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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

CASCADIA WILDLANDS PROJECT, LEAGUE OF WILDERNESS DEFENDERS - BLUE MOUNTAINS BIODIVERSITY PROJECT, OREGON CHAPTER OF THE SIERRA CLUB,

Plaintiffs,

vs.

WILLIAM ANTHONY, in his capacity as District Ranger of the Sisters Ranger District of the Deschutes National Forest; UNITED STATES FOREST SERVICE, an administrative agency of the United States Department of Agriculture,

Defendants.

Civ. Case No. 07-6147-AA

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

EXPEDITED HEARING REQUESTED

REQUEST FOR ORAL ARGUMENT

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I. INTRODUCTION.

The Black Crater logging project is a post-fire logging project entirely within a Late-Successional Reserve ("LSR") and entirely within designated critical habitat for the northern spotted owl. The Forest Service planned and authorized the logging project, which will remove all but 6 dead trees ("snags") per acre from over 200 acres of National Forest land, without any environmental analysis in even a basic environmental assessment ("EA"). Instead of taking a "hard look" at the environmental effects of the Black Crater logging project, the Forest Service has categorically excluded the project from review under the National Environmental Policy Act ("NEPA"). In doing so, the Forest Service has ignored the extraordinary circumstances that exist within the project area, such as designated critical habitat for a threatened species, and the potential for significant environmental effects to occur.

The dominant feature on the local landscape is a large block of private industrial timberland that appears to have been clearcut within the past year. Directly adjacent to this private land is a portion of the Deschutes National Forest that has been left fragmented from previous logging projects. Within this fragmented portion of the Deschutes National Forest is the Black Crater logging project, yet another timber sale, encompassing much of what remains in the area that has not yet been clearcut. Because the Forest Service excluded the Black Crater logging project from NEPA review, there has been no analysis or even acknowledgment of cumulative impacts.

The Black Crater logging project is narrowly focused on short-term economics, and the Forest Service has given no ecological purpose or need for removing snags from the project area. This is clearly inconsistent with the purpose of Late-Successional Reserves: to protect and enhance conditions of late-successional and old-growth forest ecosystems, including snags,

which serve as habitat for late-successional and old-growth related species. Logging all but 6 large snags from more than 200 acres of an LSR will substantially degrade wildlife habitat in both the immediate future and for decades to come.

Plaintiffs have a very strong likelihood of prevailing on the merits of this case because, as described more fully below, many of the claims brought by Plaintiffs here have already been resolved in prior cases in the Ninth Circuit and the courts in the District of Oregon. Plaintiffs ask this court to rule consistently with its previous guidance and that of the Ninth Circuit.

II. STATEMENT OF ISSUES TO BE DECIDED.

1. Did the Forest Service violate the National Forest Management Act by authorizing the logging of burned trees from the Cache-Trout Late-Successional Reserve that currently provide key resources to a diversity of wildlife?

2. Did the Forest Service violate the National Forest Management Act by authorizing logging in the Cache-Trout Late-Successional Reserve to meet narrow short-term timber sale program goals?

3. Did the Forest Service ignore extraordinary circumstances and significance factors and violate the National Environmental Policy Act by authorizing the logging project without preparing a basic environmental assessment?

4. Did the Forest Service violate the National Environmental Policy Act by failing to protect diverse populations of wildlife and ensure the scientific integrity of the Black Crater logging project Decision Memo when it relied upon a spotted owl study to reach a conclusion directly at odds with the key findings of the study?

III. LEGAL BACKGROUND.

The National Forest Management Act and Northwest Forest Plan

In 1976 Congress enacted the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600-1614, which governs the Forest Service's management of the National Forests. NFMA establishes a two-step process for forest planning. It first requires the Forest Service to develop, maintain and revise Land and Resource Management Plans ("LRMP") for each National Forest. 16 U.S.C. § 1604(a). The LRMP guides natural resource management activities across the forest, setting standards, management area goals and objectives, and monitoring and evaluation requirements. Implementation of a Forest Plan occurs at the site-specific level; once an LRMP is in place, site-specific actions, such as the Black Crater logging project, are assessed by the Forest Service in this second step of the forest planning process. Site-specific decisions must be consistent with the LRMP. 16 U.S.C. § 1604(i). The Deschutes LRMP governs the management of public lands in the Deschutes National Forest.

