No. 06-344

In the Supreme Court of the United States

MINERAL COUNTY, MONTANA, ET AL., PETITIONERS

v.

ECOLOGY CENTER, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR FEDERAL RESPONDENTS

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QUESTION PRESENTED

Whether the court of appeals failed to apply the proper standard of review under the Administrative Procedure Act in evaluating whether the Forest Service had complied with the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, and the National Forest Management Act of 1976, 16 U.S.C. 1600 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-37a) is reported at 430 F.3d 1057. The opinion of the district court (Pet. App. 40a-53a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2005 (Pet. App. 38a-39a). A petition for rehearing was denied on May 8, 2006 (Pet. App. 54a-55a). On August 1, 2006, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 7, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2000, wildfires burned approximately 74,000 acres on the Lolo National Forest in western Montana. Pet. App. 3a. Respondent Forest Service developed the July 2002 Lolo National Forest Post Burn Project (Post-Burn Project) to deal with the aftermath of the fires by treating 4500 of those acres. Respondent Ecology Center, Inc., filed a suit against the federal respondents pursuant to the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, challenging the Post-Burn Project under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, and the National Forest Management Act of 1976 (NFMA), 16 U.S.C. 1600 *et seq.* Pet. App. 3a.[1] Petitioners intervened as defendants. The district court granted summary judgment to the federal respondents and to petitioners. *Id.* at 40a-53a. A divided panel of the Ninth Circuit reversed and remanded. *Id.* at 1a-37a.

1. a. NEPA requires that federal agencies prepare an environmental impact statement (EIS) for major federal actions significantly affecting the quality of the human environment. 42 U.S.C. 4332(2)(C). NEPA is a procedural statute and does not mandate a particular substantive result. *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350-351 (1989).

b. NFMA governs the Forest Service's management of the National Forest System. See generally *Ohio Forestry Ass'n* v. *Sierra Club*, 523 U.S. 726, 728 (1998).

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[1] The federal respondents are Deborah L. R. Austin, in her official capacity as Forest Supervisor for the Lolo National Forest, Abigail Kimbell, who succeeded defendant Bradley Powell as Regional Forester for Region One of the Forest Service, and the Forest Service, an agency of the United States Department of Agriculture.

NFMA directs the Forest Service to develop a land and resource management plan (forest plan) for each unit of the system to provide for the multiple use and sustained yield of the various natural resources, including timber and wildlife. See 16 U.S.C. 1604(a) and (e). A forest plan is a broad, long-term programmatic planning document that establishes the goals and objectives for units of the National Forest System. Such a plan guides management of forest resources, ensuring consideration of both economic and environmental factors. 16 U.S.C. 1604(g)(1)-(3). NFMA also directs the Secretary to specify guidelines for forest plans to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. 1604(g)(3)(B).

c. Judicial review of a Forest Service decision approving a project is governed by the APA, which permits a court to set aside final agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). As this Court has often explained, while a court's inquiry must be thorough, the APA's standard of review is highly deferential and narrow. See, *e.g.*, *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). A court's inquiry is limited to whether the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 105 (1983).

2. Following the 2000 fires on the Lolo National Forest, many of the Forest's resources were left in an unacceptable condition and susceptible to further degradation, through more fires or insect infestation, in the

absence of management intervention. Pet. App. 3a; C.A. Forest Service Supp. E.R. 115 (Supp. E.R.). The Forest Service therefore developed a project to address those conditions. After publication of a draft environmental impact statement and extensive public involvement and comment, the Forest Service issued a final environmental impact statement (FEIS) for its proposal in July 2002. *Ibid.* The FEIS identified and gave detailed analysis to four alternative courses of action to rejuvenate the Lolo National Forest's resources, and it analyzed the benefits and risks of each alternative. Supp. E.R. 47-50.[2] The FEIS for the project exceeds 1900 pages, with more than 250 pages analyzing the affected environment (Chapter 3), 160 pages analyzing the environmental consequences (Chapter 4), and 150 detailed maps. See Pet. App. 27a (McKeown, J., dissenting).[3]

In a July 2002 Record of Decision, the Forest Service selected a slightly modified version of FEIS Alternative 5 as the Post-Burn Project. Pet. App. 3a. The Post-Burn Project included a number of activities to improve the condition of the Lolo National Forest. One set of activities included the treatment of old-growth and potential old-growth stands of trees. *Id.* at 6a-7a. Those treatments involve the thinning of small-diameter, non-old-growth trees to better replicate the forest's historic structure. *Ibid.* The Forest Service concluded that such thinning would reduce the risk of stand-destroying fires

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[2] One of those alternatives was a "no action" alternative under which the Forest Service would conduct no post-burn management. Two additional alternatives were considered, but eliminated from detailed study.

