "to accelerate implementation" of the National Fire Plan).

68. Predecisional Administrative Review Process for Hazardous Fuel Reduction Projects Authorized by the Healthy Forests Restoration Act of 2003, 36 C.F.R. pt. 218 (2004).

69. § 218.1.

70. To facilitate increased timber harvest and roadbuilding in the National Forests, in addition

the "agencies' combined target for hazardous fuels treatment and improving land condition was 3.7 million acres."[71] They "far exceeded this goal by treating nearly 4.2 million acres, or 113% of the 2004 goal. Of these acres, 2.4 million were in the wildland-urban interface" and 1.8 million acres were outside of it.[72]

III. LITIGATION AGAINST THE HEALTHY FORESTS INITIATIVE

Because it is merely a statement of goals and policy, there is no litigation against the Healthy Forests Initiative per se.[73] Rather, the

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to the actions implementing the Healthy Forests Initiative, the Forest Service changed numerous other regulations and internal procedures. For instance, on May 17, 2001, the Secretary of Agriculture suspended the National Forest Management Act (NFMA) planning regulations that had been adopted by the Clinton administration in 2000. National Forest System Land and Resource Planning; Extension of Compliance Deadline, 66 Fed. Reg. 27,552 (May 17, 2001) (codified at 36 C.F.R. § 219.35). Effective May 20, 2002, the Secretary extended the suspension of the 2000 regulations indefinitely. National Forest System Land and Resource Planning; Extension of Compliance Deadline, 67 Fed. Reg. 35,431 (May 20, 2002). On December 6, 2002, the Bush administration proposed its own NFMA planning regulations. National Forest System Land and Resource Management Planning, 67 Fed. Reg. 72,770 (Dec. 6, 2002) (codified at 36 C.F.R. pt. 219). Effective July 16, 2004, the administration proposed to open 58.5 million acres of National Forest roadless areas to logging that had been set aside by regulation in the Clinton administration's "Roadless Rule." Protection of Inventoried Roadless Area, 36 C.F.R. § 294.10 (2004). Then, to address a series of losses in court that applied the management indicator species provisions of 36 C.F.R. § 219.19 (2004), the Forest Service issued an "interpretative rule" that contended that the 1982 NFMA rules were no longer in effect. *See* National Forest System Land and Resource Management Planning; Use of Best Available Science in Implementing Land Management Plans, 69 Fed. Reg. 58,055 (Sept. 29, 2004) (stating that the intent of planning regulations is to use "best available science"). (For an example of a case that held the Forest Service in violation of the management indicator provisions of the 1982 NFMA rules, see Utah Envtl. Cong. v. Bosworth, 372 F.3d 1219, 1226 (10th Cir. 2004).) On October 26, 2004, a lawsuit was filed against the "interpretative rule," on the grounds that, inter alia, it is a legislative rule that did not meet the requirements for prior notice and public comment in the Administrative Procedure Act. 5 U.S.C. § 553 (b)(3)(A) (2000); Complaint for Declaratory and Injunctive Relief at 3, Defenders of Wildlife v. Johanns, No. c-04-4512-BZ (N.D. Cal. filed Oct. 26, 2004). The Forest Service subsequently published its final NFMA planning regulation. National Forest System Land and Resource Management Planning; Removal of 2000 Planning Rule; National Environmental Policy Act Documentation Needed for Developing, Revising or Amending Land Management Plans; Categorical Exclusion; Final Rules and Notice, 70 Fed. Reg. 1021 (January 5, 2005). The regulation includes a proposed categorical exclusion from the requirement of NEPA analysis for future development, revision or amendments of Forest Plans. *Id.* Plaintiffs in the Defenders of Wildlife suit requested leave of court to supplement their complaint to add claims against the final NFMA planning regulation. First Supplemental Complaint for Declaratory and Injunctive Relief, Defenders of Wildlife v. Johanns, No. c-04-4512-BZ (N.D. Cal. filed Feb. 17, 2005).

