Rubber-Stamping v. Probing Review - The Judicial Role in Enforcing the Substantive Requirements of the National Forest Management Act: Lands Council v. Powell

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RUBBER-STAMPING v. PROBING REVIEW—THE JUDICIAL ROLE IN ENFORCING THE SUBSTANTIVE REQUIREMENTS OF THE NATIONAL FOREST MANAGEMENT ACT:
LANDS COUNCIL v. POWELL

I. INTRODUCTION

The National Forest Management Act (NFMA) provides a vision and a process for making environmentally sound decisions regarding our national forests. Yet, the NFMA's structure leaves it vulnerable to environmentally unsound results. In NFMA cases, the courts act as a safeguard against environmentally unsound results just as they do in decisions under the National Environmental Policy Act (NEPA): if the courts find that an agency has not complied with a regulation by failing to conduct an adequate study, the courts have the ability to force an agency to reexamine their studies and do what is necessary to make them sufficient. The Administrative Procedure Act (APA) provides the underlying framework for judicial review of agency decisions. Under the APA, many courts give great deference to the actions and decisions of the United States Forest Service (Forest Service).

In Lands Council v. Powell (Lands Council), however, the Ninth Circuit demanded rigorous adherence to the NFMA's requirement that any proposed project must conform to the applicable land and

2. See id. (explaining requirement that United States Forest Service create land and resource management plan (LRM plan) for each national forest). LRM plans may be ineffective because of two circumstances. Id. The first is that even though the United States Forest Service (Forest Service) is required to revise LRM plans at least every fifteen years, the Forest Service is not required to perform any retroactive actions that may be beneficial to previously approved projects. See id. § 1604(f)(5). The second is the deference that the courts give agency actions under the Administrative Procedure Act (APA). See 5 U.S.C. § 706 (2000).
5. See Kristen Potter, Judicial Review of Forest Service Decisions Made Pursuant to the National Forest Management Act's Substantive Requirements: Time for a Science Court?, 20 J. NAT'L A. ADMIN. L. JUDGES 241, 247 (stating trend of courts is to be very deferential to Forest Service decisions, despite NFMA's intent to limit Forest Service's discretion).
6. 379 F.3d 738 (9th Cir. 2004), amended by 395 F.3d 1019 (9th Cir. 2005). Changes made do not affect this Note's analysis.
resource management plan (LRM plan).\textsuperscript{7} The Ninth Circuit reversed the District Court's decision to uphold the approval of the Iron Honey Project's timber harvest (Project) because the Ninth Circuit determined that the Forest Service violated NFMA in approving the Project.\textsuperscript{8} The Ninth Circuit rejected the Forest Service's argument that the Forest Service's substitute standards in the Idaho Panhandle National Forest Management Plan (Forest Plan) were adequate because the court should defer to the Forest Service's expertise.\textsuperscript{9} The NFMA plays an important role in this country because it is meant to ensure that the Forest Service only acts in the best interest of our national forests.\textsuperscript{10}

This Note explores the Ninth Circuit's decision in \textit{Lands Council}, particularly the propriety of the high level of scrutiny the court used to determine whether the Forest Service's methodology met the NFMA's requirements.\textsuperscript{11} Section II summarizes the factual context of \textit{Lands Council}.\textsuperscript{12} Section III presents a background of the pertinent parts of the NFMA and the Forest Service, as well as cases illustrating the proper judicial deference a court should give to the Forest Service.\textsuperscript{13} Section IV discusses the Ninth Circuit's analysis and holding in \textit{Lands Council}.\textsuperscript{14} Section V provides a critical analysis of \textit{Lands Council} by examining its consistency with prior case law and statutory construction.\textsuperscript{15} Finally, Section VI discusses the impact of \textit{Lands Council} on future judicial outcomes and agency decisions.\textsuperscript{16}

\begin{itemize}
\item \textsuperscript{7} See id. at 751-52 (explaining that court refused to give Forest Service extreme deference).
\item \textsuperscript{8} See id. at 751-53 (stating holding regarding NFMA violations).
\item \textsuperscript{9} See id. at 751-52 (rejecting Forest Service's argument that variations were sufficient to meet LRM plan's requirements).
\item \textsuperscript{10} See 16 U.S.C. § 1604(g)(2) (setting forth NFMA requirements for creating LRM plans).
\item \textsuperscript{11} For a discussion of the propriety of the Ninth Circuit's decision in \textit{Lands Council}, see infra notes 134-96 and accompanying text.
\item \textsuperscript{12} For a discussion of the facts of \textit{Lands Council}, see infra notes 17-38 and accompanying text.
\item \textsuperscript{13} For a discussion of the NEPA, the Forest Service, the NFMA and related precedent, see infra notes 39-112 and accompanying text.
\item \textsuperscript{14} For a narrative analysis of \textit{Lands Council}, see infra notes 113-33 and accompanying text.
\item \textsuperscript{15} For critical analysis of \textit{Lands Council}, see infra notes 134-96 and accompanying text.
\item \textsuperscript{16} For a discussion of the impact of \textit{Lands Council}, see infra notes 197-210 and accompanying text.
\end{itemize}
II. Facts

The Project was a watershed restoration project in the Idaho Panhandle National Forest to restore fourteen watersheds. In 1996, the Forest Service began research for the Project, with the goal of restoring the area’s natural balance. In April 2000, the Forest Service released a Draft Environmental Impact Statement (EIS) for the Project, and in November 2001, after the required comment period expired, the Forest Service issued the Final EIS. The Project presented several alternative ways for its implementation, and in February 2002, the supervisor of the Idaho Panhandle National Forest chose to utilize the option entitled “Modified Alternative Eight.”

The Lands Council and other nonprofit groups (Nonprofit groups) were alarmed because this option would entail logging 17.5 million board feet of lumber from 1,408 acres of forest to fund the Project. The Nonprofit groups filed an administrative appeal of this decision. The Regional Forester of Region One of the Forest Service, Bradley Powell, denied their appeal. The Nonprofit groups then filed suit in the District Court of Idaho against Powell and the Forest Service alleging that the Project violated the NEPA and the NFMA. Both parties moved for summary judgment, and the District Court of Idaho granted the Forest Service’s Motion for Summary Judgment.

The Nonprofit groups subsequently appealed this decision to the Ninth Circuit, alleging that the Forest Service failed to comply

17. See Lands Council v. Powell, 379 F.3d 738, 742 (9th Cir. 2004) (stating Project’s location and status of watersheds that Project targeted). A watershed is the “whole gathering ground of a river system; i.e., the geographic area from which any river or creek draws its flow.” Id. at 742 n.1.

18. See id. at 742 (stating when Forest Service began scoping for Project). Since 1960, 39,977 acres of national forest were logged which caused upsets in aquatic, vegetative and wildlife habitats, so the Forest Service needed to restore the natural balance. Id.

19. See id. (noting Project’s progression).

20. See id. (explaining that Modified Alternative Eight Option included harvesting 1,408 acres to create 17.5 million board feet of commercial lumber, creating 0.2 miles of new road, building two miles of temporary road and reconstructing twenty-nine miles of pre-existing roads).