[3] The overall administrative record includes more than 20,000 pages of supporting information. See Pet. App. 27a (McKeown, J., dissenting).

and bark-beetle infestation, thereby providing for the enhancement of existing old-growth stands and recruitment of new ones, as well as a reduction in the risk that existing old-growth stands would be lost to fire or insects. *Id.* at 6a; *id.* at 34a-35a (McKeown, J., dissenting); Supp. E.R. 156-157, 172-173, 211-219, 238-239, 647, 688.

In September 2002, respondent Ecology Center filed an administrative challenge to the Forest Service's Record of Decision. After its administrative appeal was denied, Ecology Center filed suit in the United States District Court for the District of Montana, alleging that the Post-Burn Project violated NFMA and NEPA. Pet. App. 3a, 40a-41a.

3. The district court rejected Ecology Center's claims. Pet. App. 40a-53a. The court concluded that "[t]he record demonstrates that the [Forest Service] took the requisite hard look at the impacts of this project on both the animal species at issue, and on old growth and soil conditions." *Id.* at 49a. The court noted that "[t]he Forest Service considered the impacts of this project on the goshawk, pileated woodpecker, and black-backed woodpecker" and "concluded that the proposed activities would have no cumulative negative impacts, based on the evidence in the record before the agency." *Ibid.* (citations omitted). The court also observed that the Forest Service "evaluate[d] current and historical soil conditions on the Lolo National Forest and identifie[d] the predicted impacts of the Project on those conditions." *Ibid.*

The district court viewed Ecology Center's arguments as "disput[ing] management decisions of the Forest Service." Pet. App. 50a. The court noted that it "[wa]s not in a position to settle scientific disputes," and

concluded that "[i]f opinions of experts conflict, as the record before the Court suggest[ed], the Court defers to the expertise of the agency." *Ibid.*

4. A divided panel of the Ninth Circuit reversed and remanded. Pet. App. 1a-37a.

a. The court first concluded that the Forest Service's decision to remedy uncharacteristic forest development and to reduce the risk of fires and insect infestation through the old-growth treatment measures was arbitrary and capricious. *Id.* at 6a-12a. The court acknowledged that the Forest Service had "cite[d] a number of studies that indicate such treatment is necessary to correct uncharacteristic forest development resulting from years of fire suppression," and that the Post-Burn Project "is designed to leave most of the desirable old-growth trees in place and to improve their health." *Id.* at 6a. The court further acknowledged that "Ecology Center does not offer proof that the proposed treatment causes the harms it fears" to old-growth habitat and species that are dependent on that habitat. *Id.* at 7a. Nevertheless, expressing the view that the Forest Service did "not offer proof that the proposed treatment benefits—or at least does not harm—old growth dependent species," the court accepted Ecology Center's argument that the Forest Service "cannot be reasonably certain" that treating the old-growth habitat would be consistent with a mandate the court perceived in NFMA to ensure species diversity and viability. *Id.* at 7a-8a; see *id.* at 8a-11a.

In so holding, the court rejected the Forest Service's reliance on evidence in the administrative record that supported its conclusion, as well as the Service's choice of scientific methodology to reach that conclusion. Pet. App. 8a. The court recognized that the Forest Service

had relied upon a study documenting that two old-growth-dependent species were observed foraging elsewhere in "treated old-growth forest," and had concluded that the treatment of old-growth forest would not substantially affect such species because—

> (1) it has observed the short-term effects of thinning old-growth stands via commercial logging and prescribed burning on forest composition, (2) it has reason to believe that certain old-growth dependent species would prefer the post-treatment composition of old-growth forest stands, and (3) its assumption that treatment does not harm old-growth dependent species is therefore reasonable.

