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6 UNITED STATES DISTRICT COURT
7 FOR THE WESTERN DISTRICT OF KENTUCKY
8 PADUCAH DIVISION

9 FOREST SERVICE EMPLOYEES FOR)
ENVIRONMENTAL ETHICS, and)
10 PAUL SCHAEFER,)

11 Plaintiffs,)

12 vs.)

13 UNITED STATES FOREST SERVICE,)
14 an agency of the U.S. Department)
of Agriculture,)

15 Defendant.)
16

Case No: 5:06 CV-92-R

**PLAINTIFFS' SECOND AMENDED
COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF**

17
18 **INTRODUCTION**

19 1. This is a civil action for declaratory and injunctive relief. Plaintiffs Forest Service
20 Employees for Environmental Ethics and Paul Schaefer (collectively "FSEEE") challenge the
21 Defendant United States Forest Service's issuance of six special use permits on the Land
22 Between the Lakes National Recreation Area ("LBL") in western Kentucky and Tennessee, and
23 the Forest Service's renewal of three of those permits. These special use permits authorize
24 commercial agriculture on over 4,000 acres of the LBL. The Forest Service issued and renewed
25 the permits without notifying the public, accepting public comments, considering environmental
26

1 impacts, and allowing administrative appeals, in violation of the National Environmental Policy
2 Act (“NEPA”) and the Appeals Reform Act.

3 2. FSEEE seeks a declaratory judgment and injunctive relief to remedy these
4 violations of the law. FSEEE also seeks an award of attorney fees, expenses, and costs pursuant
5 to the Equal Access to Justice Act, 28 U.S.C. § 2412(d).
6

7 **JURISDICTION**

8 3. This court has jurisdiction under 28 U.S.C. §§ 1331 and 1346 as this action
9 involves the United States as a defendant and arises under the laws of the United States,
10 including NEPA, 42 U.S.C. §§ 4321, *et seq.*; the Appeals Reform Act, 16 U.S.C. § 1612 Note;
11 and the Administrative Procedure Act, 5 U.S.C. §§ 701, *et seq.* An actual, justiciable
12 controversy exists between Plaintiffs and Defendant. Reviewable final agency action exists and
13 falls under this Court's review pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 702,
14 704, and 706. Any available administrative remedies have been exhausted. This Court may
15 issue the requested relief pursuant to 28 U.S.C. § 2202 and 5 U.S.C. §§ 705 and 706.
16

17 **VENUE AND INTRADISTRICT ASSIGNMENT**

18 4. Venue is proper in this Court under 28 U.S.C. § 1391(e), and within this District
19 and Division pursuant to Local Rule 3.1(b)(4). Defendant Forest Service has its main office for
20 the LBL in Golden Pond, Kentucky, which is in Trigg County. The majority of the LBL is within
21 western Kentucky. Half of the special use permits are issued to residents of western Kentucky,
22 who work eighty-five percent of the total acreage covered by the permits.
23

24 **PARTIES**

25 5. Plaintiff FSEEE is a nonprofit organization headquartered in Eugene, Oregon.
26

1 FSEEE's mission is to forge a socially responsible value system for the Forest Service based on a
2 land ethic that ensures ecologically and economically sustainable resource management.
3 Thousands of concerned citizens, present, former, and retired Forest Service employees and other
4 resource managers comprise FSEEE.

5
6 6. Plaintiff Paul Schaefer has been an employee of the Forest Service for the past 28
7 years. For the past year and a half, Mr. Schaefer has been the Interdisciplinary Team Leader for a
8 variety of projects on the Spring Mountains National Recreation Area, Las Vegas, Nevada. Prior
9 to moving to Las Vegas, Mr. Schaefer worked for approximately four and a half years as the
10 NEPA Specialist at the LBL, where he was responsible for overseeing the completion of NEPA
11 analyses on all types of projects.

12
13 7. Mr. Shaefer is a member of Forest Service Employees for Environmental Ethics.