71. DECEMBER PROGRESS REPORT, *supra* note 23, at 1.

72. *Id.*

73. *See generally* Sierra Club v. Glickman, 974 F. Supp. 905, 914 (E.D. Tex. 1997) (stating that the Sierra Club had standing to sue the Forest Service because it was with respect to "alleged on-the-ground violations of the NFMA and regulations"), *aff'd sub nom.* Sierra Club v. Peterson, 185 F.3d 349 (5th Cir. 1999), *rev'd en banc*, 228 F.3d 559, 561 (5th Cir. 2000) (holding that suit cannot be brought against a Forest Service policy, but must be against specific projects, and then only after

litigation response has taken the form of lawsuits against the various regulations and categorical exclusions that are implementing the Healthy Forests Initiative. There are several lawsuits pending, and these are summarized below.

A. The WildLaw Litigation

The first filed lawsuit, and the one that addresses the greatest number of Healthy Forests Initiative actions in one suit, is *WildLaw v. Forest Service*.[74] Filed on June 20, 2003, the *WildLaw* suit attacks the Healthy Forests Initiative's administrative appeals regulations, the Fuels Categorical Exclusion (CE) and the Small Timber CE.[75] As a threshold matter, the suit contends that the Forest Service violated NEPA, 42 U.S.C. § 4321, by failing to prepare an EA or EIS for these actions.[76]

The plaintiffs in the *WildLaw* suit attack the categorical exclusions on several grounds.[77] They contend that, based on the administrative records for the Fuels CE and the Small Timber CE, each violates NEPA because the actions covered by the respective rules individually or cumulatively have significant effects on the environment.[78] As a result, they are not appropriate actions for categorical exclusion.[79] The plaintiffs also argue that the data the Forest Service used to rationalize these categorical exclusions lacks scientific and statistical merit.[80]

The *WildLaw* suit also includes claims against the new Appeals Rule. The essence of these claims is that the Forest Service violated the

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exhaustion of administrative remedies).

74. WildLaw v. U.S. Forest Serv., No. CV-03-T-682-N (M.D. Ala. filed June 20, 2004).

75. Plaintiffs' First Brief at 4, *WildLaw* (No. CV-03-T-682-N) [hereinafter WildLaw Brief] (on file with author).

76. On this issue the *WildLaw* suit contends that *Heartwood v. Forest Serv*., 230 F.3d 947 (7th Cir. 2000) was wrongly decided. WildLaw Brief, *supra* note 75, at 16. *Heartwood* held that no EA or EIS was required for a 1990s categorical exclusion that was similar to the Small Timber CE, although it was based on maximum board feet of timber harvest instead of acreage. *Heartwood*, F.3d at 954.

77. WildLaw Brief, *supra* note 75, at 4.

78. *Id.* at 1.

79. 40 C.F.R. § 1508.4 (2004).

80. WildLaw Brief, *supra* note 75, at 61. In establishing the Fuels CE, the Forest Service conducted a survey of more than 2,500 hazardous fuel reduction and rehabilitation/stabilization projects. National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,814 (June 5, 2003). A similar survey was performed for the Small Timber CE. *See* National Environmental Policy Act Documentation Neeed for Limited Timber Harvest, 68 Fed. Reg. 44,598 (July 29, 2003) (discussing a review of the environmental effects of 154 timber projects as insignificant under NEPA). The *WildLaw* plaintiffs contend the data called for in these surveys were faulty and that the outcome was pre-decided by the Forest Service. *See* WildLaw Brief, *supra* note 75, at 44 ("[A]long with the help of a lot of smoke and a few mirrors—the Forest Service . . . made NEPA virtually disappear from its entire decision-making process.").

Department of the Interior and Related Agencies Appropriations Act's Forest Service Decisionmaking and Appeals Reform Act (ARA).[81] The ARA directs the Forest Service to "establish a notice and comment process for proposed actions of the Forest Service concerning projects and activities implementing land and resource management plans . . . [and to] modify the procedure for appeals of decisions concerning such projects."[82] In a nutshell, the suit contends that the new Appeals Rule contradicts the ARA by depriving the public of notice, opportunity to comment and the right to appeal all projects and activities implementing National Forest land and resource management plans.[83] The plaintiffs assert that the new Appeals Rule does this in three ways. First, it "fails to require public notice and opportunity for comment on '[p]rojects and activities which are categorically excluded from documentation in an environmental impact statement (EIS) or environmental assessment (EA),' even if such projects and activities implement [National Forest] land and resource management plans."[84] Second, the new "Appeals Rule fails to allow appeals of '[d]ecisions for actions that have been categorically excluded from documentation in an EA or EIS,' even if such actions implement [National Forest land and resource management] [p]lans.[85] And, third, the new "Appeals Rule also exempts decisions for projects and activities implementing [National Forest land and resource management plans] from 'notice, comment, and appeal procedures' '[w]hen the Secretary of Agriculture or Under Secretary, Natural Resources and Environment, issues a decision for projects and activities implementing land and resource management plans."[86]

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81. WildLaw Brief, *supra* note 75, at 97.

