

*Coalition Of Arizona/
New Mexico Counties
For Stable Economic
Growth*

"Working together for responsible management."

February 2, 2024

Submitted via <https://cara.fs2c.usda.gov/Public//CommentInput?Project=65356>.

Director
Ecosystem Management Coordination
201 14th Street SW, Mailstop 1108
Washington, DC 20250-1124

RE: Scoping for Land Management Plan Direction for Old-Growth Forest Conditions Across the National Forest System

Dear Director,

The Boundary Line Foundation comments below are being submitted by the Arizona Counties Apache, Cochise, Gila, Graham and Navajo and the New Mexico Counties Catron, Chaves, Eddy, Hidalgo, Lea, McKinley, Otero, Roosevelt, Sierra and Socorro along with strong support from the timber, farming, livestock, mining, small business, sportsman and outfitter industries as members of the Coalition of Arizona/ New Mexico Counties (Coalition). Our representation currently exceeds 700,000 in combined county populations.

Summary of the Boundary Line Foundation Comments

1. On December 20, 2023, USFS published a notice of intent to prepare an EIS, initiated a scoping process on a preliminary proposed action, and opened a public comment period at 88 FR 88042 for its proposed *Land Management Plan Direction for Old-Growth Forest Conditions Across the National Forest System*. The proposed action is respondent to Executive Order 14072 *Strengthening the Nations' Forests, Communities, and Local Economies*.
2. Centrally planned simultaneous or near-simultaneous amendments to all 128 NFS forest plans for the purpose of uniformity for protecting old-growth conditions and promoting mature-growth stands to old-growth conditions upends long-standing successful local planning for old-growth condition forest stands.
3. There are serious federalism concerns with the proposed amendment process:
 - a. Centrally planned amendments fail to account for significant differences in local conditions across the broad geography of the United States.
 - b. USFS proposes to disregard the 10th Amendment reserved powers of the various States and local governments while promoting the position of Tribal governments above those of the States and local governments.
 - c. Despite express Presidential direction in E.O. 14072 USFS fails to afford opportunity for meaningful government-to-government consultation in the development and implementation of the proposed action for State, local and territorial governments, even as it affords such opportunity for Tribal governments.

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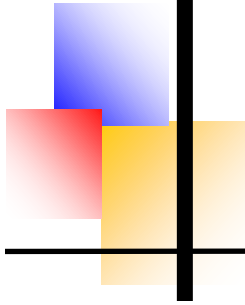
4. The proposed amendments are a major federal action justified through a demonstration of need and science, having a clear purpose, with the demonstration-of-need burden being on the agency. USFS has not satisfactorily demonstrated the need for its proposal.
5. The proposed action is one of a group of concerted actions by the Secretaries of Agriculture and Interior implementing a whole-of-government climate policy agenda via executive order raising issues pertinent to the *major questions* and *delegation* doctrines.
6. USFS transition of land use planning to landscape-scale biodiversity and ecosystem management principles contravenes the statutorily authorized mandates and goals of inventory and assessment for the purposes of multiple use and sustained yield.
7. The Chief of the U.S. Forest Service cannot accomplish top-down uniform amendments to dozens of plans while also reflecting distinctive and unique roles, capabilities, adjacent private lands and other management areas which are currently considered in unit-level management planning.
8. USFS has failed to consult with affected local governments at the unit or any other level and no scoping meetings have been held for the proposed amendment. USFS is acting in an arbitrary and capricious manner bypassing statutory and administrative mandates, public process, and coordination requirements for meaningful government-to-government interaction.
9. Central planning in the NFS is inconsistent with the bottom-up statutory priorities Congress intended which incorporate an interdisciplinary approach. USFS units differ in what permitted activities occur (grazing, mining, timber, etc.), unique geographical features, agencies and local governments, and climate. Unique localized conditions and authorities can only be substantively apprised and involved at the local level.
10. This amendment process fails to account for the monetary and human resource costs of a simultaneous revision of all 128 forest plans. If adopted, all 128 plans and their internal policies down to local FS offices, would have to be revised and/or otherwise amended.
11. The preliminary proposed action was prematurely noticed in the *Federal Register* because the threat analysis was not made available until the comment period was well under way and the initial inventory released in draft in April 2023 has yet to be issued in final its final version.
12. In its integration of artificial intelligence (AI) into its policy and operations USFS overlooks significant known risks AI brings to the table resulting in concern regarding the agency's compliance with the Information Quality Act.
13. The proposed action would affect as much as 64% of the total forested acres under USFS management, adversely impacting its ability to comply with its multiple-use and sustained-yield mandated.
14. The proposed action prematurely calls for "braiding" Western science and IK together to inform and prioritize conservation and recruitment of old-growth forest conditions through proactive stewardship. Development of such "braiding" as an academic discipline was not formally funded and initiated until the first quarter of FY 2024.

Given the serious violations of statutes, rules, directives, and guidance governing Forest Service land planning the Secretary of the U.S. Department of Agriculture should withdraw the proposed rule and notice to prepare an environmental impact statement.

Sincerely,



Dean Jackson, President



**A Review of the Delegated Statutory
Responsibilities
to the
United States Forest Service
for
Forest Planning, Inventory, Management,
and
Coordination with County Governments**

A Report to the Public Record in Response to the NEPA Scoping Process

Federal Register Vol. 88, No. 243
Wednesday, December 20, 2023

THE BOUNDARY LINE FOUNDATION
“Helping Administrative Government Understand and Respect its Limits”

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February 1, 2024

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1.0 INTRODUCTION

Old-growth amendments applied uniformly across the entire forest system using biodiversity ideologies have significant federalism implications under United States land law. It is a long-established scientific fact that the:

“...maintenance of national protection floors supplemented by states is unworkable because in contrast to air and water pollution control, there are no uniform standards that one can realistically apply to biodiversity in states as different as Alaska, Arizona and Florida.”

Furthermore, there are legal implications with implementing biodiversity objectives because:

“...the national government must rely on powers, primarily land-use controls and water-rights administration, that are traditionally and firmly lodged within state and local governments.”¹

In the American system of government all authority possessed by Federal executive branch administrative agencies is delegated by Congress through statutory acts. Statutes form the core authorities and mandates authorizing agency any action. For purposes of legal hierarchy, statutes supersede administrative rules, regulations, executive orders, memoranda, policy, and guidance. Major Federal actions are justified through the demonstration of need and science, having a clear purpose, with the onus and demonstration-of-need burden being upon the agency.

The Land Use Planning section under Title II of the Federal Land Policy and Management Act of 1976 (FLPMA) Sec. 202 - Land Use Planning and the Forest and Rangeland Renewable Resources Planning Act of 1974 (FRRRPA) require a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences consistent with the principles of multiple-use and sustained-yield as provided for in applicable law.² The secretaries of the Interior and Agriculture are required to coordinate the land use inventory, planning, and management activities for forest lands with the land use planning and management programs of other Federal departments and agencies and of the States and local governments within which the lands are located.³

¹ Tarlock, A. Dan. *Biodiversity Federalism*. 54 Md. L. Rev. 1315 (1995).

² [43 USC § 1712\(c\)\(1\)\(2\)](#); [16 USC § 1604\(b\) Criteria](#)

³ [16 USC § 1604\(a\)](#) Development, maintenance, and revision by Secretary as part of program; coordination

35 Determinations under relevant statutes, land use rules, and Forest Service planning
36 procedures for revising or amending Forest Management Plans are intended to
37 originate from the local USFS field office level pursuant to land use plan
38 evaluations and other applicable monitoring required by the plans themselves. In
39 deciding whether changes in policy or supporting NEPA analyses are warranted,
40 and whether to amend or revise a forest plan or resource management plan (RMP),
41 the decision is contingent on emerging information providing for interpretations
42 not known at the time planning decisions were made.

43 1.1 *Situation Appraisal*

44 On December 20, 2023, the United States Department of Agriculture Forest Service
45 (USFS) published a notice of intent to prepare an environmental impact statement,
46 initiated a scoping period on a preliminary proposed action, and opened a public
47 comment period for its proposed ***Land Management Plan Direction for Old-
48 Growth Forest Conditions Across the National Forest System*** (NFS). USFS
49 proposes to amend all land management plans for units of the NFS (128 plans in
50 total):

51 *“...to include consistent direction to conserve and*
52 *steward existing and recruit future old-growth forest*
53 *conditions and to monitor their condition across*
54 *planning areas of the National Forest System. The intent*
55 *is to foster the long-term resilience of old-growth forest*
56 *conditions and their contributions to ecological*
57 *integrity across the National Forest System.”⁴*

58 These priorities were directed by an April 2022 [Executive Order 14072](#)
59 [Strengthening the Nation’s Forests, Communities, and Local Economies](#) which
60 called particular attention to old-growth forests on Federal lands for their role in
61 “contributing to nature-based climate solutions by storing large amounts of
62 carbon.” EO 14072 provides direction to the Secretaries of the Departments of
63 Agriculture and Interior. The question raised in this report is whether the Executive
64 Branch has delegated authority to direct agency activities not authorized by statute.

65 In November 2022, the Biden-Harris Administration released the Nature-Based
66 Solutions Roadmap at COP 27 in Egypt marking the **first time** the United States
67 has published a strategy to scale up nature-based solutions.^{5,6} In April of 2022 the
68 White House issued, pursuant to Executive Order 14008, the *U.S. International*
69 *Climate Finance Plan* to address the need to align public and private financial flows

4 [88 FR 88042](#), column3.

5 [FACT SHEET: Biden-Harris Administration Announces Roadmap for Nature-Based Solutions to Fight Climate Change, Strengthen Communities, and Support Local Economies | The White House; Optimal allocation of nature-based solutions to achieve climate mitigation and adaptation goals - Villarreal-Rosas - 2023 - People and Nature - Wiley Online Library](#)

6 [EO 14008 § 102 \(b\)](#)

70 to achieve international objectives for decarbonization under the Paris Accord.^{7,8,9}
71 The claims that such novel, whole-of-government directives are necessary to
72 advance U.S. national and economic security are false. Page 3 of the climate plan
73 states:

74 *“As the United States scales up its international climate*
75 *finance, we must ensure greater impact and*
76 *coordination among the various departments and*
77 *agencies involved in providing or mobilizing this*
78 *finance.”*

79 The White House efforts to place nature on the balance sheet in collaboration with
80 the efforts of multiple Federal agencies seeks to establish of administrative
81 governmental mechanisms that facilitate private investments on public lands
82 without extractive products to attach a value to.¹⁰ This creates the illusion of private
83 market value for the application of non-use on public lands which then could be
84 sold and marketed into the international finance community that have no
85 discernable benefits to local governments or citizens.

86 1.2 Summary of Issues

- 87 • USFS is obligated by statute to inform the public of the interdisciplinary
88 team membership for the proposed plan amendments;¹¹ what data sources
89 are used; and demonstrate that USFS complied with FLPMA, FRRRPA,
90 and PRIA inventory mandates in developing the old- and mature-growth
91 inventories at the unit level. These activities must be coordinated with all
92 interested local governments.¹²

⁷ [U.S. International Climate Finance Plan](#). April 22, 2021.