14 8. Mr. Shaefer's concerns over the Forest Service's management practices on the
15 LBL center around the open land management and farming programs on the LBL, and include
16 the widespread use of pesticides, fertilizers, and herbicides; the lack of adequate riparian buffers;
17 and the impacts on core habitats for amphibians and reptiles. Mr. Shaefer has attempted to
18 provide input to the Forest Service regarding the open land management and farming programs
19 on the LBL, both as a Forest Service employee and public citizen, but his concerns have not been
20 addressed.
21

22 9. The Forest Service's actions in the LBL have adversely affected FSEEE members,
23 who use and enjoy the LBL for professional, scientific, aesthetic, and recreational purposes. The
24 Forest Service's violation of federal laws related to the issuance of the special use permits has
25 and will continue to adversely affect FSEEE members by allowing the continued degradation of
26

1 the LBL and by depriving FSEEE members of their right to be informed of the environmental
2 impacts of the issuance of the special use permits and to meaningfully participate in the decision
3 making process. These actual and concrete injuries would be redressed by the relief sought.

4
5 10. Defendant Forest Service is an agency of the U.S. Department of Agriculture.
6 The Forest Service and its officers are responsible for the lawful management of the National
7 Forest System, including the LBL.

8 **SUMMARY OF FACTS AND GENERAL ALLEGATIONS**

9 **The Land Between the Lakes National Recreation Area**

10 11. The geographic area between the Tennessee and Cumberland Rivers in western
11 Kentucky and northwestern Tennessee used to be referred to as the Land Between the Rivers, or
12 simply Between the Rivers. Beginning in the 1930s, the federal government began acquiring
13 portions of this area in several stages.
14

15 12. In 1944, a large dam was constructed on the Tennessee River, and thereby created
16 Kentucky Lake. Similarly, in 1965 a large dam was constructed on the Cumberland River, and
17 thereby created Barkley Lake. The area between Kentucky Lake and Barkley Lake became
18 known as the Land Between the Lakes.
19

20 13. In the 1960s, the federal government decided to acquire the remaining private
21 lands within the created peninsula to form the Land Between the Lake National Recreation Area,
22 to be managed by the Tennessee Valley Authority. The former settlements of Tharpe, Tennessee;
23 Model, Tennessee; and Golden Pond, Kentucky were forcibly abandoned, with Golden Pond
24 replaced by the LBL headquarters.
25

26 14. The Land Between the Lakes Protection Act of 1998, 16 U.S.C. § 460111 Note,
27

1 transferred management of the LBL from the Tennessee Valley Authority to the Forest Service.
2 That LBL Protection Act states that the emphasis of the LBL “shall be (A) to provide public
3 recreational opportunities; (B) to conserve fish and wildlife in their habitat; and (c) to provide for
4 diversity of native and desirable non-native plants, animals, opportunities for hunting and fishing,
5 and environmental education.” 16 U.S.C. § 460111-11(b)(2).
6

7 15. The LBL includes more than 170,000 acres and 300 miles of undeveloped
8 shoreline, and is the largest inland peninsula in the United States. The LBL is also the second
9 largest contiguous block of forested public land east of the Mississippi River.

10 16. The LBL has become one of the most accessible National Recreation Areas in the
11 United States, with approximately 70 million Americans residing within a six-hour drive. The
12 LBL attracts approximately two million visitors annually from across the United States and
13 numerous foreign countries. The LBL’s rolling landscape and forests offer a wide range of
14 recreational opportunities such as camping, horseback riding, biking, hiking, and wildlife
15 viewing. The LBL also offers numerous environmental education opportunities with
16 approximately 2100 interpretive programs offered per year.
17

18 17. The LBL provides a wide range of wildlife habitat, including a restored prairie
19 that is home to a combined herd of bison and elk. Overall, the LBL provides habitat for more
20 than 1,300 plant species, over 240 bird species, and 53 mammal species. The species on the LBL
21 that are listed as threatened or endangered under the Endangered Species Act include the bald
22 eagle, Interior least tern, gray bat, Indiana bat, and Price's potato bean.
23

24 18. Twenty-one species of fish inhabit the LBL’s interior lakes, while more than 75
25 species are found in the LBL’s streams. Invertebrate studies have found eight species of
26

1 gastropods and numerous populations of macroinvertebrates.

2 19. The LBL has been heavily impacted since European settlement by a combination
3 of activities, including agriculture, logging, and grazing, and the use of numerous chemicals in
4 these activities. The LBL now contains 420 miles of road and 5 dams.