82. Department of the Interior and Related Agencies Appropriations Act, Pub. L. 102-381, § 322, 106 Stat. 1374, 1419 (1992) (codified as amended at 16 U.S.C. 1612 (2000)).

83. WildLaw Brief, *supra* note 75, at 97–134.

84. Plaintiffs' First Amended Complaint for Declaratory and Injunctive Relief at 23, para. 101, WildLaw v. Forest Serv., No. CV-03-T-682-N (M.D. Ala. 2004) (first alteration in original) (quoting Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. 33,582, 33,597 (June 4, 2003) (codified at 36 C.F.R. § 215.4(a) (2004))) (on file with author).

85. *Id.* at p. 23, para. 102 (first alteration in original) (quoting Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. at 33,600 (codified at 36 C.F.R. § 215.12(f))).

86. *Id.* at 24, para. 104 (second alteration in original) (quoting Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities, 68 Fed. Reg. at 33,602 (codified at 36 C.F.R. § 215.20(b))).

B. Litigation Against the New Appeals Rule

Another lawsuit was filed against the new Appeals Rule on July 28, 2003. In *Wilderness Society v. Rey* (*Rey II*), the plaintiffs contend that the new Appeals Rule violates the ARA for the same reasons set forth in the *WildLaw* suit.[87] The Wilderness Society places a special emphasis on a previous ruling construing the ARA, *Wilderness Society v. Rey* (*Rey I*).[88] In *Rey I*, the court had held that these same defendants "may not circumvent [the ARA] by attempting to create a new rule that any decision signed by the Undersecretary or Secretary is exempt from the statute."[89] Yet, the new Appeals Rule provision states the "[d]ecisions of the Secretary of Agriculture or Under Secretary, Natural Resources and Environment are not subject to the notice, comment, and appeal procedures set forth in this part."[90] The plaintiffs in *Rey II* thus contend that the new Appeals Rule is in direct contravention with the holding of *Rey I*.

As for the government's defense in *Rey II*, they contend that the plaintiffs have no standing to challenge the appeal regulations in a facial, instead of an as-applied, context, and that the case is not ripe for adjudication.[91] On the merits, the government's basic contention is that Congress did not speak unambiguously with respect to the specific matters addressed in the regulations plaintiffs are challenging, and, as a result, the Forest Service's construction of the ARA is entitled to deference from the court.[92] The matter has been fully briefed on summary judgment, and a decision can be expected in the spring of 2005.

Meanwhile, there is a third case pending against the new Appeals Rule, *Earth Island Institute v. Pengilly*.[93] Some claims in this case overlap with *WildLaw* and *Rey II*, but it challenges even more of the new Appeals Rule.[94] The suit contends that the new rule improperly exempts many

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87. Complaint for Declaratory and Injunctive Relief at 1, Wilderness Soc'y v. Rey, No. CV-03-119-M-DWM (D. Mont. filed July 28, 2003) (on file with author).

88. *Id.* at 2; Wilderness Soc'y v. Rey, 180 F. Supp. 2d 1141 (D. Mont. 2002).

89. *Id.* at 1148.

90. 36 C.F.R. § 215.20(b).

91. Defendants' Memorandum in Support of Motion for Summary Judgment at 5–7, Wilderness Soc'y v. Rey, No. CV-03-119-M-DWM (D. Mont. filed July 28, 2003) (dated June 3, 2004) (on file with author).

92. *Id.* at 8–19.

93. Earth Island Inst. v. Pengilly, No. 03–6386 (E.D. Cal. Dec. 10, 2003) (order granting preliminary injunction).

94. *See* Corrected Complaint for Declaratory and Injunctive Relief at 4, Earth Island Inst. v. Pengilly, No. 03–630 (E.D. Cal. 2003 filed Oct. 7) [hereinafter Earth Island Institute Complaint] (challenging the facial validity of "the notice, comment, and administrative appeal regulations of the defendants") (on file with author).