21. See id. (explaining reasons Nonprofit groups disagreed with decision to proceed with “Modified Alternative Eight”).

22. See Lands Council, 379 F.3d at 742 (stating action taken prior to judicial recourse).

23. See id. at 738 (identifying parties involved in suit).

24. See id. at 741 (identifying plaintiffs’ allegations).

25. See id. at 743 (setting forth District Court’s holding).
with requirements of the NEPA and the NFMA.26 The Ninth Circuit reversed the District Court’s decision on five grounds, and granted the Nonprofit group’s Motion for Summary Judgment.27 The Nonprofit groups alleged that the Forest Service violated the NEPA because the Forest Service used inadequate methodology to prepare the required EIS.28 The Ninth Circuit found three NEPA violations due to deficiencies in the Forest Service’s Final EIS.29

The Ninth Circuit also found two NFMA violations because of non-compliance with the Forest Plan.30 The Nonprofit groups argued that meeting the Inland Native Fish Strategy (INFISH) guidelines did not comply with the Forest Plan because the Forest Plan included an eighty percent success rate for fry emergence.31 The Forest Service used the INFISH standard in place of the eighty percent fry emergence standard, and asserted that this was sufficient to comply with the Forest Plan.32

The Forest Plan provided that the Forest Service could not approve any activity that would create detrimental soil conditions in fifteen percent of the proposed project area.33 The Nonprofit groups also argued that the Forest Service used an improper analysis to prove that the Project would conform to this standard.34 The Forest Service’s analysis consisted of examining samples obtained

26. See id. (explaining allegation that Forest Service violated NEPA by erring in its methodology used and its cumulative effects analysis, thus resulting in incomplete EIS). The Nonprofit groups alleged that the Forest Service violated the NFMA because the Forest Service did not comply with the Idaho Panhandle National Forest Plan. See id. at 750.

27. See Lands Council, 379 F.3d at 754-55 (setting forth Ninth Circuit’s holding). The Ninth Circuit reviewed the district court’s grant of summary judgment de novo. Id. Under the APA, the Ninth Circuit could only reverse an administrative agency’s decision if that decision was arbitrary and capricious, an abuse of discretion, or otherwise contrary to the law. See id. at 743 (citing 5 U.S.C. § 706(2)).

28. See id. at 743 (stating plaintiffs’ allegations that Forest Service’s EIS violated NEPA because of errors in cumulative analysis and in scientific methodology).

29. See id. at 743-50 (listing Forest Service’s alleged NEPA violations). The Nonprofit groups alleged that the Forest Service violated the NEPA by: (1) not taking a “hard look” at prior timber harvests in its EIS; (2) not taking a “hard look” at the evidence regarding trout habitat; and (3) heavily relying on the water and sediment yields model. Id.

30. See id. at 751-53 (specifying NFMA violations).

31. See id. at 750 n.19 (explaining that 80% fry emergence rate under Forest Plan means that 80% of fish which hatch can emerge from sediment that has settled on eggs).

32. See Lands Council, 379 F.3d at 751 (stating standard Forest Service used in its analysis).

33. See id. at 752 (noting Forest Plan’s standard for soil conditions).

34. See id. (stating Nonprofit groups’ argument regarding second alleged NFMA violation).
throughout the forest and aerial photographs to create a spreadsheet model, which was used to obtain estimates.\textsuperscript{35} The Forest Service argued that this methodology was sufficient because the Forest Service tested similar soils, and therefore the court should give its methodology deference.\textsuperscript{36} 

The Ninth Circuit held: (1) the fry emergence standard did not comply with the Forest Plan, because the Forest Service used the INFISH standard in its analysis; and (2) the Forest Service used an unreliable methodology to calculate the amount of soil that was in a detrimental state because it used only aerial photographs and samples from throughout the forest.\textsuperscript{37} Due to the violations, the Ninth Circuit granted the Nonprofit group's Motion for Summary Judgment, which prohibited the implementation of the "Modified Alternative Eight" option of the Project until the NEPA and NFMA were satisfied.\textsuperscript{38}

III. Background

A. The NEPA, the NFMA and the APA

1. The NEPA

One purpose of the NEPA is to "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man."\textsuperscript{39} To accomplish this goal, the NEPA uses both substantive and procedural requirements to ensure that agencies consider the environmental impact of their decisions.\textsuperscript{40} The NEPA was drafted with a focus on "notions of sustainability and ecosystem balance."\textsuperscript{41} Yet, it is important to note

\textsuperscript{35} See id. at 742 (noting methodology Forest Service used to determine amount of soil in detrimental state).

\textsuperscript{36} See id. (stating Forest Service's defense of its methodology).

\textsuperscript{37} See Lands Council, 379 F.3d at 751-53 (specifying NFMA violations). In 1995, the Forest Service incorporated the Inland Native Fish Strategy (INFISH) into the Forest Plan to promote the health of fisheries. See id. at 751. Adopting the INFISH guidelines into any LRM plan includes accepting that they replace any conflicting provisions of the LRM plan, except where the initial LRM plan provides more protection than the INFISH guidelines. See id.

\textsuperscript{38} See id. at 755 (stating holding and effect of this holding on Forest Service's decision to proceed with Modified Alternative Eight).


\textsuperscript{41} See Lindstrom, supra note 40, at 246 (stating results stemming from NEPA's enactment, implementation and enforcement).
that the NEPA contains no specific monitoring procedures. Also the NEPA does not generally require "ongoing monitoring, reevaluation, or project assessments."  

2. The NFMA

The NFMA was enacted in 1976 and contains both procedural and substantive requirements. Procedurally, the NFMA requires the Forest Service to create, implement, and regularly revise LRM plans for each of the country’s national forests. Substantively, the NFMA contains provisions to guide the Forest Service in creating its procedural requirements, such as the requirements to maintain plant and animal diversity; to monitor and evaluate the effects of management practices; to allow increased harvest under certain conditions; to determine lands suitable for harvest; and to put limits on even-age management.

In creating the NFMA, Congress recognized that legislators lacked the requisite scientific knowledge to implement the NFMA, so Congress directed the Secretary of Agriculture to appoint an objective scientific advisory committee to do this. This committee gave the Forest Service discretion to make specific management decisions because the committee was confident that the Forest Service would utilize contemporary scientific knowledge.

3. The APA

The APA provides procedural guidelines for individuals and courts in actions against administrative agencies. Under the APA, the applicable standard of judicial review for most NEPA and

42. See 42 U.S.C. § 4332(c) (demonstrating absence of monitoring requirement).
43. See Karkkainen, supra note 3, at 927 (noting what NEPA does not require and noting lack of recourse for mistaken EISs).
44. See Potter, supra note 5, at 245 (commenting and describing contents and history of NFMA); see also Sierra Club v. Peterson, 185 F.3d 349, 373 (5th Cir. 1999) (citing Sierra Club v. Espy, 38 F.3d 792, 800-02 (5th Cir. 1994)) (noting NFMA has substantive requirements that Forest Service must fulfill).
45. See 16 U.S.C. § 1604(a)(c) (stating NFMA’s procedural requirement to create and implement LRM plans for national forests).
46. See id. § 1604(g)(3) (describing regulations that Forest Service must create pursuant to NFMA); see also Potter, supra note 5, at 246 (discussing NFMA’s substantive provisions).
47. See 16 U.S.C. § 1604(h) (stating Congress’ directive that Secretary of Agriculture appoint committee of independent scientists).
48. See Potter, supra note 5, at 246 (stating committee’s decision to entrust Forest Service with discretion regarding site specific management decisions).
NFMA claims is the deferential "arbitrary and capricious" standard.\(^{50}\) This standard requires a court to uphold an agency's decision unless the agency's decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law."\(^{51}\) Under this standard, courts give agencies substantial deference when implementing a statute because they recognize that agencies are the most capable to respond to changing circumstances within their expertise.\(^{52}\) When analyzing an agency's statutory interpretation, a court must determine whether an agency, such as the Forest Service, "considered all 'the relevant factors and whether or not there was a clear error of judgment.'"\(^{53}\) This analysis is a fact specific inquiry based on the facts in each specific case.\(^{54}\)


In *Chevron*, the Supreme Court set forth a two-step analysis to determine the proper amount of deference a court should give to an agency's statutory interpretation.\(^{56}\) The Court reviewed the Environmental Protection Agency's (EPA) interpretation of the Clean Air Act Amendments of 1977.\(^{57}\) In 1979, EPA adopted a plant-wide definition of the term "source."\(^{58}\) The National Resource Defense

\(^{50}\) See id. § 706(2)(a) (setting forth standard of judicial review for agency decisions).

\(^{51}\) See *Lands Council v. Powell*, 379 F.3d 798, 743 (9th Cir. 2004) (citing 5 U.S.C. § 706(2)) (explaining how courts apply standard of review to agency decisions).


