A FOREORDAINED FORMALITY: THE UTTER USELESSNESS OF ENVIRONMENTAL IMPACT STATEMENTS FOR FEDERAL ACTIONS IN EXPERIMENTAL FORESTS

BY

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This Article criticizes the courts' application of the National Environmental Policy Act (NEPA) to federal actions in experimental forests. Further, this Article questions whether environmental impact statements (EISs) have any utility at all in experimental forests. Under NEPA, federal agencies must prepare EISs for actions that have a significant effect on the environment. However, EISs only operate as intended when these agencies integrate NEPA early in the planning process and seriously consider lower-impact alternatives. When agencies learn how courts will review their actions, it is possible for agencies to follow the correct procedures for an EIS without complying with the spirit of the law—taking a hard look at their proposed action and various lower-impact alternatives to determine if they are doing their part to protect the environment. Therefore, this Article contends that federal actions in experimental forests have become unreviewable, both because of the unique nature of experimental forests, and the incentive for agencies to be disingenuous in drafting impact statements.

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I. INTRODUCTION

Under the National Environmental Policy Act (NEPA),[1] federal agencies must prepare environmental impact statements (EISs) for actions that have a significant effect on the environment.[2] For over forty years federal agencies have engaged in costly litigation over the sufficiency of EISs. Most of the time courts have sided with the agencies, giving great deference to their expertise and the purpose of the proposed project.[3] However, this litigation, or the prospect of it, has forced agencies to take a hard look at the environmental impacts of their actions. This chilling effect makes EISs exactly the kind of "action-forcing device[s]" that NEPA drafters envisioned them to be.[4]

Regardless, EISs only operate as intended when federal agencies integrate NEPA early in the planning process and seriously consider lower-impact alternatives. When agencies know how courts will review their actions, it is possible for them to fulfill the letter of the law—following the mechanical guidelines for an EIS—without complying with the spirit of the law—taking a hard look at their proposed action and various alternatives in order to determine if they are doing their part to protect the environment. Agencies are able to satisfy both NEPA and the public while going ahead with their preferred plan.

United States Forest Service (USFS) actions in experimental forests lend themselves to this kind of shoddy, false-alternatives analysis. In *League of Wilderness Defenders—Blue Mountains Biodiversity Project v. United States Forest Service* (*Defenders*),[5] the Ninth Circuit considered whether a USFS EIS for a thinning and fuels reduction project in the Pringle Falls

1 National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321–4370h (2012).

2 *Id.* § 4332(C).

3 JAY AUSTIN ET AL., ENVTL. L. INST., JUDGING NEPA: A "HARD LOOK" AT JUDICIAL DECISION MAKING UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT 8–9, 12 (2004), *available at* http://www.eli.org/research-report/judging-nepa-hard-look-judicial-decision-making-under-national-environmental-policy-act (reporting that for all NEPA challenges prior to 2004, pro-environmental plaintiffs had 46% and 35% success rates before district courts and circuit panels, respectively; pro-development plaintiffs saw 35% of their challenges succeed in a District Court and 18% in the circuits).

4 40 C.F.R. § 1502.1 (2015).

5 689 F.3d 1060 (9th Cir. 2012).

Experimental Forest (Pringle Falls) in Oregon complied with NEPA.[6] In its discussion, the court hinted that the analysis was a little different because of the project's location in an experimental forest, but failed to explain when, if ever, an EIS for an experimental forest would be insufficient.[7] EISs are merely a foreordained formality for USFS actions in experimental forests, and USFS can sidestep a serious look at environmental impacts when they have become familiar with how courts will review their actions.

The first section of this Article will discuss NEPA and its requirements for federal agencies, focusing especially on the process agencies must go through to be in compliance. The second section examines the history and purposes of national forests and experimental forests, highlighting how experimental forests are unique. The third section explains the USFS's proposed project in the experimental forest and the Ninth Circuit's opinion in *Defenders*, giving special attention to the arguments made by the environmental appellants and the court's treatment of those arguments. The fourth section will argue that USFS actions in experimental forests have become unreviewable under the current model, as demonstrated by the Ninth Circuit's opinion in *Defenders*. The fifth and final section will discuss alternatives to the current process and what the decision in *Defenders* might mean for future NEPA decisions.

II. NEPA AND ITS REQUIREMENTS

NEPA has been both heartily lauded and severely criticized in its forty-five year existence.[8] This is perhaps because the Act prescribes a very specific—and often time consuming—process with which federal agencies must comply before embarking on projects that may affect the environment.[9] If this process is effective in producing the desired result—eliminating or at least significantly lessening damage to the environment—then much of the bureaucracy can be forgiven. If, however, the laborious process produces no noticeable change, detractors will find much to criticize indeed in this behemoth of a document. This section will examine the Act, its requirements for federal agencies, and the way various courts have interpreted these requirements.

A. NEPA

NEPA, a glowing bipartisan pronouncement of man's desire to live harmoniously with his environment, was signed into law by President

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6 *Id.* at 1064.

7 *Id.* at 1065.

8 *See* Mark W. Anderson, *National Environmental Policy Act*, *in* BERKSHIRE ENCYCLOPEDIA OF SUSTAINABILITY: THE LAW AND POLITICS OF SUSTAINABILITY 393, 394 (2010), *available at* http://umaine.edu/soe/files/2009/06/National-Environmental-Policy-Act1.pdf (describing criticism and support of NEPA).

9 *See id.*

Richard Nixon on January 1, 1970.[10] Often called the "Magna Carta" of environmental laws, it was one of the first major pieces of environmental legislation to come out of Congress.[11] NEPA's purpose statement overflowed with promise:

> To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.[12]

NEPA is markedly different from the Clean Air Act of 1963[13] and the Clean Water Act of 1972[14] in that it was not directed at people or industry, but instead is directed at federal agencies.[15] The primary goal of NEPA is to "assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that significantly affects the environment."[16]

NEPA's most important and far-reaching directive requires federal agencies to incorporate environmental considerations in their planning and decision making.[17] When government agencies propose an action that will significantly affect the environment, NEPA directs them to prepare a detailed EIS, which must include: 1) the environmental impact of the proposed action; 2) any adverse environmental effects; 3) alternatives to the proposed action; 4) the relationship between local short-term uses of the environment and long-term productivity; and 5) any irreversible and irretrievable commitments of resources.[18]

NEPA gave citizens and environmental groups a great amount of ammunition with which to attack agency actions that affected the

10 CHARLES H. ECCLESTON, NEPA AND ENVIRONMENTAL PLANNING: TOOLS, TECHNIQUES, AND APPROACHES FOR PRACTITIONERS xl (2008). NEPA received overwhelming support in both the House and Senate. 115 CONG. REC. 19,011 (1969). It was introduced in the Senate by Henry M. Jackson on February 18, 1969, and was passed unanimously by the Senate on July 10 of the same year. *Id.* It was passed by the House a mere two and a half months later. 115 CONG. REC. 26,590 (1969).

11 COUNCIL ON ENVTL. QUALITY, A CITIZEN'S GUIDE TO THE NEPA 2 (2007), *available at* https://ceq.doe.gov/nepa/Citizens_Guide_Dec07.pdf [hereinafter CITIZEN'S GUIDE].

12 42 U.S.C. § 4321 (2012).

13 42 U.S.C. §§ 7401–7671q (2012).

14 Federal Water Pollution Control Act, 33 U.S.C. §§ 1251–1387 (2012).

15 42 U.S.C. § 4332 (2012). With the exception of NEPA and possibly the Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012), the Clean Air Act and the Clean Water Act are, in the author's opinion, the two most important pieces of federal environmental legislation.