Forest Service decisions from appeal, particularly categorical exclusion decisions and decisions by the Secretary and Under Secretary of Agriculture.[95] It further contends that the new rule unlawfully denies appeals to appellants who have notified the Forest Service of their interest in the challenged project and improperly allows the Forest Service to not decide appeals.[96] The suit also contends that the new rule improperly restricts the automatic stay provisions of the ARA and avoids uniformity in the public comment and appeals processes required by the ARA.[97]

The defense in the *Earth Island Institute* suit again alleges a lack of ripeness and standing, and asserts agency deference.[98] The non-ARA portions of the suit have been settled, briefing is finished on the ARA claims, and oral argument was held in December, 2004.

C. Litigation Against the Fuels CE

A facial and "as applied challenge" to the Fuels CE was filed in October, 2004, by the Sierra Club and Sierra Nevada Forest Protection Campaign.[99] This suit makes the same facial-challenges claims as the *WildLaw* suit and, like that suit, seeks a nationwide injunction on operation of the Fuels CE.[100] The *Sierra Club* suit makes an additional claim against the Forest Service's designation of "extraordinary circumstances."[101] The claim is based on 40 C.F.R. § 1508.4, which requires a categorical exclusion to include provision for "extraordinary circumstances," or those circumstances "in which a normally excluded action may have a significant environmental effect."[102] The Sierra Club contends that the Forest Service's designation of "extraordinary circumstances" did not meet the requirements of 40 C.F.R. § 1508.4 because the Forest Service just listed "[r]esource conditions that should be considered in determining whether extraordinary circumstances . . . warrant further analysis and documentation

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95. *Id.* at 27.

96. *See id.* at 29 (claiming that the ARA does not "restrict the right of appeal to those parties who file 'substantive comments'").

97. *See id.* at 27 (claiming that the new rule improperly exempts "economic loss" from the automatic stay) .

98. *See* Plaintiffs' Reply Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction at 20, Earth Island Inst. v. Pengilly, No. 03–6386 (E.D. Cal. 2003) (noting that the Forest Service relies on *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842–43 (1984), for deference) (on file with author).

99. Complaint for Declaratory and Injunctive Relief, Sierra Club v. Bosworth, No. CIV.S-04-2114-GEB-DAD (E.D. Cal. filed Oct. 8, 2004) [hereinafter Sierra Club Complaint] (on file with author).

100. *Id.*

101. *Id.* at 18–19.

102. 40 C.F.R. § 1508.4 (2004).

in an EA or an EIS."[103] The Forest Service stated: "The mere presence of one or more of these resource conditions does not preclude use of a categorical exclusion."[104] Plaintiffs contend that allowing the deciding officer to determine "significance" for purposes of deciding whether the extraordinary circumstances exception applies results in a case-by-case categorical exclusion, which is not allowed under 40 C.F.R. § 1508.4.[105] The *Sierra Club* suit also makes "as applied" challenges to the Fuels CE.[106] The Complaint names five timber sales in the Lassen National Forest and Eldorado National Forest that are implementing the Fuels CE, and names several future projects expected to be approved applying the categorical exclusion.[107] The plaintiffs contend that these sales have individual and/or cumulatively significant effects making the use of the Fuels CE for them contrary to 40 C.F.R. §§ 1501.4, 1508.4, 1508.9 and 1508.27.[108] Plaintiffs further challenge defendants' finding that the sales were not significant as "arbitrary and capricious, an abuse of discretion or not in accordance with law, contrary to the APA."[109] In addition, plaintiffs contend that the projects involve extraordinary circumstances, including California Spotted Owl and Northern Goshawk habitat, and thus a categorical exclusion cannot be applied to these projects.[110] Plaintiffs also challenge the Forest Service's case-by-case analysis of the projects as "an impermissible ad hoc use of a categorical exclusion contrary to 40 C.F.R. § 1508.4."[111]

The Fuels CE is applicable to all units of the National Forest System. In the Forest Service's fiscal year 2004, the Fuels CE and other "administrative tools" were used to treat 442,000 acres while in 2005 the Forest Service projects 351,238 acres will be treated.[112] It is likely, however, that use of the Fuels CE will be even greater. The Fuels CE was based upon a review of more than 2,500 projects over two years, and the projects covered more than 2.5 million acres.[113] Projecting those numbers

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103. FOREST SERVICE HANDBOOK, *supra* note 44, at ch. 30.3, pt. 2.

