NOTES

Environmental Protection Information Center v. United States Forest Service: The Ninth Circuit Questionably Renders Habitat as a Proxy Beyond Question

I. OVERVIEW

The United States Forest Service (USFS) proposed the Knob Timber Sale (Sale) to harvest timber from 578 acres in the Salmon River Ranger District of the Klamath National Forest in 2001.[1] In order to comply with provisions of the National Environmental Policy Act (NEPA), USFS issued an Environmental Assessment (EA) in December 2001.[2] USFS decided to officially proceed with the Sale in March 2002.[3] USFS received comments about the Sale, which prompted USFS to amend the Sale's terms.[4] In October 2002, USFS issued a final EA, which evaluated the Sale's effects on the habitat of the northern spotted owl[5] and on watersheds in the proposed area of impact.[6] Subsequently, USFS again decided to proceed with the Sale and issued a Finding of No Significant Impact (FONSI) for a proposed alternative.[7] The proposed alternative included logging 125 acres of critical habitat for the spotted owl.[8] The proposed alternative for the Sale also required the removal of

1. Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1008 (9th Cir. 2006).
2. *Id.* at 1008 n.1.
3. *Id.*
4. *Id.*
5. The Fish and Wildlife Service (FWS) listed the spotted owl as a threatened species in 1990. Seattle Audubon Soc'y v. U.S. Forest Serv., 952 F.2d 297, 300 (9th Cir. 1991). The FWS's prescription of the owl as a threatened species did not obviate USFS's duties to maintain species diversity in national forests under the National Forest Management Act. *Id.* at 302.
6. *Envtl. Prot. Info. Ctr.*, 451 F.3d at 1008.
7. *Id.*
8. *Id.* at 1010. Spotted owls live in the same general area throughout their entire lifespans. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1063 (9th Cir. 2004).

fourteen acres of the spotted owl's nesting habitat and called for fifty-one acres of "high" quality nesting habitat to be degraded to "moderate" quality.[9]

Consequently, the Environmental Protection Information Center (EPIC) filed suit in the United States District Court for the Eastern District of California alleging that USFS violated both NEPA and the National Forest Management Act (NFMA).[10] The district court granted summary judgment to USFS on all claims.[11] EPIC appealed the district court's decision.[12] The United States Court of Appeals for the Ninth Circuit reviewed the district court's judgment *de novo*.[13] EPIC argued that USFS violated NFMA when USFS assessed the potential impact on wildlife in the proposed Sale area because USFS relied on studies of effects on habitat, rather than examinations of effects on individual species populations.[14] The Ninth Circuit *held* that USFS's methodology of using habitat as a proxy for evaluating effects on wildlife in the proposed Sale area was neither arbitrary nor capricious. *Environmental Protection Information Center v. United States Forest Service*, 451 F.3d 1005, 1018 (9th Cir. 2006).

II. BACKGROUND

NFMA evolved from a series of legislative measures, the first of which Congress passed in the late nineteenth century.[15] In 1891, Congress passed the Creative Act, which gave the President authority to set aside forest reserves.[16] Subsequently, President Harrison set aside thirteen million acres of forest reserves.[17] However, the Creative Act did not contain any regulatory structure embedded in its language.[18] Therefore, Congress passed the Organic Act of 1897,[19] which provided that all forest reserves set aside by the President "shall be as far as practicable controlled and administered in accordance with the

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9. *Envtl. Prot. Info. Ctr.*, 451 F.3d at 1010.
10. *Id.* at 1008.
11. *Id.*
12. *See id.* (providing the decision of the appeal of the grant of summary judgment).
13. *Id.*
14. *Id.* at 1017.
15. *See generally* CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS (1987) (documenting the history of national forests and USFS).
16. *Id.* at 17-18.
17. Jack Tuholske & Beth Brennan, *The National Forest Management Act: Judicial Interpretation of a Substantive Environmental Statute*, 15 PUB. LAND L. REV. 53, 57 (1994).
18. WILKINSON & ANDERSON, *supra* note 15, at 18.
19. *Id.* at 18.