16 U.S. Envtl. Prot. Agency, *Summary of the National Environmental Policy Act*, http://www2.epa.gov/laws-regulations/summary-national-environmental-policy-act (last visited Nov. 21, 2015).

17 42 U.S.C. § 4332(2) (2012).

18 *Id.* § 4332(2)(C). NEPA also creates the Council for Environmental Quality (CEQ). *Id.* § 4342. The CEQ has also promulgated detailed regulations that govern the EIS process. *See* 40 C.F.R. §§ 1500–1508 (2015).

environment. Early courts interpreted NEPA broadly, and it appeared that judicial enforcement of the law might drastically scale back, or even eliminate, the possibility of any federal action that might severely affect the environment.[19] Over time, however, courts began to rein in NEPA, emphasizing that the law has only a procedural effect.[20] Recently, courts have been somewhat unwilling to look at the actual impact of a proposed action on the environment. Instead, courts will examine whether agencies took a hard look at the environmental effects of their actions,[21] or followed the correct procedures in determining those effects.[22] A failure to discuss adverse environmental impacts will be fatal, but so long as all significant environmental impacts are discussed and the agency can claim to have made a reasoned decision, whatever decision it reaches is likely permissible.[23]

The courts' procedural focus raises the question of whether NEPA has any teeth at all. Yet, the mountains of environmental litigation emanating from various agencies' EISs would suggest that NEPA's teeth are very sharp indeed. The NEPA procedural requirements still force agencies to be very thorough in assessing the impacts their proposed actions will have on the environment and whether alternatives may exist.[24] At the very least, NEPA compels agencies to stop and think about their actions, even if a proposed action may have very little chance of being prohibited. The very prospect of

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19 *See* Richard Lazarus, *The National Environmental Policy Act in the U.S. Supreme Court: A Reappraisal and a Peek Behind the Curtains*, 100 GEO. L.J. 1507, 1515–21 (2012) (analyzing early NEPA case law); DANIEL A. FARBER ET AL., CASES AND MATERIAL ON ENVIRONMENTAL LAW 461 (8th ed. 2010).

20 *See, e.g.*, Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519, 555 (1978) ("Neither [NEPA] nor its legislative history contemplates that a court should substitute its judgment for that of the agency as to the environmental consequences of its actions." (quoting Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976))); *see also*, *e.g.*, Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989) ("[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process" and "[i]f the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs."). The government has won all seventeen NEPA claims that reached the Supreme Court, even though the NEPA plaintiffs succeeded in the lower courts in each case. *See* Lazarus, *supra* note 19, at 1510.

21 *See, e.g.*, Marsh v. Or. Natural Res. Council, 490 U.S. 360, 373–74 (1989) (explaining NEPA requires "that agencies take a 'hard look' at the environmental effects of their planned action"). *See also*, *Defenders*, 689 F.3d 1060, 1075 (9th Cir. 2012) ("Taking a 'hard look' includes 'considering all foreseeable direct and indirect impacts. Furthermore, a "hard look" should involve discussion of adverse impacts that does not improperly minimize negative side effects.'" (quoting N. Alaska Envtl. Ctr. v. Kempthorne, 457 F.3d 969, 975 (9th Cir. 2006))).

22 *See, e.g.*, *Defenders*, 689 F.3d at 1075 (referencing Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 960 (9th Cir. 2005)) (explaining that courts make a "pragmatic judgment whether the EIS's form, content[,] and preparation foster both informed decision-making and informed public participation" to determine if agencies have taken a hard look).

23 *See Defenders*, 689 F.3d 1060 (describing the limited role of a court's review of an EIS as ensuring that potential environmental impacts were thoroughly discussed).

24 42 U.S.C. § 4332 (2012). *See also Marsh*, 490 U.S. at 374.

extended litigation over a shoddily prepared EIS should force agencies to take the drafting seriously and to earnestly consider mitigation.[25]

B. The NEPA Process

The NEPA process involves a series of interrelated steps with which agencies must comply, though some undertakings are categorically excluded from a detailed analysis if certain criteria are met.[26] If an action does not fall into a categorical exclusion, the federal agency must prepare a written environmental assessment (EA).[27] The EA is a concise public document that is used to determine whether a proposed action would significantly affect the environment.[28] The EA briefly considers impacts of the action, alternatives, mitigation measures, cost–benefit analysis, and the action's consistency with other laws and programs.[29] The overwhelming majority of environmental assessments result in a finding of no significant impact (FONSI).[30] If an agency issues a FONSI, it has found that the proposed action will not have a significant effect on the human environment, and an EIS will not be prepared.[31]

If an agency determines that the proposed action will have a significant effect on the environment, it must prepare an EIS.[32] This behemoth of a

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25 *See* Bradley C. Karkkainen, *Toward a Smarter NEPA: Monitoring and Managing Government's Environmental Performance*, 102 COLUM. L. REV. 903, 919 (2002) (noting that producing a "litigation proof" EIS is burdensome and time consuming).

26 40 C.F.R. § 1508.4 (2015). A common example of a categorical exclusion is found within the Healthy Forests Initiative, which allows certain logging operations to commence without a detailed report or analysis. Healthy Forests Restoration Act, Pub. L. No. 108-148, § 103(c)(1), 117 Stat. 1896 (2003) (codified as 16 U.S.C. 6513 § 103(c)(1)). The categorical exclusion allows the USFS to thin certain areas to reduce the risk of wildfire. A COLLABORATIVE APPROACH FOR REDUCING WILDLAND FIRE RISKS TO COMMUNITIES AND THE ENVIRONMENT: 10-YEAR STRATEGY (2006), *available at* https://fs.usda.gov/Internet/FSE_DOCUMENTS/fsbdev7_021159.pdf.

27 40 C.F.R. § 1501.4(a)–(b) (2015).

28 *Id.* § 1508.9.

29 CITIZEN'S GUIDE, *supra* note 11, at 11–12. According to the regulations, an EA serves to "(1) [b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact. (2) Aid an agency's compliance with the Act when no environmental impact statement is necessary. (3) Facilitate preparation of a statement when one is necessary." 40 C.F.R. § 1508.9.

30 There are about 50,000 EAs prepared in any given year, and ninety-nine percent of them result in a finding of no significant impact. MICHAEL B. GERRARD, GLOBAL CLIMATE CHANGE AND U.S. LAW 215 (2d ed. 2007).

31 40 C.F.R. § 1508.13 (2015). A large amount of NEPA litigation concerns agencies' FONSI determinations. *See* Wendy B. Davis, *The Fox is Guarding the Henhouse: Enhancing the Role of the EPA in FONSI Determinations Pursuant to NEPA*, 39 AKRON L. REV. 35, 36–37, 39 (2006). Courts review a FONSI determination under an "arbitrary and capricious" standard. *See, e.g.*, Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 526 (9th Cir. 2007). The arbitrary or capricious standard is extremely deferential to district courts and appellate courts will rarely reverse. Louis J. Virelli, *Deconstructing Arbitrary and Capricious Review*, 92 N.C. L. REV. 721, 727 (2014). *But see*, Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229 (9th Cir. 2001) (cattle growers' permit reinstated after no evidence of endangered species existing on their land).