In 1994, the Forest Service issued a Record of Decision (ROD) for the Northwest Forest Plan (NFP). The NFP established management requirements for all Forest Service land within the range of the northern spotted owl, and amended all National Forest LRMPs within the range of the owl. With a small exception, the Deschutes National Forest lies within the range of the northern spotted owl. The Deschutes LRMP incorporates the four basic land allocations created by the NFP: (1) Late-Successional Reserves (LSRs); (2) Adaptive Management Areas; (3) Riparian Reserves; and (4) Matrix. Each land allocation is governed by a different set of Standards and Guidelines.

[12] At least two District Courts have enjoined logging projects planned under this CE. League of Wilderness Defenders Blue Mountains Biodiversity Project v. Smith, 2004 WL 2847877 (D.Or. 2004); Forest Service Employees for Environmental Ethics v. Forest Service, 2005 WL 1514071 (N.D. Cal. 2005).

The objective of the LSRs is to protect and enhance the conditions of old-growth forests that serve as habitat for the northern spotted owl and other wildlife by creating a network of large "reserves" or blocks of habitat. Plaintiffs' Exhibit 1, Northwest Forest Plan Standards and Guidelines (NFP S&Gs), C-9. The NFP requires the Forest Service to manage LSRs to "protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species." Id. at C-12. "No programmed timber harvest is allowed inside [LSRs.]" Plaintiffs' Exhibit 2, Northwest Forest Plan Record of Decision, 8.

In certain limited circumstances, the NFP permits some post-fire logging in LSRs, but post-fire logging (called "salvage" logging) must be consistent with the salvage guidelines. Exhibit 1 at C-13–C-16. Salvage in LSRs "will not be driven by economic or timber sale program factors." Plaintiffs' Exhibit 3, Northwest Forest Plan Appendix F-21. Instead, "planning for salvage [in LSRs] should focus on long-range objectives, which are based on desired future conditions of the forest." Exhibit 1 at C-14. Particularly relevant to this case, the NFP states that "[s]alvage operations should not diminish habitat suitability now or in the future." Id. at C-13.

A primary objective of LSRs is the "development of old-growth characteristics including snags." Id. at B-5. If post-fire logging is proposed following a stand-replacing wildfire, the NFP directs the Forest Service to "focus on retaining snags that are likely to persist until late-successional forest conditions have developed and the new stand is again producing large snags." Id. at C-14. The NFP affirmatively requires the Forest Service to retain snags that will persist until the forest recovers and the next forest develops. Oregon Natural Resources Council Fund v. Brong, 2004 WL 2554575 (D.Or. 2004)(appeal pending).

The National Environmental Policy Act.

The National Environmental Policy Act ("NEPA") is our basic national charter for protection of the environment. 42 U.S.C. § 4321 et seq; 40 C.F.R. §1500.1(a). NEPA's sweeping commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989) (citing 42 U.S.C. § 4321).

NEPA "declares a broad national commitment to protecting and promoting environmental quality." Robertson v. Methow Valley Citizens, 490 U.S. 332, 348 (1989); see 42 U.S.C. § 4331. "To insure this commitment is infused into the ongoing programs and actions of the Federal Government, the act also establishes some important 'action-forcing' procedures." Robertson, 490 U.S. at 348 (citing 115 Cong. Rec. 40416 (remarks of Sen. Jackson)). NEPA directs that all federal agencies must prepare an Environmental Impact Statement ("EIS") whenever they propose "major federal actions significantly affecting the quality of the environment." 42 U.S.C. § 4332(C); Robertson, 490 U.S. at 348.