[provisions of the Organic Act]."[20] Accordingly, the Department of Interior administered the forest reserves.[21]

Congress then transferred the administration of the reserves to the Department of Agriculture (Department) in 1905.[22] At that time, Gifford Pinchot led the Division of Forestry within the Department.[23] Congress renamed the "Division of Forestry" the "Forest Service" approximately one month after Congress transferred the forest reserves to the Department.[24] Then, in 1907, Congress designated that the forest reserves were to be known as "national forests."[25] Following the transfer of the forest reserves to the Department, Congress authorized the Secretary of Agriculture (Secretary) to "examine, locate, and purchase such forested, cut-over, or denuded lands . . . [as] may be necessary . . . for the production of timber."[26]

By 1960, Congress declared national forests should be used for "outdoor recreation, range, timber, watershed, and wildlife and fish purposes"[27] and called upon the Secretary to "administer the renewable surface resources of the national forests for multiple use and sustained yield."[28] In 1974, the Agriculture and Forestry Committee of the Senate found "questions relating to the condition and use of [American] renewable resources ha[d] increased in number and intensity over the last decade."[29] Congress attempted to answer these questions by passing the Forest and Rangeland Renewable Resources Planning Act of 1974 (FRRRPA).[30]

In FRRRPA, Congress required the Secretary to assess renewable resources due to the "vital importance of America's renewable resources of the forest . . . to the [n]ation's social and economic well-being" and "the necessity for a long term perspective in planning and undertaking related national renewable resource programs administered by the Forest

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20. Organic Act of 1897 (codified as amended at 16 U.S.C. § 475 (2000)). Relevant sections of the Organic Act noted herein have been enfolded into post-1897 statutes governing national forests. *See* WILKINSON & ANDERSON, *supra* note 15, at 18 n.58 (noting amendments made to the Act).

21. WILKINSON & ANDERSON, *supra* note 15, at 18.

22. *Id.*

23. *Id.*

24. *Id.*; *see id.* at 18 nn.60-61 (noting Congress transferred the reserves in February 1905 and changed the name in March 1905).

25. *Id.* at 18.

26. Weeks Act of 1911 (codified as amended at 16 U.S.C. § 515 (2000)).

27. Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. § 528 (2000).

28. *Id.* § 529.

29. S. REP. NO. 93-686 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 4060, 4063.

30. *Id.*

Service."[31] A series of federal court decisions limiting timber production, however, prompted Congress to reevaluate the parameters prescribed by FRRRPA.[32] Subsequently, Congress amended FRRRPA through the passage of the National Forest Management Act of 1976.[33]

Among the changes enacted, Congress implemented the specific requirement that the Secretary develop working plans for national forests[34] that would "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives."[35] Congress further required the Secretary to implement regulations to enact the provisions of NFMA.[36] USFS presented the first planning regulations under NFMA in 1979, later codified at 36 C.F.R. § 219.[37]

In the 1979 regulations, USFS promulgated management objectives that included "provid[ing] for and maintain[ing] diversity of plant and animal communities to meet overall multiple-use objectives" in national forests.[38] Specifically, USFS sought to "maintain or improve fish and wildlife habitats"[39] and "improve critical and essential habitats of threatened or endangered plant and animal species."[40] Therefore, USFS stipulated that management practices shall "ensure that fish and wildlife habitats [were] managed to maintain viable populations of all existing native vertebrate species and to improve habitat of selected species . . . to the extent practicable."[41]

In order to maintain viable populations of species, USFS required the forecast of population viability be cast in terms of "population trends" and the "amount and quality of habitat" when feasible.[42] USFS further mandated that planners identify management indicator species

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31. Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, § 2, 88 Stat. 476, 476 (1974) (codified as amended by the National Forest Management Act of 1976 in sections of 16 U.S.C.).

32. *See* S. REP. NO. 94-893, at 8 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6662, 6669 (noting that "[r]ecent developments have underscored the need for legislative changes to enable the Forest Service to perform its proper role of management").

33. National Forest Management Act of 1976, 16 U.S.C. §§ 1600-14 (2000) (originally enacted as the Forest and Rangeland Renewable Resources Planning Act of 1974).

34. *Id.* §§ 1603-04.

35. *Id.* § 1604(g)(3)(B).

36. *Id.* § 1613.

37. National Forest System Land and Resource Management Planning, 44 Fed. Reg. 53,928, 53,928 (Sept. 17, 1979) (codified in 36 C.F.R. § 219 (1983) (repealed 2001)).

38. 36 C.F.R. § 219.13(b)(5).

39. *Id.* § 219.10(b)(9).

40. *Id.* § 219.10(b)(10).

41. *Id.* § 219.13(b)(8).

42. *Id.* § 219.12(g)(1).