32 *See* 40 C.F.R. § 1502 (2015).

document is exponentially more detailed and time consuming than its lesser cousin, the EA,[33] and the prospect of preparing an EIS hardly elicits excitement. Agencies, in an effort to avoid preparing such a document, will sometimes drastically scale back their original project or consider serious mitigation efforts so they can issue a FONSI.[34] This avoidance tactic, although self-serving, actually dovetails quite nicely with NEPA's goals; the project's environmental impact remains minimal even though no EIS is prepared.[35]

Once an agency determines that an EIS is necessary, but before the agency begins the actual drafting, it must publish a notice of intent in the Federal Register and participate in a process called "scoping."[36] Through the scoping process, the agency must invite the participation of other affected federal agencies and the public, determine the scope of the EIS, and identify the significant issues that the EIS will address.[37]

After scoping, the drafting process begins. An EIS is an exhaustive look at the environmental impacts of a proposed action and a detailed consideration of the alternatives.[38] The primary purpose of an EIS is to "serve as an action-forcing device to ensure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government."[39] Although the regulations governing the statements require them to be "concise" and "no longer than absolutely necessary,"[40] EISs are generally lengthy documents, filling up to 300 pages with appendices.[41]

An EIS is an EA in much greater detail that usually includes four sections: 1) an introduction with a purpose and need statement; 2) a description of the affected environment; 3) a description of alternatives, including the proposed action; and 4) an analysis of the environmental impacts of the alternatives.[42] Lawsuits concerning the EIS document often arise over either the purpose and need statement or the alternatives section. In the purpose and need statement, agencies are directed to "specify the underlying purpose and need to which the agency is responding in proposing the alternatives, including the proposed action."[43] While agencies have control over the direction of their project, "an agency may not define the

33 See NAT'L ASS'N OF ENVTL. PROF'LS, KNOWLEDGE-BASED SURVEY FOR IDENTIFYING BEST PRACTICE PRINCIPLES FOR ENVIRONMENTAL ASSESSMENTS: CEQ PILOT STUDY 68 (2013), *available at* http://www.naep.org/assets/NAEPGuidanceonBPPsforEAstotheCEQ/comprehensivereportasof20130724.pdf.

34 Lazarus, *supra* note 19, at 1519.

35 *Id.*

36 40 C.F.R. § 1501.7 (2015).

37 *Id.* § 1501.7(a)(1)–(3).

38 *Id.* § 1502.1.

39 *Id.*

40 *Id.* § 1502.2.

41 *See* CHARLES H. ECCLESTON, NEPA AND ENVIRONMENTAL PLANNING 77 (2008).

42 40 C.F.R. § 1502.10 (2015).

43 *Id.* § 1502.13. Lawsuits often arise out of the purpose and need statement because environmental plaintiffs argue that the purpose statement is so narrow that it only encompasses one alternative—namely, the proposed action itself.

objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality."[44]

The alternatives section is the heart of an EIS.[45] There has been much litigation over what kinds of alternatives an agency must discuss and how detailed those discussions must be.[46] Although NEPA regulations require an EIS to "[r]igorously explore and objectively evaluate all reasonable alternatives" to the proposed action,[47] courts generally have been very deferential in letting agencies decide what alternatives to put on the table.[48] NEPA does not force an agency to consider an infinite range of alternatives, but it must consider reasonable alternatives, including taking no action at all.[49] Additionally, an agency must "briefly discuss" why it eliminated certain alternatives from detailed study.[50]

When an agency has completed a Draft EIS, it must make the document public and provide a period of time for public comment.[51] Environmental groups, other agencies, and affected citizens usually take this time to voice their concerns about or support for the project.[52] The public comment period gives the agency yet another opportunity to take a hard look at the proposed project. Although many of the public's concerns have undoubtedly been addressed in the Draft EIS, some new concerns are likely to arise as well, which the agency can incorporate into the Final EIS. The Environmental Protection Agency (EPA) also reviews Draft EISs pursuant to section 309 of the Clean Air Act,[53] and if EPA agrees that the project should proceed, EPA

44 Citizens Against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991).

45 40 C.F.R. § 1502.14 (2015).

46 *See, e.g.*, Valley Citizens for a Safe Env't v. Aldridge, 886 F.2d 458, 463 (1989) (stating that the level of detail required in discussion of EIS alternatives depends on the nature and scope of the proposed action); Dubois v. U.S. Dept. of Agric., 102 F.3d 1273, 1287–88 (1996) (concluding defendant failed to adequately explore reasonable alternatives).

47 40 C.F.R. § 1502.14(a) (2015).

48 *See, e.g.*, Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 551 (1978) (stating that agencies do not need to "include every alternative device and thought conceivable" in an EIS). *See also Burlington*, 938 F.2d at 193, 206 (upholding an EIS that only considered two alternatives—the proposed plan and doing nothing). *But see* Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin., 508 F.3d 508, 551–52 (2007) (finding that the agency's "very narrow range" of alternatives was inappropriate because the alternatives were "hardly different from the option that NHTSA ultimately adopted").

49 40 C.F.R. § 1502.14(a), (d) (2015); City of Carmel-By-The-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1155 (9th Cir. 1997) ("The Environmental Impact Statement need not consider an infinite range of alternatives, only reasonable or feasible ones.").

50 40 C.F.R. § 1502.14(a) (2015).

51 *Id.* § 1503.1(a). The comment period generally must last at least 45 days. *Id.* § 1506.10(c).

52 *See Id.* §§ 1503.1–1503.3. Some projects affect multiple agencies, but only one agency (called the "lead agency") prepares the EIS. *Id.* § 1501.5. When there are major interagency disagreements about the proposed project, they are referred to CEQ. *Id.* § 1504.1(a). CEQ then either recommends a course of action or, in extremely rare occasions, refers the disagreement to the President. *Id.* § 1504.3(f).

53 42 U.S.C. § 7609(a) (2012) ("The Administrator shall review and comment in writing on the environmental impact of any matter relating to duties and responsibilities granted pursuant to this chapter or other provisions of the authority of the Administrator.").

writes a letter to the agency with a "Lack of Objections" rating signifying EPA's approval.[54] Finally, an agency will issue a Final EIS and a "Record of Decision" (ROD) which summarizes its actions and explains why it rejected the various alternatives to the project.[55]

III. THE NATIONAL FOREST SYSTEM

The national forest system in the United States is a unique treasure. Legitimate disagreement exists regarding how and to what extent it should be protected, but precious few would argue that it should not be protected at all. This Section considers the nature and purpose of the national forest system, and then examines how experimental forests fit into the preservation strategy.

A. National Forests, Their History, and Their Purpose

In 1891, Congress passed the Forest Reserve Act,[56] which authorized President Benjamin Harrison to set aside public lands as forest reserves to be managed by the Department of the Interior.[57] The Act represented a monumental shift in public policy from an emphasis on the privatization of land[58] to the conservation of land for public use.[59] This policy continued through the next several administrations until a substantial portion of the country was federal land.[60] Today, national forests alone comprise over 225 million acres, or about 9.5% of the United States by area.[61]

After 1905 the forests were managed by a fledgling organization—the USFS—run by a man named Gifford Pinchot.[62] Not accidentally, the newly

54 U.S. Envtl. Prot. Agency, *Environmental Impact Statement Rating System Criteria*, http://www2.epa.gov/nepa/environmental-impact-statement-rating-system-criteria (last visited Nov. 21, 2015).

55 40 C.F.R. § 1505.2 (2015).

56 Forest Reserve Act of 1891, 16 U.S.C. §§ 55, 61, 471c, 471d (2012).

57 *Id.*

58 *See, e.g.*, Homestead Act of 1862, ch. 75, 12 Stat. 392 (1862) (repealed 1976), which essentially gave away plots of 160 acres to interested individuals.

59 *See*, *e.g.*, David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 284 (1982) ("The contents of the Act reflect the mix of views about the appropriate use of the public lands which was prevalent on the cusp between the eras of disposal and retention of public lands."). The Act was fairly controversial, especially in western states where it was seen as a massive land grab by the federal government. *See*, *e.g.*, EVERETT DICK, THE LURE OF THE LAND 327 (1970) (discussing the view that it was an "unbearable encroachment upon the rights of the West"). For example, in Skamania County in Washington State, eighty percent of the land was seized for forest reserves. *Skamania County*, www.skamaniacounty.org (last visited Nov. 21, 2015).

