

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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Sierra Club, Friends of the Boundary  
Waters Wilderness, Defenders of Wildlife,  
and Northeastern Minnesotans For  
Wilderness,

**Civ. No. 06-3334 PJS/RLE**

Plaintiffs,

Dale N. Bosworth, Chief of the United  
States Forest Service, and Ed Shafer,  
Secretary of Agriculture,

**BRIEF OF AMICUS CURIAE  
THE RUFFED GROUSE  
SOCIETY**

Defendants,

Minnesota Forest Industries, Inc.,  
Minnesota Timber Producers Association,  
Lake County, All-Terrain Vehicle  
Association of Minnesota, and  
BlueRibbon Coalition, Inc.,

Defendant-Intervenors,

The State of Minnesota,  
The Ruffed Grouse Society,

Amici Curiae.

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**INTRODUCTION**

The Ruffed Grouse Society (“the Society”) submits this amicus curiae brief in opposition to the Complaint and Motion For Summary Judgment filed by the plaintiffs, Sierra

Club, Friends of the Boundary Waters Wilderness, Defenders of Wildlife and Northeastern Minnesotans for Wilderness.

The Ruffed Grouse Society is an international non-profit wildlife conservation organization established in 1961 and has over 18,000 members nationwide, representing 113 local chapters. The mission of the Society is to promote and conserve habitat associated with young forest species such as the ruffed grouse, American woodcock, 43 species of neotropical songbirds, and other associated wildlife. Proper management of the national forests is critical to the Society and the wildlife on whose behalf it advocates. See Previously Filed Zagata Affidavit, Doc. 32.

### **BACKGROUND**

Plaintiffs challenge the implementation of the Revised Land and Resource Management Plan (“Forest Plan”) for the Superior National Forest (“SNF”) in northeastern Minnesota. The Forest Service manages the SNF in accordance with the National Forest Management Act, 16 U.S.C. §§1604-14. That Statute requires the agency to prepare land and resource management plans for each national forest. Id. at 1604(a). These forest plans must “provide for multiple use and sustained yield of the products and services obtained in accordance with the National Forest Management Act,...and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.” Id. 1604(c)(1). Similarly, the Multiple Use-Sustained Yield Act of 1960

requires the Forest Service to manage for uses including “outdoor recreation, range, timber, watershed, and wildlife and fish purposes.” 16 U.S.C. § 528.

Pursuant to those statutory directives and years of study and public involvement, the Forest Service adopted the SNF Forest Plan on July 30, 2004. FEIS, Appendix A. The outcome of the plan revision process led to a delicately balanced management approach split between recreational, game, and environmental preservationist concerns. FEIS 1-12,16,18. With the demand for recreational, social, and industrial uses increasing at the same time as calls for additional wilderness protections, the Society recognizes the important balance struck by the Forest Service.

The plaintiffs now seek judicial review of the 2004 SNF Forest Plan, contending that the Forest Plan violates certain Statutes. Specifically, the plaintiffs’ complaint raises claims under the National Forest Management Act, 16 U.S.C. §§ 1600 to 1687 (“NFMA”), and the National Environmental Policy Act, 42 U.S.C. §§ 4321 to 4370a (“NEPA”). After this Court dismissed the Plaintiffs’ NFMA claims, only the NEPA claims remain in dispute.

### **NEPA STANDARD OF REVIEW**

NEPA requires that the Forest Service take a “hard look” at the environmental consequences of its actions, including those consequences associated with revision of forest plans. 16 U.S.C. § 1604(g)(1). Accordingly, a forest plan requires the preparation of an Environmental Impact Statement (“EIS”), which examines the consequences of and

alternatives to the proposed action. In order to demonstrate that the Forest Service took a “hard look” at the proposed action, it must establish the “professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.” 40 C.F.R. § 1502.24. However, reviewing courts uniformly apply a deferential approach when reviewing issues that deal with areas of agency expertise. Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 377 (1989). This is true because NEPA is a procedural statute that does not mandate particular results. *See, e.g.* Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 250-51 (1989) (“NEPA merely prohibits uninformed – rather than unwise – agency action.”).