(MIS) to assess fish and wildlife resources.[43] The regulations required USFS to consider identified endangered and threatened species, species with special habitat needs, commonly-pursued species, and species that indicated the effects of MIS management.[44] USFS provided for such consideration of species by monitoring "population trends of the management indicator species" and the determination of "relationships to habitat changes."[45] USFS never completed any forest plans under these regulations.[46]

Finding the regulations of section 219 to be too onerous, by 1982, USFS sought to streamline the planning process for national forests under new regulations.[47] USFS, however, did not eliminate the stipulation for species viability or the MIS concept to ease planning burdens.[48] Rather, USFS sought to strengthen the requirement for species diversity in keeping with congressional intent.[49] The regulations continued to call on USFS to "provide for and maintain diversity of plant and animal communities"[50] and to "provide for adequate fish and wildlife habitat to maintain viable populations."[51] Accordingly, USFS defined a viable population as that "which ha[d] the estimated numbers and distribution of reproductive individuals to insure its continued existence [wa]s well distributed in the planning area."[52] Section 219.19 required USFS to maintain viable populations by monitoring MIS population trends and MIS's relationships to habitat changes.[53] USFS further provided that "[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."[54]

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43. *Id.* § 219.12(g)(2). The regulations also required that USFS provide reasons why it designated species as MIS. *Id.*

44. *Id.*

45. *Id.* § 219.12(g)(6).

46. National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,514, 67,516 n.1 (Nov. 9, 2000).

47. National Forest System Land and Resource Management Planning, 47 Fed. Reg. 7,678, 7,679 (Feb. 22, 1982).

48. National Forest System Land and Resource Management Planning, 47 Fed. Reg. 43,026, 43,034 (Sept. 30, 1982).

49. *Id.* at 43,036.

50. 36 C.F.R. § 219.27(a)(5) (1983) (repealed 2001).

51. *Id.* § 219.27(a)(6).

52. *Id.* § 219.19.

53. *Id.* § 219.19(a)(6).

54. *Id.* § 219.19(a)(2).

The 1982 regulations endured minor amendments following their codification, but for the most part remained intact until 2000.[55] In 2000, the regulations underwent a major overhaul, as USFS sought to adjust to changing ideas and concepts, including sustainability and ecosystem management.[56] The regulations eliminated the MIS concept and put in its place rules that required the monitoring of ecosystem diversity[57] and species diversity based upon the evaluation of "focal species" and "species-at-risk."[58] Accordingly, USFS stipulated this assessment be done through the monitoring of ecological conditions and, when circumstances required, populations for some focal species and some species-at-risk.[59] The regulations allowed for a transition period in order to provide time for USFS to bring plans into line with the new regulations.[60]

In 2001, though, the Department determined that USFS "[was] not sufficiently prepared to fully implement the new planning rule agencywide."[61] As a result, USFS extended the transition period for revamping forest plans and permitted USFS the choice of continuing to operate under the 1982 regulations or implementing changes under the 2000 regulations.[62] USFS again extended the transition period in 2002.[63] In 2003, USFS provided the same extension to site-specific projects.[64] USFS issued an interpretation of the transition rule in 2004, clarifying that USFS "must consider the best available science in implementing and . . . in amending existing plans" and USFS could continue to use the 1982 regulations until USFS adopted a final planning rule.[65]

By 2005, however, USFS had promulgated a new framework for national forest planning.[66] In the new regulations, USFS focused on

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55. *See* National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,514, 67,516 (Nov. 9, 2000).

56. *Id.*

57. 36 C.F.R. § 219.11(a)(1)(i) (2001).

58. *Id.* § 219.11(a)(1)(ii).

59. *Id.* § 219.11(a)(1)(ii)(A)-(B).

60. *Id.* § 219.35.

61. National Forest System Land and Resource Management Planning; Extension of Compliance Deadline, 66 Fed. Reg. 27,552, 27,552 (May 17, 2001).

62. *Id.* at 27,554.

63. National Forest System Land and Resource Management Planning; Extension of Compliance Deadline, 67 Fed. Reg. 35,431, 35,434 (May 20, 2002).

64. National Forest System Land and Resource Management Planning; Extension of Compliance Deadline for Site-Specific Projects, 68 Fed. Reg. 53,294, 53,297 (Sept. 10, 2003).

65. National Forest System Land and Resource Management Planning; Use of Best Available Science in Implementing Land Management Plans, 69 Fed. Reg. 58,055, 58,057 (Sept. 29, 2004).