\(^{54}\) See *Sierra Club v. Peterson*, 185 F.3d 349, 368 (5th Cir. 1999) (citing *Citizens to Preserve Overton Park, Inc.*, 401 U.S. at 415) (discussing application of arbitrary and capricious standard).


\(^{56}\) See id. at 842-44 (setting forth method of review).

\(^{57}\) See id. at 838 (presenting issue Court was to decide in case as whether EPA's decision to permit states to treat all pollution-emitting devices within same industrial grouping as if they were within one "bubble" was based on reasonable statutory construction of statutory term 'stationary source'). The statute required states that did not meet EPA's national air quality standards to establish permit programs for "new or modified stationary sources" of air pollution. See id. at 840. EPA also created certain permit requirements. See id.

\(^{58}\) See id. at 855 (noting potential effects of EPA's interpretation). EPA's interpretation would allow a plant to increase the pollution from one device as long
Council (NRDC) challenged EPA’s interpretation. 59 The Court examined EPA’s interpretation using a two-step analysis. 60 First, the Court must determine whether Congress has addressed the particular issue in the statute. 61 If the statute is silent or ambiguous on the specific issue, then the court must determine whether the agency’s interpretation was reasonable. 62

The Court found that neither the statutory language nor the legislative history determined if the term “source” had a plant-wide definition. 63 The Court then determined that EPA’s interpretation was reasonable, and thus ultimately deferred to EPA’s interpretation. 64

B. The Forest Service

The Forest Service manages the national forests, the national grasslands and the land utilization units. 65 The Forest Service’s objective is to balance protecting and conserving the nation’s forests with providing renewable and nonrenewable natural resources to meet the country’s needs. 66

When conducting its duties, the Forest Service must comply with the NFMA’s mandate to create a LRM plan that complies with

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as the total amount of pollution that the plant produced did not increase. Id. Prior to this, EPA defined “source” as any pollution-emitting device in a plant. See id. at 853.

59. See id. at 840 (stating issue in case).
60. See Chevron, 467 U.S. at 859-66 (setting forth Court’s analysis).
61. See id. at 859-62 (stating step one of Chevron analysis). The Court determined that neither the statutory language nor the legislative history specifically defined the term “source.” See id. at 866.
62. See id. (explaining step two of Court’s analysis and holding).
63. See id. (stating step one of Court’s analysis of facts).
64. See id. (stating step two of Court’s analysis of facts and holding of case).
66. See id. (explaining Forest Service’s five objectives). The Forest Service’s objectives are to:

1) provide a sustained flow of renewable resources in a combination to best meet society’s current and future needs;
2) administer nonrenewable resources within the national forest system to help meet the nation’s energy and mineral needs;
3) promote a healthy and productive environment for the nation’s forests and range lands;
4) develop and provide scientific and technological capabilities to advance renewable natural resource management, use, and protection;
5) conserve natural resource through cooperating with other federal agencies, and state and local governments.

See id.
the NEPA for each forest that it manages.\(^6\) Once the Regional Forester approves a LRM plan for a particular national forest, all proposed site-specific projects must conform to the LRM plan's standards.\(^6\)

1. **LRM Plan for the Idaho Panhandle National Forest (Forest Plan)**

The Forest Plan sets forth standards regarding fisheries and disturbed soil conditions.\(^6\) To protect fisheries, the Forest Plan requires that there must be an eighty percent fry emergence success rate.\(^7\) Another strategy to promote the health of fisheries is INFISH, which the Forest Service incorporated into the Forest Plan.\(^8\) Therefore, the INFISH guidelines replace the Forest Plan guidelines in the event of a conflict, except where the Forest Plan provided more protection than the INFISH guidelines.\(^9\)

*Lands Council v. Vaught*\(^10\) demonstrated how difficult it can be to determine when the INFISH guidelines replace existing guidelines. In *Vaught*, the plaintiffs alleged that the Forest Service violated the NFMA because the Forest Service failed to show that the project met the applicable LRM plan's standards for protecting fish-

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\(^6\) See Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 961 (9th Cir. 2002) (citing 16 U.S.C. § 1604) (stating Forest Service's obligations); see also Inland Empire Pub. Lands Council v. United States Forest Serv., 88 F.3d 754, 757 (9th Cir. 1996) (describing two-stage approach to creating LRM plans for each national forest); see also Madden, supra note 53, at 329 (citing 16 U.S.C. § 1604(g)(1)) (stating public participation as one reason for requirement that LRM plans conform to NEPA).

\(^6\) See Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1376-77 (9th Cir. 1998) (stating requirement that site-specific activities be consistent with that national forest's LRM); see also Inland Empire, 88 F.3d at 757 (explaining that LRM plans are implemented through site-specific project compliance with whole forest's LRM plans).


\(^7\) See Lands Council v. Powell, 379 F.3d 738, 750 (9th Cir. 2004) (stating Forest Plan standard that Forest Service must meet to protect fisheries). An eighty percent fry emergence success rate means that eighty percent of hatched fish fry can emerge from the sediment that has settled on top of the eggs before they hatch. See id. at 750, n.19.

\(^8\) See id. at 751 (noting Forest Service adopted INFISH into Forest Plan in 1995). The Ninth Circuit explained that the INFISH guidelines serve to lessen sediment delivery to streams because they limit timber harvest and minimize road construction. Id.


eries. The Forest Service asserted that the INFISH guidelines superceded the LRM plan’s standards, and that the evidence proved that the Forest Service complied with the INFISH guidelines. The District Court for the Eastern District of Washington held that the Forest Service did not violate the NFMA; the District Court concluded that the INFISH guidelines and the LRM plan were in conflict because they measured the same thing, and both could not be met at the same time. Furthermore, the District Court concluded that the LRM plan standards did not provide more protection for fisheries than the INFISH guidelines. Therefore, the District Court determined that the Forest Service could fulfill the LRM plan’s requirements through compliance with the INFISH guidelines.

C. Recent Trends in Interpreting Agency Decisions

1. Emphasis on Procedure

The Supreme Court’s recent trend in cases involving administrative agencies is to determine the adequacy of the agency’s decision by examining whether the agency has complied with all relevant procedural requirements.

a. Sierra Club v. Marita

The Seventh Circuit illustrated this trend in Sierra Club. Plaintiffs presented extensive evidence to support their argument that the Forest Service’s methodology did not comply with the LRM

74. See id. at 1244 (describing plaintiffs’ allegations regarding fishery protection).
75. See id. at 1244-45 (explaining Forest Service’s argument).
76. See id. (stating court’s grant of summary judgment in favor of Forest Service). The District Court for the Eastern District of Washington noted that the LRM plan standard for protecting fisheries identified delivery of sediment to streams as a threat to fisheries. Id. The plaintiffs argued that the proposed activities delivered sediments to streams. Id. The LRM plan also required the maintenance of water quality parameters and use. Id. The Forest Service argued that the INFISH guidelines would maintain existing water quality because the proposed project was not expected to adversely affect the watershed scale or the local tributary scale. Id.
77. See id. at 1245 (explaining INFISH standard afforded same required protection).
78. See Lindstrom, supra note 40, at 259-62 (listing Supreme Court cases where judicial review was limited to compliance with procedural, rather than substantive, requirements of NEPA).
79. 46 F.3d 606, 621-24 (7th Cir. 1995).
80. See id. (using deferential analysis to examine Forest Service’s decision).
plan's requirement to protect biodiversity. The Seventh Circuit found that the Forest Service's decision was not arbitrary and capricious, and accepted the Forest Service's assertion that the principle the plaintiffs advocated was uncertain as it applied to these facts without a probe into the merits of that principle.

b. **Kettle Range Conservation Group v. United States Forest Service**

In *Kettle Range*, the Kettle Range Conservation Group challenged the Forest Service's approval of a timber harvest and restoration project. Plaintiffs argued that the Forest Service's analysis was flawed because the Forest Service's method of analysis of disturbed soil conditions was inadequate. The District Court for the Eastern District of Washington focused its inquiry on the Forest Service's procedure, but did not defer to the Forest Service's conclusion. The District Court stated that the Forest Service was entitled to judicial deference because the claim was based on the Forest Service's expertise. Nevertheless, the District Court concluded that the Forest Service's analysis was improper, and therefore issued an injunction to stop the timber harvest and restoration project until the Forest Service conducted the proper analysis. Thus, in *Kettle Range*, the District Court did not defer to the Forest Service's choice of methodology.