## **ARGUMENT**

### **I. Road, Trail, and Roadless Area Data**

The plaintiffs assert that the Forest Plan violates NEPA due to discrepancies with the roads, trails, and roadless data used in the Superior Road Report. (Complaint ¶¶ 107-114). However, the Society believes that the Forest Service took a hard look at the issues and complied with the requirements of NEPA in formulating and analyzing its road and trail data within the Forest Plan. Additionally, this Court owes deference to the Forest Service in its preparation and evaluation of the Transportation Atlas.

**A. Analysis of Plaintiffs' NEPA Claim Regarding Road and Trail Data**

The SNF is in the best position to prepare an accurate Transportation Atlas, as it possesses firsthand knowledge and understanding of the affected areas. In particular, the SNF has a long history of land use, especially as a result of intense logging that occurred between 1880 and 1920, resulting in an almost complete cut-over. FEIS 3.11-8. Roads, sleigh trails and railroad grades also crisscross the area, of which traces still remain visible on the landscape, even in the Boundary Waters Canoe Area Wilderness. See FEIS Appendix F-2,3. In addition, many private, state and county roads intersect and transverse near or around the SNF. Superior Roads Report; AR #9940. Undoubtedly, firsthand knowledge of the history and landscape of the SNF is essential to understanding and preparing an accurate Transportation Atlas. FEIS, Appendix F-2.

In that context, the Forest Service performed a forest-wide roads analysis in compliance with the National Transportation Policy Rule and also to inform the Forest Plan revision process. See 36 CFR 212, January 12, 2001; FEIS Appendix F-13. As required, the SNF utilized a collaborative, science based methodology to complete its Roads Analysis Process. See FEIS Appendix F-12; Superior Roads Report AR #9940; Conference calls and meetings to discuss transportation system data needs and development AR #8565; Chad Skally, Forest Road Geographic Information (GIS) Data Collection Process and Summary

of Road Data (March 2003) AR #8147. More specifically, the SNF explained its methodology in a 2001 inventory progress update:

INFRA Travel Routes is our basic tabular road inventory database. Over the last three years we have been conducting a Forest-wide road inventory update, including historic record and on-the-ground field review of each road on the USGS quadrangle basis. Roads were analyzed by District ID Team members within each quad to determine if each road was needed for long-term forest access (both for our land management needs and for access needs to other land ownerships) and either retained on the forest transportation system, added to the system, or removed from the system. A road data sheet (road management objectives) was established for each road to be included in the transportation system. Also, a summary table was developed for each quad listing all classified and unclassified roads and documenting the decision for each road on whether to include it on the road system or not to include it on the system. Each road summary table was reviewed and signed by the District Ranger.

AR #8570.

In compiling an accurate roads inventory, the SNF utilized its Infrastructure (INFRA) Travel Routes database, which is an electronic database of updated “data for each road on the system.” FEIS Appendix F-18. The SNF also incorporated relevant Geographical Information Systems (“GIS”) Roads Layer, which is an “electronic spatial inventory...showing the location of all classified roads across each national forest” by linking it to the INFRA Travel Routes. Id. For purposes of the Forest Plan, the SNF used data current as of October 2002. Id., Table F-2. The SNF staff also verified its data with state, local and tribal authorities and used extensive on-the-ground field reviews and photographs. AR #8570; see also AR #9927; AR#2466; AR #8147; FEIS Appendix F,

Figure A-1; F-2; F-4; F-5; F-6; F-7; F-8; F-9; F-10; F-11; F-12. Also, the Court should be mindful that a Transportation Atlas is not static, but a dynamic document that anticipates ongoing updates through the implementation of future projects and national transportation policy. FEIS Appendix F; see also FEIS Appendix J-296, PC# 3.0-20.

Surveying, modeling, and mapping are specific agency functions that require judicial deference to the agency's expertise and methodology. *See Utah Environmental Congress v. Bosworth*, 285 F. Supp. 2d 1257 (D.Utah 2003), reversed on other grounds, 439 F.3d 1184 (10<sup>th</sup> Cir. 2006). In *Bosworth*, the Utah court held that the Forest Service's preparation and analysis of GIS Maps when delineating roadless areas was well within the permissible expertise of the Forest Service, whose personnel possessed "on-the-ground" knowledge of the areas. Similarly, the SNF's road inventory and analysis is one of agency expertise. The SNF, in consultation with state, local and tribal authorities, utilized its extensive electronic INFRA database, GIS maps, aerial photographs and on-the-ground inspections to prepare its roads inventory. The Forest Service, therefore, achieved its legal mandate to use accurate and high quality data in the Forest Plan. NEPA requires nothing more. Under these circumstances, a reviewing court is not in the position to second guess an agency's methodology.