66. National Forest System Land and Resource Management Planning, 70 Fed. Reg. 1,023, 1,023 (Jan. 5, 2005).

"ecosystem diversity as the primary means of providing for the diversity of plant and animal communities."[67] USFS built upon the eradication of the MIS concept from the 2000 regulations and did not adopt the species viability requirement, finding that "the more effective the ecosystem management guidance is in sustaining species habitat, the less need there is for analysis and planning at the species level of ecological organization."[68] The only vestige of the MIS concept remained in the transition period section of the 2005 regulations, which stated that USFS could comply with MIS obligations under plans developed under the 1982 regulations "by considering data and analysis relating to habitat unless the plan specifically require[d] population monitoring or population surveys for the species."[69]

Despite the codification of the 2005 regulations, the 1982 regulations still governed many USFS actions because of the transition rule USFS put in place following the overhaul of the regulations in 2000.[70] As a result, a tension emerged as to whether USFS should monitor species individually to ensure viability of populations under the 1982 regulations, when the 2005 regulations no longer called for specific population monitoring.[71] This tension ultimately sparked lawsuits between environmental groups and USFS.[72] Furthermore, while the Federal circuit courts could agree that NFMA imposed substantive requirements, whether habitat as a proxy,[73] rather than individual population monitoring, fulfilled NFMA's mandate to provide for diversity and satisfied USFS's regulatory obligations to maintain viable populations, led to a split in the courts.[74]

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67. *Id.* at 1,029.

68. *Id.*

69. 36 C.F.R. § 219.14(f) (2005).

70. *See, e.g.*, Utah Envtl. Cong. v. Zieroth, 190 F. Supp. 2d. 1265, 1269 (D. Utah 2002) (establishing that action commenced in 2000 over USFS forest plan would be governed by 1982 regulations).

71. *See, e.g.*, Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 759-60 (9th Cir. 1996) (exemplifying that environmental groups interpreted regulations to require populations studies, while USFS interpreted regulations to permit habitat studies to ensure species viability).

72. *See, e.g.*, *id.* (explicating that environmental groups challenged USFS's habitat studies because USFS did not undertake any species population trends studies).

73. USFS's employment of habitat studies became known as the proxy-on-proxy method because the approach "operate[d] on the assumption that as long as a species' habitat [wa]s maintained, the species will likewise be maintained. Thus, analysis of trends in the species habitat [wa]s, in essence, an indirect measurement of the species population trends." Lands Council v. Powell, 395 F.3d 1019, 1036 n.23 (9th Cir. 2005).

74. *Compare Inland Empire Pub. Lands Council*, 88 F.3d at 757, 763 (finding NFMA imposed substantive requirements and permitting habitat studies as a measure for population viability), *with* Utah Envtl. Cong. v. Bosworth, 372 F.3d 1219, 1223 n.3, 1227 (10th Cir. 2004)

In *Inland Empire Public Lands Council v. United States Forest Service*, the Ninth Circuit permitted USFS deference in providing for species viability through habitat studies rather than specific population monitoring.[75] Environmental groups had claimed that USFS failed to examine species population size, trends, or interspecies interaction before approving timber sales in the Kootenai National Forest.[76] The Ninth Circuit noted that section 219 regulations imposed a duty on USFS to ensure viable populations, particularly sensitive species populations.[77] USFS argued that its "habitat viability analysis," which measured how much habitat a species required to survive, would ensure species viability through commensurate habitat provision.[78] The environmental groups, on the other hand, argued that section 219 regulations required USFS to examine the population of each species rather than just habitat as a proxy.[79] The Ninth Circuit applied an arbitrary and capricious standard in evaluating whether USFS's methodology met the obligations under section 219.[80] Because USFS's method of measuring habitat as a proxy for populations did not exhibit any fundamental scientific error and could reasonably ensure species viability, the Ninth Circuit held that USFS's approach conformed with the requirements of NFMA regulations.[81]

The Ninth Circuit continued to defer to USFS's use of habitat studies and the provision of adequate habitat quantities in *Idaho Sporting Congress v. Thomas*.[82] So long as USFS could demonstrate "no appreciable habitat disturbance" from the proposed project, the Ninth Circuit found that "using habitat as a proxy for population [was] not arbitrary and capricious."[83]

The Ninth Circuit reaffirmed this holding in *Native Ecosystems Council v. United States Forest Service*.[84] In *Native Ecosystems*, an environmental group claimed USFS failed to appropriately monitor goshawk populations and goshawk viability in the Helena National

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(finding NFMA imposed substantive requirements and requiring USFS to monitor species populations for viability).

75. 88 F.3d at 760.
76. *Id.* at 758.
77. *Id.* at 759.
78. *Id.*
79. *Id.* at 760.
80. *Id.*
81. *Id.* at 762-63.
82. 137 F.3d 1146, 1154 (9th Cir. 1998).
83. *Id.*
84. 428 F.3d 1233, 1251 (9th Cir. 2005).