6 20. The bottomland acreage of the LBL, which possesses the most productive soils
7 and is relatively flat, has been the most heavily degraded through years of intensive use. Much of
8 the bottomlands still remains in agriculture production.

9 21. The soil in the LBL bottomland areas is better suited for forestlands than
10 cultivation. Keeping these bottomlands as farmland, as opposed to forest, has required
11 considerable management effort and cost. Severe damage has resulted to the soil from continued
12 cultivation, such as severely reduced rates of water infiltration and percolation capacities. If
13 allowed to revert to forestland, the soil's ability to handle storm events (i.e. prevent erosion and
14 protect water quality) would increase considerably.

16 22. If the LBL bottomlands were allowed to naturally regenerate into forestland, early
17 species in the area would include Persimmon, Winged Elm, Black Walnut, Sweetgum, Yellow
18 Poplar, Sycamore, and Cherry. These would then give way to a variety of oaks, such as
19 Cherrybark, Northern and Southern Red Oak, White Oak, Shumard Oak, and Swamp White Oak.
20 Eventually, the forest would be comprised of a mix of species such as Yellow Poplar, Sweetgum,
21 Hickory, Walnut, Pecan, Ash, and Maple.

23 23. The reforestation of the LBL bottomlands would help repair the ecological
24 damage caused by centuries of cultivation that has adversely affected, among other things, the
25 structure, pH, and density of the area's soil. It would also promote healthier watersheds with
26

1 improved water quality. Forestland would promote more diversity of wildlife and provide for the
2 upland component of core habitat for reptiles and amphibians.

3 24. Bottomland hardwood forests such as that which would retake the LBL farmlands
4 is a vanishing forest community in the Southeast. Most private land in the region is used either
5 for agriculture or development. The Forest Service could help mitigate this habitat loss by
6 converting the agricultural fields of the LBL to forestland.
7

8 25. Even if the areas currently set aside for agriculture on the LBL were maintained as
9 open areas, converting the farmland to native grasslands maintained by frequent, low-intensity
10 fires, would be environmentally valuable. Native grasses would not require long term use of
11 herbicides, would provide a variety of habitat, and would provide better long term soil
12 conditions. Open grasslands with native plant species would also support more species,
13 including game birds and deer, as well as providing core habitat for reptiles and amphibians.
14

15 26. The LBL Protection Act directs the Forest Service to prepare a “land and resource
16 management plan” (“LRMP”) for the LBL, in conformity with the National Forest Management
17 Act. 16 U.S.C. § 460111-21(a). The Forest Service completed the LRMP for the LBL in
18 December, 2004.
19

20 27. Prior to the development of the 2004 LRMP, the Forest Service imposed 10-20
21 foot riparian buffers on site-specific actions and activities. These riparian buffers are generally in
22 poor condition throughout the LBL.

23 28. The 2004 LRMP imposes new standards for riparian areas and corridors that are
24 inadequate to support and protect the core habitat needs of amphibians and reptiles on the LBL,
25 and conflict with current scientific research. The scientifically recommended minimum riparian
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1 buffer to protect reptiles and amphibians is far greater than the standards developed for the LBL.

2 29. Each year, chemical pesticides, herbicides, and fertilizers are applied to thousands
3 of acres of cropland on the LBL, which has negative impacts on aquatic species.

4 **The Challenged Special Use Permits**

5 30. The Forest Service has issued six special use permits that authorize and allow
6 substantial commercial farming in the Land Between the Lakes National Recreation Area. As of
7 August 26, 2005, approximately 4141 acres were in production. Of these, approximately 1278
8 acres were planted in corn, 1691 acres were planted in hay, and 1172 were planted in soybeans.

9 31. The six special use permits for agriculture on the LBL are as follows:

- 10 a) Permit number LBL00001 authorizes farming on approximately 432 acres;
- 11 b) Permit number LBL00002 authorizes farming on approximately 1862 acres;
- 12 c) Permit number LBL00004 authorizes farming on approximately 1367 acres;
- 13 d) Permit number LBL05020 authorizes farming on approximately 316 acres;
- 14 e) Permit number LBL05021 authorizes farming on approximately 51 acres;
- 15 f) Permit number LBL05022 authorizes farming on approximately 112 acres.