60 ROSS W. GORTE ET AL., CONG. RESEARCH SERV., FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 2 (2012), *available at* https://fas.org/sgp/crs/misc/R42346.pdf.

61 USFS, LAND AREAS OF THE NATIONAL FOREST SYSTEM 1 (2011), *available at* http://www.fs.fed.us/land/staff/lar/LAR2011/LAR_Table_01.pdf. This number does not include the millions of acres set aside as purchase units, national grasslands, and national preserves, or other research/experimental areas. *Id.*

62 RICHARD H. STROUD, NATIONAL LEADERS OF AMERICAN CONSERVATION 306–07 (1985).

minted USFS was placed within the Department of Agriculture.[63] Trees were seen as an economic commodity, and forestry was tree farming.[64]

In the 1970s, however, attitudes toward forestry and timber management began to change, and USFS transitioned toward multiple-use management, focusing simultaneously on both economic and ecological concerns.[65] A glut of environmental legislation worked its way through Congress during this period, which forced federal agencies to consider the environmental effects of their actions.[66] NEPA was one of the heavy hitters. Attitudes continued to evolve, and in the 1990s, USFS shifted to an "ecosystem management" approach, which requires consideration of ecological, economic, and social factors.[67] Economic outputs played a minor role in forest management, and forests instead were managed for certain "conditions."[68]

B. Experimental Forests

In some ways, experimental forests are the last vestige of Gifford Pinchot's early view that forestry was tree farming. Experimental forests are not economic in nature, but they do represent USFS's last great concerted attempt to manipulate and intimately control the power of a living forest over generations.[69] They are essentially outdoor laboratories, used for research, trials, and the testing of hypotheses on a grand scale. Experimental forests are not managed for a "state" or "condition," but instead are managed to produce scientific data.[70]

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63 *Id.*

64 GIFFORD PINCHOT, BREAKING NEW GROUND 31 (Island Press 1998) (1947).

65 *See* MARGARET HERRING & SARAH GREENE, FOREST OF TIME 126–27 (Oregon State University Press 2007).

66 *See* Corp. for Pub. Broad., *Timeline: The Modern Environmental Movement*, http://www.pbs.org/wgbh/americanexperience/features/timeline/earthdays/ (last visited Nov. 21, 2015).

67 Jack Ward Thomas, *Forest Service Perspective on Ecosystem Management*, 6 ECOLOGICAL APPLICATIONS 703 (1996).

68 Roger A. Sedjo & Douglas MacCleery, *Sustainable Forests in America?*, *in* PERSPECTIVES ON SUSTAINABLE RESOURCES IN AMERICA 28, 29 (Roger A. Sedjo ed. 2008). The evolution of management strategies has been described as follows:

> Ecosystem management replaces the traditional objectives of public forest management . . . with a somewhat nebulous "desired forest condition." However, that is not operationally useful in the absence of specific dimensions of that desired condition. In many cases, the objective of ecosystem management appears to be simply the practice of an ecosystem approach: the means and the ends have merged.

Id. (quoting Roger A. Sedjo, *Toward an Operational Approach to Public Lands Ecosystem Management*, 94 J. OF FORESTRY 8, 26 (1996)).

69 Aaron Shapiro, *A Grand Experiment: USDA Forest Service Experimental Forests and Ranges*, *in* USDA FOREST SERVICE EXPERIMENTAL FORESTS AND RANGES 3, 20 (Deborah C. Hayes et al. eds., 2014).

70 *Id.*

As early as 1911, USFS began setting aside land for experimental forests.[71] These sites were used for long-term research and served as living laboratories for USFS scientists and biologists.[72] Some experiments in the forests lasted for months, but some experiments could be designed to last over one hundred years.[73] Today there are seventy-seven experimental forests in the United States, and they encompass a wide variety of different foliage, ecosystems, climates, and sizes.[74] Experimental forests are managed by USFS under the Forest and Rangeland Renewable Resources Research Act of 1978 (Research Act).[75] The Research Act recognizes that the "Federal Government has an important and substantial role in ensuring the continued health, productivity, and sustainability of the forests . . . of the United States."[76] The Research Act authorizes the Secretary of the Interior to "conduct, support, and cooperate in investigations, experiments, tests, and other activities the Secretary deems necessary to obtain, analyze, develop, demonstrate, and disseminate scientific information about protecting, managing, and utilizing forest and rangeland renewable resources."[77]

Pringle Falls was established in 1931 and is managed by the Pacific Northwest Research Station.[78] Located on 4,475 hectares within the Deschutes National Forest in the east Cascade Mountains, it was created to conduct silviculture experiments involving Ponderosa and lodgepole pine.[79] The goal of the experimental forest is to "provide an area where field research activities are conducted while considering other resource values."[80] Currently, much of the research in Pringle Falls involves consideration of "the long-term processes that regulate or influence the structure,

71 *See* MARY BETH ADAMS ET AL., USFS, EXPERIMENTAL FORESTS AND RANGES OF THE USDA FOREST SERVICE 128, 134 (2003) *available at* http://www.nrs.fs.fed.us/pubs/gtr/gtr_ne321R.pdf (discussing the Priest River Experimental Forest in Idaho, established in 1911, and the Great Basin Experimental Range in Utah, established in 1912).

72 *Id.*

73 *See, e.g.*, *id.* at 1 (discussing a study in the H.J. Andrews Experimental Forest in Oregon on log decomposition that started in 1982 and is expected to last 200 years).

74 USFS, *Experimental Forests and Ranges of the Pacific Northwest Research Station*, http://www.fs.fed.us/pnw/exforests/ (last visited Nov. 21, 2015) [hereinafter *Experimental Forests*]. The smallest experimental forest is the 47 hectare (ha) Kawishiwi Experimental Forest in Minnesota, and the largest experimental forest is the 22,500 ha Desert Experimental Range in Utah. USFS, *Experimental Forests & Ranges*, http://www.fs.fed.us/rmrs/experimental-forests/ (last visited Nov. 21, 2015). One hectare equals about 2.5 acres. *Hectare,* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1424 (1986) (under the metric system table, a hectare is equivalent to 2.47 acres which is about 2.5 acres).

75 16 U.S.C. §§ 1641–1650 (2012).

76 *Id.* § 1641(a)(1).

77 *Id.* § 1642(a).

78 USFS, *Pringle Falls Experimental Forest and Research Natural Area*, http://www.fs.fed.us/pnw/exforests/pringle-falls/index.shtml (last visited Nov. 21, 2015).

79 *Id.*; USFS, DESCHUTES FOREST, LAND AND RESOURCE MANAGEMENT PLAN SUMMARY 13, *available at* http://www.fs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb5347237.pdf.

80 LAND AND RESOURCE MANAGEMENT PLAN SUMMARY, *supra* note 79, at 13.

composition, and pattern of forests."[81] A thinning and fuel reduction project in Pringle Falls was the issue in *Defenders*.[82]

IV. THE NINTH CIRCUIT'S OPINION IN *LEAGUE OF WILDERNESS DEFENDERS*

In *Defenders*, the Ninth Circuit addressed the sufficiency of a USFS EIS under NEPA for a thinning and fuels reduction project in Pringle Falls.[83]

A. The Project

The Experimental Forest Thinning, Fuels Reduction, and Research Project (the Project) was designed to "reduce risk to the site by reducing stand densities, and lowering susceptibility to catastrophic loss to insects, disease, and fire."[84] USFS proffered two purposes for the Project: to "address the risk of a severe insect epidemic or catastrophic fire," and "to provide operational scale research opportunities through a series of thinning and fuel reduction treatments."[85]

The Project called for fuel reduction and thinning on approximately 2,500 acres in a sector of the forest called the Lookout Mountain Unit.[86] The Lookout Mountain Unit had been left relatively untouched since 1845, when a large stand-replacing fire had swept the area.[87] In the 1970s and '80s, USFS had conducted thinning projects throughout the unit, and within the last century only one, relatively small, fire had affected 323 acres in 1914.[88] As a result, the Lookout Mountain Unit had high stand density and elevated fuel accumulation.[89] USFS was concerned that problems would result: "Because of stand density, average diameter, and availability of host species and fuels, there is a high and increasing probability that ponderosa pine across the Lookout Mountain unit will support a landscape-scale . . . beetle outbreak, or a large stand-replacing event."[90] In particular, USFS was worried that, if such

81 *Pringle Falls Experimental Forest*, *supra* note 78.