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81. See id. at 609 (alleging Forest Service did not apply conservation biology principles in LRM plan). In support of their claim, plaintiffs presented evidence consisting of more than one hundred scientific articles, thirteen affidavits and amicus briefs from scientific institutions. Id. at 618.

82. See id. at 621-24 (stating Seventh Circuit's analysis and holding).


84. See id. (explaining project known as Douglas-fir Bark Beetle Project was adopted by Colville National Forest (CNF) and Idaho Panhandle National Forest, but that plaintiffs only challenged its implementation in one district of CNF).

85. See id. at 1125-27 (explaining court's finding that soil analysis method was inadequate). The Forest Service did not observe or test the soil conditions at each site. Id. at 1125-26. Instead, the Forest Service created estimations based on aerial photos and generalized data. See id. The District Court for the Eastern District of Washington refused to accept the Forest Service's conclusion without sufficient reasoning concerning the Forest Service's reasoning as to why it could not obtain the necessary data. See id. at 1126-27.

86. See id. at 1127 (explaining District Court's analysis).

87. See id. at 1116 (acknowledging judicial deference owed to Forest Service).

88. See *Kettle Range*, 148 F. Supp. 2d at 1140 (stating holding of case).

89. See id. (rejecting Forest Service's methodology which yielded generalized results in favor of methodology that would result in particularized results).
2. **Deference When Reviewing Agency Decisions**
   a. **Highly Deferential**
      
      1. **Inland Empire Public Lands Council v. United States Forest Service**

      In *Inland Empire*, the Inland Empire Public Lands Council challenged a proposed timber sale in the Kootenai National Forest, alleging in part that the Forest Service violated the NFMA because the Forest Service conducted an inadequate analysis of a “sensitive” species. The plaintiffs claimed that the Forest Service analysis was insufficient because it failed to examine three areas. The Ninth Circuit recognized that the NFMA contained a substantive duty to protect biodiversity, especially sensitive species. Nevertheless, the Ninth Circuit ruled that the Forest Service’s analysis was sufficient because the Forest Service’s analysis was entitled to deference.

   2. **Cronin v. United States Department of Agriculture**

      In *Cronin*, the Seventh Circuit upheld the Forest Service’s decision. In *Cronin*, the Forest Service authorized “group selection” harvesting from the Shawnee National Forest for a timber sale. Frequent recreational visitors of the Shawnee National Forest sought a preliminary injunction to stop the timber sale, alleging that the Forest Service violated the NFMA because it did not comply with the LRM plan. The plaintiffs asserted that to use group se-

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90. 88 F.3d 754 (9th Cir. 1996).
91. See id. at 758-59 (alleging Forest Service’s analysis was inadequate because Forest Service did not include any estimate of species population or related information and analysis). To fulfill the NFMA’s substantive requirements, the Forest Service must ensure viable populations especially for ‘sensitive species.’ See 36 C.F.R. pt. 219.19 (2004).
92. See Inland Empire, 88 F.3d at 760 (stating plaintiffs’ claims that Forest Service erred because it did not examine population of each species, trends of each species and whether species could travel between different patches of forest).
93. See id. at 759 (noting NFMA substantive requirement to maintain diversity in plants and animals).
94. See id. at 759-61 (examining court’s reasoning as to why Forest Service’s decision was not arbitrary and capricious).
95. 919 F.2d 439 (7th Cir. 1990).
96. See id. at 449 (holding in favor of Forest Service).
97. See id. at 441-42 (explaining case’s factual background). Group selection is a method of harvesting which consists of cutting down small patches of trees. See id.
98. See id. (stating requirements contained in LRM plan). The LRM plan authorized logging by “even-aged management,” including clear-cutting. See id. Clear-cutting is the cutting down of all trees in a given area. Id. at 441. Clear-cutting is termed “even-aged management” because when all the trees in a tract are cut down at the same time, then the trees that grow to replace them will be the
lection, the Forest Service must show that group selection would serve visual quality objectives.\textsuperscript{99} The Seventh Circuit interpreted the LRM plan as permitting clear-cutting unless it would not achieve the visual quality objectives, in which case the Forest Service may authorize a less unsightly method, such as group selection.\textsuperscript{100} The Seventh Circuit upheld the Forest Service's decision based on the court's interpretation of the LRM plan.\textsuperscript{101}

\textbf{b. Non-Deferential Ninth Circuit Decisions}

1. \textit{Earth Island Institute v. United States Forest Service}\textsuperscript{102}

In \textit{Earth Island}, the Ninth Circuit reversed an earlier decision denying plaintiffs a preliminary injunction prohibiting the implementation of a restoration project involving timber sales.\textsuperscript{103} The plaintiff, Earth Island Institute, challenged a restoration project in the Eldorado Forest of the Sierra Nevada Mountains.\textsuperscript{104} The Ninth Circuit found a likelihood of success on the merits of the claim that the Forest Service's failure to conduct a specific survey violated the applicable LRM plan.\textsuperscript{105} The Ninth Circuit did not defer to the Forest Service's reasoning for not conducting the survey.\textsuperscript{106}

\textsuperscript{99} See id. The LRM plan also authorized "uneven-aged management," such as group selection, when it was needed to attain certain objectives, including visual quality. See id. at 441-42.

\textsuperscript{100} See id at 439 (stating case's holding that preliminary injunction to stop timber harvest was denied).

\textsuperscript{101} See id at 447-48 (stating court's interpretation of LRM plan).

\textsuperscript{102} See id. at 447-48 (stating court's holding that Forest Service's decision did not violate forest plan).

\textsuperscript{103} 351 F.3d 1291 (9th Cir. 2003).

\textsuperscript{104} See id. at 1309 (stating Ninth Circuit's holding that District Court's denial of preliminary injunction was reversed).

\textsuperscript{105} See id. at 1295 (explaining background of challenged project, Star Fire Restoration Project).

\textsuperscript{106} See id. at 1304 (explaining Ninth Circuit's rationale for holding in favor of plaintiffs). The Ninth Circuit noted that the LRM plan unambiguously required a survey to confirm that a habitat is unoccupied, and in this case, that Forest Service failed to conduct this survey. See id.

\textsuperscript{106} See id. at 1303 (stating Forest Service's reason for not conducting survey to determine habitat's occupancy was unsuitable). The Forest Service ignored scientific research that indicated that owls may return to previously abandoned places. See id. (pointing out Forest Service's critical oversight).
2. **Neighbors of Cuddy Mountain v. United States Forest Service**

In *Neighbors of Cuddy Mountain*, the plaintiff environmental groups sought to enjoin a timber sale in the Payette National Forest. The plaintiffs claimed that the Forest Service violated the NFMA because it approved the sale. The LRM plan required that any project retain a certain percentage of old growth habitat in a specified area. The Forest Service did not show that the required percentage of old growth habitat would remain in the specified area after the sale. The Ninth Circuit interpreted the NFMA narrowly and held that the Forest Service violated the NFMA because it inadequately evaluated whether the proposed timber sale was consistent with the LRM plan.