16 Permits LBL00001, LBL00002, and LBL00004 were to expire in December, 2004, but
17 were renewed by the Forest Service and will now expire in December, 2007. Permits LBL05020,
18 LBL05021, and LBL05022 will expire in December, 2007.

19 32. The Forest Service recently amended the six special use permits to include a new
20 Operations and Maintenance Plan, which sets forth new guidelines for the permit holders. The
21 permittees must attend a pre-season meeting each year to inform the Forest Service of plans for
22 each field for the year, such as plans for chemical applications and other treatments. The

1 Operation and Maintenance Plan requires that each permitted field be mechanically disturbed at
2 least every two years unless Forest Service personnel specifically direct otherwise. The existing
3 permits also need to be brought into compliance with the 2004 Land Resource Management Plan
4 as soon as practicable. The Operations and Management Plan increased the minimum buffer
5 along riparian areas from 10 feet to 25 feet, and added provisions regarding pesticide use.
6

7 33. The Forest Service's issuance of the six special use permits each constituted final
8 agency action under the Administrative Procedure Act, and each constituted agency action
9 pursuant to NEPA. The Forest Service's renewal of three of the special use permits also each
10 constituted final agency action under the Administrative Procedure Act and agency action
11 pursuant to NEPA.
12

13 34. The six special use permits each implement the LRMP for the LBL.

14 35. The Forest Service has not prepared an environmental impact statement or
15 environmental assessment for any of the six special use permits, or for the three permit renewals,
16 pursuant to NEPA. The Forest Service has not provided formal notice, an opportunity for public
17 comment, or the opportunity to file administrative appeals for any of the six special use permits,
18 or for the three permit renewals, pursuant to the Appeals Reform Act.
19

20 CLAIMS FOR RELIEF

21 **CLAIM I: The Forest Service violated NEPA by failing to prepare an Environmental**
22 **Impact Statement or an Environmental Assessment for the Special Use**
23 **Permits and Permit Renewals.**

24 36. Plaintiffs hereby incorporate by reference all preceding paragraphs.

25 37. NEPA requires federal agencies to consider the environmental consequences of
26 their actions. *See* 42 U.S.C. § 4331 *et seq.* Federal agencies must prepare a detailed
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1 “environmental impact statement” (“EIS”) for all major federal actions that may significantly
2 impact the environment. 42 U.S.C. § 4332(2)(C).

3 38. If an agency is unsure whether a proposed action may significant impact the
4 environment, the agency is directed to prepare an “environmental assessment” (“EA”). 40 C.F.R.
5 § 1501.4(b). Based on the EA, the agency must determine whether to prepare an EIS. 40 C.F.R.
6 § 1501.4(c). If the agency decides not to prepare an EIS, it must prepare a “finding of no
7 significant impact.” 40 C.F.R. § 1501.4(e).

8 39. “NEPA procedures must insure that environmental information is available to
9 public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. §
10 1500.1(b). NEPA ensures that the agency will have available and will consider carefully detailed
11 information regarding the environmental consequences of any proposed final agency action.
12 NEPA also requires that the information be made available to the public so that it may participate
13 in the decision making process.

14 40. In determining the proper scope of an EIS, agencies must consider connected,
15 cumulative, and similar actions. 40 C.F.R. § 1508.25(a).

16 41. An analysis of environmental impacts must include “cumulative impacts” which
17 are defined as impacts resulting from the incremental impact of the action when added to other
18 past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.7. “Cumulative
19 actions can result from individually minor but collectively significant actions taking place over a
20 period of time. *Id.*

21 42. Each of the six special use permits for agriculture on the LBL constitutes a major
22 federal action that may significantly impact the environment and, therefore, requires an EIS. In
23

1 addition, each of the three special use permit renewals for agriculture on the LBL constitutes a
2 major federal action that may significantly impact the environment and, therefore, requires an
3 EIS. At a minimum, the Forest Service was required to prepare an EA for the six special use
4 permits, and the three special use permit renewals, to determine whether the environmental
5 impacts may be significant. The Forest Service was also required by NEPA to consider the
6 overall, cumulative environmental impacts of the special use permits.
7