82 *See Defenders*, 689 F.3d 1060, 1067 (2012) ("[T]he Environmental Protection Agency wrote that it was supportive of the proposed project, both as a means to address the risk of severe insect epidemic or catastrophic fire, and as an opportunity to study forest dynamics after thinning and fuels reduction in dry forests.").

83 *Id.* at 1064.

84 USFS, DRAFT ENVIRONMENTAL IMPACT STATEMENT: EXF THINNING, FUELS REDUCTION, AND RESEARCH PROJECT 4 (2009), *available at* http://permanent.access.gpo.gov/gpo15409/41261FSPLT2026462.pdf [hereinafter DEIS].

85 *Defenders*, 689 F.3d at 1067.

86 *Id.* at 1064–65.

87 *Id.* at 3.

88 *Id.*

89 *Id.*

90 *Id.* Beetle infestation is a common concern in the western United States. *See* CLARENCE J. DEMARS & BRUCE H. ROETTGERING, USFS, FOREST INSECT & DISEASE LEAFLET 1: WESTERN PINE BEETLE 1–2 (1982), *available at* http://www.na.fs.fed.us/spfo/pubs/fidls/we_pine_beetle/wpb.htm. Particularly damaging is the Western Pine Beetle, and its close cousin the Mountain Pine Beetle, which carry spores of blue-staining fungus that spreads quickly throughout the tree

an event occurred, it would mean "the loss of existing, high-value, long-term studies" and would "eliminate most future research opportunities."[91]

The Project involved dividing the study area into four blocks.[92] Each block was divided further into five areas, each of which would represent a specified level of logging and controlled burning.[93] The different areas would be thinned to various stand density indexes (SDIs), and the growth of the trees in the five areas would be compared.[94] Based on the Project, USFS planned to decide what actions should be taken that would afford trees the greatest protection.[95]

As required by NEPA, USFS included a discussion of alternatives in its EIS for the Project. USFS considered three alternatives for the Project: a no-action alternative, and two action alternatives.[96] The preferred alternative was Alternative 2, which called for logging 27–29 million board feet of timber on just over 2,500 acres.[97] Actions under Alternative 2 would have eliminated about one-third of all trees greater than twenty-one inches in diameter in the logged areas, and seventy percent of trees larger than six inches in diameter at breast height to reach the target SDI.[98] Because the Deschutes Forest Plan prohibited logging old growth trees that were larger than twenty-one inches in diameter east of the Cascade Mountains, Alternative 2 amended the Forest Plan to exempt the Project area.[99] The other action alternative (Alternative 3) was essentially the same as Alternative 2 with one notable exception: it would leave 372 acres of spotted owl habitat undisturbed that would otherwise be thinned under Alternative 2, thereby reducing the total logged area by about fifteen percent.[100]

Before circulating the Draft EIS in September 2009, USFS dutifully followed NEPA guidelines in preparing for the Project.[101] In April of 2008, USFS sent out a scoping letter to interested parties that described the proposed action, and published notice in the Federal Register of intent to prepare an EIS for the Project.[102] Another letter was sent to interested parties in April 2009, and USFS offered two field trips to the Lookout Mountain Unit to discuss the Project with interested parties.[103] The League of Wilderness

and kills it. *Id.* Typically areas with too many trees are more susceptible to beetle infestation. *Id.* at 1.

91 DEIS, *supra* note 84, at 3.

92 *Id.* at 15. *See also Defenders*, 689 F.3d 1060, 1066 (9th Cir. 2012).

93 *Defenders*, 689 F.3d at 1066.

94 *Id.* SDI measures density based on mean tree size and the number of trees within a stand. *Id.* If the SDI is high, that means that the trees are at imminent risk of beetle infestation. *Id.* USFS had previously determined that the SDI was between 132% and 224% of what it should be. *Id.*

95 *Id.* at 1067.

96 DEIS, *supra* note 84, at i.

97 *Id.* at 15–16.

98 *Defenders*, 689 F.3d at 1067.

99 *Id.* at 1067; DEIS, *supra* note 84, at 18.

100 DEIS, *supra* note 84, at 17–21; *Defenders*, 689 F.3d at 1067.

101 DEIS, *supra* note 84, at 9.

102 *Id.* at 6.

103 *Id.*

Defenders (the League), the plaintiff in *Defenders*, participated in one of the field trips.[104]

The Draft EIS was circulated in September of 2009, and public comments were solicited.[105] The EPA expressed support for the project in a November 2009 letter.[106] The letter explained:

> This forest is an important natural laboratory that is serving to enhance our understanding of the role of natural and human-caused disturbances as agents of change in ponderosa pine, lodgepole pine and mixed conifer forests, and the degree to which they can be effectively managed to achieve or sustain desired ecological conditions. We are supportive of the proposed project, both as a means to address the risk of severe insect epidemic or catastrophic fire, and as an opportunity to study forest dynamics after thinning and fuels reduction in dry forests. . . . Research such as this can help to build our understanding and inform future management.[107]

Additionally, the United States Fish and Wildlife Service (FWS) released a biological opinion, as required by the Endangered Species Act,[108] addressing the effect of the project on the northern spotted owl.[109] The FWS found that the Project would not seriously jeopardize the treasured owl's existence.[110] In March 2010, the Final EIS was released and USFS published a ROD which selected Alternative 2 and approved the project.[111] The ROD rejected Alternative 3 for two reasons: it would "render the proposed research design incomplete," and it would not represent any significant benefit to the spotted owl.[112] The ROD explained that Alternative 2 "does the best job of meeting the statutory mission of the Experimental Forest by reducing the risk of losing a large portion of it to fire or insects, and incorporating important research into the design of risk-reduction activities."[113]

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104 *Id.*

105 Environmental Impact Statements; Notice of Availability, 74 Fed. Reg. 47943 (Sept. 18, 2009).

106 U.S. Envtl. Prot. Agency, Opinion Letter on EXF Thinning, Fuels Reduction, and Research Project (Nov. 2, 2009), *available at* https://cdxnodengn.epa.gov/cdx-enepa-II/public/action/eis/
details?eisId=87531.

107 *Id.*

108 16 U.S.C. § 1536(b) (2012).

109 U.S. Fish & Wildlife Serv., U.S. Dep't of the Interior, Opinion Letter on Formal Consultation on the impacts of the EXF Thinning, Fuels Reduction, and Research Project on the Northern Spotted Owl (Jan. 4, 2010), *available at* http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/41261_FSPLT3_2573646.pdf.

110 *Id.* at 51.

111 U.S. FOREST SERV., U.S. DEP'T. AGRIC., RECORD OF DECISION: EXF THINNING, FUELS REDUCTION, AND RESEARCH PROJECT 1 (2010), *available at* http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/41261_FSPLT2_051332.pdf.

112 *Id.* at 11.

113 *Id.* at 12.