### **B. Analysis of Plaintiffs' PBI Roads Study**

After years of public input and scientific analysis, the SNF adopted the Forest Plan on July 30, 2004. *Three months after the Plan was adopted*, the plaintiffs submitted a competing roads report by the Pacific Biodiversity Institute ("PBI"), which they assert supports their NEPA claims. See *An Analysis of Roads and Roadless Areas on the Superior National Forest, Minnesota* (October 2004), Plaintiffs' Exhibit L. The plaintiffs argue that the PBI study shows that the Forest Service utilized inaccurate data in the Forest Plan. Not only is the PBI study untimely, but it merely offers an alternate methodology to which this Court owes no deference.

First, the PBI study was submitted after approval of the Forest Plan, despite the significant amount of time plaintiffs had to timely submit the study. In fact, the SNF published a DEIS and initially allowed 90 days for public review and comment on the DEIS, but later extended the period for 30 days to ensure that the large number of persons and entities who wished to comment had ample opportunity to do so. ROD at 26. The environmental review process culminated with the issuance of a FEIS, which contained further analysis in response to the comments received on the DEIS. In total, the environmental review process took several years and the DEIS generated roughly 26,900 public comments. ROD at 26. The SNF documented the numerous changes and edits it made following the DEIS comments. ROD 20-24. Yet throughout the lengthy process, the

plaintiffs failed to submit the PBI study. The PBI study even contains data from as late as September 2004, two months after the Forest Plan was adopted. Plaintiffs' Exhibit L-0009. Plaintiffs' failure to timely submit the PBI study prior to final approval of the Forest Plan prevented the Forest Service from reviewing and considering the data and methodology. Submission of the study only after final plan approval constitutes nothing more than an ambush aimed at disrupting the NEPA process. The Court should give little weight to this untimely study.

Second, the PBI study merely reflects an alternative methodology to which this Court owes no deference. This Circuit has stated that when an "administrative record contains evidence that supports the positions of both the agency and the party seeking relief, the agency is entitled to rely on its experts' tests and observations, and decisions made in such reliance are not arbitrary and capricious." Cent. S.D. Co-op. Grazing Dist. v. Sec'y of U.S. Dep't. of Ag., 266 F.3d 889, 899 (8<sup>th</sup> Cir. 2001). The Supreme Court expressed a similar sentiment that "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989). In this case, the Forest Service properly prepared its Transportation Atlas in collaboration with the state, local and tribal authorities and used its own INFRA database, photography and on-the-ground reviews. Based upon the specific agency expertise involved, the Court should not even entertain the plaintiffs' alternate study.

In the event this Court considers the PBI study, it must be noted that the study suffers from its own inaccuracies that render it unreliable. PBI bases its study on orthophotography analyzed from an office in Winthrop, Washington in 2004. Plaintiffs' Exhibit L-009. Yet the study's authors admit "it is not possible to positively differentiate between roads of different classifications and between roads versus trails without a field visit". *Id.* at L-028. Despite this admission, the PBI study produced findings that it claims are superior to the defendant's report. The study goes on to state that a quantitative assessment of spatial accuracy was not performed due to resource constraints; however, it admits that such an accuracy assessment would be a critical component in validating PBI's claims of data inaccuracy. *Id.* at L-026. The PBI study lacks scientific credibility, because it utilizes minimal on-the-ground field reviews to verify its many findings made through study of its orthophotographs and fails to provide an accuracy assessment that it admits is a critical component. Where an agency is faced with competing expert opinions, it must have the discretion to defer to its own expertise.

## **II. Effects On The Boundary Water Canoe Area Wilderness**

The plaintiffs contend in Count Three of their Complaint that the Forest Service violated NEPA by preparing an FEIS without considering the impact of the Forest Plan on the Boundary Water Canoe Area Wilderness ("BWCAW"). (Complaint ¶105). The Plaintiffs read NEPA to require the Forest Service to consider the potential impacts of a

programmatic document on the BWCAW. Plaintiffs are mistaken because neither NEPA, the BWCAW Act, nor applicable federal case law supports their arguments.