Forest.[85] USFS argued its responsibility under NFMA permitted USFS to preserve goshawk habitat in order to ensure goshawk viability.[86] The Ninth Circuit agreed, stating that

> [Ninth Circuit] case law permit[ted] the Forest Service to meet the wildlife species viability requirements by preserving habitat, but only where both the Forest Service's knowledge of what quality and quantity of habitat [wa]s necessary to support the species and the Forest Service's method for measuring the existing amount of that habitat [we]re reasonably reliable and accurate.[87]

Upon examining the specific facts of the claim, the Ninth Circuit found USFS's methodology to be reasonable and therefore commensurate with the requirements of NFMA regulations.[88]

When the Ninth Circuit did not find USFS's scientific methodology to be sound or reasonable, however, the court rejected habitat studies as a means to ensure species viability.[89] In *Idaho Sporting Congress, Inc. v. Rittenhouse*, environmental groups argued habitat studies and commensurate habitat provision did not meet the mandate of NFMA regulations, which required the monitoring of species populations.[90] USFS had planned to affect two timber sales in the Boise National Forest.[91] In evaluating the effects of the sales on species populations within the forest, USFS relied on a monitoring report that had rendered USFS's habitat studies antiquated and erroneous.[92] The Ninth Circuit declared that USFS's "methodology [did] not reasonably ensure viable populations of the species at issue."[93] Because USFS's methodology exhibited clear flaws, the Ninth Circuit held USFS's "use of habitat as a proxy for population monitoring . . . was arbitrary and capricious."[94] The Ninth Circuit also encouraged specific population monitoring, despite the allowance of habitat studies with sound methodology.[95]

The United States Court of Appeals for the Seventh Circuit drew on *Inland Empire Public Lands Council* in its decision in *Indiana Forest Alliance, Inc. v. United States Forest Service*.[96] Like the Ninth Circuit,

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85. *Id.* at 1249-50.
86. *Id.* at 1250.
87. *Id.*
88. *Id.* at 1251.
89. Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 972-73 (9th Cir. 2002).
90. *Id.* at 966.
91. *Id.* at 964.
92. *Id.* at 967.
93. *Id.* at 972.
94. *Id.* at 972-73.
95. *Id.* at 973.
96. 325 F.3d 851, 863-64 (7th Cir. 2003).

the Seventh Circuit found USFS's use of habitat studies to ensure species viability to be in keeping with the mandate of NFMA regulations.[97] USFS had planned to open areas of the Hoosier National Forest in an area with neotropical migrant bird populations.[98] Environmental groups concerned with the open areas' effects on the bird populations filed suit, claiming USFS failed to collect population data on MIS, as required by NFMA regulations.[99] USFS argued that habitat studies permitted it to monitor habitat available for MIS.[100] The environmental groups in *Indiana Forest Alliance, Inc.*, like the groups in *Inland Empire Public Lands Council*, argued that both NFMA and its implementing regulations required USFS to monitor specific populations.[101] The Seventh Circuit found that neither NFMA nor its implementing regulations "impose[d] such a specific requirement on the [USFS]."[102] Just as the Ninth Circuit decided in *Inland Empire Public Land Council* and *Thomas*, the Seventh Circuit found USFS's methodology of habitat studies in *Indiana Forest Alliance* to be "eminently reasonable" given the nature of USFS's project.[103]

In 1999, the Sierra Club brought the same issue (i.e., whether habitat as a proxy could be used to ensure species viability) before the United States Court of Appeals for the Eleventh Circuit.[104] In *Sierra Club v. Martin*, USFS had proposed to sell timber rights in approximately 2000 acres of forest.[105] In making the decision to proceed with selling timber rights, USFS relied on habitat studies and habitat provision rather than population information or individual species data.[106] Sierra Club filed suit alleging that USFS had failed to acquire data on particular MIS, as required by NFMA section 219 regulations.[107] USFS argued that, under the implementing regulations, it had no duty to collect MIS population data, asserting that habitat information USFS had collected sufficed.[108] The Eleventh Circuit reviewed the specific language of section 219 to construe whether the regulations required USFS to undertake particular population studies or whether USFS could substitute

97. *Id.* at 865.
98. *Id.* at 854-55.
99. *Id.* at 855.
100. *Id.* at 863.
101. *Id.*
102. *Id.*
103. *Id.* at 864.
104. Sierra Club v. Martin, 168 F.3d 1, 3 (11th Cir. 1999).
105. *Id.* at 2.
106. *Id.* at 3.
107. *Id.*
108. *Id.* at 4.