104. *Id.*

105. Sierra Club Complaint, *supra* note 99, at 11–12.

106. *Id.* at 22.

107. *Id.* at 22–24.

108. *Id.* at 24.

109. *Id.* at 24.

110. *See id.* at 22 (stating that some "projects involve extraordinary circumstances, in that species designated by the Forest Service as sensitive species and/or sensitive species' habitat are present"); *accord* Rhodes v. Johnson, 153 F.3d 785, 790 (7th Cir. 1998) (holding that if an extraordinary circumstance exists the Forest Service's use of a categorical exclusion is not allowed).

111. Sierra Club Complaint, *supra* note 99, at 24.

112. DECEMBER PROGRESS REPORT, *supra* note 23, at 3.

113. The Forest Service surveyed 2,559 projects over two years to support its decision to issue the Fuels CE. U.S. FOREST SERV., FINAL REPORT ON DATA CALL 3 (2003), *available at* http://www.fs.fed.us/emc/hfi/analysis.pdf. Those projects involved treatment of 2,542,328.8 acres by

into the future indicates that the Fuels CE will likely be used for more than 1.25 million acres per year. And, the usage may be even higher considering that the purpose of the Fuel CE is to expedite projects. Given the large number of projects and acreage involved, it is likely that there will be several more lawsuits in 2005 challenging the Fuels CE and projects approved under it.

D. Litigation Against the Small Timber CE

Although the footprint of any one project under the Small Timber CE is relatively little, collectively these projects present death by a thousand cuts for the forests because the use of this categorical exclusion seems limitless. Nowhere in the rulemaking record does the Forest Service indicate how many projects the new regulations will cover, how many total acres will be affected, or how many board feet of timber will be removed. There is no discussion of the types or ages of trees to be cut, nor of the effects to wildlife or watersheds from these projects. The Forest Service used no apparent objective quantitative or qualitative measure of "significance" in the promulgation of this categorical exclusion.[114]

Another lawsuit was filed on December 1, 2004 against the small timber CE, regarding the Shaw Lake Vegetation Management Project in Colorado. That suit is *Colorado Wild v. U.S. Forest Service*, and contends that the small timber CE "violates NEPA, both facially and as-applied."[115] In addition, a successful challenge against the application of the Small Timber CE was made in *Earth Island Institute*.[116] In that case the court granted a preliminary injunction against a timber harvest in the Burnt Ridge area of the 2002 McNally fire in California.[117] The court found the Forest Service was violating the CE regulations and NEPA "by permitting a

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mechanical methods and/or prescribed burns. U.S. Forest Service Spreadsheet Compiling Bureau Indian Affairs, Bureau Land Mgmt., Forest Serv., Fish & Wildlife Serv., and Nat. Park Serv. NEPA Records Used in Fuels CE Analysis (on file with author). The Forest Service has stated that those projects would be covered under the Fuels CE, and therefore represent a reasonable projection of its future use. National Environmental Policy Act Documentation Needed for Fire Management Activities; Categorical Exclusions, 68 Fed. Reg. 33,814, 33,823 (June 5, 2003) ("[T]he profile of the past hazardous fuels reduction and fire rehabilitation activities . . . is indicative of the agencies' future activities.").

114. *See* National Environmental Policy Act, Documentation Needed for Limited Timber Harvest, 68 Fed. Reg. 44,598, 44,598 (July 29, 2003) (exempting certain categories of small timber harvest).

115. Complaint for Declaratory and Injunctive Relief Appealing Final Agency Actions at 2, Colorado Wild v. U.S. Forest Serv., No. 04-m-242 (D. Colo. filed Nov. 30, 2004) (on file with author).

116. Earth Island Inst. v. Pengilly, No. 03–6386 (E.D. Cal. Dec. 10, 2003) (order granting plaintiffs' motion for preliminary injunction).