B. The League's Argument

The League argued that the EIS was deficient in several ways, most notably in the statement of purpose and need and the alternatives analysis.[114] The two sections of the EIS are inextricably linked because the alternatives are simply possible methods *by which* the agency will accomplish the purpose of the project *for which* there is an alleged need. A problem with one meant that there was likely a problem with the other. The League argued that this connection between the two sections of the EIS was problematic.[115]

In particular, the League asserted that the statement of purpose and need was "unreasonably narrow" and incorporated a "rigid implementation" of the Study Plan.[116] Because the statement of purpose was so narrow, the League explained, the only alternative that would satisfy it was the alternative chosen—Alternative 2.[117]

The League also argued that USFS created their study plan well before they had initiated the NEPA process.[118] NEPA became simply a step in the process of going forward with the original study plan, because USFS already had their plan in place prior to doing any environmental analysis of the affected area. The League argued that USFS was required to "integrate the NEPA process with other planning at the earliest possible time," pursuant to 40 C.F.R. § 1501.2, and the agency had failed to do that.[119]

The court was unsympathetic to both arguments, but buttressed its rather paltry analysis with broad claims about the Project's location in an experimental forest and the considerable discretion afforded agencies in this area.[120] The court responded to the League's first argument about the scope of the purpose statement by explaining that sometimes, even though the statement of purpose appeared too narrow when read in isolation, it was ultimately reasonable because it expressly incorporated broader objectives.[121] Language in the EIS revealed that alternatives were compared "for their ability to implement the study plan"[122] and that one alternative was rejected because it "would not meet the purpose and need of implementing the study plan."[123] The League argued, quite convincingly, that the alternatives were not evaluated objectively, but only in reference to how they would fit in with a predetermined course of action.[124]

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114 *Defenders*, 689 F.3d 1060, 1068 (9th Cir. 2012).

115 *See id.* at 1070.

116 *Id.*

117 *Id.*

118 *Id.*

119 *Id. See* 40 C.F.R. § 1501.2 (2015).

120 *Defenders*, 689 F.3d at 1071.

121 *Id.* at 1070.

122 FOREST SERVICE, U.S. DEP'T OF AGRIC., FINAL ENVIRONMENTAL IMPACT STATEMENT: EXF THINNING, FUELS REDUCTION, AND RESEARCH PROJECT 9 (Mar. 2010) [hereinafter FEIS], *available at* http://a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/41261_FSPLT2_051334.pdf.

123 *Id.* at 37.

124 *See, e.g.*, *Defenders*, 689 F.3d at 1070–72.

The court attempted to explain that, when read in context, the language was directed at research questions and objectives described in the Plan and not to rigid implementation of specifics.[125] The court also clarified that Alternative 2, which USFS ultimately selected, actually differed slightly from the Plan's proposed design in that it removed forty-nine acres of logging in response to various environmental groups' concerns.[126]

The court responded to The League's second argument that the NEPA process had not been integrated early enough by pointing out that "the Service began the process nearly a year before the Plan was finally approved."[127] The court explained that the "touchstone of their inquiry" was whether the alternatives analysis "fosters informed decision-making and informed public participation."[128] Because of the scoping letter, the field trip, and a subsequent slight modification as a result of these discussions, the court concluded that the purpose and need in the EIS "adequately informed decisions by the Service and participation by the public."[129]

The League also argued that the EIS lacked scientific integrity.[130] NEPA regulations require that an agency ensure scientific integrity in its analysis and explicitly refer to "the scientific and other sources relied upon for conclusions."[131] The League argued that the proposed logging of seventy percent of all trees greater than six inches in diameter would actually kill more trees than the catastrophic fire and bug infestation the logging was designed to prevent.[132] The court found that the protection of trees was not the only goal of the project.[133] The function of an experimental forest was to keep the forest viable for research opportunities and not to save as many trees as possible.[134]

Finally, the League argued that the EIS failed to take a "hard look" at the Project's impact on tree mortality and wildlife species.[135] The court simply pointed to its analysis earlier in the opinion regarding the function and purpose of an experimental forest and reiterated that reduction in tree mortality was not the primary goal of the Project.[136]

Each of the League's arguments regarding the insufficiencies of the EIS were thrown aside quite readily in what amounted to a relatively short Ninth Circuit opinion. The court was ultimately satisfied with the EIS and its "reasonable range of alternatives that would fulfill both of the Project's goals."[137]

125 *Id.* at 1070.
126 *Id.*
127 *Id.*
128 *Id.* at 1071.
129 *Id.*
130 *Id.* at 1073.
131 40 C.F.R. § 1502.24 (2015).
132 *Defenders*, 689 F.3d at 1075.
133 *Id.*
134 *Id.*
135 *Id.*
136 *Id.* at 1076.
137 *Id.* at 1077.

V. EIS STATEMENTS AND EXPERIMENTAL FORESTS

The Ninth Circuit's opinion in *Defenders* is notable not for the holding, but for its utter uselessness as guiding precedent regarding USFS actions in experimental forests. For all its discussion, the opinion says very little about what USFS must do to successfully navigate the NEPA process when taking action in an experimental forest, and says even less about when, if ever, EISs will be declared unsatisfactory by a court.[138] However, *Defenders* does one thing effectively: it demonstrates that USFS actions in experimental forests are virtually unreviewable.

EISs are merely a foreordained formality for USFS actions in experimental forests. USFS can sidestep a serious look at environmental impacts when they are familiar with how courts will review their actions.

In *Defenders*, the League argued primarily that the USFS's purpose and need statement was unreasonably narrow and essentially incorporated the study plan.[139] In other words, USFS knew exactly what it wanted to do and then crafted a purpose and need statement to allow for only the preferred alternative. The court, in its analysis, dove into a morass of semantics trying to justify the manifest narrowness of the purpose statement that stated explicitly that the EIS compared alternatives "for their ability to implement the study plan."[140] The court was quick to point out that the preferred alternative "removed forty-nine acres of logging" from the plan's original design, at most a mere two percent of the project's total area.[141]

In discussing the statement of purpose and need, the court employed a quote from *Citizens Against Burlington, Inc. v. Busey*,[142] which states: "[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, and the EIS would become a foreordained formality."[143] The choice of the quote was interesting, because it could be argued that the D.C. Circuit's decision in *Burlington* promoted exactly that: an agency defining its objectives in an "unreasonably narrow" way so that the "EIS would become a foreordained formality."[144] In that decision, the court upheld an EIS with only two alternatives—the proposed action, and doing nothing.[145] Although the *Defenders* court never says so explicitly, it may have employed some dubious reasoning: If the D.C. Circuit decided that an agency had done enough by proposing only two alternatives—the preferred alternative and doing nothing—why shouldn't USFS be allowed to proceed in this case with three alternatives?

138 *Id.* at 1075–77.
139 *Id.* at 1070.
140 FEIS, *supra* note 122, at 9.
141 *Defenders*, 689 F.3d at 1070.
142 938 F.2d 190 (D.C. Cir. 1991).
143 *Defenders*, 689 F.3d at 1068; *Burlington*, 938 F.2d at 196.
144 *Burlington*, 938 F.2d at 196.
145 *Id.* at 198.

USFS may rightly view this case as a green light to plan their preferred action in an experimental forest, go forward with pre-implementation steps, and then think up a slightly different alternative to satisfy courts if environmental groups do not approve. The problem, of course, with this line of thinking is that it sidesteps the very goal of EISs: to "serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the federal government."[146] In this scenario, not only is an EIS not an action-forcing device, but it is more appropriately characterized as a minor nuisance to make courts and environmental groups happy so the agency may go forward with its preferred alternative.