⁸ Carlson, J.R. et al. [Survey of the History, Background, and Compliance of the Proposed BLM Landscape, Conservation and Health Rule with The Public Land Laws of the United States, Report to Public Record RIN 1004-AE92](#). Boundary Line Foundation, June 2023.

⁹ Descheemaeker, Nathan. [All Roads Lead to Paris: Administrative Chronology and Structural Violations of the Climate Policy Agenda Under the Biden Administration Executive Orders 14008 and 13990](#). January 27, 2023.

¹⁰ The White House [Natural Capital Accounting Strategy](#) ranks conservation as an economic necessity. These processes seek to arbitrarily place a value on non-use of public lands and inventory them under the 30x30 conservation objectives.

¹¹ [16 USC § 1604\(f\)](#) “Required provisions - Plans developed in accordance with this section shall - (3) be prepared by an interdisciplinary team. Each team shall prepare its plan based on inventories of the applicable resources of the forest.”

¹² On April 21, 2023, the Forest Service published a preliminary report on the definitions, identification, and initial inventory of mature and old-growth forests. [Mature and Old-Growth Forests: Definition, Identification, and Initial Inventory on Lands Managed by the Forest Service and Bureau of Land Management](#)

- 93 • USFS must include specific language in existing Forest Management
94 Plans, including flexibility provisions, to identify when new
95 circumstances or information warrant plan changes or whether such
96 changes may be addressed within existing policy or planning frameworks.
- 97 • Before proceeding with the proposed action, each USFS field office must
98 prepare and make available to the public and affected governments all
99 land use plan evaluations or assessments and demonstrate the need to
100 amend the plan at the unit level.¹³
- 101 • The proposed action is one of a group of concerted actions by the
102 Secretaries of Agriculture and Interior that implements a “whole-of-
103 government” climate policy agenda via Executive Order¹⁴ raising *major*
104 *questions* and *delegation* doctrine issues.¹⁵
- 105 • The proposed amendment must be withdrawn because it conflicts with
106 statutory mandates for intergovernmental coordination, public
107 involvement, and USFS responsibility to meaningfully interact with local
108 governments to inform and direct unique management needs from the
109 bottom up.¹⁶
- 110 • It is not an established scientific fact that conserving old-growth forests
111 will improve ecosystem resilience, mitigate wildfire threats, or sequester
112 more carbon than traditional land use planning and management of forests
113 that assure a continuous flow of timber.¹⁷

¹³ [FSM 1900 - PLANNING CHAPTER 1920 - LAND MANAGEMENT PLANNING](#)

¹⁴ 40 CFR § 1508.1(q)(3) “Major Federal actions tend to fall within one of the following categories: (iii) Adoption of programs, such as a **group of concerted actions** to implement a specific policy or plan; systematic and **connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.**”

¹⁵ See I. Wurman, *Nondelegation at the Founding*, 130 Yale L. J. 1490, 1493–1494 (2021); D. Candeb, *Preference and Administrative Law*, 72 Admin. L. Rev. 607, 614–628 (2020); P. Hamburger, *Delegation or Divesting?*, 115 Nw. L. Rev. Online 88, 91–110 (2020); M. McConnell, *The President Who Would Not Be King* 326–335 (2020); A. Gordon, *Nondelegation*, 12 N. Y. U. J. L. & Liberty 718, 719 (2019); R. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J. L. & Pub. Pol’y 147, 155–161 (2017); G. Lawson & G. Seidman, *A Great Power of Attorney: Understanding the Fiduciary Constitution* 104–129 (2017); P. Hamburger, *Is Administrative Law Unlawful?* 377–402 (2014); L. Alexander & S. Prakash, *Reports of the Nondelegation Doctrine’s Death are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297, 1298–1299 (2003); G. Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 335–343 (2002); D. Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 Mich. L. Rev. 1223, 1252–1255, 1260–1261 (1985); see generally P. Wallison & J. Yoo, *The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine* (2022).

¹⁶ [NACo Policy Resolutions on USFS Rulemaking for Formalizing County Coordination and Cooperating Agency Status, Focus on Local Conditions and Public Involvement in Firefighting and Associated Interdisciplinary Resource Management](#). National Association of Counties (NACo) 2022 Annual Conference Platform Changes and Policy Resolutions. July 24, 2022.

¹⁷ [16 USC § 1600](#) Forest and Rangeland Renewable Planning Act; 36 CFR § 221.3 Timber Management Planning, “Provide, so far as feasible, an even flow of national forest timber in order to facilitate the stabilization of communities and of opportunities for employment.”

- 114 • Managing and enhancing old-growth conditions and preserving old-
115 growth for carbon sequestration is inconsistent with the purpose and
116 objectives of USFS planning and diminishes access to principal resources
117 necessary for the welfare of the American people.¹⁸
- 118 • The use of Indigenous Knowledge (IK) (Tribal Ecological Knowledge)
119 in Federal administrative decision-making is being embedded in USFS
120 administrative policymaking through *Joint Secretarial Order 3403 on*
121 *Fulfilling the Trust Responsibility to Indian Tribes in the Stewardship of*
122 *Federal Lands and Waters*^{19,20} without any statutory authority.

123 1.3 Background

124 The USFS transition of land use planning to landscape-scale biodiversity
125 management contravenes the statutorily authorized mandates and objectives of
126 inventory and assessment for the purposes of multiple use and sustained yield.²¹
127 Management goals associated with biodiversity fail to prioritize productive
128 harmony between the human and natural environments.²² USFS is attempting to
129 implement landscape level ecosystem management that is coordinated with at least
130 three other Federal agencies. This illegitimate approach to public policy renders
131 meaningful public involvement impossible. USFS simultaneous actions include:

- 132 1. **November 28th, 2023:**²³ USFS initiated a policy change to replace Forest
133 Service Manual (FSM) 1900 Chapter 1940,²⁴ *Inventory, Monitoring and*
134 *Assessment* with FSM 2000 proposed Chapter 2040, *National Forest System*
135 *Monitoring*.²⁵ Chapter 2040 would change the standards-based approach of
136 FSM 1900 Chapter 1940 to an approach based on landscape ecosystem
137 monitoring and Indigenous Tribal Ecological Knowledge (ITEK). Monitoring
138 is proposed to occur at an ecosystem scale requiring adaptive management.
139 ITEK is intended to be prioritized as an information source on par with
140 “Western science”.

¹⁸ [Title 16 Chapter 36 Forest and Rangeland Renewable resources Planning § 1600 Congressional findings](#) (2), (3), (4), and (6).

¹⁹ [Joint Secretarial Order 3403](#)

²⁰ [Climate Adaptation Plan](#). P.12. USDA Forest Service, July 2022.

²¹ [16 USC § 1604\(e\)](#) Required assurances

²² [42 USC § 4331\(a\)](#) “... it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which **man and nature can exist in productive harmony**, and fulfill the social, economic, and other requirements of present and future generations of Americans.”

²³ [88 FR 83073](#) Forest Service Manual 2000 National Forest Resource Management; Chapter 2040 National Forest System Monitoring

²⁴ [FSM 1900, Chapter 1940: Inventory, Monitoring, and Assessment Activities](#).

²⁵ [88 FR 83073](#) “It is expected that Chapter 2040 will replace Chapter 1940—*Inventory, Monitoring, and Assessment Activities* which established direction associated solely for land management planning.”

- 141 2. **December 18, 2023:**²⁶ Notice of intent to amend the Northwest Forest Plan
142 (NWFP) within the range of the Northern spotted owl in regions 5 & 6 was
143 published at 88 FR 87393. The proposed action would amend the NWFP to
144 establish new or modify existing plan components for seventeen (17) national
145 forests to conserve mature- and old-growth ecosystems and habitat for the
146 Northern spotted owl and other species.²⁷
- 147 3. **December 20, 2023:**²⁸ USFS proposed to amend all 128 land management
148 plans for units of the National Forest System to include and prioritize nature-
149 based solutions for decarbonization by conserving existing and recruiting future
150 old-growth forest conditions and to monitor their conditions across planning
151 areas of the National Forest System (NFS).

152 The simultaneous introduction of multiple Forest Service actions disenfranchises
153 the regulated community and the American public by denying opportunities to
154 adequately analyze the administrative processes and ascertain the agency’s short-
155 and long-term intent. That USFS is acting to implement untested, blanket priorities
156 across the National Forest System at the direction of Executive Orders deeply
157 conflicts with long-standing practice, statutory authorities, and the congressional
158 intent of public land laws.

159 With the proposed old-growth amendments the Chief of the Forest Service seeks to
160 uniformly amend 128 NFS forest plans contravening the *National Forest System*
161 *Unit Planning* forest plan amendment administrative process. The Chief is
162 responsible for administration of a national performance oversight process for NFS
163 planning that begins at the individual forest unit level.²⁹ 36 CFR § 219.2 *National*
164 *Forest System Unit Planning* states:

165 “...A plan reflects the unit’s **expected distinctive roles**
166 **and contributions to the local area, region, and Nation,**
167 **and the roles for which the plan area is best suited,**
168 **considering the Agency’s mission, the unit’s unique**
169 **capabilities, and the resources and management of**
170 **other lands in the vicinity...”**

171 The Chief cannot accomplish top-down, centrally-planned uniform amendments to
172 dozens of plans while also reflecting distinctive and unique roles, capabilities,
173 adjacent private lands and other management areas that must be meaningfully
174 considered at unit-level. The proposed approach is substantially inconsistent with the
175 2012 USFS Planning Rule ([36 CFR § 219](#)).

²⁶ [88 FR 87393](#) Region 5 and Region 6; California, Oregon, and Washington; Forest Plan Amendment for Planning and Management of Northwest Forests Within the Range of the Northern Spotted Owl.

²⁷ [88 FR 87393](#) Purpose p.87395

²⁸ [88 FR 88042](#) Land Management Plan Direction for Old-Growth Forest Conditions Across the National Forest System. December 20, 2023.

²⁹ [36 CFR § 219.2 \(5\)\(ii\) Establish and administer a national oversight process for accountability and consistency of NFS land management planning under this part.](#); FSM 1921.9

176 *1.4 Requirements for Meaningful Intergovernmental Participation in Forest*
177 *Management Planning*

178 In July of 2022, the National Association of Counties (NACo) issued a policy
179 resolution regarding USFS rulemaking and NEPA to formalize county coordination
180 and cooperating agency status with a focus on local conditions and public
181 involvement in firefighting and associated interdisciplinary resource management.³⁰
182 The NACo Policy statement says:

183 *“Wildland fires continue to take lives, livelihoods, and*
184 *destroy millions of acres of lands and resources with the*
185 *United States Forest Service (USFS) operating under a*
186 *Wildland Fire Management “Direction” and*
187 *“Strategy” that circumvents the Administrative*
188 *Procedures Act, The National Forest Management Act*
189 *(NFMA), and the National Environmental Policy Act*
190 *(NEPA) as well as the required inclusion of cooperating*
191 *agencies, including counties and states, coordination*
192 *with state and local governments, and the requisite*
193 *transparency, public engagement and input.”*

194 USFS has failed to consult with affected local governments at the unit (or any other)
195 level, and no scoping meetings have been proposed for county involvement. USFS
196 may be acting in an arbitrary manner, bypassing statutory and administrative
197 mandates, public process, and coordination requirements for meaningful
198 government-to-government interaction. Amendments or revisions to management
199 plans for USFS units need to be scoped and informed at the local level through the
200 regional field offices.