Ibid. The court, however, dismissed this determination as "an unverified hypothesis," because, in the court's view, the Forest Service had failed to engage in sufficient "on the ground analysis" to test its rationale. *Id.* at 9a (quoting *Lands Council* v. *Powell*, 379 F.3d 738, 752 (9th Cir. 2004), amended, 395 F.3d 1019 (9th Cir. 2005)). The court reasoned:

> Just as it would be arbitrary and capricious for a pharmaceutical company to market a drug to the general population without first conducting a clinical trial to verify that the drug is safe and effective, it is arbitrary and capricious for the Forest Service to irreversibly "treat" more and more old-growth forest without first determining that such treatment is safe and effective for dependent species.

Ibid. For similar reasons, the court concluded that the Forest Service's decision violated NEPA with respect to treatment of old-growth forests. *Id.* at 11a-12a.

b. The court of appeals next concluded that the Forest Service violated NFMA and NEPA by failing to ex-

amine adequately the Post-Burn Project's potential impact on the black-backed woodpecker, a species that inhabits post-burn areas. Pet. App. 12a-18a. Although the court recognized that the 2000 fires had greatly expanded the potential habitat available for the black-backed woodpecker and that only limited timber activity would occur in the identified potential habitat, *id.* at 14a,[4] the court concluded that "[t]o be reasonably certain that the post-Project habitat levels would be sufficient to ensure species viability, one must know where the threshold between 'critical' and 'sufficient' levels of burned habitat lies." *Id.* at 16a. Because the Forest Service had not identified the "threshold" the court believed to be necessary, the court held that there was an insufficient basis for the Forest Service's conclusion that the Post-Burn Project would not adversely affect the viability of the black-backed woodpecker. *Id.* at 16a-18a.

c. Finally, the court of appeals concluded that the Forest Service's soil-quality analysis was inadequate. Pet. App. 18a-25a. According to the court, the methodology used by the Forest Service—which included "estimat[ing] soil conditions on the basis of maps, samples from throughout the Forest, aerial reconnaissance, and computer modeling"—"was insufficiently reliable." *Id.* at 19a. In the court's view, the Forest Service engaged in insufficient on-the-ground observations of soil conditions within the Post-Burn Project area. *Id.* at 25a. The court also faulted the Forest Service's conclusion

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[4] As authorized by the Record of Decision, the Post-Burn Project included salvage harvesting in 815 acres of the 9870 acres of potential black-backed woodpecker habitat created by the 2000 fires. As a result of a settlement in other litigation challenging the Post-Burn Project, *Sierra Club, Inc.* v. *Austin*, 82 Fed. Appx. 570 (9th Cir. 2003), the 815 acres was reduced to 155 acres. Pet. App. 4a n.1, 14a & n.5.

that it was meeting soil quality standards because in the court's view the analysis should have included more information, such as the qualifications of the soil scientists conducting the analysis, more information on the methodology utilized, and discussion of how field observations confirmed the Forest Service's estimates. The court found that this information was necessary for the Forest Service to "be certain" that the Post-Burn Project complies with NFMA. *Id.* at 22a-24a.

d. Judge McKeown dissented. Pet. App. 26a-37a. In her view, the majority's approach "represents an unprecedented incursion into the administrative process." *Id.* at 27a. She criticized the majority for changing the court's "posture of review to one where we sit at the table with Forest Service scientists and second-guess the minutiae of the decisionmaking process." *Id.* at 28a. That approach, she concluded, was contrary to "two firmly established lines of precedent in administrative law." *Id.* at 36a. First, she observed that the "arbitrary and capricious" standard of review does not countenance "flyspeck[ing] the agency's analysis," such as "rejecting the Forest Service's soil analysis field checks and its observations and historical data in treated old-growth forests." *Ibid.* Second, she believed that the "majority's rationale cannot be reconciled with our case law requiring '[d]eference to an agency's technical expertise and experience,' particularly 'with respect to questions involving engineering and scientific matters.'" *Id.* at 36a-37a (citations omitted).

DISCUSSION

We agree with petitioners that the court of appeals' decision is in error in a number of important respects. The federal respondents did not file their own petition

because, *inter alia*, it is not yet clear whether the approach articulated by the Ninth Circuit, in fact, introduces a new and even more stringent standard of review in land-management cases under the APA than the Ninth Circuit has applied in recent years. Nevertheless, the fact remains that the Ninth Circuit impermissibly second-guessed scientific judgments of a federal agency that were amply supported by the administrative record and departed from the standards this Court has held to be applicable to agency factual and scientific judgments under the APA. Accordingly, the federal respondents do not oppose the petition for a writ of certiorari.