IV. **Narrative Analysis**

In *Lands Council*, the Ninth Circuit reviewed the Forest Service’s decision to proceed with a timber harvest as part of a watershed restoration project. The Nonprofit groups argued that the Forest Service violated the NEPA and the NFMA. The Ninth Circuit began it analysis by reviewing the background of the Project

107. 137 F.3d 1372 (9th Cir. 1998).
108. See id. at 1375 (stating requested relief).
109. See id. (stating Forest Service’s alleged NFMA violation).
110. See id. at 1377 (noting requirement to comply with LRM plan). The Forest Service had to show that after the timber sale, at least 5% of old growth or mature forest within each theoretical pileated woodpecker home range would remain, and that 2.5% of this area would be old growth habitat. See id.
111. See id. (noting that Forest Service did not show requisite percentage of old growth habitat would remain after project was implemented). Instead, the Forest Service recited survey results showing that the requisite percentage would remain in the whole sales area, but not in the woodpecker home ranges, as required. See id. at 1378.
113. See *Lands Council v. Powell*, 379 F.3d 738, 742 (9th Cir. 2004) (explaining Project). The Project was the Modified Alternative Eight of the Iron Honey Project. *Id.* This Project included logging 17.5 million board feet of lumber from 1,408 acres of the Idaho Panhandle National Forest. *Id.*
114. See id. at 743 (stating plaintiffs’ allegation that Forest Service’s EIS was incomplete because Forest Service’s cumulative effects analysis and choice of scientific methodology was improper). See also id. at 750 (stating plaintiffs’ allegation that Project did not comply with Forest Plan in three ways).
and the procedural history of the case.\textsuperscript{115} The Ninth Circuit determined that the APA provided the standard of review because, in this case, the court was reviewing a decision of a federal agency.\textsuperscript{116}

A. The NEPA Claims

The Ninth Circuit considered the Nonprofit groups' claims that the Forest Service violated the NEPA.\textsuperscript{117} After examining the NEPA and the evidence, the Ninth Circuit determined that three of the six alleged NEPA violations were valid, and thus the Forest Service did violate the NEPA.\textsuperscript{118}

B. The NFMA Claims

The Ninth Circuit examined the proposed NFMA violations.\textsuperscript{119} To comply with the NFMA, the Project must have conformed to the Forest Plan.\textsuperscript{120} The Nonprofit groups asserted that the Project did not conform with the Forest Plan in three areas: fishery protection, soils impact, and old-growth species viability.\textsuperscript{121} Ultimately, the Ninth Circuit held that the first two of these areas did not conform

\begin{itemize}
\item \textsuperscript{115} See \textit{id.} at 741-42 (noting District Court granted summary judgment in favor of Forest Service because Forest Service complied with NEPA and NFMA so Forest Service's decision to approve Project was not arbitrary and capricious). See \textit{id.} at 742-43 (discussing Project's history and its approval).
\item \textsuperscript{116} See \textit{id.} at 743 (citing 5 U.S.C. § 706(2)) (stating that when agency decisions are reviewed under APA, court must reverse agency decision only if action is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law"). The Ninth Circuit used \textit{de novo} standard of review from the same position as the District Court. See \textit{id.} (citing Sierra Club v. Babbitt, 65 F.3d 1502, 1507 (9th Cir. 1995)).
\item \textsuperscript{117} See \textit{id.} (reiterating Nonprofit groups' allegation that Forest Service's EIS was incomplete due to error in Forest Service's cumulative effect analysis and scientific methodology).
\item \textsuperscript{118} See \textit{Lands Council}, 379 F.3d at 744-50 (separating NEPA violations in two categories: (1) that Final EIS lacked required "hard look" at cumulative effects in areas of prior timber harvests, reasonably foreseeable future timber harvests, possibility of toxic sediment transport, and impact on Westslope Cutthroat Trout; and (2) that Forest Service's WATSED (water and sediment yields) model used was incomplete, resulting in insufficient cumulative effects analysis of instream sedimentation in Final EIS). The Forest Service did not take the required "hard look" at timber harvests and evidence of current trout conditions. \textit{Id.} at 750. The Ninth Circuit also determined that there was an inadequate disclosure of the relevant variables considered by the WATSED model. \textit{Id.}
\item \textsuperscript{119} See \textit{id.} at 744-50 (explaining Nonprofit groups' allegation that Forest Service did not comply with NFMA).
\item \textsuperscript{120} See \textit{id.} (setting forth applicable NFMA requirements).
\item \textsuperscript{121} See \textit{id.} at 750 (reiterating Nonprofit groups' NFMA claims).
\end{itemize}
with the Forest Plan, and that the third area only conformed in part.\textsuperscript{122}

1. Fishery Protection

The Ninth Circuit had to first examine whether the INFISH standards conflicted with the eighty percent fry emergence standard in the Forest Plan.\textsuperscript{123} If the court found that the standards conflicted, the Ninth Circuit would then have to consider whether the INFISH standard provided more or the same amount of protection.\textsuperscript{124}

The Ninth Circuit determined that the Forest Plan and the INFISH guidelines did not conflict because both standards could be met in all cases.\textsuperscript{125} The Ninth Circuit used preventative terms to refer to the INFISH standard, noting that certain circumstances always require it, and the court referred to the fry emergence standard in terms of mandating assessment and repair if necessary.\textsuperscript{126} Even though both standards measured stream sediment, the Ninth Circuit noted that the standards were different because both “measure different variables, are triggered by different conditions, and have different remedies.”\textsuperscript{127} The Ninth Circuit did not defer to the Forest Service’s conclusion because there was no ambiguity in the scope or effect of either standard.\textsuperscript{128} The Ninth Circuit held that, because the standards did not conflict, the Forest Service erred in using the INFISH standard in place of the Forest Plan’s prescribed fry emergence standard.\textsuperscript{129}

\textsuperscript{122} See id. at 755 (stating Ninth Circuit’s holding). Regarding the Project’s impact on old growth species viability, the Ninth Circuit found one of the two alleged violations to be valid. Id. at 753-54

\textsuperscript{123} See Lands Council, 379 F.3d at 751 (stating Ninth Circuit’s analysis to determine validity of plaintiffs’ allegation).

\textsuperscript{124} See id. (stating Ninth Circuit’s analysis to determine validity of plaintiffs’ allegation). “If the fry emergence standard is not implicitly superseded by INFISH, then the Forest Service’s decision must be set aside because the fry emergence standard was never evaluated.” See id.

\textsuperscript{125} See id. (stating Ninth Circuit’s conclusion that standards were not in conflict).

\textsuperscript{126} See id. (discussing rationale for determining that there was no conflict between INFISH standard and Forest Plan’s fry emergence standard).

\textsuperscript{127} See id. (discussing rationale for finding no conflict between standards).

\textsuperscript{128} See Lands Council, 379 F.3d at 751 (stating Forest Service’s reasons for using INFISH standard and failing to use fry emergence standard).

\textsuperscript{129} See id. (explaining why Forest Service erred in determining that INFISH standard replaced Forest Plan’s fry emergence standard).
2. Soils Impact

The Forest Plan provided that the Forest Service could not approve any activity that would create detrimental soil conditions in fifteen percent of the proposed project area.130 The Ninth Circuit relied on Kettle Range to determine that the methodology was insufficient.131 In Kettle Range, the District Court for the Eastern District of Washington found no merit in estimates or projections based on generalized data and aerial photographs, absent any on-site verification or inspection.132 The Ninth Circuit adopted this rationale and stated that the Forest Service’s estimates were unreliable without verification by observation, and therefore, the Forest Service violated the NFMA.133

V. Critical Analysis

In Lands Council, the Ninth Circuit was reluctant to yield to the requirement that the Forest Service ensure the Project conformed to the Forest Plan.134 Although the Ninth Circuit established that the Forest Service is owed deference because of its expertise, especially on issues of scientific methodology, the Ninth Circuit determined that such deference did not allow the Forest Service to make these substitutions in the methodology.135 The Ninth Circuit’s reluctance to yield was made more apparent when considering that the Ninth Circuit reviewed the Forest Service’s decisions under the arbitrary and capricious standard.136 The Ninth Circuit’s decision in Lands Council was internally consistent, consistent with Congres-