201 Scoping establishes alternatives to proposed actions. It is impossible to establish
202 alternatives representing good management and localized conditions through one
203 top-down centrally planned EIS applied to 128 distinct NFS units. To satisfy basic
204 federalism principles as well as congressional intent, alternatives must be established
205 at the unit level in formal consultation and in coordination with affected local
206 governments.³¹ This requires locally developed unit-level impacts analyses. Every
207 forest unit has unique characteristics, varying management frameworks, differing
208 jurisdictional authorities, and unique adjacent property owners pursuing individual
209 economic pursuits. It is only through unit-level forest management planning that
210 these elements can be adequately assessed to appropriately inform decision making.

³⁰ [NACo Policy Resolution on USFS Rulemaking and NEPA for Formalizing County Coordination and Cooperating Agency Status, Focus on Local Conditions and Public Involvement in Firefighting and Associated Interdisciplinary Resource Management, July 2022](#)

³¹ [16 USC § 1604\(a\)](#) National Forest System land and resource management plans “...the Secretary shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.”

211 Unit-level forest planning is also necessary for the responsible official to ensure
212 inherent capabilities within the unit context:

213 **36 CFR § 219.1(g)** *“The responsible official shall*
214 *ensure that the planning process, plan components, and*
215 *other plan content are within Forest Service authority,*
216 *the inherent capability of the plan area, and the fiscal*
217 *capability of the unit.”*

218 Many forest communities have been economically hamstrung by limiting access
219 and reductions in utilization of mature timber sources. This has resulted in an
220 unreliable supply chain, causing sawmills to go out of business. This condition
221 conflicts with the purpose of the Forest Service’s Organic Act of 1897, as echoed
222 at 36 CFR § 221.3 Timber Management Planning:

223 *“Provide, so far as feasible, an even flow of national*
224 *forest timber in order to facilitate the stabilization of*
225 *communities and of opportunities for employment.”*

226 The central problem with conserving old-growth conditions is succinctly
227 summarized in the current proposal:

228 *“...the Agriculture Department said it will direct*
229 *national forests across the country to adopt an*
230 *“adaptive strategy” to protect old-growth forests,*
231 *which would include new restrictions on timber*
232 *harvesting and other policies to encourage the*
233 *evolution of mature forests into old-growth*
234 *characteristics.”*³²

235 1.5 Forest Service Planning Levels

236 36 CFR § 219.2 states that planning occurs at different organizational levels and
237 geographic scales. The three principal levels are: National strategic planning; NFS
238 unit planning; and project or activity planning. Individual forest unit planning is the
239 process leading to amendments. The Chief of Forest Service develops a Forest
240 Service strategic plan for National planning that is integrated through Forest and
241 Rangeland Renewable Resources Planning Act mandates. 36 CFR § 219.2(a) states:

242 *“The Chief of the Forest Service is responsible for*
243 *national planning, such as preparation of the Forest*
244 *Service strategic plan required under the Government*
245 *Performance and Results Modernization Act of 2010 ([5](#)*
246 *[U.S.C. 306](#); [31 U.S.C. 1115–1125](#); [31 U.S.C. 9703–](#)*
247 *[9704](#)), which is integrated with the requirements of the*
248 *Forest and Rangeland Renewable Resources Planning*
249 *Act of 1974, as amended by the NFMA. The strategic*
250 *plan establishes goals, objectives, performance*

³² [Biden admin eyes carbon capture boost from old growth forests](#). E&E News, Greenwire. 12/19/23.

251 *measures, and strategies for management of the NFS, as*
252 *well as the other Forest Service mission areas:*
253 *Research and Development, State and Private Forestry,*
254 *and International Programs.”*

255 Land use and forest management plans are developed through NFS unit planning,
256 accounting for localized conditions, uses, and characteristics. 36 CFR § 219.2(b)
257 states:

258 (1) *“NFS unit planning results in the development,*
259 *amendment, or revision of a land management plan. A*
260 *land management plan provides a framework for*
261 *integrated resource management and for guiding*
262 *project and activity decision making on a national*
263 *forest, grassland, prairie, or other administrative unit.*
264 *A plan reflects the unit's expected distinctive roles and*
265 *contributions to the local area, region, and Nation, and*
266 *the roles for which the plan area is best suited,*
267 *considering the Agency's mission, the unit's unique*
268 *capabilities, and the resources and management of*
269 *other lands in the vicinity...”*

270 To keep public participation commensurate with the scope of proposed
271 amendments, the amendments must be developed at the local unit level.³³ Forest
272 Service Handbook (FSH) 1900 identifies two general objectives of land
273 management planning at FSH 1900 Chapter 1920.2, stating:

274 *1. Develop a fully integrated plan for management of the*
275 *land and resources of the plan area.*

276 *2. Display short and long-term management intent to the*
277 *public, Federal, State, Tribal, and local governments,*
278 *and other users.”*

279 **1.6 Required Assurances and Provisions for Forest Management Plans**

280 Statutes governing forest management planning include the National Forest
281 Management Act (NFMA), the Federal Land Policy and Management Act
282 (FLPMA), the Public Rangeland Improvement Act (PRIA), the Taylor Grazing Act
283 (TGA), and the Forest and Rangeland Renewable Resources Planning Act

³³ FSH 1909.12 – Land Management Planning Handbook Chapter 20 – Land Management Plan 21.3 Plan Amendment - *“Whether an amendment is proposed in response to changing conditions or in relation to a specific project, the Responsible Official should keep the scope and scale of the process, including public participation, commensurate with the scope of the plan amendment”* (CFR 219.13(b)(2)).

284 (FRRRPA).^{34, 35} These statutes direct officials in management of reserved lands to
285 provide for multiple use and sustained yield of resources and use for the benefit of
286 the American people. FRRRPA at 16 USC Sec. 1604(e) requires the secretary to
287 assure such priorities:

288 *“In developing, maintaining, and revising plans for*
289 *units of the National Forest System pursuant to this*
290 *section, the Secretary shall assure that such plans - (1)*
291 *provide for **multiple use and sustained yield** of the*
292 ***products and services obtained therefrom** in*
293 *accordance with the Multiple-Use Sustained-Yield Act*
294 *of 1960 (16 U.S.C. 528-531)”*

295 Emphasis on unit-level planning is mandated at 16 USC Sec. 1604(f):

296 *“Plans developed in accordance with this section shall-*
297 *(1) form **one integrated plan for each unit of the***
298 ***National Forest System**, incorporating in one document*
299 *or one set of documents, **available to the public at***
300 ***convenient locations**, all of the features required by this*
301 *section;*

302 *(2) be embodied in appropriate written material,*
303 *including maps and other descriptive documents,*
304 *reflecting proposed and possible actions, including the*
305 *planned timber sale program and the proportion of*
306 *probable methods of timber harvest within the unit*
307 *necessary to fulfill the plan;*

308 *(3) be prepared by an interdisciplinary team. Each team*
309 *shall prepare its plan based on inventories of the*
310 *applicable resources of the forest;”*

311 Central planning in the NFS is inconsistent with the bottom-up statutory priorities
312 mandated by Congress that require an interdisciplinary approach. USFS units differ
313 in what permitted activities occur (grazing, mining, timber, etc.), unique
314 geographical features, agencies and local governments, and climate. Unique
315 localized conditions and authorities can only be substantively apprised and
316 involved at the local level. USFS must tell the public who the members of the
317 interdisciplinary team for the proposed amendments are, what data sources are
318 used, and demonstrate that the FLPMA, FRRPA, and PRIA inventory priorities and

³⁴ Boundary Line Foundation. [Application of Federal Land and Natural Resource Authorities to the Proposed US Forest Service Manual 2000 Chapter 2040 Adaptive Management and Monitoring Policy](#). January 10, 2024;

³⁵ Carlson, J.R. et. al. [The Repurposing of Federally-Reserved Taylor Grazing Districts For Wildlife Rewilding: A Statutory, Administrative and Legal Analysis](#). Stillwater Technical Solutions. April 22, 2020.

319 mandates were complied with in developing the old-growth inventories.³⁶ The
320 inventories for this proposed actions were driven by [Executive Order](#), signifying
321 that Congress neither anticipated nor directed such priorities.³⁷

322 *1.7 Major Questions Doctrine; Delegation/Nondelegation Doctrine;* 323 *Intelligible Principle*

324 The implications of the proposed policy transformation must be assessed in the
325 context of a group of concerted efforts³⁸ emerging from USDA, DOI, and other
326 executive departments which pose vast disruptive impacts to the National and local
327 economies and the human environment. The proposed centrally planned
328 amendment process is inconsistent with statutory authorities and needs to be
329 withdrawn to allow time for evaluation in the full context of the long-established
330 statutory framework developed over time. Executive orders that circumvent
331 congressionally directed purpose and can be revoked by the stroke of a pen by any
332 incoming administration cannot legitimately drive department priorities that need
333 certainty and remain in place for the long term.

334 Though the President has authority to issue Executive Orders, he is prevented by
335 nature of his office from legislating to agencies responsibilities that extend beyond
336 their congressionally delegated authority.³⁹ These coordinated efforts are shaping
337 biodiversity conservation policy, claiming National and global benefits without
338 adequate analysis, and posing significant impacts on regional economies. The
339 claimed National and global benefits are generally left unqualified and
340 unquantified. The readily foreseeable disproportionate impacts of the proposed
341 amendments to western states and their political sub-divisions raise serious
342 federalism concerns that must be addressed.

343 USFS is engaged in an effort to comply with an Executive Order that requires a
344 nationwide inventory of old-growth and mature-growth conditions in forest lands
345 comprising approximately 64% of the forested lands in the National Forest System.

³⁶ On April 21, 2023, the Forest Service published a report on the definitions, identification, and initial inventory of mature and old-growth forests. [Mature and Old-Growth Forests: Definition, Identification, and Initial Inventory on Lands Managed by the Forest Service and Bureau of Land Management](#)

³⁷ “...But an agency’s attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority. See ante, at 18 ...When an agency claims to have found a previously “unheralded power,” its assertion generally warrants “a measure of skepticism.” *Utility Air*, 573 U. S., at 324.” *West Virginia v. Environmental Protection Agency*, 597 U.S. ____ (2022)

³⁸ 40 CFR § 1508.1(q)(3) *Major Federal actions tend to fall within one of the following categories: (iii) Adoption of programs, such as a **group of concerted actions** to implement a specific policy or plan; systematic and **connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.** (emphasis ours)*

³⁹ “There is no undefined residuum of power,” said President William Howard Taft, “which the president can exercise because it seems to him to be in the public interest ... His jurisdiction must be justified or vindicated by the affirmative constitutional or statutory provisions, or it does not exist.” - William Howard Taft. *Our Chief Magistrate and His Powers* 138-45 (1916). Quoted and cited in James L. Hirsens, *Government by Decree* 7 (1999).

346 This was completed in the space of a few months and is not likely to have been
347 performed without the use of artificial intelligence systems. As a class of high-level
348 computing, the current maturity of AI is insufficient and unsuitable for the purpose
349 of scientific evaluations in continental-scale systems as diverse as those represented
350 by the landscapes of the National Forest System.