habitat studies for MIS monitoring.[109] Drawing on section 219.19, which stipulated that USFS monitor population trends and determine relationships to habitat changes, the Eleventh Circuit found that "[i]t [was] implicit that population data must be collected before it can be monitored and its relationships determined."[110] Unlike the Seventh and Ninth Circuits, the Eleventh Circuit held that the section 219 regulations required USFS "to gather quantitative data on MIS and use it to measure the impact of habitat changes on the Forest's diversity."[111]

Like the Eleventh Circuit, the United States Court of Appeals for the Tenth Circuit has largely sidelined Seventh and Ninth Circuit precedent and found that NFMA regulations in section 219 required USFS to monitor specific populations.[112] In *Utah Environmental Congress v. Bosworth*, USFS had marked two groups of MIS in a project development area.[113] USFS did not collect specific data about the MIS groups.[114] USFS argued that NFMA regulations only required USFS to monitor trends of population, leaving the methodology to USFS discretion.[115] The Tenth Circuit, however, turned to Eleventh Circuit precedent to determine that NFMA regulations required USFS "to use actual, quantitative population data to effectuate its MIS monitoring obligations."[116] The Tenth Circuit found the plain language of the regulations required species populations to be monitored.[117] Within this climate of disagreement between circuit courts regarding the efficacy of the use of habitat as a proxy for population, the Ninth Circuit handed down yet another opinion affirming the method in 2006.[118]

III. COURT'S DECISION

In the noted case, the Ninth Circuit took an inductive approach to decide USFS's employment of habitat as a proxy satisfied NFMA's mandate to ensure diversity and species viability.[119] The Ninth Circuit

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109. *Id.* 5-7.
110. *Id.* at 6.
111. *Id.* at 7.
112. Utah Envtl. Cong. v. Bosworth, 372 F.3d 1219, 1226 (10th Cir. 2004).
113. *Id.* at 1224.
114. *Id.*
115. *Id.* at 1225.
116. *Id.* at 1226.
117. *Id.*
118. *See* discussion *infra* Part III (describing the Ninth Circuit's most recent decision regarding the use of the method of habitat as a proxy).
119. *See* Envtl. Prot. Info. Ctr. v. U.S. Forest Serv., 451 F.3d 1005, 1017-18 (9th Cir. 2006) (basing the decision on individual facts, a statute, regulations and previous decisions of the Ninth Circuit).

began its review of the district court's decision with a reiteration of the relevant NFMA sections.[120] The Ninth Circuit then proceeded to analyze the factual saga underlying the claim itself.[121] Following its review of the factual saga, the Ninth Circuit presented the issue alleged by EPIC—whether USFS could rely on habitat studies in lieu of individual population monitoring—in order to evaluate the efficacy of the EPIC's claim.[122] Finally, the Ninth Circuit concluded its decision by drawing on and reiterating its own precedent to determine USFS employed adequate methodology to satisfy NFMA and the implementing regulations.[123]

Initially, the Ninth Circuit stated that NFMA imposed substantive duties on USFS.[124] The Ninth Circuit accentuated NFMA's mandate to USFS to provide for diversity of plant and animal species in national forests.[125] Accordingly, the Ninth Circuit drew specific attention to NFMA's section 219 implementing regulations, which required USFS to maintain viable species populations through wildlife habitat management by supporting a minimum number of reproductive species that could interact with each other.[126]

In order to provide a baseline of facts by which to assess the validity of EPIC's claim, the Ninth Circuit then enumerated the details of the Klamath Forest Plan USFS put in place to comply with NFMA and the population viability maintenance requirement.[127] Specifically, the Ninth Circuit noted that USFS chose twenty-seven MIS to be monitored in order to gauge plan and project impacts in accordance with 36 C.F.R. § 219.19.[128] The Ninth Circuit further pointed to an evaluation of impacts prepared by a Wildlife Biologist and Fisheries Biologist for the Sale.[129] This assessment, the Ninth Circuit noted, indicated that six out of sixteen MIS selected by the Biologists for evaluation would suffer minor displacement and minor short-term population loss as a result of the Sale's impact on habitat.[130]

After setting forth the details of the Klamath Forest Plan and the habitat study USFS undertook via the Biologists to determine the Sale's impact on wildlife in the Sale area, the Ninth Circuit presented EPIC's

120. *Id.* at 1017.
121. *Id.*
122. *Id.*
123. *Id.* 1017-18.
124. *Id.* at 1017.
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

claim that USFS failed to monitor specific populations in order to take into account the effects of the Sale.[131] The Ninth Circuit then juxtaposed the claim with an explanation of the "proxy-on-proxy," or habitat as a proxy, method.[132] Drawing upon previous Ninth Circuit case law, the Ninth Circuit explicated the underlying assumption of the methodology—that the maintenance of species habitat ensured species survival.[133]