130. See id. at 752 (noting Forest Plan’s standard for soil conditions).
132. See id. (citing Kettle Range, 148 F. Supp. 2d at 1127) (demanding testing of actual area for valid analysis).
133. See Lands Council, 379 F.3d at 752 (stating that facts of this case are same as in Kettle Range). The Ninth Circuit noted that the Forest Service’s predictions based on the spreadsheet model were not verified with any ground analysis. See id.
134. See id. at 751-55 (describing Ninth Circuit’s strict analysis).
135. See Inland Empire Pub. Lands v. United States Forest Serv., 88 F.3d 754, 760 (9th Cir. 1996) (explaining deference courts owe to agency expertise).
136. See Lands Council, 379 F.3d at 743 (citing Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983)) (noting when arbitrary and capricious standard is met). The arbitrary and capricious standard is met “if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the problem that is contrary to the evidence, if the agency’s decision is so implausible that it could not be ascribed to a difference in view or be the product of agency expertise.” Id. (citations omitted). This standard is also met if the agency’s decision is contrary to the governing law. See id. (citing 5 U.S.C. § 706(2)).
sional intent, consistent with precedent, properly distinguishable from contrary precedent and proper in light of the NFMA and the APA.\textsuperscript{137}

A. Internally Consistent

The Ninth Circuit in \textit{Lands Council} used a ‘probing review’ to examine the allegations of the Forest Service’s noncompliance with the NEPA, as well as the NFMA.\textsuperscript{138} The Ninth Circuit found three violations of the NEPA.\textsuperscript{139} When examining the NEPA claims, the Ninth Circuit required strict compliance with the NEPA and did not give much deference to the Forest Service’s methodology.\textsuperscript{140} The Ninth Circuit’s holding concerning the NEPA issues demonstrated the Ninth Circuit’s consistent disinclination to allow the Forest Service deference in interpreting unambiguous statutory requirements.\textsuperscript{141}

B. Consistent with Congressional Intent

One purpose of the NFMA was to limit the Forest Service’s discretion and deference in managing the nation’s forests.\textsuperscript{142} To accomplish this purpose, Congress required an interdisciplinary scientific approach by directing the Secretary of Agriculture to assemble a committee of scientists from outside the Forest Service to create regulations to further the NFMA’s substantive requirements.\textsuperscript{143} Although recognizing the need to give some deference to the Forest Service, Congress’ inclusion of both procedural requirements created by those with the requisite scientific knowledge and substantive limitations shows its desire to limit discretion.\textsuperscript{144}

\textsuperscript{137} For a discussion of the factors supporting the propriety of the decision in \textit{Lands Council}, see infra notes 138-96.

\textsuperscript{138} See \textit{Lands Council}, 379 F.3d at 743-50 (stating court’s analysis regarding NEPA claims).

\textsuperscript{139} See \textit{id.} at 743 (stating court’s holding).

\textsuperscript{140} See \textit{id.} at 743-50 (setting forth court’s analysis of alleged NEPA violations).

\textsuperscript{141} See \textit{id.} at 743-53 (showing amount of deference Ninth Circuit gave Forest Service).

\textsuperscript{142} See Potter, \textit{supra} note 5, at 247 (explaining proper judicial review of Forest Service decisions under NFMA).

\textsuperscript{143} See Madden, \textit{supra} note 53, at 330 (stating Congress’ intent to limit Forest Service’s discretion). Another indication of this intent is the requirement that committee members be from outside the Forest Service. \textit{Id.}

\textsuperscript{144} See \textit{id.} (stating statutory elements meant to limit Forest Service’s discretion).
Congress' actions also gave the courts more law to apply, so the courts now have a greater ability to "keep the Service in check."\textsuperscript{145}

Congress also intended that the LRM plans change with the evolving science by requiring that they be revised "from time to time when the Secretary finds conditions in a unit have significantly changed, but at least every fifteen years."\textsuperscript{146} This requirement provides a mechanism for the regulations in LRM plans to change with scientific advances.\textsuperscript{147} In \textit{Lands Council}, the Ninth Circuit's insistence that the Forest Service comply with the Forest Plan's unambiguous requirements does not defeat Congress' intent.\textsuperscript{148} If, in its expertise, the Forest Service found fault with methods in the Forest Plan, the Forest Service could have revised the Forest Plan rather than disregarding clear requirements.\textsuperscript{149}

1. \textit{Rubber-stamping v. Probing Review}

There are two extremes when a court reviews a NFMA decision: (1) "unquestioning deference, or rubber-stamping," and (2) "a probing review requiring adequate explanations for decisions."\textsuperscript{150} In \textit{Lands Council}, the Ninth Circuit used the probing review approach, which is more consistent with congressional intent than the unquestioning deference approach.\textsuperscript{151} The propriety of the Ninth Circuit's review in \textit{Lands Council} conducting a "probing review" is apparent by reviewing \textit{Sierra Club}, a case where the court gave "unquestioning deference."\textsuperscript{152} The Seventh Circuit affirmed the Forest Service's decision, even though the Forest Service did not provide an acceptable explanation for this decision in the face

\textsuperscript{145} See Potter, supra note 5, at 247 (summarizing Congress' steps to limit Forest Service's discretion).

\textsuperscript{146} See 16 U.S.C. § 1604(f)(5) (stating NFMA requirement that LRM plans must be periodically revised).

\textsuperscript{147} See id. (stating NFMA revision requirement).

\textsuperscript{148} See \textit{Lands Council v. Powell}, 379 F.3d 738, 749-53 (9th Cir. 2004) (discussing Ninth Circuit's rationale for determining that Forest Service was not entitled to deference under NFMA).

\textsuperscript{149} See 16 U.S.C. § 1604(f)(5) (stating NFMA's option to revise LRM plan "from time to time when the Secretary finds conditions in a unit have significantly changed").

\textsuperscript{150} See Potter, supra note 5, at 252 (noting tension between two positions on judicial review of Forest Service decisions under NFMA). The two positions on judicial review of agency decisions are: (1) total deference; and (2) an inquisitive review, in which the court will not defer to the Forest Service without sufficient explanation. See id.

\textsuperscript{151} See id. (giving examples of NFMA cases utilizing deferential review).

\textsuperscript{152} \textit{Sierra Club v. Marita}, 46 F.3d 606 (7th Cir. 1995).
of the vast amount of evidence that plaintiffs presented.\textsuperscript{153} In Sierra Club, the court acted contrary to congressional intent that a LRM plan should contain contemporary scientific knowledge because the court was too deferential and did not require the Forest Service to provide an acceptable explanation for its decision in the face of an overwhelming amount of contrary evidence.\textsuperscript{154} Congress’ inclusion in the NFMA of the requirement that forest plans be periodically revised is evidence of this intent.\textsuperscript{155}

C. Consistent with Precedent

The decision in Lands Council meets the test articulated in Chevron.\textsuperscript{156} In Chevron, the Court imposed a two-step analysis to determine the proper amount of judicial deference a court should give to agency decisions.\textsuperscript{157} First, a court must determine if Congress was silent or ambiguous on the matter.\textsuperscript{158} If so, then the agency’s determination ought to be upheld if it is reasonable; if not, “the court must give effect to the unambiguously expressed intent of Congress.”\textsuperscript{159} The Lands Council holding was proper under the Chevron analysis.\textsuperscript{160} Ambiguity in a statute or in a forest plan can be read as a grant of reasonable authority to the agency.\textsuperscript{161} In the NFMA, Congress unambiguously required that the LRM plans reflect the NFMA’s substantive requirements, and that once a LRM plan is established, a proposed project must conform to the existing

\textsuperscript{153}See id. at 621 (stating Forest Service considered conservation biology but it deemed conservation biology uncertain as applied to these forests). Plaintiffs responded by noting that there is always some uncertainty in science and that science could not be tested at every location. See id.

\textsuperscript{154}See Madden, supra note 53, at 329 (noting Congress’ motive behind revision requirement). In Sierra Club, the plaintiffs attacked the LRM plan’s methodology to preserve biodiversity and supported their claims with a vast amount of data and testimonials confirming that their alternative was more appropriate in light of conservation biology. See Sierra Club, 46 F.3d at 609-17.


\textsuperscript{156}See Shuren, supra note 52, at 291 (citations omitted) (noting that in Chevron, Court advocated deferential standard).