351 The resulting inventories are not represented in a finalized report, yet have been
352 used as the basis for and justification of the proposed centrally planned amendments
353 and can be presumed suspect in light of the lack of confidence that even the
354 developers of AI systems have in those systems, particularly when they are used in
355 scientific application settings.

356 It is incumbent upon the responsible officials to evaluate the proposal in the context
357 of the statutory authorities for Forest Service planning. Most of the relevant statutes
358 were carefully constructed by Congress using major questions doctrine, intelligible
359 principle, and delegation doctrine (also referred to as non-delegation doctrine when
360 authority for a potential action is specifically withheld). The statutes also need to
361 be read *in pari materia* through the lens of related statutes canon.

362 1.8 *Shared Similarity with Bureau of Land Management (BLM) Sage Grouse* 363 *Planning*

364 The Department of Interior, acting through the BLM, is contemporaneously
365 amending 98 Resource Management Plans (RMPs) across ten states for sage grouse
366 protection. The combined BLM and Forest Service actions have 226 plans being
367 amended through top-down planning from the Nation’s capital. This “whole-of-
368 government” approach is of high concern, and as expressed in these comments, it
369 breaks with congressional intent regarding resource management planning.
370 Injecting ephemeral executive priorities into RMPs and Forest Management Plans
371 across virtually the entire Federal lands portfolio prevents normal management
372 activities and results in non-compliance with historical statutory mandates.⁴⁰

⁴⁰ “...We presume that ‘Congress intends to make major policy decisions itself, not leave those decisions to agencies.’” *United States Telecom Assn. v. FCC*, 855 F. 3d 381, 419 (CA DC 2017); “... it is unlikely that Congress will make an “[e]xtraordinary gran[t] of regulatory authority” through “vague language” in “a long-extant statute.” Ante, at 18–20 (quoting *Utility Air*, 573 U. S., at 324).

373 **2.0 APPLICATION OF AUTHORITIES**

374 The proposed amendment of all 128 forest plans is the USFS response to Executive
375 Order 14072, *Strengthening the Nation’s Forests, Communities, and Local*
376 *Economies*. Section 5, subparagraph (b) states:

377 *“This order shall be implemented consistent with*
378 *applicable law and subject to the availability of*
379 *appropriations.”*

380 All existing statutory authority and derived administrative law that mandate USFS
381 planning and operations remain in full force and effect. Executive Order 14072,
382 Section 2, informs that the Secretaries of the Departments of Agriculture and
383 Interior, in coordination with the heads of other agencies, are jointly responsible for
384 complying with its mandates within their spheres of responsibility.

385 Statutes governing the various departments and their agencies are therefore
386 interpreted *in pari materia* through the lens of the related-statutes canon for the
387 purposes of tracing authority for the proposed forest plan amendment.

388 To the extent that the proposed amendment is inconsistent with or redundant to
389 existing statutory authority and/or administrative law, it must be corrected before
390 USFS can proceed.

391 Much of the “Preliminary Proposed Action” section at 88 FR 88046-88048 is
392 addressed in the 2012 planning rule at 36 CFR § 219, including requirements for
393 Tribal government consultation and participation. This indicates that USFS failed
394 to apply the 2012 planning rule’s provisions and mandates.

395 This amendment process does not account for the monetary and human resource
396 cost of a simultaneous or near-simultaneous revision of all 128 forest plans. The
397 proposed action is not as simple as just amending each of the 128 Forest
398 Management Plans. If adopted, all the contextual activities contained in each of the
399 plans and their related internal policy documents down to local FS offices, would
400 have to be revised for consistency within the unit planning area.

401 This would have to be accomplished across the entire USFS and could pull
402 employees from their day-to-day tasks. Congress has not appropriated funding for
403 that, and it would be inconsistent with Paperwork Reduction Act. Executive Order
404 14072 states that its implementation is subject to the availability of appropriations,
405 which have not been made available for the proposed amendment process to be
406 completed as scheduled at 88 FR 88042.

407 We therefore recommend that USFS withdraw this proposal and report to the
408 President on:

- 409 • The extent to which planning conducted according to the USFS 2012 Planning
410 Rule and other USFS plans and programs are already compliant with Executive
411 Order 14072; and
- 412 • A plan for how USFS will comply with any mandates or provisions of
413 Executive Order 14072 that are not already provided for by USFS within the
414 128 existing forest management plans.

415 **3.0 FINDINGS OF FACT and CONCLUSIONS OF LAW**

416 Here we provide analysis on how BLF reaches its findings and
417 conclusions. The public land laws of the United States are a unitary
418 body of law comprising several titles and acts that are codified together
419 as the United States Code. The American public expects USFS officials
420 to be familiar with the statutes and administrative law that mandate the
421 agency's actions.

422 Congress is responsible for enacting laws. These laws are codified as
423 the United States Code which delegates authority to executive branch
424 agencies to promulgate rules that are codified in the Code of Federal
425 Regulations. Congress provides or withholds authority for departments
426 and their agencies through the delegation /non-delegation doctrine.

427 Departmental and agency bodies of policy are subordinate to and must
428 be consistent with the statutory law and administrative law with which
429 departments and their agencies must comply.

430 Cognate acts⁴¹ are interpreted *in pari materia*⁴² through the lens of the
431 related-statutes canon⁴³. For the purposes of interpretation related to
432 this process the subject of the proposed action is land use planning.

433 BLF recognizes that the purpose of the NEPA scoping process is to
434 guide USFS in the preparation of an environmental impact statement
435 that will be developed and then noticed in the *Federal Register* for
436 comment. Entities providing comment are encouraged to assist the
437 responsible officials by providing recommendations regarding the
438 proposal in context with the statutory authorities, the stated purpose(s)
439 of the proposed action, and foreseeable outcomes. Commenting
440 entities, particularly those of the regulated community are expected to
441 inform the proposing agency about how the proposed action could
442 affect their interests.

⁴¹ **cognate act** (1852) A statute whose subject-matter is related to that of another, esp. when the two statutes were enacted at about the same time. Black's Law Dictionary, Tenth Edition. Thomson Reuters. Bryan A. Garner, Editor in Chief.

⁴² **in pari materia** [Latin "in the same manner"] **1. adj.** On the same subject; relating to the same matter. • It is a canon of construction that statutes that are *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject. *Ibid.*

⁴³ **related-statutes canon** The doctrine that statutes *in pari materia* are to be interpreted together, as though they were one law. *Ibid.*

443 **I. The proposed amendment process was prematurely noticed in the**
444 ***Federal Register*. The FS-1242a introductory report “*Analysis of***
445 ***Threats to Mature and Old-Growth Forests on Lands Managed by the***
446 ***Forest Service and Bureau of Land Management*” was not made**
447 **available until well into January 2024. The draft FS-1215a report**
448 ***“Mature Old-Growth Forests: Definition, Identification, and Initial***
449 ***Inventory on Lands Managed by the Forest Service and Bureau of Land***
450 ***Management*” has been available since April 2023 but has not been**
451 **published in final form.**

452 All primary documents pertinent to the development of an
453 environmental impact statement must be made available to the public
454 prior to the initiation of the public comment period for a scoping
455 process. The Government entities, the regulated community, and the
456 commenting public need to have final documents in a timely manner
457 prior to the initiation of a scoping period so that they can be confident
458 that their consultations are conducted, and comments prepared with the
459 finalized information that will be used by USFS in final decision-
460 making for the project.

461 In this instance, FS-1242a was not made available until the scoping
462 period comment process was under way, and the FS-1215a preliminary
463 report linked to from the FS-1242a threat analysis report has not yet
464 been finalized. Members of non-federal government entities, the
465 regulated community, or the commenting public cannot be confident
466 that the final published version of the FS-1215a report will not contain
467 significant changes to the April 2023 draft rendering some or all of their
468 comments moot (and time preparing the comments wasted).

469 It is impossible to prepare fully informed pertinent comments for a
470 forthcoming draft EIS if the core reference documents for the project
471 were not available in final form.

472 The proper course of action is for USFS to withdraw the current process
473 and not initiate a new scoping process unless and until all the relevant
474 reference documents are published in final form, and the information
475 they contain has been evaluated in the full context of the proposed
476 action(s).

477 **II. In its integration of artificial intelligence (AI), machine learning, and**
478 **big data into its policy and operations, USFS disregards significant,**
479 **known risks of AI.**

480 The National Institute of Standards and Technology (NIST) Artificial
481 Intelligence Risk Management Framework (AI RMF 1.0)⁴⁴ defines an
482 artificial intelligence (AI) system as:

483 *“...an engineered or machine-based system that can, for*
484 *a given set of objectives, generate outputs such as*
485 *predictions, recommendations, or decisions influencing*
486 *real or virtual environments. AI systems are designed to*
487 *operate with varying levels of autonomy (Adapted from:*
488 *OECD Recommendation on AI:2019; ISO/IEC*
489 *22989:2022).”*

490 The AI RMF 1.0 Executive Summary begins:

491 *“Artificial intelligence (AI) technologies have*
492 *significant potential to transform society and peoples’*
493 *lives — from commerce and health to transportation*
494 *and cybersecurity to the environment and our planet. AI*
495 *technologies can drive inclusive economic growth and*
496 *support scientific advancements that improve the*
497 *conditions of our world. AI technologies, however, also*
498 *pose risks that can negatively impact individuals,*
499 *groups, organizations, communities, society, the*
500 *environment, and the planet. Like risks for other types*
501 *of technology, AI risks can emerge in a variety of ways*
502 *and can be characterized as long- or short-term, high-*
503 *or low-probability, systemic or localized, and high- or*
504 *low-impact.”*

505 USFS has been working with Google (Alphabet) artificial intelligence
506 products since at least 2011. Using this and Google Cloud, USFS used
507 100 lines of code to reduce the time it took to analyze ten years of land-
508 cover data from three months to one hour, built models for coping with
509 change, then mapped the modeled changes in its Landscape Change
510 Monitoring System.⁴⁵ It is not difficult to understand why USFS finds
511 AI attractive in its research and information projects.

512 BLF’s experience in commenting on regulatory initiatives put forward
513 by the USFS and Department of the Interior (DoI) bureaus demonstrate
514 evidence of extensive use of AI in the formulation of rules,

⁴⁴ [Artificial Intelligence Risk Management Framework \(AI RMF 1.0\)](#). National Institute of Standards and Technology (NIST). January 2023.

⁴⁵ [Picture this: How the U.S. Forest Service uses Google Cloud tools to analyze a changing planet](#). Lesta Brady, Director, Google Federal Civilian Sales. April 13, 2022.

515 environmental impact statements (EISs), and other policies where there
516 were concerns of Information Quality Act (IQA) non-compliance.

517 The proposed amendment arising from this scoping process will likely
518 result in all 128 National Forest System plans being revised together
519 for the protection of old-growth forests and the promotion of mature-
520 growth forests to old-growth conditions. The national inventory
521 process mandated by Executive Order 14072 could not have been
522 accomplished in the short timeframe the Order mandated without use
523 of AI. The timeline projection for a final decision likewise cannot be
524 accomplished without further extensive use of AI.