8 43. The Forest Service has not prepared an EIS or an EA regarding any of the six
9 special use permits for agriculture on the LBL, and has not considered their overall, cumulative
10 impacts on the environment. The Forest Service has also not prepared an EIS or an EA regarding
11 any of the three special use permit renewals for agriculture on the LBL, and has not considered
12 their overall, cumulative impacts on the environment. The Forest Service therefore violated
13 NEPA in authorizing each of the six special use permits, and the three special use permit
14 renewals, and its decisions to issue and renew the permits are each arbitrary, capricious, an abuse
15 of the agency's discretion, not in accordance with the law, and without observance of the
16 procedures required by law. 5 U.S.C. § 706(2)(A), (D). Each of the decisions should therefore
17 be held to be unlawful and set aside. *Id.*
18

19
20 **CLAIM II: The Forest Service violated the Appeals Reform Act by failing to provide**
21 **formal notice, an opportunity for public comment, and an opportunity to**
22 **administratively appeal the Special Use Permit decisions.**

23 44. Plaintiffs hereby incorporate by reference all preceding paragraphs.

24 45. The Appeals Reform Act, 16 U.S.C. § 1612 Note, grants to the public the right to
25 be notified, provide comments, and administratively appeal Forest Service projects and activities
26 that implement land and resource management plans.
27

1 46. Prior to proposing an action, the Forest Service must provide formal, published
2 notice of the action in a newspaper of general circulation. 16 U.S.C. § 1612(b)(1). The Forest
3 Service must then accept comments from the public on the proposed action for a thirty-day
4 period following the publication of notice. 16 U.S.C. § 1612(b)(2). A person who submitted
5 comments on the proposed action, or otherwise notified the Forest Service on their interest in the
6 proposed action, then has the right to file an administrative appeal following the issuance of a
7 final decision regarding the proposed action. 16 U.S.C. § 1612(c). The Forest Service must stay
8 implementation of the action during the administrative appeal period, and for an additional 15
9 days after the date of the disposition of the appeal. 16 U.S.C. § 1612(e). Any Forest Service
10 regulation that is contrary to these statutory requirements is in conflict with the intent and
11 purpose of the Appeals Reform Act and therefore invalid. *See Earth Island Institute v. Pengilly*,
12 376 F.Supp.2d 994 (E.D. Cal. 2005); *Wilderness Society v. Rey*, Civ. No. 03-119-M-DWM (D.
13 Mont. 2006).

14 47. For each of the six special use permits for agriculture on the LBL, the Forest
15 Service failed to provide published notice, failed to accept public comments, and failed to allow
16 administrative appeals, in violation of the Appeals Reform Act, 16 U.S.C. § 1612. For each of
17 the three special use permit renewals, the Forest Service also failed to provide published notice,
18 failed to accept public comments, and failed to allow administrative appeals, in violation of the
19 Appeals Reform Act, 16 U.S.C. § 1612. The Forest Service's decisions to issue and renew the
20 permits were therefore arbitrary, capricious, an abuse of discretion, not in accordance with the
21 law, and without observance of the procedures required by law. 5 U.S.C. § 706(2)(A), (D). The
22 decisions should therefore be held to be unlawful and set aside. *Id.*

1 **RELIEF REQUESTED**

2 Wherefore, Plaintiffs respectfully request that this Court:

3 A. Declare that the Forest Service's failure to prepare an EIS or an EA for the special
4 use permits and permit renewals violated NEPA;

5
6 B. Declare that by failing to provide formal notice, an opportunity for comment, and
7 an administrative appeal for the special use permits and permit renewals, the Forest Service
8 violated the Appeals Reform Act;

9 C. Order the Forest Service to conduct a NEPA analysis on the six special use
10 permits, considering the direct, indirect, and cumulative environmental impacts of the permits,
11 and allowing for meaningful public participation as required by NEPA;

12
13 D. Order the Forest Service to provide notice, public comment, and an opportunity
14 to administratively appeal the special use permits, as required by the Appeals Reform Act;

15 E. Grant FSEEE the necessary and appropriate injunctive relief pending the agency's
16 full compliance with NEPA and the Appeals Reform Act, in order to prevent undue harm to the
17 environment and FSEEE's interests;

18
19 F. Award FSEEE its costs, expenses, and attorney fees pursuant to the Equal Access
20 to Justice Act, 28 U.S.C. § 2412(d);

21 G. Grant additional relief as the Court deems necessary and proper.

22 DATED this 3rd day of November, 2006.

23 Respectfully submitted,

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