1. The court of appeals' decision is incorrect, and the approach the court used to review the Forest Service's Post-Burn Project is mistaken.

a. As the dissenting judge recognized (*e.g.*, Pet. App. 27a, 36a-37a), the court of appeals intruded substantially into the Forest Service's decision-making process in a manner that departs markedly from the arbitrary-and-capricious standard of review called for by the APA. The Ninth Circuit repeatedly referred, for example, to whether the evidence was sufficiently strong to allow the Forest Service—or indeed the court of appeals itself—to be "certain" or "reasonably certain" that the Post-Burn Project would not cause the adverse effects feared by respondent Ecology Center. *Id.* at 8a, 16a, 18a, 22a. Nothing in NFMA or the APA requires that degree of certitude concerning the impact on certain selected resources before a land-management agency can act. Moreover, although the court acknowledged that Ecology Center offered no proof that its posited fears with respect to the treatment of the identified old-growth stands would be realized, *id.* at 7a, the court nevertheless rejected the Forest Service's reasoned and record-

based decision to treat those stands. While recognizing the "scientific uncertainty surrounding the treatment of old-growth stands," the court rejected the Forest Service's decision in the face of that uncertainty as resting on an "unverified hypothesis," *id.* at 9a, and placed the burden on the agency to disprove Ecology Center's claims in court. *Id.* at 7a-8a.

In so doing, the court imposed its own judgment as to how much information is useful or desirable for an agency to have in hand before the agency decides on a particular course of action in the face of scientific uncertainty. Pet. App. 7a-8a. For example, the court concluded that the Forest Service had not engaged in what the court deemed to be sufficient "on the ground analysis" with respect to treating the old-growth stands, *id.* at 9a, or collected sufficient "on-site" soil samples to assess the Post-Burn Project's potential effect on soil quality. *Id.* at 22a-24a. In essence, the Ninth Circuit established its own "bright-line rules, such as requiring an on-site, walk the territory inspection," and "assesse[d] the detail and quality of the analysis—even in the absence of contrary scientific evidence in the record." *Id.* at 29a-30a (McKeown, J., dissenting).

The court of appeals' improper impositions on the agency's decisionmaking process is epitomized by its wholly inapposite reliance on the standards for clinical trials of new drugs. See Pet. App. 9a. The majority faulted the Forest Service for not undertaking a comparable analysis before it took any action in the 74,000-acre burn area. *Ibid.* But, as the dissent explained, the statutory and regulatory regime applicable to the "FDA process dictates a substantive and specific administrative course of action in terms of clinical trials and other requirements as a prelude to the approval of drugs and

medical devices." *Id.* at 36a. "Neither NEPA nor NFMA serve that function in the environmental context," *ibid.*, and neither statute, much less the APA, contains any requirements remotely similar to the rigorous statutory and regulatory requirements that must be met before marketing a new drug. It therefore is plainly inappropriate to import the notion of clinical trials, and the proofs that those entail, to the very different and difficult task of managing federal lands for multiple uses and sustained yield in a dynamic environment. *Ibid.*; see Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. 528. "'Multiple use management' is a deceptively simple term that describes the enormously complicated task of striking a balance among the many competing uses to which land can be put." *Norton* v. *Southern Utah Wilderness Alliance*, 542 U.S. 55, 58 (2004). That is especially so where, as here, circumstances required a prompt affirmative response by the Forest Service to prevent further deterioration in forest conditions. In short, nothing in the highly deferential standard of APA judicial review of decisions under NFMA and NEPA warrants imposition by the courts of the sort of heightened requirements on which the court of appeals relied.