525 BLF’s concern is the lack of transparency for the AI processes and lack
526 of confidence that USFS applies adequate risk management or quality
527 assurance/quality control for the data-driven aspects of the proposal.
528 This is coupled with a concern that USFS has not managed AI harmful
529 bias sufficiently for the results to be trustworthy.

530 An Internet search using the term “**forest service**”+“**AI**” returns
531 hundreds of results. Online services on the USFS website provide a
532 wealth of information, much in the form of interactive mapping and a
533 library of scholarly and popular articles for public use.

534 One of these is a May 2, 2023, USFS article titled *Future of AI in*
535 *Natural Resource Management: Self-Learning Forest Growth Model*.
536 It includes a video from the USFS Eastern Region’s speaker series, *FS*
537 *Talks*, featuring Dr. Jingjing Liang, co-director of Purdue University’s
538 Lab of Forest Advanced Computing and Artificial Intelligence, co-
539 director of the Global Forest Biodiversity Initiative, which features the
540 first comprehensive global forest inventory database, and co-lead for
541 the Institute for a Sustainable Future’s Biodiversity Research
542 Community.⁴⁶

543 What is not readily available from USFS is information about the
544 concerns many AI professionals and business and government leaders
545 express about the negative aspects of the rapidly evolving tools making
546 up the AI, big data, and machine learning sphere. These concerns come
547 from government, the legal professions, the financial world, the hard
548 sciences community, and numerous other key sector leaders. Their
549 concerns include:

⁴⁶ [Future of AI in natural resource management: Self-Learning Forest Growth Model](#). fs.usda.gov. April 28, 2023

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- **Artificial intelligence hallucination.** Also known as a confabulation or delusion, *hallucination* describes AI-generated responses containing false or misleading information presented as fact. This may negatively affect decision-making, giving rise to ethical and legal problems and not be easily discoverable to the regulated public. AI can fabricate research results undetected and its use in research requires policies and controls that have not yet been developed or implemented.
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- **Artificial intelligence bias.** Also termed machine learning bias or algorithm bias, this refers to occurrence of biased results due to human biases skewing original training data or AI algorithms—leading to distorted outputs and potentially harmful outcomes. AI requires human input. Bias can be injected without operators being aware of it, impacting either the dataset or model behavior. Algorithm bias can result when a question is not fully correct or sufficiently specific, or if the feedback to the learning algorithm does not help guide the search for a solution.
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569 Concerns are found throughout scholarly articles. One such appeared

570 in *Tropical Conservation Science* Volume 14:1-11 titled *The Smart*

571 *Forest Conundrum: Contextualizing Pitfalls of Sensors and AI in*

572 *Conservation Science for Tropical Forests*.⁴⁷ We present three of the

573 areas of concern from the peer-reviewed article. From the abstract:

574 “... While there has been some critical discussion about

575 the value of using smart technology in conservation, a

576 holistic discussion about the broader technological,

577 social, and economic interactions involved with using

578 big data, sensors, artificial intelligence, and global

579 corporations is largely missing. Here, we explore the

580 pitfalls that are useful to consider as forests are

581 gradually converted to technological sites of data

582 production for optimized biodiversity conservation and

583 are consequently incorporated in the digital economy.

584 We consider who are the enablers of the technologically

585 enhanced forests and how the gradual

586 operationalization of smart forests will impact the

587 traditional stakeholders of conservation. ...”

⁴⁷ Sarkar, D. & Chapman, C. [The Smart Forest Conundrum: Contextualizing Pitfalls of Sensors and AI in Conservation Science for Tropical Forests](#). *Tropical Conservation Science*. 2021;14. DOI:10.1177/19400829211014740

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From the introduction:

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“...Collection and circulation of data is a basic premise of data currency driving corporations to devise new ways of extracting data, from all sources, by any means possible (Fourcade & Healy, 2017). The transformation of data to a new form of currency means that data by itself is valuable and value-creating (Arvidson, 2016; Roderick, 2014; Srnicek, 2017). Data is collected with the belief that it will have use, and thus value at some point in time, if not today.”

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From the conclusion:

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“... Conservation science has a tradition of seizing onto new ideas branded as solutions to problems that threaten biodiversity (Redford et al. 2013). Grabbing onto fads is typically done without adequate testing of effectiveness or consideration of how particular field conditions would affect the outcome (Redford et al., 2013). Fads are often driven by the need of institutions or researchers to be seen as novel to secure funding. The technological solutions found in smart forests clearly offer valuable solutions to address some problems; however, their broad-scale and uncritical use in many situations may reflect fad following. ...”

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Artificial intelligence is a mystery ...

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“But if deep learning predictions were explainable, they wouldn’t be used in the first place. Instead, we would use linear models, table look-ups, if-then statements, fixed rules and other, simpler approaches.”

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— Gary Gensler, U.S. Securities and Exchange
Commission (SEC) Chair

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“In a departure from its previous releases, the company [OpenAI] is giving away nothing about how GPT-4 was built—not the data, the amount of computing power, or the training techniques.”⁴⁸

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— Will Douglas Haven, *MIT Technology Review*
Senior Editor

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⁴⁸ Heaven, WD. [GPT-4 is bigger and better than ChatGPT – but Open AI won't say why](#). MIT Technology Review. March 14, 2023.

624 “Black-box decision making remains a challenge for
625 policymakers, researchers, company executives, and the
626 public seeking to understand why an AI model is
627 generating a particular output.”⁴⁹

628 “Florenta Teodoris, an economist at the USC School of
629 Business who studies AI, told Consumer Watchdog, ‘It
630 is true that these algorithms, at least up until this point,
631 are a bit of a black box, in the sense that not even the
632 most advanced computer scientists understand exactly
633 what happens inside for a prediction to come out at the
634 other end. So they cannot be reverse engineered, which
635 makes it harder because we don’t know what we are
636 missing along the way.’

637 “This is a problem, as science relies on robust
638 transparency and reasoning.

639 “ ‘Without knowing how these systems are built, there
640 is no reproducibility,’ said Dr. Kate Crawford, the
641 former director of research at the AI Now Institute at
642 New York University. ‘You can’t test or develop
643 mitigations, predict harms, or understand when and
644 where they should not be deployed or trusted. The tools
645 are black boxed.’ ”⁵⁰

646 On October 30, 2023, President Biden signed Executive Order 14110,
647 *Safe, Secure, and Trustworthy Development and Use of Artificial*
648 *Intelligence*.⁵¹ On November 17, 2023, the Congressional Research
649 Service (CRS) published CRS Report R47843, *Highlights of the 2023*
650 *Executive Order on Artificial Intelligence for Congress*.⁵² The Order
651 establishes a government-wide effort to guide responsible AI
652 development and deployment through Federal agency leadership,
653 regulation of industry, and engagement with international partners. In
654 its summary, the report states:

655 “The E.O. requires the Office of Management and
656 Budget (OMB) to establish an interagency council to
657 coordinate AI use by federal agencies and develop
658 guidance on AI governance and risk management
659 activities for agencies. It acknowledges the ubiquity of
660 generative AI (GenAI) tools, and directs agencies to

⁴⁹ Bommasani, R., Zhang, D., Lee, T., Liang, P. [Improving Transparency in AI Language Models](#). Stanford University, February 2023.

⁵⁰ [Hallucinating Risk](#). Justin Kloczko. *Consumer Watchdog*. January 2024. Page 10.

⁵¹ [Executive Order 14110. Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence](#). 88 FR 75191. October 30, 2023.

⁵² [Highlights of the 2023 Executive Order on Artificial Intelligence for Congress](#). Congressional Research Service. R4783 -VERSION 3 – New.

661 *move toward adoption with safeguards in place. The*
662 *E.O. also calls for additional agency hiring and training*
663 *activities to increase the AI workforce capacity across*
664 *the federal government.”⁵³*

665 Pursuant to the Information Quality Act⁵⁴ (IQA) USFS is to follow its
666 information quality guidelines ensuring and maximizing the quality,
667 objectivity, utility, and integrity of information (including statistical
668 information). The above discussion indicates that there is doubt as to
669 whether AI-involved information developed as justification for the
670 proposed 128 forest plan amendments is adequately compliant with
671 IQA mandates or USFS information quality guidelines.

672 Science and “best available information” rely on robust transparency
673 and reasoning. At its current level of maturity, AI is widely recognized
674 even by the most advanced computer scientists as being deficient in
675 both respects.

676 If we were to analogize AI in its current state, we might consider *The*
677 *Sorcerer’s Apprentice*⁵⁵ where the apprentice, left to do the chores,
678 conjures a broom to do them for him. The apprentice returns to a
679 flooded room with the broom hauling in more water and he tries to shut
680 it down but discovers he does not know how.

681 While Executive Order 14110 requires that OMB establish a council to
682 coordinate Federal agency AI use and to develop guidance on AI
683 governance and risk management, these executive mandates have not
684 been met. E.O. 14110 also directs agencies to move toward adoption of
685 AI tools, directing that they *have safeguards in place* as part of the
686 process. USFS has been an early adopter of AI, machine-learning, and
687 big data tools but what safeguards it may have in place are unlikely to
688 be uniform across the board and will certainly be noncompliant with
689 OMB’s standardized minimums when those are rolled out.

690 BLF is not confident that USFS either has or has applied AI safeguards
691 to information generated by AI systems for compliance with the
692 mandates of Executive Order 14072. Therefore, the public can only
693 conclude that such safeguards are either non-existent or inadequate for
694 the resulting information to be consistent with the mandates of the IQA
695 and thus the information is inadequate to justify the proposed
696 amendment.

⁵³ [Highlights of the 2023 Executive Order on Artificial Intelligence for Congress](#). Congressional Research Service. R4783 -VERSION 3 – New. Page 2.

⁵⁴ [Information Quality Act](#). 114 Stat. 2763A—154. Pub. L. 106—554—Appendix C.

⁵⁵ *The Sorcerer’s Apprentice*. (German: *Der Zauberlehrling*) Johann Wolfgang von Goethe, (1797). Poem in ballad form in 14 stanzas. Popularized in the animated 1940 Disney film *Fantasia* where it follows Goethe’s original closely.

697 **III. Ethical risks exist for using AI in land use planning.**

698 Constitutional government includes relational obligations for Federal,
699 state, territorial, and local governments, the individual citizen, and
700 Tribes. Deference is made in a subsidiary way to the least powerful in
701 society. Subsidiarity is a principle of social organization where social
702 and political issues are most effectively dealt with at the most
703 immediate or local level that is consistent with their resolution.

704 The current administration has initiated a top-down centralized
705 approach through executive orders. This approach, as noted in these
706 comments violates Federal land use planning law which mandates
707 individual unit planning at the local level meaningfully involving
708 affected State and local governments, individual citizens in public
709 process, and through government-to-government consultation with
710 Tribes.

711 Injection of AI into land use planning introduces conflict with the
712 relational and subsidiarity principles. The capacity of AI to amass and
713 correlate a vast amount of information can form an authoritarian bias
714 where those who control the knowledge also control the power and
715 influence. The consequence is that the AI knowledgebase can become
716 the final court of appeal rendering local input irrelevant. This drift to
717 authoritarian control is demonstrated by the observation that the AI
718 entity and how it uses algorithms is influenced by the bias and inbuilt
719 discrimination of the programmer. Those responsible for programming
720 and training the AI become the final arbiters in land use planning, not
721 local government, or the public.