Following the explication of EPIC's contention, the Ninth Circuit turned to the merits of EPIC's claim.[134] Noting previous Ninth Circuit decisions, the Ninth Circuit stated the rule that "absent some indication in the record that USFS's underlying methodology is flawed," the Ninth Circuit "ha[d] previously endorsed" habitat as a proxy.[135] With in-text parenthetical citations, the Ninth Circuit pointed to instances where the court had and had not approved of USFS's use of habitat as a proxy.[136] The Ninth Circuit provided very little, if any, substantive detail of the cases it parenthetically cited in the text of the opinion.[137]

Finally, the Ninth Circuit examined EPIC's proffer of a USFS monitoring report that EPIC purported would demonstrate the flaws of the method of habitat as a proxy.[138] The report indicated that USFS found it difficult to monitor some MIS and that in some cases USFS could not find a clear link between MIS presence and habitat USFS monitored.[139] EPIC's proffer of the monitoring report did not persuade the Ninth Circuit, however, that USFS's utilized a flawed methodology.[140] In fact, the Ninth Circuit drew on precedent to state "that monitoring difficulties d[id] not render a habitat-based analysis unreasonable, so long as the analysis use[d] all the scientific data currently available."[141] Therefore, finding no fault with USFS's method of using habitat as a proxy, the Ninth Circuit held that the Sale complied with NFMA and affirmed the district court's judgment.[142]

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131. *Id.*

132. *Id.* See *Lands Council v. Powell*, 395 F.3d 1019, 1036 n.23 (9th Cir. 2003), and *supra* note 73 for a more precise review of the Ninth Circuit's explanation of the proxy-on-proxy method.

133. *Envtl. Prot. Info. Ctr.*, 451 F.3d at 1017.

134. *Id.*

135. *Id.*

136. *Id.* at 1017-18.

137. *See id.* (demonstrating a lack of substantive detail in the parenthetical citations).

138. *Id.* at 1018.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

IV. ANALYSIS

The Ninth Circuit's decision in *Environmental Protection Information Center* and its underlying reasoning present many relevant issues regarding environmental integrity and statutory interpretation.[143] At first glance, previous Ninth Circuit decisions buttress the Ninth Circuit's conclusion that habitat studies (habitats as proxies) ensure the viability of species populations, thus fulfilling NFMA's mandate and its implementing regulations.[144] Like the environmental groups in both *Inland Empire Public Land Council* and *Native Ecosystems Council*,[145] EPIC attacked USFS's invocation of habitat as a proxy in wildlife analysis based upon NFMA implementing regulations.[146] Similar to the response given by the Ninth Circuit in those previous decisions, in *Environmental Protection Information Center*, the Ninth Circuit tested the efficacy of USFS utilizing habitat studies, based upon the underlying facts of the case and the Klamath Forest Plan in place when EPIC filed suit.[147]

Unfortunately, the Ninth Circuit failed to address at any length the distinguishing characteristics of other notable Ninth Circuit cases, including *Rittenhouse* and *Thomas*.[148] Where the Ninth Circuit expanded its test for sound methodology for habitat as a proxy by adding the "no appreciable habitat disturbance" standard in *Thomas*,[149] the Ninth Circuit contracted the test in *Environmental Protection Information Center*. In fact, the Ninth Circuit did not even attempt to examine whether the effects the Sale would have on the spotted owl population amounted to appreciable habitat disturbance, as *Thomas* called to test.[150] As for the core test—whether habitat as a proxy for population might meet NFMA regulations because of the use of sound and reasonable methodology underlying the habitat studies—the Ninth Circuit provided no basis by which to assess whether *Rittenhouse* could apply, and whether the reliance on one study presented by the Wildlife Biologist and the

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143. *See, e.g.*, Jamison E. Colburn, *The Indignity of Federal Wildlife Habitat Law*, 57 ALA. L. REV. 417, 474 (2005) (noting the disjuncture within USFS as to how to measure diversity and which species to manage).

144. *See, e.g.*, Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 763 (9th Cir. 1996) (permitting habitat studies as a measure for population viability).

145. *See supra* text accompanying notes 79-81, 85-88 (describing Ninth Circuit cases in which environmental groups attacked USFS's use of habitat as a proxy and where USFS prevailed).

146. *Envtl. Prot. Info. Ctr.*, 451 F.3d at 1017.

147. *Id.*

148. *Id.* at 1017-18.

149. Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1154 (9th Cir. 1998).

150. *See Envtl. Prot. Info. Ctr.*, 451 F.3d at 1017-18 (failing to discuss the *Thomas* decision).