In *Defenders*, the League attacked this inconsistency head on with its argument that USFS failed to "integrate the NEPA process with other planning at the earliest possible time."[147] The court, in an effort to bolster its conclusion that USFS acted within bounds, responded that the Service had started the NEPA process a year before the Plan was approved.[148] EPA sent its letter that expressed support for the project in November 2009, while USFS started planning for this project at the *latest* in 2007, a full two years earlier.[149] USFS had planned for a year or more before the NEPA process started, which gave them plenty of time to choose their preferred course of action before considering any of the environmental impacts.[150] The court did not explain why it was satisfied with the one-year mark prior to approval.[151] Neither did the court explain how sending out a scoping letter or hosting a field trip to the unit—arguments which it used in support of its proposition that USFS had integrated NEPA early enough—indicate that the agency had integrated the NEPA process at the earliest possible time.[152] The court's analysis represents another nonhurdle for USFS to clear. It would be easy for USFS to plan their project, and then, sometime—maybe a year before implementation—start incorporating the NEPA process to satisfy the courts.

The question of whether courts really *do* require a "hard look" at environmental alternatives when USFS plans an action in experimental forests is very different from that of whether courts *should* require USFS to take a hard look at environmental alternatives in experimental forests. So far, this Article has been quite critical of the Ninth Circuit's opinion in *Defenders*. However, it may be that the court had such a difficult time addressing the EIS issues because of the environment USFS was acting upon—namely, an experimental forest. The nature of an experimental forest and the actions taken upon it are vastly different than nearly anything else

146 40 C.F.R. § 1502.1 (2015).

147 *Defenders*, 689 F.3d at 1070, (quoting 40 C.F.R. § 1501.2 (2012)).

148 *Id.*

149 *Id.* at 1066–67.

150 USFS, SCHEDULE OF PROPOSED ACTION: 10/01/2007 TO 12/31/2007, DESCHUTES NATIONAL FOREST 6 (Oct. 1, 2007).

151 *See Defenders*, 689 F.3d at 1070–71 (discussing how USFS began the NEPA process nearly a year before its Study Plan was approved).

152 *Id.* at 1066–67.

USFS does, and it may be time to consider whether experimental forests should be exempt from EISs altogether.

In *Defenders*, the court went through a fairly typical EIS analysis focusing on the great deference given to agencies, but also hinted that the analysis was slanted because USFS is dealing with an experimental forest. At least four times in the opinion, and in nearly every major argument it makes, the court pointed specifically to "the special circumstances of a research project in an experimental forest."[153] When the League argued that USFS did not consider enough varied alternatives, the court reasoned that the work in an experimental forest "necessarily narrowed consideration of alternatives."[154] In its alternatives analysis, the court stated directly: "Given the research purpose of the Project and its location in an experimental forest, the *EIS does not have to consider in detail* an alternative that would not provide the research data that the Service seeks to obtain."[155]

Another key component of the League's argument was that USFS's actions would potentially kill more trees through logging than it would save from bug infestation and fire.[156] The court gave the argument very little credence and explained that it overlooked the purpose of an experimental forest.[157] Specifically, the primary goal of an experimental forest is to maintain viable high-value, long-term studies and future research opportunities.[158] The ability to conduct research in the experimental forest is the first consideration—not the protection of nature. According to the EIS, the purpose of USFS's project in Pringle Falls was not solely to save trees, but rather to "protect those trees for ongoing and future research."[159] Astonishingly, the court agreed with USFS's premise: "Even though the proposed Project might result in more tree mortality than a beetle infestation or wildfire, it would do so as part of a controlled research study that would also protect ongoing and future research opportunities."[160]

The framing of the issues by the court is of primary importance. A cursory glance over the opinion may lead a casual observer to be satisfied with the court's homage to the purposes of NEPA and the EIS, but the court actually flipped the script. The court made "the research data that the Service seeks to obtain" the operative statement that dictates the agency's actions.[161] Therefore, although environmental concerns are acknowledged, the specific research data sought—which was specifically and exclusively determined by the agency itself—is the concern that drives the analysis, and that is why the League had no chance to win this case.

The absurdity of the false alternatives analysis can be demonstrated through a football analogy. Football is a game of deception where one team

153 *Id.* at 1065, 1071–72, 1076.
154 *Id.* at 1071.
155 *Id.* at 1072 (emphasis added).
156 *Id.* at 1075.
157 *Id.*
158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.* at 1072.

must call plays on offense that will confuse the defense, making them think they are going to do one thing, but then doing the opposite. If the defense knew the exact plays the offense was going to run every time, the offense would be able to do very little. If, for example, the defense was sure that the offense was going to run up the middle, the defense could stack eight, nine, or ten players "in the box" to stop them. There may be a couple slightly different ways you could run up the middle, but if there are ten defenders in the box, the exact play you run will not make that much difference.

In this case, USFS is the defense. It is scripting beforehand the plays the offense may run. USFS has chosen an objective—diminish the risk to the site by reducing stand densities—and has given the "offense" two different kinds of "runs up the middle" to choose from. USFS knows that either path will lead to essentially the same result—a result which will manifestly accomplish what the Service seeks to obtain. In this analogy, USFS is dictating the defense *as well as* the offense by giving the offense no leash.

Perhaps this is the problem with requiring an EIS for experimental forests at all. Experimental forests are a different breed. They are natural laboratories, built for experimentation. When a scientist does an experiment, she maps out exactly what she hopes to accomplish. She formulates a question, makes a hypothesis, tests that hypothesis, and analyzes the results. A specific test is designed for a specific hypothesis. Likewise, in an experimental forest, USFS first formulates a question. In *Defenders*, the question would be: "What would happen if we reduced stand densities in Pringle Falls?" The hypothesis would be: "Reducing stand densities will lower susceptibility to catastrophic loss to insects, disease, and fire." The only thing left to do would be to test that hypothesis, and the one way to test the hypothesis is to actually reduce the stand densities. Therefore, any "alternatives" in the EIS, with the exception of the required no-action alternative, would inevitably lead to that one result—reducing stand densities. As the district court observed: "The [USFS] simply cannot entertain every alternative without regard for elements that are unique to the research forest."[162]

In short, USFS has very little incentive to honestly comply with the mandates of NEPA regarding the EISs for actions done on experimental forests. Indeed, if the process was legitimately complied with, the Service would run the risk of delegitimizing the very nature of experimental forests and the functions they serve. The paths are largely mutually exclusive, and USFS has straddled the line since 1970, paying homage to the NEPA requirements while going forward with its predetermined plans for experimental forests.[163] Courts have turned a blind eye, going through the typical analysis, but couching that same analysis within a notion that experimental forests should be treated differently. Neither side has faced the

162 *Id.* at 1071–72 (quoting League of Wilderness Defenders, Blue Mountain Biodiversity Project v. U.S. Forest Serv., No. CIV. 10-6302-HO, 2011 WL 1871224, at *3 (D. Or. May 16, 2011)).

163 *See* Daniel A. Marion et al., *A History of Watershed Research in Experimental Forests of the Interior Highlands*, *in* USDA FOREST SERVICE EXPERIMENTAL FORESTS AND RANGES, *supra* note 69, at 350–61.

music, but it may be time for decision makers to honestly assess the situation and make changes that reflect reality.