722 This creates a problem of denial of individual autonomy, recourse, and
723 rights. One goal for AI is to make it capable of decision-making,
724 prediction, and classification affecting citizens. If there is conflict with
725 AI output in situations, planning efforts, or debates, the common
726 response is to hold AI accountable by noting this is what it presents and
727 there is nothing that can be done to change the outcome. This overlooks
728 the fact that AI's capacity is derived from human-controlled input,
729 where human intervention should be able to correct deleterious
730 conclusions in coordination and public process relationships.

731 AI systems lack transparency, are unexplainable, and are prone to
732 unjustifiable outcomes. Non-transparency can occur on several levels.
733 Machine learning models generate their results by operating on high
734 dimensional correlations that are beyond the interpretive capabilities of
735 human reasoning. Their use of information fails to document how their
736 conclusions are reached or the resources used in the AI summarizing
737 process. Reasons for this are noted by Dr. David Leslie:

738 *What creates the need for principles tailored to the*
739 *design and use of AI systems is that their emergence and*
740 *expanding power ‘to do things that require intelligence’*
741 *has heralded a shift of a wide array of cognitive*
742 *functions to algorithmic processes that themselves can*
743 *be held neither directly responsible nor immediately*
744 *accountable for the consequences of their behavior.”⁵⁶*

745 AI is programmed to attempt to accomplish what intelligent human
746 beings do, but a programmed AI is not human, nor can it use intuition,
747 cognitive reasoning, or internal moral or ethical motivations to arrive
748 at conclusions:

749 *As inert and program-based machinery, AI systems are*
750 *not morally accountable agents. This has created an*
751 *ethical breach in the sphere of the applied science of AI*
752 *that the growing number of frameworks for AI ethics are*
753 *currently trying to fill. Targeted principles such as*
754 *fairness, accountability, sustainability, and*
755 *transparency are meant to ‘fill the gap’ between the new*
756 *‘smart agency’ of machines and their fundamental lack*
757 *of moral responsibility.⁵⁷*

758 Programmed limitations of AI can contribute to isolation and
759 disintegration of social connection. Excessive automation can reduce
760 the need for human-to-human interaction. Algorithmically enabled
761 hyper-personalization will limit our exposure to worldviews different
762 from ours. This can cause polarization in social relationships because
763 of the lack of knowledge of and comparing different worldviews that
764 often leads to intuitive insight necessary to solve problems and
765 reconcile differences.

766 **IV. The USFS inventory conducted pursuant to EO 14072 identified an**
767 **estimated 24.7 million acres of old-growth forest conditions and 68.1**
768 **million acres of mature forest conditions representing 17% and 47%**
769 **respectively of the 144.3 million acres of National Forest System**
770 **forested lands. The vast proposed area targets a significant portion of**
771 **the total NFS forested lands for removal directly conflicting with the**
772 **organic USFS mandate in 16 USC § 475 and 16 USC § 528 to produce**
773 **merchantable timber.**

⁵⁶ Leslie, D. [Understanding Artificial Intelligence Ethics and Safety: A Guide for the Responsible Design and Implementation of AI Systems in the Public Sector](#). p. 12. The Alan Turing Institute. 2019.

⁵⁷ Ibid; p 12

774 In part 16 USC § 475 states:

775 *“... No national forest shall be established, except to*
776 *improve and protect the forest within the boundaries, or*
777 *for the purpose of securing favorable conditions of*
778 *water flows, and to furnish a continuous supply of*
779 *timber for the use and necessities of citizens of the*
780 *United States...”*

781 The statutory construction here is that a national forest can be
782 established to improve and protect the forest within its boundaries, or
783 that one can be established to secure favorable conditions of water
784 flows (instream flows). In both cases the additional purpose (the “and”
785 in the sentence) of each forest is that it is to furnish a continuous supply
786 of timber for the use and necessities of the citizens of the United States.

787 16 USC § 475 is the still extant congressional statement of purpose at
788 the core of the original Organic Act of 1897.

789 16 USC § 528 states:

790 *“It is the policy of the Congress that the national forests*
791 *are established and shall be administered for outdoor*
792 *recreation, range, timber, watershed, and wildlife and*
793 *fish purposes. The purposes of sections 528 to 531 of*
794 *this title are declared to be supplemental to, but not in*
795 *derogation of, the purposes for which the national*
796 *forests were established as set forth in section 475 of*
797 *this title. Nothing herein shall be construed so as to*
798 *affect the use or administration of the mineral*
799 *resources of national forest lands or to affect the use or*
800 *administration of Federal lands not within national*
801 *forests.”*

802 However, 88 FR 88044, column 1 includes the statement:

803 *“...it has been the agency’s position that decisions*
804 *concerning the management of old-growth forest*
805 *conditions will be made in the development and*
806 *implementation of land management plans, including*
807 *plan direction that provides for a succession of young*
808 *and mature forests into old-growth forests. ...The*
809 *proposed amendment builds on those plan components*
810 *and promotes consistency in old-growth management,*
811 *conservation, and recruitment efforts.”*

812 Here USFS states unequivocally that each of its forest plans must
813 include direction that provides a standard progression path for all the
814 forests it manages to be managed in a manner that ensures their
815 eventual succession to old-growth conditions. The proposed concurrent

816 revision of all 128 forest plans is acknowledged to be a significant
817 action toward consistency in these efforts.

818 The 88 FR 88047 *Standards for Management Actions Within Old-*
819 *Growth Forest Conditions*— section beginning near the bottom of
820 column 2 states:

821 *“1. Vegetation management activities must not degrade*
822 *or impair the composition, structure, or ecological*
823 *processes in a manner that prevents the long-term*
824 *persistence of old-growth forest conditions within the*
825 *plan area.*

826 *2. (a) Vegetation management in old-growth forest*
827 *conditions must be for the purpose of proactive*
828 *stewardship, to promote the composition, structure,*
829 *pattern, or ecological processes necessary for the old-*
830 *growth forest conditions to be resilient and adaptable to*
831 *stressors and likely future environments. ...*

832 *3. Vegetation management within old-growth forest*
833 *conditions may not be for the primary purpose of*
834 *growing, tending, harvesting, or regeneration of trees*
835 *for economic reasons. ...”*

836 The USFS default position is that forest management plans must
837 provide for succession of young and mature forests into old-growth
838 forests. Based on the inventory conducted in response to E.O. 14072
839 this means that as much as 64% of the forested lands in the NFS would
840 become ineligible for furnishing a continuous supply of timber for the
841 use and necessities of the citizens of the United States.

842 The 88 FR 88044 statement above indicates that the portion of the NFS
843 dedicated to the succession-to-old-growth would also extend into the
844 36% of the NFS young forest classification that is targeted toward
845 becoming mature forest. This means that the far-reaching impact of the
846 proposed amendment is inconsistent with the timber supply mandate
847 because the quantity of small dimension timber that comes from
848 thinning young forests is insufficient to meet the 16 USC § 475
849 mandate to furnish a continuous supply of timber products to the public.

850 **V. Similar to a proposed Bureau of Land Management (BLM) rule that**
851 **establishes conservation as a principal use under FLPMA, USFS is**
852 **proposing old-growth management and denial-of-access in the forest**
853 **system as the dominant principal use of USFS-managed lands.**

854 On April 3, 2023, the Department of the Interior’s Bureau of Land
855 Management noticed a proposed rule at 88 FR 19583 amending 43 CFR
856 §1600 and establishing a new § 6100 that would declare conservation
857 as a new FLPMA principal or major use.

858 43 USC § 1702(l) defines principal or major uses as:

859 *“The term “principal or major uses includes, and is*
860 *limited to, domestic livestock grazing, fish and wildlife*
861 *development and utilization, mineral exploration and*
862 *production, rights-of-way, outdoor recreation, and*
863 *timber production.”*

864 Congress used nondelegation-doctrine to preclude the addition of new
865 principal or major uses through the phrase “*and is limited to*” in the
866 statute. BLM lacks the authority to add conservation as a FLPMA
867 principal or major use.

868 88 FR 88042 provides direction to both the Secretary of Agriculture
869 and the Secretary of the Interior. Both departments are responsible for
870 timber production through their agencies on behalf of the Nation.

871 The USFS analog to 43 USC § 1702(l) is 16 USC § 475 which states
872 in part:

873 *“...No national forest shall be established, except to*
874 *improve and protect the forest within its boundaries, or*
875 *for the purpose of securing favorable conditions of*
876 *water flows, and to furnish a continuous supply of*
877 *timber for the use and necessities of citizens of the*
878 *United States; ...”*

879 BLF interprets 16 USC § 475 and 43 USC § 1702(l) together *in pari*
880 *materia* through the lens of the related-statutes canon as if they are the
881 same law. Here the subject is timber production, which is a statutorily
882 mandated principal or major use of forested lands managed by both
883 USFS and BLM.

884 While BLM is attempting to establish conservation as a new FLPMA
885 principal or major use, USFS states at 88 FR 88044 that:

886 *“...it has been the agency’s position that decisions*
887 *concerning the management of old-growth forest*
888 *conditions will be made in the development and*
889 *implementation of land management plans, **including***
890 ***plan direction that provides for a succession of young***
891 ***and mature forests into old-growth forests. ...”***

892 The USFS inventory of old-growth and mature-growth forest
893 conditions within the NFS forested lands comprises approximately
894 64% of those lands. The agency intends that mature-growth forests be
895 conserved so they can eventually feature old-growth conditions.

896 That goal would be accomplished through conservation measures and
897 those conserved lands would be taken out of routine timber production.
898 Such actions would result in unavoidable failure to comply with
899 mandates at 16 USC § 475, 16 USC § 528, and 16 USC §§ 583-583(i)
900 and other related statutes.

901 Further, the USFS position is open-ended in that it sets the process of
902 succession to old-growth conditions from “young forest” conditions
903 through the maintenance of old-growth conditions, resulting in
904 uncertainty as to the agency’s willingness to continue complying with
905 its congressionally defined and mandated purposes.

906 Because the proposed amendment would contravene long-established
907 statutory authorities and restructure USFS management of the forested
908 portions of the NFS in a disruptive manner without congressional
909 approval or delegation of authority, the proposed action must be
910 withdrawn. The *only* appropriate governmental body to initiate change
911 of the magnitude proposed is the Congress.

912 **VI. The proposed revision of all 128 Forest Management Plans as a single**
913 **action represents central planning and demonstrates USFS abdication**
914 **of its responsibility to apply risk management processes and principles**
915 **to its proposed actions.**

916 Forest plan revisions have long been conducted in a manner that
917 ensures NFS human and budget resources are not overwhelmed. NFS
918 local plan revisions are completed on a rolling basis over decades.

919 The effect is that no one widespread catastrophic event or unwise
920 decision can detrimentally affect the NFS as a whole and that individual
921 plan corrections do not disrupt the system overall.