The Ninth Circuit has established a relatively low threshold for preparation of an EIS. "An EIS must be prepared if substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor. Thus, to prevail on a claim that the [agency] violated its statutory duty to prepare an EIS, a plaintiff need not show that significant effects will in fact occur. It is enough for the plaintiff to raise substantial questions whether a project may have a significant effect on the environment." Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9th Cir. 1998)(internal quotations omitted).

NEPA's disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) "to insure that the public has sufficient information to challenge the agency." Robertson, 490 U.S. at 349; Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998). By focusing the agency's attention on the environmental consequences of its proposed action, NEPA "ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast." Robertson, 490 U.S. at 349.

NEPA's action-forcing procedures require federal agencies to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decision making process." Baltimore Gas and Electric Company v. NRDC, 462 U.S. 87, 97 (1983). "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1237 (10th Cir. 2002)(citing 40 C.F.R. § 1500.1(b) and Robertson, 490 U.S. at 349). A central purpose of NEPA is to ensure that an agency "will not act on incomplete information, only to regret its decision after it is too late to correct." Marsh, 490 U.S. at 374; Friends of the Clearwater v. Dombeck, 222 F. 3d 552, 557-558 (9th Cir. 2000).

1. Environmental Assessments and Environmental Impact Statements.

"A threshold question in a NEPA case is whether a proposed project will 'significantly affect' the environment, thereby triggering the requirement for an EIS." Blue Mountains Biodiversity Project, 161 F.3d at 1212 (citing 42 U.S.C. § 4332(C)). "As a preliminary step, an agency may prepare an EA to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS." Id. (citing 40 C.F.R. § 1508.9). "The purpose of an EA is to provide the agency with sufficient evidence and analysis for determining

whether to prepare an EIS or to issue a [Finding of No Significant Impact]." Metcalf v. Daley, 214 F.3d 1135, 1143 (9th Cir. 2000) (citing 40 C.F.R. § 1508.9). "Because the very important decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making process." Id.; see also 40 C.F.R. § 1500.1(b); Idaho Sporting Congress, 137 F.3d at 1151.

NEPA's regulations lay out several factors an agency must consider in determining whether a federal action may have a significant impact, including unique characteristics of the geographic area, "the degree to which the effects on the quality of the human environmental are likely to be highly controversial," "the degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," whether the action may have significant cumulative impacts in conjunction with other federal and non-federal projects, and "the degree the which the action may adversely affect an endangered or threatened species or its critical habitat." 40 C.F.R. §§ 1508.27(b)(3), (b)(4), (b)(5), (b)(7), (b)(9). The presence of any of these factors signals the possibility of significant effects and requires the preparation of an EIS. Anderson v. Evans, 314 F.3d 1006, 1021 (9th Cir. 2002) (holding that the presence of one NEPA significance factor required the preparation of an EIS). "If [the agency's] action is environmentally 'significant' according to *any* of these criteria, then [the agency] erred in failing to prepare an EIS." Public Citizen v. Department of Transportation, 316 F.3d 1002, 1023 (9th Cir. 2003) (emphasis in original) (citing National Parks and Conservation Assn. v. Babbit, 241 F.3d 722, 731 (9th Cir. 2001).

If the agency determines on the basis of the EA not to prepare an EIS, the agency must prepare a Finding of No Significant Impact ("FONSI") to set forth a "convincing statement of reasons" to explain why the action will not have a significant impact on the environment. Blue

Mountains Biodiversity Project, 161 F.3d at 1212; see also 40 C.F.R. § 1501.4(e); 40 C.F.R. § 1508.13. "The statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." Blue Mountains Biodiversity Project, 161 F.3d at 1212.

2. Categorical Exclusions.

NEPA regulations also recognize that certain types of actions will have no significant environmental impact, and therefore not require either an EA or EIS. Agencies are directed to identify and designate as categorical exclusions those categories of actions "which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency . . ." 40 C.F.R. § 1508.4; see also 40 C.F.R. § 1500.4(p).