VI. PROPOSING A SOLUTION AND *LEAGUE OF WILDERNESS DEFENDERS* GOING FORWARD

Some might argue that, even if it does no *good*, there is at least no *harm* in forcing USFS to prepare an EIS when planning an action in an experimental forest. This notion underestimates the downsides of having to prepare an EIS for an experimental forest. The obvious drawback is that impact statements are tremendously time consuming and waste valuable resources—in both personnel and material—that could be used more productively.[164] The average time it takes for a federal agency to prepare an EIS is 3.4 years.[165] The second drawback is that the process forces USFS to be disingenuous, especially in its alternatives analysis. Actions taken in experimental forests are meticulously planned as a science experiment to test a hypothesis,[166] so alternatives analysis for USFS is an exercise in coming up with false alternatives. Very few would argue that adding another cumbersome level of bureaucracy just to have USFS artificially manipulate the results is a good use of taxpayer dollars. The third drawback is that, in complying with the EIS guidelines, USFS runs the risk of derogating the very purpose for which the experimental forests were designed. The massive amount of effort it takes to prepare an EIS has a chilling effect on USFS's ability to advance its research goals in an experimental forest.[167] Legitimate projects the agency could undertake in an experimental forest may be left on the drawing board for fear that such an experiment will be too costly.

This is not to say environmental concerns are worthless, but there may be a more appropriate way to address those concerns in an experimental forest. One option is to have USFS address environmental concerns a single time in a comprehensive report not unlike a EIS.

Instead of focusing on a single project, however, the report would focus on specific environmental concerns germane to a particular forest. The report would address how projects and experiments in the forest would affect the environment and could be incorporated into amendments of existing Forest Plans.[168] These reports would force USFS to incorporate environmental concerns into their decision making as NEPA requires, but would also allow for increased flexibility when planning for specific projects.

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164 Piet deWitt & Carole A. deWitt, *How Long Does It Take to Prepare an Environmental Impact Statement*, 10 ENVTL. PRAC. 164, 164 (2008).

165 *Id.*

166 *See* Ariel D. Lugo, et. al., *Long-term Research at the USDA Forest Service's Experimental Forests and Ranges*, BIOSCIENCE, Jan. 2006 at 40 (stating that "a wide variety of ecological research networks exist" and that they are often highly coordinated).

167 *See, e.g.*, *Defenders*, 689 F.3d at 1066–67 (showing that it took more than two years for the EIS to get finalized, chilling USFS's ability to continue research).

168 Under this model, the Pringle Falls report would be integrated into the Deschutes Forest Management Plan.

Beyond the scope of this Article is how a solution like this might dovetail with the sharp teeth of the Endangered Species Act.[169] This problem could generally be addressed by requiring USFS to specifically consider endangered species concerns in the report,[170] and also by requiring FWS to weigh in on the issues. One of the primary functions of an experimental forest is to protect the trees in it for ongoing and future research opportunities.[171] That function merges with the protection of endangered species most of the time.

What remains to be seen is how future courts will deal with the Ninth Circuit's opinion in *Defenders*. The opinion is difficult to decipher in one respect: the Ninth Circuit did not expressly narrow its holding to federal actions in experimental forests, even though some of its analysis seems to be slanted precisely *because* Pringle Falls is an experimental forest.[172] One danger, then, is that lower courts in the Ninth Circuit may be tempted to pull sections of the opinion dealing with experimental forests and use them in other contexts. Indeed, this may have already happened. In *Klamath-Siskiyou Wildlands Center v. Graham,*[173] the federal district court for the Eastern District of California, relying on *Defenders*, explained that "the agency does not need to consider alternatives not reasonably related to the project's stated goal and purpose."[174] The issue in *Graham* was the adequacy of an EIS for action in a national forest, not an experimental forest.[175] The district court granted summary judgment for USFS in the case, holding that they did not act arbitrarily and capriciously in their review and approval of the project.[176] While the result would have likely been the same either way, the district court used language from *Defenders*, a decision which was made in the context of an experimental forest.[177]

One final consideration is that the problem with the *Defenders* opinion might not be unique to federal actions on experimental forests at all. There may be a much larger problem with analyzing federal actions under NEPA that is well beyond the scope of this Article. Many of the same problems arise whether a federal agency is acting in an experimental forest or whether they are taking any other action that implicates NEPA. Problems with less-

169 Endangered Species Act of 1973, 16 U.S.C. §§ 1531–1544 (2012). The Endangered Species Act is perhaps the piece of federal environmental legislation that is the farthest reaching because of its regulation of private, as well as public, activity. J. Peyton Doub, ENDANGERED SPECIES ACT: HISTORY, IMPLEMENTATION, SUCCESSES, AND CONTROVERSIES 12 (CRC Press 2013). Once a species is "listed" under the Act as endangered, heaven and earth will be moved to protect it. *See*, *e.g.*, *Rare Spider Halts $15 Million Texas Road Project*, HOUS. CHRON., Oct. 2, 2012, http://www.chron.com/news/houston-texas/article/Rare-spider-halts-15-million-Texas-road-project-3913782.php (last visited Nov. 21, 2015).

170 As they are already required to do in the EIS.

171 *Defenders*, 689 F.3d at 1075.

172 *Id.* at 1064–65 (affirming the district court's grant of summary judgment to the Service, "relying in part on the fact that the Project involves research in an experimental forest").

173 899 F. Supp. 2d 948 (E.D. Cal. 2012).

174 *Id.* at 957 (citing *Defenders*, 689 F.3d at 1071).

175 *Id.* at 951.

176 *Id.* at 971.

177 *Id.* at 957 (citing *Defenders*, 689 F.3d at 1071).

than-early integrations of the NEPA process, overly narrow purpose and need statements, and trifling alternatives analyses could manifest themselves almost anywhere. However, these problems are probably more pronounced in an experimental forest because of the nature of the forest.[178] Because of the scientific nature of the forest, the USFS will be much more likely to design an experiment that is very narrow and only considers a small number of very similar alternatives.

VII. CONCLUSION

In the Christian Bible's New Testament, Jesus condemned the Pharisees[179] for strict adherence to the letter of the law while ignoring the spirit of the law.[180] Jesus accused them of "nullify[ing] the word of God for the sake of . . . tradition."[181] Jesus explained, "These people honor me with their lips, but their hearts are far from me."[182] When Jesus was asked in the Gospel of Luke what the greatest commandment was, he responded: "Love the Lord your God with all your heart and with all your soul and with all your mind. . . . And . . . [l]ove your neighbor as yourself. All the Law and the Prophets hang on these two commandments."[183] While following the specifics of the law the Pharisees abandoned the two greatest Commandments and lost their way.

In a similar way, USFS can follow the letter of NEPA while abandoning the spirit of NEPA. The purpose of NEPA is not to add another layer of bureaucracy to an already-burdened system; instead, the purpose is to "promote efforts which will prevent or eliminate damage to the environment"[184] and to "assure that all branches of government give proper consideration to the environment prior to undertaking any major federal action that could significantly affect the environment."[185] When proposing actions on experimental forests, USFS gives artificial credence to the noble goal of NEPA while gutting its central requirement—the EIS statement—of any real significance beyond alleviating the concerns of the public and environmental groups. The Ninth Circuit's decision in *Defenders* demonstrates that USFS actions in experimental forests have become essentially unreviewable. Both the nature of experimental forests

178 *See* discussion *supra* Part III.B.

179 The Pharisees were a Jewish religious sect that took pride in their knowledge of the law and their strict observance of religious ceremonies and practices. *See Pharisee*, Webster's New International Dictionary (3d ed. 1971). Today the word "pharisee" can be used to describe a self-righteous person. *See Pharisaical,* Webster's New International Dictionary (3d ed. 1971).

180 *See, e.g.*, *Mark* 3:1–6; *See also*, *Mark* 2:3–28.

181 *Matthew* 15:6.

182 *Matthew* 15:8.

183 *Matthew* 22:37–40.

184 42 U.S.C. § 4321 (2012).

185 U.S. Envtl. Prot. Agency, *Summary of the National Environmental Policy Act*, http://www2.epa.gov/laws-regulations/summary-national-environmental-policy-act (last visited Nov. 21, 2015).

themselves and the incentive for USFS to be disingenuous in its drafting of the EIS should reveal the uselessness of the document.