922 **VII. Indigenous Knowledge integration into USFS resource management**
923 **lacks statutory authority and “braiding” it with applied science is not**
924 **presently supported by specific academic discipline.**

925 The use of indigenous knowledge (IK) is being embedded into USFS
926 policymaking without statutory authority through Joint Secretarial
927 Order (JSO) 3403 as part of a Tribal homelands initiative.⁵⁸

928 At 88 FR 88047, column 1, [Proposed] Management Approach—1.(a)
929 *Adaptive Management for Old-Growth Forest Conservation* USFS
930 directs that it will:

931 *“Within two years, in consultation with Tribes and*
932 *Alaska Native Corporations and in collaboration with*
933 *States, local governments, industry partners, and public*
934 *stakeholders, create or adopt an Adaptive Strategy for*
935 *Old-Growth Forest Conservation based on*
936 *geographically relevant data or information to:*

- 937 *• Effectively braid place-based Indigenous Knowledge*
938 *and Western science to inform and prioritize the*
939 *conservation and recruitment of old-growth forest*
940 *conditions through proactive stewardship.”*

941 This “braiding” of IK and Western science (an alternative term for the
942 standard term “applied science) would not be consistent with the
943 mandates of the Information Quality Act because IK does not meet the
944 IQA’s scientific objectivity and integrity standards regarding
945 reproducibility and peer review.

946 “Braiding” of IK and applied science is a novel approach—so much so
947 that in September 2023 the U.S. National Science Foundation (NSF)
948 awarded \$29.8 million over five years (\$5.9 million for FY 2024) to
949 fund the new Center for Braiding Indigenous Knowledges and Science
950 (CBIKS) at the University of Massachusetts Amherst as an
951 “Interconnected and Urgent Research Area”:⁵⁹

952 *“Supported by the National Science Foundation’s*
953 *Science and Technology Centers Program, the Center*
954 *for Braiding Indigenous Knowledges and Science*
955 *(CBIKS) will examine how to effectively braid Western*
956 *and Indigenous science research, education, and*
957 *practice related to the urgent and interconnected*

⁵⁸ [Application of Federal Land and Natural Resource Authorities to the Proposed US Forest Service Manual 2000 Chapter 2040 Adaptive Management and Monitoring Plan](#). Boundary Line Foundation. January 2024. pp. 16-21

⁵⁹ [NSF announces new Center for Braiding Indigenous Knowledges and Science](#). September 7, 2023. National Science Foundation.

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challenges of climate change, cultural places, and food security.”⁶⁰

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Clearly the concept of “braiding” IK and applied science remains highly aspirational. NSF did not award a taxpayer-funded grant to develop a new academic discipline until the last quarter of FY 2023.

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It will take years before standards and curricula are developed for the “braiding.” Until then, Congress is not likely to enact statutes or provide specific authority to incorporate IK into agency policy. The work is in an early stage of determining how to effectively and ethically “braid” applied science and IK together as an academic discipline.

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Here, USFS proposes amendments for all 128 NFS forest plans based on the “effective” use of a novel hybrid discipline that has yet to be developed. This further demonstrates that USFS officials are prematurely initiating this EIS scoping process.

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The proposal needs to be withdrawn for lack of statutory authority or academic definition of the concept of and support for “braiding” applied science and IK together as an academic discipline.

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VIII. Tribal co-stewardship of Federal lands inappropriately promotes Tribal governments to a government-to-government relationship with Federal government agencies superior to that afforded to State and local governments through the retained powers guaranteed by the Tenth Amendment.⁶¹

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Co-stewardship is a collaborative or cooperative arrangement between agencies and Tribes and Native Hawaiian Organizations related to shared interests in managing, conserving, and preserving Federal lands and waters. Collaborative and cooperative arrangements have a wide variety of forms. These include:

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- Sharing technical expertise;
- Combining the capabilities of agencies and Tribes and Native Hawaiian Organizations to improve resource management and advance the responsibilities and interests of each;
- Making Tribal knowledge, experience, and perspectives integral to the public's experience of Federal lands;

⁶⁰ <https://www.umass.edu/gateway/research/indigenous-knowledges>

⁶¹ Ewing, R. *Coordination of Authorities Regarding Federal Trust and Treaty Fiduciary Responsibilities* Boundary Line Foundation. January 11, 2024

- 992 • Cooperative agreements; and
- 993 • Annual funding agreements under the Tribal Self-
- 994 Governance Act (25 USC § 5361 et seq.) where applicable.⁶²

995 Joint Secretarial Order 3403 explains how Tribal involvement beyond
996 coordination between two sovereigns is extended to Federal land use
997 planning. Implementation principles in JSO 3404 highlight expanded
998 Tribal involvement in land management beyond government-to-
999 government coordination or consultation:

- 1000 • Indian Tribes and Native Hawaiian Organizations can
1001 engage directly with the Departments to address matters of
1002 mutual interests in the management of Federal lands.
- 1003 • The Departments will collaborate with Indian Tribes to
1004 ensure that Tribal governments play an integral role in
1005 decision making related to the management of Federal lands
1006 and waters through consultation, capacity building, and
1007 other means consistent with applicable authority.
- 1008 • The Departments will engage affected Indian Tribes in
1009 meaningful consultation at the earliest phases of planning
1010 and decision-making relating to the management of Federal
1011 lands to ensure that Tribes can shape the direction of
1012 management. This will include agencies giving due
1013 consideration to tribal recommendations on public lands
1014 management.
- 1015 • For landscape or watershed scale restoration and
1016 conservation planning, the Departments will, to the
1017 maximum extent practicable, incorporate Tribal Forest land,
1018 agriculture, and/or range land management plans into
1019 Federal land management planning efforts.
- 1020 • The Departments will collaborate with Indian Tribes to
1021 educate affected communities regarding the role Tribal
1022 governments play in the stewardship of Federal public lands,
1023 waters, and wildlife, and will work to develop appropriate
1024 institutional structures to implement agreements related to
1025 co-stewardship.

⁶² [Current Land, Water, and Wildlife Authorities That Can Support Tribal Stewardship and co-stewardship, Final Report.](#) § II Terminology. Department of the Interior, Office of the Solicitor. November 2022

1026 The Department of the Interior Issue Guidance on Tribal co-
1027 stewardship states:

1028 *“The Department is committed to ensuring that*
1029 *decisions relating to co-stewardship will continue to*
1030 *advance safeguards for traditional subsistence, cultural*
1031 *practices, trust interests, and treaty rights for Tribes.”⁶³*

1032 Co-stewardship extends Tribal traditional subsistence and cultural
1033 practices into the management of public lands. As illustrated by the
1034 Alaskan state government and congressional intent to provide for
1035 subsistence living of Alaskan native Americans, the extension of this
1036 concept into the lower 48 states is reserved for congressional action,⁶⁴
1037 not DOI policy development.⁶⁵ Introducing a priority for subsistence
1038 living in public land management explains the need for ecosystem
1039 management which relegates non-Tribal Americans to subsistence
1040 access to resources.

1041 Inclusion of Federal lands co-stewardship is a change in long-standing
1042 agency Native American policy:

1043 *“This updated Native American policy (policy) provides*
1044 *a framework for government-to-government*
1045 *relationships, which furthers the United States’ and the*
1046 *Department of the Interior’s trust responsibility to*
1047 *federally recognized tribes to protect, conserve, and use*
1048 *tribal reserved, treaty guaranteed, or statutorily*
1049 *identified resources.”⁶⁶*

1050 Tribes enjoy government-to-government coordination because they are
1051 considered sovereign governments and are to be included on that level
1052 in relationship to Tribal plans and the effect Federal plans have on
1053 Tribal lands over which the Tribes retain self-determination. Including
1054 co-stewardship in the Department of Interior and USFS land
1055 management policies conflicts with the priority to manage Federal
1056 lands under multiple use and sustained yield policy, and changes the
1057 coordination procedure with Tribal governments as mandated in the
1058 Federal Land Planning Management Act (FLPMA):

⁶³ [Interior Department Issues Guidance to Strengthen Tribal Co-Stewardship of Public Lands and Waters](#)
U.S. Department of the Interior. September 13, 2022.

⁶⁴ Handbook of Federal Indian Law by Felix S. Cohen Chapter 5 The scope of Federal power over Indian
Affairs Section 1.

⁶⁵ Thornton, Thomas F. [Alaska Native Subsistence: A Matter of Cultural Survival](#). culturalsurvival.org.
March 26, 2010.

⁶⁶ [The Service’s Native American Policy](#) fws.gov. January 20, 2016.

1059 “... In implementing this directive, the Secretary shall,
1060 to the extent he finds practical, keep apprised of State,
1061 local, and tribal land use plans; assure that
1062 consideration is given to those State, local, and tribal
1063 plans that are germane in the development of land use
1064 plans for public lands; assist in resolving, to the extent
1065 practical, inconsistencies between Federal and non-
1066 Federal Government plans, and shall provide for
1067 meaningful public involvement of State and local
1068 government officials, both elected and appointed, in the
1069 development of land use programs, land use
1070 regulations, and land use decisions for public
1071 lands...”⁶⁷

1072 **IX. The recently-instituted elevated collaboration status between the**
1073 **executive branch departments and Tribal governments is inconsistent**
1074 **with the National Environmental Policy Act (NEPA) mandate that**
1075 **humanity and nature are to exist in productive harmony.**

1076 42 USC § 4331(a) states:

1077 “*The Congress...declares that it is the continuing policy*
1078 *of the Federal Government, in cooperation with State*
1079 ***and local governments**, and other concerned public and*
1080 *private organizations, to use all practicable means and*
1081 *measures, including financial and technical assistance,*
1082 *in a manner calculated to foster and promote the*
1083 *general welfare, to **create and maintain conditions***
1084 ***under which man and nature can exist in productive***
1085 ***harmony**, and fulfill the social, economic, and other*
1086 *requirements of present and future generations of*
1087 *Americans.” (Emphases added)*

1088 Executive Order 14072, section 1, paragraph 4 states:

1089 “*It is the policy of my Administration, **in consultation***
1090 ***with State, local, Tribal, and territorial governments,***
1091 *... to pursue science-based, sustainable forest and land*
1092 *management; conserve America’s mature and old-*
1093 *growth forests on Federal lands; invest in forest health*
1094 *and restoration; support indigenous traditional*
1095 *ecological knowledge and cultural **and subsistence***
1096 ***practices**; honor Tribal treaty rights; and deploy*
1097 *climate-smart forestry practices and other nature-based*
1098 *solutions to improve the resilience of our lands, waters,*
1099 *wildlife, and communities in the face of increasing*

⁶⁷ [43 USC § 1712 \(c\)\(9\)](#)

1100 *disturbances and chronic stress arising from climate*
1101 *impacts.”*

1102 Congress specifically states that it is the policy of the Federal
1103 government to use all practicable means to create and maintain
1104 conditions under which man and nature can exist in productive
1105 harmony. For all the time that humans have occupied the lands that now
1106 comprise the United States of America, indigenous peoples have
1107 existed with nature in *subsistence harmony* as acknowledged in
1108 Executive Order 14072, with few exceptions. The concepts of
1109 productive harmony and subsistence harmony are mutually distinct
1110 from one another.

1111 The statutory construction of 42 USC § 4331(a) is such that through the
1112 non-discretionary use of *all* practicable means the Federal government
1113 is to create and maintain conditions under which man [humanity] and
1114 nature can exist in productive harmony. USFS cannot and must not
1115 unilaterally add subsistence harmony to the statutory structure created
1116 by Congress at 42 USC § 4331(a) unless and until Congress amends
1117 the statute to accommodate that goal.