117. *Id.* at 3.

project which may have individual and cumulative significant impact on the environment to be approved without environmental documentation and public review."[118]

More lawsuits are looming against the Small Timber CE. For example, the Forest Service has proposed two logging projects under this categorical exclusion in a portion of Carson-Iceberg inventoried roadless area scorched in a 2003 prescribed burn.[119] These projects would remove approximately 3 million board feet of timber from 500 acres of the inventoried roadless area.[120] These projects exemplify the segmentation allowed under this categorical exclusion because the two projects, although practically adjacent to one another, qualify for the exclusion because the agency treated them as separate actions.[121] Another example is the Sims Fire Salvage project proposed for the Shasta-Trinity National Forest and Six Rivers National Forest.[122] It is likely that this lawsuit and others like it will make the same arguments that led to the previous Small Timber CE (which was based on board feet rather than acreage) to be invalidated in *Heartwood*.[123] Namely, the Forest Service's designation of the class of actions to be covered by the categorical exclusion was arbitrary and capricious because it was based on an arbitrarily designated amount of acres.[124]

E. Litigation Against the Self-Consultation Rule

Pursuant to the new Joint Counterpart Endangered Species Act section 7 Consultation Regulations,[125] on March 2, 2004 and March 3, 2004, the U.S. Fish and Wildlife Service entered into "Alternative Consultation

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118. *Id.* at 2. This case also challenged the application of the Fuels CE to these particular projects, but the categorical exclusion claims were settled after the court issued the preliminary injunction. *Id.* at 3. The challenge to the new Appeals Rule in this case is still pending, however. *See infra* Part III.B (discussing litigation against the new Appeals Rule).

119. Notice from Tom Quinn, Forest Supervisor, U.S. Forest Serv., Mud & Whit Fire Salvage Projects Scoping Notice (July 26, 2004) (on file with author).

120. *Id.*

121. *Id.*

122. Notice from Ann Garland, District Ranger, U.S. Forest Serv., Sims Fire Salvage Projects Scoping Notice (Jan. 7, 2005) (on file with author).

123. Heartwood, Inc. v. U.S. Forest Serv., 73 F. Supp. 2d 962, 980 (S.D. Ill. 1999) ("[D]eclar[ing] null and void FS project decisions approved relative to the timber harvest CE since September 16, 1998, and enjoin[ing] further actions through the application of the timber harvest CE.") (citation omitted) (emphasis omitted).

124. The *Heartwood* opinion was appealed by plaintiffs on other grounds and affirmed. *See* Heartwood, Inc. v. U.S. Forest Serv., 230 F.3d 947, 954 (7th Cir. 2000) (finding that the Forest Service action was an implementing procedure).

125. Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. 68,254 (Dec. 8, 2003) (codified at 50 C.F.R. pt. 402 (2004)).

Agreements" with the Forest Service and the Bureau of Land Management.[126] These agreements authorized the agencies to avoid consultation for any National Fire Projects that they find may affect but are not likely to adversely affect endangered or threatened species or critical habitat.[127] This led to the July 22, 2004 filing of *Defenders of Wildlife v. Norton*. In that case, plaintiffs challenge the self-consultation rule on the grounds that it violates section 7 of the Endangered Species Act and the Administrative Procedure Act.[128] In addition, they contend that the agencies violated NEPA by not preparing an EIS or an adequate EA for the rule or for the Alternative Consultation Agreements.[129] The case is scheduled to be fully briefed by July 31, 2005.

CONCLUSION

The Healthy Forests Initiative has undermined public participation and environmental review for countless timber projects in the National Forests. It did this based on the faulty premise that administrative appeals and NEPA review are to blame for the western wildfire problem. Under the guise of the Healthy Forests Initiative, the Forest Service is conducting commercial timber sales on millions of acres outside the immediate community protection zones, without full review of their effects. Time will tell if the litigation brought in response to the Healthy Forests Initiative succeeds, but the role of the public and the extent of environmental review in management of the National Forests depends upon it.

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126. BUREAU OF LAND MGMT. ET AL., ALTERNATIVE CONSULTATION AGREEMENT TO IMPLEMENT SECTION 7 COUNTERPART REGULATIONS (Mar. 3, 2004), *available at* http://endangered.fws.gov/consultations/BLM_ACA.pdf.

127. Joint Counterpart Endangered Species Act Section 7 Consultation Regulations, 68 Fed. Reg. at 68,255.

128. Complaint for Declaratory and Injunctive Relief at 47, Defenders of Wildlife v. Norton, No. 1:04CV01230 (D.D.C. filed July 22, 2004) (on file with author).

129. *Id.*