In addition, the court of appeals misstated NFMA's substantive mandate. See Pet. App. 6a, 8a. NFMA directs the Secretary to specify guidelines for forest plans to "provide for diversity of plant and animal communities based on the suitability and capability of the specific land area in order to meet overall multiple-use objectives." 16 U.S.C. 1604(g)(3)(B). The government agrees with petitioners (Pet. 17-19) that NFMA itself does not contain a "viability" requirement. See *Sierra Club* v. *Marita*, 46 F.3d 606, 620 (7th Cir. 1995). A provision to manage habitat to maintain viable populations of certain

species was once found in NFMA regulations that were originally promulgated in 1982, but those regulations have since been superseded. Compare 36 C.F.R. 219.19 (2000) (last codification of the 1982 NFMA regulations), with 36 C.F.R. Pt. 219 (2005). It is true that the forest plan in this case provided for management of resources to maintain population viability of certain "sensitive" species. Supp. E.R. 573; see Pet. App. 18a. But the court of appeals exceeded the scope of its authority in holding that the Forest Service's decision that the Post-Burn Project would not undermine the viability of one such species, the black-backed woodpecker, was arbitrary and capricious, because the 2000 fire created a substantial amount of new post-fire habitat for that species. See *id.* at 14a. Contrary to the court of appeals' view (*id.* at 16a-17a), in light of that greatly increased habitat, nothing in NFMA or NEPA required the Forest Service to specify a particular threshold below which the viability of the black-backed woodpecker would be jeopardized in order to conclude that the modest timber harvesting (with mitigation measures) in the project at issue here would *not* have that effect. And the court's imposition of that requirement was in any event based on the court's further (and unwarranted) insistence that the Forest Service must be "reasonably certain" of its scientific judgments. See *id.* at 16a.[5]

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[5] Although the Forest Service defended its July 2002 Record of Decision under the 1982 regulations, the Forest Service subsequently clarified in September 2004 that the 1982 regulations did not apply to site-specific decisions that were made after the 1982 regulations were superseded but under a forest plan adopted while the 1982 regulations were still in effect; rather, regulations promulgated in 2000 (which have themselves since been superseded) governed. 69 Fed. Reg. 58,057 (2004). The 2000 regulations required the agency to "consider the best

b. The proper inquiry under the APA is whether the agency acted arbitrarily or capriciously on the basis of the administrative record, including the comments submitted to it during the administrative process. Under this Court's decision in *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519 (1978), the development of procedures, determinations as to what evidence to seek, and decisions about how much evidence is sufficient in a particular case to warrant going forward, are within the province of the agency, not the reviewing court. *Id.* at 543.

That is particularly true with respect to the types of scientific judgments at issue here. The court of appeals should have deferred to the agency's largely predictive scientific judgments within its area of expertise. See *Marsh* v. *Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 103 (1983) (where an agency "is making predictions, within its area of special expertise, at the frontiers of science," and the reviewing court is called on to examine "this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential"). The Forest Service was faced

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available science when implementing * * * the plan." 36 C.F.R. 219.35(a) and (d) (2001). Neither the courts below nor any party took issue with the agency's reliance in this case on the 1982 regulations, inasmuch as the project was required to be consistent with the forest plan, which was adopted under 1982 regulations and therefore contained a parallel provision for maintaining the viability of certain species. See 16 U.S.C. 1604(i).

with a deteriorating situation because of the prospect of disease or fire that would harm the forest and the species that depend upon it. See Pet. App. 34a-35a (McKeown, J., dissenting) (observing that it was uncontroverted that "inaction may harm old-growth areas"). The agency had to act, even in the face of uncertainty, relying on the information it had in hand.

Moreover, the Forest Service's decision at issue here was rendered at the conclusion of an agency proceeding in which the Federal Rules of Evidence and other formal judicial-type procedures do not apply. For that reason, as well, and especially in light of the deference owed to an agency's scientific judgments, the court of appeals had no authority under the APA's arbitrary-and-capricious standard of review to impose its own standards for, *e.g.*, the reliability and verification of scientific or other studies and evidence, see Pet. App. 8a-11a, 14a, 16a, 20a-21a & n.13, 24a, the methodology used to determine whether the Post-Burn Project would threaten the viability of a sensitive species, see *id.* at 16a-17a; see pp. 7-8, *supra*, or the qualifications and documentation practices of agency personnel who conduct surveys, see *id.* at 23a-24a.