1118 The proposed amendment is thus inconsistent with the statute and the
1119 congressional declaration of national environmental policy.

1120 **X. Despite express Presidential direction, USFS continues to deny**
1121 **opportunities for meaningful government-to-government consultation**
1122 **in the development and implementation of the proposed amendment**
1123 **for State, local, and territorial governments, even as it affords such**
1124 **opportunity for Tribal governments.**

1125 Executive Order 14072, section 1, paragraph 4 states:

1126 *“It is the policy of my Administration, in consultation*
1127 *with State, local, Tribal, and territorial governments,*
1128 *...to pursue science-based, sustainable forest and land*
1129 *management; ...”*

1130 Executive Order 14072, section 2, paragraph 1 states:

1131 *“To further conserve mature and old-growth forests and*
1132 *foster long-term United States forest health through*
1133 *climate-smart reforestation for the benefit of Americans*
1134 *today and for generations to come, the following actions*
1135 *shall be taken, in consultation with State, local, Tribal,*
1136 *and territorial governments and the public, and to the*
1137 *extent consistent with applicable law.”*

1138 In the first instance the use of the phrase “It is the policy of my
1139 Administration” is followed by the President’s non-discretionary (on

1140 the part of USFS officials at all levels) direction that the four stated
1141 levels of government are to be engaged by the agency in meaningful
1142 government-to-government consultation.

1143 The Tribal governments have been actively engaged by USFS in the
1144 development of the proposed amendments and will be closely involved
1145 in co-management of the affected NFS lands. The affected State, local,
1146 and territorial governments have not been engaged by the agency,
1147 despite the President’s unambiguous mandate that they be so.

1148 Executive Order 14072 provides direction to the Secretary of
1149 Agriculture and the Secretary of the Department of the Interior, and
1150 other Cabinet departments. Consistency with applicable law therefore
1151 includes statutes applicable to either the Department of Agriculture, the
1152 Department of the Interior, or both. Those statutes are to be considered
1153 *in pari materia* and read and applied through the lens of related-statutes
1154 canon.⁶⁸ They include but are not limited to 16 USC § 530;⁶⁹ 16 USC
1155 § 1601(d);⁷⁰ and 16 USC § 1604(a).⁷¹

1156 BLF can confidently assure USFS that there are many local
1157 governments that would be affected if the proposed amendments are
1158 adopted and implemented, and that there are many that would welcome
1159 the opportunity to consult meaningfully with the Federal agencies in
1160 the development of appropriate policy and co-management of the
1161 Federal lands that affect their human environment and local economies.
1162 Because the President has mandated meaningful consultation between
1163 the agency and State and local governments, it is incumbent upon the
1164 agency to comply with those mandates.

1165 At this late date the appropriate remedy is for USFS to accept that the
1166 President ordered the Secretaries of Agriculture and the Department of
1167 the Interior to enter consultation with State, local, Tribal, and territorial
1168 governments, and pause this proposed amendment process (if the

⁶⁸ Black’s Law Dictionary, *Tenth Edition*. Thomson Reuters. *in pari materia* [Latin “in the same matter”] *adj.* “On the same subject; relating to the same matter. It is a canon of construction that statutes that are in *in pari materia* may be construed together, so that inconsistencies in one statute may be resolved by looking at another statute on the same subject.”; *Ibid.* *Related-statutes canon* “The doctrine that statutes in *in pari materia* are to be interpreted together, as though they were one law.”

⁶⁹ 16 USC § 530. “In the effectuation of sections 528 to 531 of this title the Secretary of Agriculture is authorized to cooperate with interested State and local governmental agencies and others in the development and management of the national forests.”

⁷⁰ 16 USC § 1601(d): “In developing the reports required under subsection (c) of this section, the Secretary shall provide opportunity for public involvement and shall consult with other interested governmental departments and agencies.”

⁷¹ 16 USC § 1604(a): “As [art of the Program provided for by section 1602 of this title, the Secretary shall develop, maintain, and, as appropriate, revise land and resource management plans for units of the National Forest System, coordinated with the land and resource management planning processes of State and local governments and other Federal agencies.”

1169 proposal is not more appropriately withdrawn until corrected as
1170 recommended above) unless and until USFS notifies and affords
1171 affected State, local, and territorial governments the opportunity to
1172 engage in meaningful government-to-government consultation on an
1173 even footing with affected Tribal governments for all purposes related
1174 to the proposed amendment. Anything less would constitute illegal
1175 discrimination based on race or ethnicity.

1176 **XI. Department-wide Climate Action Plans (CAPs) Constitute a Major**
1177 **Federal Action under NEPA.**

1178 a. Department of the Interior and Department of Agriculture
1179 *Climate Action Plans (CAP)* accompany like-kind CAPs by
1180 25 executive branch departments pursuant to Executive
1181 Orders 14008, 13990, and Secretarial Order 3399 and raise
1182 novel legal and policy issues arising out of international
1183 timetables and targets being directly linked to a “*first-ever*”
1184 national conservation goal, absent Senate ratification or
1185 explicit statutory authority. These whole of government
1186 climate action plans pursuant to executive directives
1187 represent a *group of concerted actions* and therefore
1188 constitute *major Federal actions* per 40 CFR § 1508.1(q)(3)
1189 and necessitates an Environmental Impact Statement per 40
1190 CFR § 1502.4 and other impacts analyses under relevant
1191 authorities.

1192 b. Departmental climate action plans cannot be used to inform,
1193 advise, or warrant agency rulemaking or policy such as the
1194 old-growth amendments and a novel monitoring policy
1195 which constitute vast transformative impacts on political
1196 process and the economy. The CAPs themselves represent a
1197 *group of concerted actions* to drive agency policies that
1198 substantially alter agency programs.

1199 c. The Council on Environmental Quality regulations for
1200 NEPA implementation define *major Federal actions* at 40
1201 CFR § 1508.1(q)(3) as:

1202 “*Actions include the circumstance where the*
1203 *responsible officials fail to act and that failure to act is*
1204 *reviewable by courts or administrative tribunals under*
1205 *the Administrative Procedure Act or other applicable*
1206 *law as agency action.*”

1207 and,

1208 (b) “*Federal actions tend to fall within one of the*
1209 *following categories:*”

1210 (1)...“*treaties and international conventions or*
1211 *agreements; formal documents establishing an*
1212 *agency’s policies which will result in or substantially*
1213 *alter agency programs.*”

1214 (3) “*Adoption of programs, such as a group of*
1215 *concerted actions to implement a specific policy or*
1216 *plan; systematic and connected agency decisions*
1217 *allocating agency resources to implement a specific*
1218 *statutory program or executive directive.*”

1219 d. The USFS Climate Adaptation Plan⁷² cannot be used as a
1220 justification to accomplish whole-of-government regulatory
1221 rewrites in order to establish novel administrative options for
1222 USDA to accomplish goals and objectives which have been
1223 established by executive edict and not by law. There are
1224 statutory due process requirements under NEPA and other
1225 laws binding on Federal departments embarking on such a
1226 whole-of-government climate policy agenda, none of which
1227 has been satisfied with adequate public involvement.

1228 4.0 CONCLUSIONS

1229 The Boundary Line Foundation finds that the USDA Forest Service proposed
1230 amendment of all 128 forest management plans for units of the National Forest
1231 System to include consistent direction to conserve and steward existing and recruit
1232 future old-growth forest conditions and to monitor their condition across planning
1233 units of the National Forest System is premature, fails to comply with numerous
1234 existing statutory authorities, and is disruptive to long-standing policy and process
1235 for updating individually developed land management plans that are sensitive to
1236 local conditions and needs.

1237 When the notice of intent to prepare an environmental statement and the scoping
1238 period was initiated for public comment pursuant to E.O. 14072 on December 20,
1239 2023, the required mature- and old-growth threats analysis was not available, and
1240 an introductory report version of it was not made available until January 2024, well
1241 after the scoping comment period was initiated. The mature- and old-growth
1242 inventory has not been issued as a final report forcing commenters to rely on the
1243 April 2023 draft. Because timely and well-informed comment cannot be provided
1244 using incomplete and unfinished core documents and changes to either or both of
1245 those documents could render comments moot, the now-initiated EIS process is
1246 premature and should be withdrawn unless and until the documents are available in
1247 final published form.

1248 There are significant federalism concerns consequent to USFS elevating Tribal
1249 governments to enhanced ongoing consultation status while failing to afford State,

⁷² [USDA Forest Service Climate Adaptation Plan, July 2022](#)

1250 local, and territorial governments similar meaningful access to the amendment and
1251 EIS process despite express Presidential direction in Executive Order 14072 for
1252 equivalent consultation opportunities to be made available to them. USFS also
1253 failed to comply with existing statutory mandates requiring agencies to provide
1254 meaningful government-to-government participation between agencies proposing
1255 actions and affected local governments. The proposal should be withdrawn and if
1256 initiated again, must provide early notice *and* equal meaningful consultation to all
1257 affected State, local, territorial, and Tribal governments from the beginning of the
1258 process.

1259 The proposed action requires application of a core concept of “effective” braiding
1260 of place-based indigenous knowledge and applied science to inform and prioritize
1261 the conservation and recruitment of old-growth forest conditions through proactive
1262 stewardship. BLF finds that the concept of braiding IK and applied science does
1263 not currently exist as an academic discipline. Instead, the University of
1264 Massachusetts Amherst’s new Center for Braiding Indigenous Knowledges and
1265 Science was funded by the National Science Foundation on September 15, 2023, to
1266 “... *examine how to effectively and ethically braid Western and Indigenous science*
1267 *research, education, and practice related to the urgent and interconnected*
1268 *challenges of climate change, cultural places, and food security.”* Lacking the
1269 necessary scientific/academic discipline anchor, the USFS proposal is significantly
1270 premature and must be withdrawn and not considered for initiation in the same or
1271 similar form unless and until the requisite anchor is in place.

1272 USFS has long been an early adopter of artificial intelligence and related
1273 information technology. The extent to which AI tools have been employed in the
1274 development of this proposal is unknown because the agency has not been
1275 transparent as to its use of AI while developing the inventory or other information
1276 incorporated into this process. This results in uncertainty regarding the
1277 trustworthiness of the information the agency is relying upon to justify the proposed
1278 action. Underscoring this uncertainty, the President signed Executive Order 14110
1279 titled *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*
1280 on November 1, 2023. It calls for the adoption of AI services based on specific risk
1281 assessments, the establishment of guidelines, and appropriate safeguards in place.
1282 The USFS proposal is premature because the agency has not provided information
1283 regarding the use of AI tools in the development of this proposal and because the
1284 regulatory framework Executive Order 14110 mandates has not yet been
1285 implemented.

1286 Executive Order 14072 § 5(b) states that the order shall be implemented consistent
1287 with applicable law and subject to the availability of appropriations. Because the
1288 proposed action is fails to comply with numerous statutory authorities and
1289 mandates and because Congress neither anticipated nor appropriated funding for
1290 the necessary revision of affected subordinate internal policies, procedures, and
1291 programs consequent to approval and implementation of the proposed action, the
1292 proposed action is precluded.