\textsuperscript{158}See Shuren, supra note 52, at 291 (citing Chevron, 467 U.S. at 842-44) (stating first step of Chevron analysis).

\textsuperscript{159}See Chevron, 467 U.S. at 843-44 (stating second step of Chevron analysis).

\textsuperscript{160}See Lands Council v. Powell, 379 F.3d 738, 751-53 (9th Cir. 2004) (explaining Ninth Circuit’s holding on issue of whether Forest Service violated NFMA).

\textsuperscript{161}See Shuren, supra note 52, at 326 (noting one possible interpretation of Chevron analysis).
LRM plans. In *Lands Council*, the Ninth Circuit, consistent with congressional intent, required the Forest Service to follow the unambiguous requirements of the NFMA and the Forest Plan.

1. Consistent with Ninth Circuit Decisions

In previous cases, the Ninth Circuit was unwilling to allow deference to the Forest Service to be a barrier to requiring strict compliance. In *Earth Island*, the Ninth Circuit determined that the Forest violated the NFMA because it refused to conduct a survey required by the LRM plan. *Lands Council* was consistent with this holding because the Ninth Circuit did not defer to the Forest Service. In both cases, the Ninth Circuit held that failure to follow the requirements of the LRM plan violated the NFMA.

The decision in *Lands Council* is also consistent with *Neighbors of Cuddy Mountain*. In *Neighbors of Cuddy Mountain*, the Ninth Circuit held that the Forest Service violated the NFMA because the Forest Service inadequately evaluated whether the proposed timber sale was consistent with the LRM plan. The Forest Service attempted to substitute generalized findings for the more detailed ones required by the plan, but the court was unwilling to accept that. The Ninth Circuit acknowledged that the Forest Service’s methodology was owed deference, but that was not at issue because the Forest Service previously created a method in the LRM plan and


163. See *Lands Council*, 379 F.3d at 751-52 (setting forth Forest Plan’s requirements).

164. For further discussion of cases where the Ninth Circuit did not give exceeding deference to the Forest Service and subsequently determined that the Forest Service violated NFMA, see infra notes 165-75 and accompanying text.

165. See *Earth Island Inst. v. United States Forest Serv.*, 351 F.3d 1291, 1304 (9th Cir. 2003) (stating court’s holding regarding this issue). The LRM plan’s unambiguous language required survey to confirm habitat was unoccupied, yet the Forest Service failed to conduct one. *Id.* The Forest Service did not conduct the required survey with regard to owls because the Forest Service determined that this habitat was unsuitable for owls. *Id.* at 1303. The Forest Service ignored scientific research that indicated owls may return to previously abandoned places. *Id.*

166. For further explanation of *Earth Island*, see supra notes 102-06 and accompanying text.

167. See *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1377 (9th Cir. 1998) (stating that Forest Service failed to make required showing). The Forest Service failed to show that after the timber sale, at least 5 percent of old growth or mature forest within each theoretical pileated woodpecker home range would remain, and that 2.5 percent of this remaining area would be old growth habitat. *Id.*

168. See *id.* at 1378 (explaining Forest Service determined that after sale there would be requisite amount of old growth area in whole sale area, but lacked proof of whether requisite amount of old growth area would remain in specified areas).
now the Forest Service refused to comply with the LRM plan. In *Lands Council*, the Ninth Circuit required the Forest Service to fulfill the unambiguous requirements in the Forest Plan, so the court merely applied the Forest Service's own method to the facts.

*Lands Council* is also consistent with the decision in *Kettle Range*. In *Kettle Range*, the Ninth Circuit held that the Forest Service's soil analysis was inadequate. In *Kettle Range*, the Forest Service relied on estimates based on assumptions from general data, maps and aerial photographs, rather than tests conducted on the land. The Ninth Circuit stated that, "absent a justification regarding why more definitive information could not be provided," the court was not obligated to yield to the Forest Service's methodology. In *Lands Council*, the Forest Service used the same methodology for soil analysis, in the same National Forest that was deemed inadequate in *Kettle Range*.

**D. Properly Distinguishable from Contrary Precedent**

*Lands Council* does not conflict with those decisions where the Forest Service prevailed because of deference given to its decisions. In *Inland Empire*, despite recognizing that the NFMA contains a substantive duty to protect biodiversity, especially when a sensitive species is involved, the Ninth Circuit ruled that the Forest Service's analysis was entitled to deference and thus was suffi-

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169. See id. at 1876 (stating deference Ninth Circuit gave to Forest Service's scientific methodology). Here, the court's analysis did not infringe on the proper amount of deference owed the Forest Service because the court "simply applied [the Forest Service's] own method of calculating old growth to the facts," and the LRM plan requirements were not met. See Brown, supra note 112, at 669.


172. See id. at 1127 (stating due to Forest Service's methodology, soil analysis is inadequate).

173. See id. (stating methodology Forest Service used).

174. See id. (citing *Inland Empire Pub. Lands Council v. United States Forest Serv.*, 88 F.3d 754, 764 (9th Cir. 1996)) (asserting that generalized statements without adequate justification were insufficient to meet NEPA's "hard look" requirement).

175. See *Lands Council*, 379 F.3d at 752 (explaining method Forest Service used in soil analysis). The Forest Service also created a spreadsheet model based on samples taken throughout the forest and aerial pictures, and based on this spreadsheet model, the Forest Service estimated the Project area's soil quality. See id.

176. For further discussion of two cases where the Ninth Circuit gave the Forest Service more deference than in *Lands Council*, see infra notes 177-85 and accompanying text.
cient.\textsuperscript{177} In \textit{Inland Empire}, however, the Ninth Circuit faced a more ambiguous question than the court in \textit{Lands Council} because the question in \textit{Inland Empire} went further than merely applying the LRM plan's requirements.\textsuperscript{178} In \textit{Inland Empire}, the issue concerned the Forest Service's interpretation of a more ambiguous requirement, so the court should have given the Forest Service more deference in resolving this issue than in \textit{Lands Council}.\textsuperscript{179}

In \textit{Cronin}, the Seventh Circuit deferred to the Forest Service's decision.\textsuperscript{180} The LRM plan provided for the use of group selection when needed to obtain objectives, such as visual quality.\textsuperscript{181} Both the plaintiffs and the Forest Service interpreted this requirement differently.\textsuperscript{182} The court gave deference to the Forest Service's interpretation and determined that the Forest Service's interpretation was not contrary to the NFMA.\textsuperscript{183} The court reasoned that the existence of two differing but reasonable interpretations of the LRM plan showed that it was ambiguous, and thus was an appropriate situation to grant the Forest Service deference.\textsuperscript{184} Conversely, in \textit{Lands Council}, the Ninth Circuit properly withheld deference to the Forest Service's interpretation because the Forest Plan's requirements were not ambiguous.\textsuperscript{185}

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\textsuperscript{177} See \textit{Inland Empire Pub. Land v. United States Forest Serv.}, 88 F.3d 754, 759-61 (9th Cir. 1996) (explaining court's reasoning that Forest Service's decision was not arbitrary and capricious).

\textsuperscript{178} See id. at 759 (stating issue in \textit{Inland Empire}). In \textit{Inland Empire}, the issue was "what type of population viability analysis [must] the [Forest Service] perform in order to comply with Regulation 219.19." \textit{Id.} Regulation 219.19 ensures population viability, especially for sensitive species and is a regulation that the Forest Service must follow to fulfill NFMA's substantive requirements. See 36 C.F.R. pt. 219.19 (2004).

\textsuperscript{179} See \textit{Inland Empire}, 88 F.3d at 759-61 (explaining court's reasoning that Forest Service's decision was not arbitrary and capricious).

\textsuperscript{180} See \textit{Cronin v. United States Dep't of Agric.}, 919 F.2d 439, 441 (7th Cir. 1990) (stating background of case).

\textsuperscript{181} See \textit{id.} (stating LRM plan's requirements).