The plaintiffs rely upon Sierra Club v. Bosworth, 352 F.Supp. 2d 909 (D. Minn. 2005) (“Big Grass”) to support their argument that NEPA requires a BWCAW impacts analysis in the Forest Plan. Big Grass involved a timber sale that was adjacent to the Boundary Waters. Plaintiffs challenged the agency’s decision not to prepare an EIS arguing that it failed to consider the cumulative impacts of the sale and other known past and reasonably foreseeable future sales on the Boundary Waters. The agency listed 23 prior timber sales within the EA, but failed to analyze the cumulative effect of those sales. Id. at 926. Accordingly, the court held that the agency’s analysis was insufficient and that the project warranted a full blown EIS. Id. at 927. But the Big Grass decision involved a project level analysis not a programmatic forest plan. The same is true with every case cited by the plaintiffs. See Nat’l Audubon Soc’y v. Dep’t of the Navy, 422 F.3d 174 (4<sup>th</sup> Cir. 2005) (construction of airstrip); Marble Mountain Audubon Soc’y v. Rice, 914 F.2d 179 (9<sup>th</sup> Cir. 1990) (timber sale); Grand Canyon Trust v. FAA, 290 F.3d 339 (D.C.Cir. 2002) (airport expansion). These project level cases have little value in this dispute over the Forest Plan.

The Forest Plan is a programmatic document that does not directly authorize any timber sale or commission any specific road construction. Instead, NEPA provides that any future projects are subject to additional scrutiny through site-specific analyses. Issues like the impacts of specific timber sales upon the BWCAW will be addressed in the future at the

project level. See e.g. Sierra Club v. Bosworth, supra and Sierra Club North Star Chapter v. Bosworth, 428 F.Supp.2d 942 (D. Minn. 2006) (challenges to Forest Service decision not to prepare EIS for timber sales adjacent to the BWCAW); and Izaak Walton League of America, Inc. v. Kimball, 516 F.Supp.2d 982 (D. Minn. 2007) (challenge to proposed snowmobile trail adjacent to the BWCAW). In practice, it would be unwise for the SNF to guess at potential impacts to the BWCAW in the Forest Plan. The analysis of the cumulative effects of potential future projects in a programmatic document would be unlikely to yield any meaningful results. Instead, the Forest Plan is meant as a roadmap for future management that contemplates future project-level NEPA analysis. Future site-specific projects will certainly address impacts on the BWCAW, but such an analysis is not required within the context of a forest plan.

Further, adoption of the plaintiffs' argument would create a result not contemplated by Congress in the BWCAW Act. Essentially, the plaintiffs would require the Forest Service to manage adjacent forest land as de facto wilderness. Such management would create a so-called "wilderness buffer zone" within those National Forest lands adjacent to a designated wilderness area. Because of the similarity of the numerous wilderness acts' enabling statutes, such a ruling would undoubtedly have a national effect.

Congress has never authorized the creation of a buffer zone around any designated wilderness, including the BWCAW. Public Law 95-495 (1978). Quite to the contrary,

Congress explicitly authorized *intensive* timber management outside of the BWCAW.

Section 6(c) of the Act provides:

(c) Within the limits of applicable laws and prudent forest management:

**(1) the Secretary shall**, in furtherance of the purposes of subsection (a) of this section and of section 4 of the National Forest Management Act of 1976 (90 Stat. 2949), // 16 USC 1601.// **expedite the intensification of resource management including emphasis on softwood timber production and hardwood utilization on the national forest lands in Minnesota outside the wilderness** to offset, to the extent feasible, the reduction in the programmed allowable timber harvest resulting from reclassification of the Boundary Waters Area...

(emphasis added).

Congress clearly specified its intent that areas of the SNF adjacent to the BWCAW would be managed with a specific emphasis on softwood timber production and hardwood utilization. The Forest Service is entirely within its legal mandate to allow timber management on lands adjacent to the wilderness. Although the analysis would be different if the plaintiffs were challenging an individual project, Izaak Walton League of America, Inc. v. Kimball, supra, the BWCAW Act does not constrain the Forest Services' ability to permit timber management in the Forest Plan. Accordingly, the plaintiffs' must wait to bring their challenge to a project-level decision when actual impacts to the Boundary Waters can and should be measured.

**CONCLUSION**

The Ruffed Grouse Society thanks the Court for review and consideration of this Brief and recommends that the Court uphold the Superior Revised Forest Plan for the foregoing reasons.

Signed and dated this 3rd day of April, 2008

Respectfully submitted:

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