In designating these CE categories, the Forest Service is required to provide for "extraordinary circumstances" and to consider whether an individual project has significant environmental effects and therefore requires an EA or EIS. 40 C.F.R. §§ 1507.3(b)(2)(ii); 40 C.F.R § 1508.4. "A proposed action may be categorically excluded from further analysis and documentation in an environmental impact statement (EIS) or environmental assessment (EA) only if there are no extraordinary circumstances related to the proposed action." Forest Service Handbook ("FSH") 1909.15, 30.3(1)(emphasis added). Extraordinary circumstances are defined as "conditions associated with a normally excluded action that are identified during scoping as potentially having effects which may significantly affect the environment." FSH 1905.15, 30.5 (emphasis added).

The presence of critical habitat for a threatened or endangered species is one of the enumerated resource condition that signal extraordinary circumstances. FSH 1909.15, 30.3(1).

However, the list in the FSH of resource conditions that signal extraordinary circumstances is not exhaustive and the Responsible Official has the responsibility to identify any factor that could bar exclusion from NEPA documentation. 67 Fed. Reg. 54622, 54625 (2002).

In the summer of 2003, the Forest Service adopted new CE designations to cover a host of projects. These new CE categories have been highly controversial, particularly the CE category involved here which provides for "[s]alvage of dead and/or dying trees not to exceed 250 acres requiring no more than one-half mile temporary road construction." FSH 1909.15, 31.2, Category 13.[2]

Administrative Procedure Act

The Administrative Procedure Act ("APA") confers a right of judicial review on any person that is adversely affected by agency action. 5 U.S.C. §702. Upon review, the court shall "hold unlawful and set aside agency actions...found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." 5 U.S.C. § 706(2).

IV. FACTUAL BACKGROUND.

The Black Crater logging project is located on the Sisters Ranger District of the Deschutes National Forest in Deschutes County, Oregon. On February 8, 2007, Sisters District Ranger William Anthony of the Deschutes National Forest signed the Decision Memo that authorized logging of approximately 2.25 million board feet of timber from approximately 201 acres of the Black Crater Fire area, and construction of .25 miles of temporary roads within the Trout Creek watershed. Plaintiffs' Exhibit 4, Final Decision Memo for the Black Crater Fire Timber Salvage Project. Within the logging units, all but 6 dead trees ("snags") per acre will be removed. Id. The Final Decision Memo ("DM") states that the purposes of the Black Crater logging project are to salvage fire killed timber that has economic value, reforest desired tree species where

natural seed sources are lacking, and to improve safely along haul routes. Id. at 1-2.

The Black Crater logging project area is situated at the far eastern edge of the range of the northern spotted owl. The entire area is a designated Late-Successional Reserve because "[p]rotection of the northern spotted owl in this fringe habitat is especially important for the viability of the species." Plaintiffs' Exhibit 5, Whychus Late Successional Reserve Assessment, II-4. The entire area is also a Critical Habitat Unit ("CHU OR-5") for the spotted owl and was designated "to provide and maintain essential nesting, roosting, and foraging habitat situated along the eastern crest of the Cascades, and to help maintain the north-south dispersal habitat along the eastern slope of the Cascades Mountains." Id. at II-41.

The majority of known spotted owl activity centers on the Deschutes National Forest are located on the Sisters Ranger District. Exhibit 5 at II-40. There are twenty-one known owl pairs/resident singles on the District. Id. Twenty of the home ranges associated with these spotted owls currently contain less than 40% suitable habitat (40% suitable habitat within a 1.2-mile home range radius represents a habitat threshold for the species). Id.