\textsuperscript{182} See \textit{id.} at 441-42 (stating LRM plan's requirements). The LRM plan authorized logging by "even-aged management," specifically by clear-cutting, and "uneven-aged management," such as group selection, when it was needed to attain various objectives. See \textit{id.}

\textsuperscript{183} See \textit{id.} at 449 (holding that decision of forest supervisor was not "arbitrary or otherwise in error").

\textsuperscript{184} See \textit{id.} at 441-42 (setting forth two different reasonable interpretations).

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E. Proper in Light of the NFMA and the APA

The Ninth Circuit's probing review approach is also consistent with the NFMA and the APA.\textsuperscript{186} In the NFMA, Congress provided a monitoring requirement to ensure favorable results, which requires that the Secretary must revise LRM plans when "conditions in a unit have significantly changed, but at least every fifteen years."\textsuperscript{187} However, neither statute includes any type of monitoring requirement to determine whether a Forest Service decision that differs from a LRM plan, yet is judicially approved due to deference to the Forest Service, yields favorable results.\textsuperscript{188} Moreover, both the NFMA and the APA lack provisions providing for retroactive action to remedy any problems that such monitoring would uncover.\textsuperscript{189} Thus, there is no safeguard to ensure that deferential decisions are ultimately in the best interest of the national forests.\textsuperscript{190} The "proper application of the arbitrary and capricious standard . . . gives substantial deference to the agency while ensuring that the agency's conclusions are supported by a reasonable assessment of the facts."\textsuperscript{191} This mandate to consider reasonableness is especially important given the absence of such monitoring requirements as described above.\textsuperscript{192}

When courts give deference to the Forest Service's scientific expertise, it is usually in regard to scientific methodology and factual determinations.\textsuperscript{193} When exercising this discretion, the courts usually do not conduct an extensive inquiry into whether the Forest Service has complied with the NFMA's substantive regulations.\textsuperscript{194}


\textsuperscript{187} See 16 U.S.C. § 1604 (stating NFMA's revision requirement).

\textsuperscript{188} See id. (showing NFMA requirements lack this type of monitoring requirement); 5 U.S.C. §§ 551-59, 701-06 (showing APA also lacks this type of monitoring requirement).

\textsuperscript{189} See 16 U.S.C. § 1604 (showing NFMA requirements lack provision for retroactive action); 5 U.S.C. §§ 551-59, 701-06 (showing APA also lacks provision for retroactive action).

\textsuperscript{190} See 16 U.S.C. § 1604 (showing NFMA requirements lack safeguard); 5 U.S.C. §§ 551-59, 701-06 (showing APA also lacks safeguard).

\textsuperscript{191} See Brown, supra note 112, at 681 (describing proper application of arbitrary and capricious standard).

\textsuperscript{192} See id. (noting that courts must ensure agency reasonably assessed facts in making decision).

\textsuperscript{193} See Inland Empire Pub. Lands v. United States Forest Serv., 88 F.3d 754, 760 (9th Cir. 1996) (noting standard of review for agency decisions under APA). See also Potter, supra note 5, at 252 (noting great amount of deference courts give to agency decisions regarding scientific methodology and factual determinations).

\textsuperscript{194} See Potter, supra note 5, at 252 (noting generalized method courts use to review agency decisions).
Often, however, the purpose of requiring certain methodology in a LRM plan is to further a NFMA substantive requirement. Therefore, courts should require compliance with requirements in LRM plans which the Forest Service itself creates, because it is a way for courts to enforce NFMA’s substantive requirements.

VI. Impact

The impact of the Ninth Circuit’s decision in *Lands Council* is that it strengthens the likelihood that the NFMA’s substantive requirements will be enforced. In reversing the District Court, the Ninth Circuit rejected the high level of deference the District Court gave the Forest Service.

A court should not give extreme deference to the Forest Service’s interpretation of an unambiguous requirement because that would allow the Forest Service to ignore reputable scientific knowledge, which Congress has required to be reflected in the LRM plan, without sufficient justification. This would defeat Congress’ intention that the “nation’s forests . . . be managed according to advancing scientific knowledge.” Judicial deference should not insulate an agency from considering scientific advances. The *Lands Council* decision will force the Forest Service to update LRM plans based on the current scientific advances and to better enforce NFMA substantive requirements.

Unless Congress adds a monitoring requirement to the NFMA or the APA, the most effective way to ensure the NFMA’s substantive requirements are met is for the courts to conduct probing re-

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195. See id. at 246-47 (noting that NFMA is drastic change from traditional approach of almost complete deference to Forest Service decisions).

196. See id. (stating function of NFMA’s procedural requirements).

197. For a discussion of the basis for this conclusion, see supra notes 193-96 and accompanying text.


199. See *Inland Empire Pub. Lands v. United States Forest Serv.*., 88 F.3d 754, 763 (9th Cir. 1996) (illustrating instance where Ninth Circuit deferred to Forest Service’s decision, even though decision was contrary to Forest Service’s duty to protect biodiversity).

200. See Madden, supra note 53, at 333 (noting that NFMA was intended to utilize modern scientific principles and methods).

201. See Potter, supra note 5, at 252-53 (citations omitted) (commenting on effect of holding in *Sierra Club*). In *Sierra Club*, the court accepted the Forest Service’s weak justification for its decision and rejected the vast amount of evidence supporting the principle the Forest Service chose not to use in creating the LRM plan. See id. (citations omitted).

202. See 16 U.S.C. § 1604(f-g) (setting forth substantive provisions to be furthered by methodology in LRM plans, and revision requirement).
views.203 If Congress was to create a monitoring requirement in either of these statutes, it should entail: (1) creating a committee to monitor challenged Forest Service decisions that were judicially approved based on extreme judicial deference to ensure that the NFMA's substantive requirements are met; and (2) requiring the Forest Service to take remedial action if the committee determines that the NFMA's substantive requirements are not met.204 Absent such a provision, the most effective way to ensure fulfillment of the NFMA's substantive requirements is for the courts to conduct a probing review.205

Even though they are not scientific experts, judges can still conduct the review necessary to adequately safeguard NFMA purposes.206 Judges can require that the Forest Service fully comply with the express requirements of both the NFMA and the applicable LRM plan.207 If the Forest Service deviates from these requirements, judges can require the Forest Service to adequately explain this departure.208 Courts need only ensure that agency decisions are within the bounds of statutory authority.209

If other jurisdictions follow the Ninth Circuit's approach, the Forest Service would be more accountable for their decisions and would conduct a more thorough analysis before making a decision to ensure that their decision complied with the NFMA, lest the courts reverse their decision. Due to both the Forest Service conducting more careful analysis and the courts reversing agency decisions that do not strictly comply without sufficient justification, the

203. See id. § 1604 (showing absence of this type of monitoring requirement); 5 U.S.C. §§ 551-59, 701-06 (showing absence of this type of monitoring requirement).
204. See supra note 203 and accompanying text.
205. See supra note 203 and accompanying text. The court should not defer to the Forest Service without adequate justification. See Brown, supra note 112, at 681 (describing that judicial deference to Forest Service should be supported by "reasonable assessment of the facts").
206. See 5 U.S.C. § 701(a)(2) (stating that administrative agencies are given discretion); see also id. § 706(2)(A) (explaining when an agency decision should be overturned). An agency's decision should be overturned if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." Id.
207. See Potter, supra note 5, at 262 (noting how judicial review will best serve national forests).
208. See id. (noting action judge should take if Forest Service deviates from LRM plan). A court should ensure that "the Forest Service has justified its substantive actions to the court in a logical, coherent, and succinct fashion rather than simply rolling over when science is involved." Id. at 261.
209. See id. at 248-49 (stating courts must review agency decisions in manner that does not violate separation of powers).
ultimate result of jurisdictions following the Ninth Circuit in *Lands Council* would be a benefit to our national forests.\footnote{See supra notes 206-08 and accompanying text (noting circumstances which lead to conclusion requiring strict compliance with NFMA procedures would best serve purposes of NFMA).}