Fisheries Biologist, upon which the Ninth Circuit based its conclusion, met the requirement of methodological soundness. In this respect, the Ninth Circuit's decision provoked the most disappointment because the facially plain analysis seemed, at best, purgative of previous Ninth Circuit decisions.

Even if the Ninth Circuit had adequately considered its own precedent, the inattention it paid to other circuit court decisions seemed remiss, given the chasm that has opened, largely in the wake of Ninth Circuit decisions.[151] For instance, based upon the lack of reasoning the Ninth Circuit provided in *Environmental Protection Information Center*, the court might have done well to call upon the Seventh Circuit's decision in *Indiana Forest Alliance* and simply proclaim that NFMA and the implementing regulations imposed no duty to monitor individual species.[152] While this interpretation of both NFMA and the regulations seems dubious at best,[153] at least the interpretation would have provided the Ninth Circuit with a basis, albeit erroneous, to reject EPIC's claim. Furthermore, if the Ninth Circuit had examined either Tenth Circuit or Eleventh Circuit jurisprudence, the Ninth Circuit may have at least feigned to examine the present case at hand, rather than immediately write off EPIC's NFMA claim.

That the Ninth Circuit did not examine any other circuit decisions, however, merely exemplifies the fact that the time has come for the United States Supreme Court to grant a writ of certiorari to hear the issue of whether habitat as a proxy fulfills USFS's obligations to monitor populations in order to ensure viability. In doing so, not only would the Supreme Court bring cohesion to all federal district and circuit courts regarding how the courts should settle the issue of habitat as a proxy for populations, but the Supreme Court could also exact the meaning of NFMA and what Congress first intended in passing the law.

Congress's very inclusion of the requirement of maintaining a diverse array of plant and animal species in national forests in NFMA[154] makes clear the congressional intent that USFS provide for the maintenance of diversity of animal and plant species in the national forests. Clearly, USFS historically has recognized this importance because the implementing regulations for NFMA, which followed just a short

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151. *See generally* discussion *supra* Part II (emphasizing the disjuncture in different circuit opinions about whether habitat as a proxy may be used to monitor viable species populations).

152. *See* Ind. Forest Alliance, Inc. v. U.S. Forest Serv., 325 F.3d 851, 863 (7th Cir. 2003) (finding neither NFMA nor its regulations required monitoring of individual species populations).

153. *See* 36 C.F.R. § 219.19 (1983) (repealed 2001) (calling explicitly for the monitoring of MIS population trends and how those trends relate to changes in habitat).

154. 16 U.S.C. § 1604(g)(3)(b) (2000).

time after Congress passed the law, mention the mandate in no less than three separate sections.[155] Therefore, if the Supreme Court could hear the issue of whether habitat as a proxy fulfills USFS monitoring regulations, the Court could, once and for all, construe the original meaning of NFMA and require monitoring for individual species populations. In doing so, the Court could affect the legislative intent behind the passage of NFMA, invalidate the 2005 implementing regulations that only require habitat studies, and ultimately ensure the health and vitality of America's greatest renewable resource: national forests.

V. CONCLUSION

Given the Ninth Circuit's track record for approving USFS use of habitat as a proxy in order to ensure viable species populations,[156] the Ninth Circuit's decision in *Environmental Protection Information Center* to permit USFS to continue to use this method to fulfill the mandate of NFMA offers no great surprise. It remains as disappointing as the burgeoning body of NFMA jurisprudence the Ninth Circuit has promulgated in the last few decades. While the Ninth Circuit has promoted USFS's use of habitat as a proxy for populations, other circuit courts have disregarded the concept of habitat as a proxy. Because this split has emerged within the federal court system and only seems to be diverging further with decisions such as *Environmental Protection Information Center*, the time has arrived for the Supreme Court to decide whether habitat as a proxy aligns with NFMA's mandate and its implementing regulations. From the very earliest vestiges of NFMA, Congress has sought to protect national forests and the resources and diversity of species located within them.[157] If the Supreme Court chooses to hear this issue of whether habitat as a proxy fulfills USFS's obligation to monitor individual species populations, the original congressional intent that prompted the initial passage of NFMA may be given new life, as might the plant and animal species that inhabit and comprise national forests.

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155. 36 C.F.R. §§ 219.10, 219.12-13.

156. *See* discussion *supra* Part II (noting various Ninth Circuit decisions where the court found the use of habitat as a proxy to be permissible).

157. *See generally* WILKINSON & ANDERSON, *supra* note 15 (documenting the history of national forests and USFS).

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