Under the APA, the court in a case such as this must limit its review of the Forest Service's factual conclusions to whether those conclusions are supported by "substantial evidence" in the administrative record. Under the APA's arbitrary-and-capricious standard of review, "substantial evidence" is the most stringent standard that could apply to questions of evidentiary sufficiency for factual determinations. See *Dickinson* v. *Zurko*, 527 U.S. 150, 164 (1999); see also, *e.g.*, *Utah Shared Access Alliance* v. *Carpenter*, 463 F.3d 1125, 1134 (10th Cir. 2006); *Association of Data Processing*

v. *Board of Governors*, 745 F.2d 677, 683-684 (D.C. Cir. 1984) (Scalia, J., joined by R.B. Ginsburg, J.). That standard is more deferential even than the "clearly erroneous" standard for appellate review of trial court findings. *Zurko*, 527 U.S. at 162, 164. Under the substantial-evidence standard, an agency's fact-based conclusion must be sustained unless no reasonable fact-finder could have reached that conclusion based on the administrative record. See *INS* v. *Elias-Zacarias*, 502 U.S. 478, 481 (1992). Under that standard, the evidence in an administrative record is sufficient to sustain an agency's fact-based decision if the evidence is such that it would justify, in a jury trial, a refusal to take a factual decision away from the jury. See *Illinois Cent. R.R.* v. *Norfolk & W. Ry.*, 385 U.S. 57, 66 (1966) (quoting *NLRB* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939)); see also *Zurko*, 527 U.S. at 162; *Elias-Zacarias*, 502 U.S. at 481.

If the Forest Service's decision and the administrative record had been viewed under that standard, its decision to proceed with the Post-Burn Project clearly should have been sustained. As Judge McKeown concluded, the administrative record is "huge," including "a 1900+ page [FEIS], 150 detailed maps and 20,000 pages of background information," Pet. App. 27a, and that record amply supports the agency's conclusions, *id.* at 29a-31a, 34a-35a. The record evidence was more than sufficient with respect to each of the issues on which the court of appeals faulted the agency's decision to withstand review under the substantial-evidence/directed-verdict standard of review under the APA.

2. The Ninth Circuit has improperly second-guessed an important agency decision with respect to scientific judgments that were the subject of a lengthy and in-

depth deliberation and review. The government remains firmly of the view that the Forest Service's decision was in full compliance with both NFMA and NEPA and is amply supported by the administrative record. If this Court is inclined to grant the petition, the federal respondents would support petitioners on the merits.

Nonetheless, the government did not file its own petition for a writ of certiorari. Precisely because the Ninth Circuit's decision represents a substantial deviation from well-settled modes of review of administrative decisionmaking, it is in tension with, but not clear conflict with, decisions of other courts of appeals. No other circuit has expressly considered and rejected the Ninth Circuit's approach with respect to, *e.g.*, whether the agency or reviewing court must be "certain" or "reasonably certain" about possible impacts of its decisions, or the possible need for studies analogous to clinical trials for new drugs. Nor is it clear that the Ninth Circuit has adopted that standard as a distinct, new rule of law, so much as it has drifted away even further from the kind of deferential review that this Court has made clear should govern judicial review of agency actions. The degree to which the Ninth Circuit will apply this plainly erroneous approach as a distinct test in future cases, or to which this case may instead be an aberration, remains to be seen. Accordingly, the government had concerns whether this case precisely satisfies the Court's traditional criteria for plenary review.

That said, if the decision here does represent the enunciation of new standards that the Ninth Circuit will use to review scientific judgments in agency decisions, the decision will have significant negative implications for the implementation of federal land-management programs. The Ninth Circuit encompasses 122.2 million of

the 192.7 million acres of National Forest System lands, see http://www.fs.fed.us/land/staff/lar/LAR05/table1.htm, http://www.fs.fed.us/land/staff/lar/LAR05/table6.htm (last modified Sept. 2005), and an additional 197.3 million acres of public lands under the jurisdiction of the Bureau of Land Management. See 190 Bureau of Land Management, DOI, *Public Land Statistics 2005*, BLM/BC/ST-06/001+1165 (June 2006), available at http://www.blm.gov/natacq/pls05/pls1-3_05.pdf. The court's clear deviation from established precedent of this Court thus could have great practical significance given the vast expanse of federal lands and the numerous planned and potential federal projects located within the Ninth Circuit.

CONCLUSION

The federal respondents do not oppose the petition for a writ of certiorari.

Respectfully submitted.

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