The DM states, "areas that experienced stand replacement fire no longer function as critical habitat, therefore fire killed trees can be removed." Exhibit 4 at 21. The DM also states, "[w]hile there is evidence that spotted owls are able to withstand the short-term effects of fire occurring at low to moderate severities (0-70% canopy kill) without displacement, those in high severity (71-100% canopy kill) were displaced to the nearest available habitat, if they survived the fire (Bond et al. 2002)." Id. at 20. Scientific data, however, including the 2002 Bond study referenced by the Forest Service, shows that spotted owls frequently utilize burned forests, including high severity burn areas, for roosting, foraging, and dispersal. Plaintiffs' Exhibit 6, Bond, M.L. et al., *Short-term effects of wildfires on spotted owl survival, site fidelity, mate*

fidelity, and reproductive success (2002); Declaration of Monica Bond at 2-3.

The Black Crater logging project will remove the primary constituent elements of spotted owl critical habitat, including old-growth snags, from CHU OR-5 and the Cache-Trout LSR. The Black Crater logging project authorizes removal of all but six snags larger than 12 inches DBH per acre in logging units. Exhibit 4 at 22. Of these six snags, three will be larger than 20 inches diameter at breast height ("DBH") and three will be smaller than 20 inches DBH. Id. The size of snags to be removed ranges from 12 inches DBH to more than 40 inches DBH. Id. at 4. Snags less than 12 inches DBH will not be logged because they have little economic value. Id. at 22. Despite the fact that the Forest Service plans to log spotted owl critical habitat within a LSR, Black Crater logging project was planned and approved without even a basic environmental assessment.

V. STANDARD FOR ISSUANCE OF A TEMPORARY RESTRAINING ORDER OR PRELIMINARY INJUNCTION

Plaintiffs are entitled to a temporary restraining order and preliminary injunction if they demonstrate either: (1) a likelihood of success on the merits and a possibility of irreparable injury; or (2) the existence of serious questions on the merits and a balance of hardships tipping in their favor. National Wildlife Federation v. Burlington N.R.R., 23 F.3d 1508, 1510 (9th Cir. 1994); Fund for Animals v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992). The two tests represent "two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." United States v. Nutri-Ecology, Inc., 982 F.2d 394, 397 (9th Cir. 1992) (quoting Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374, 1376 (9th Cir. 1985)).

The traditional test for injunctive relief has been modified in environmental cases. Environmental suits involve the public interest, and therefore, "where the balance of hardships

tips decidedly toward the plaintiff, the district court need not require a robust showing of likelihood of success on the merits, and may grant preliminary injunctive relief if the plaintiff's moving papers raise 'serious questions' on the merits." Caribbean Marine Services v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988) (citing Los Angeles Memorial Col. v. Nat'l Football League, 634 F.2d 1197, 1203, n. 9 (9th Cir. 1980)); Fund for Animals, 962 F.2d at 1400.

The nature of public resources involved in an environmental suit also lessens plaintiffs' burden of showing irreparable harm. "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987).

"Serious questions" are those "questions which cannot be resolved one way or the other at the hearing on the injunction . . ." Republic of the Phillipines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988). Serious questions are "substantial, difficult, doubtful" enough to require more considered investigation. Id. Such questions need not show a certainty of success, nor even demonstrate a probability of success, but rather "must involve a 'fair chance of success on the merit.'" Id. (quoting National Wildlife Federation v. Coston, 773 F.2d 1513, 1517 (9th Cir. 1985)).

VI. PLAINTIFFS HAVE RAISED SERIOUS QUESTIONS AND WILL PREVAIL ON THE MERITS.

A. The Black Crater logging project Violates the National Forest Management Act ("NFMA")

1. Snag removal from the Cache-Trout LSR violates NFMA.

LSRs are designed to "protect and enhance conditions of late-successional and old-

growth forest ecosystems, which serve as habitat for late-successional and old-growth forest related species." Exhibit 1 at A-4. One of the "[d]esired characteristics" of late-successional habitat is "moderate-to-high accumulations of large logs and snags." Id. at B-5. "[O]ne of the primary objectives of LSRs is 'the development of old-growth forest characteristics including snags.'" Oregon Natural Resources Council Fund v. Brong, 2004 WL 2554575 (D.Or. 2004). (quoting Exhibit 1, B-5). Consequently, when the Forest Service proposes to post-fire log in an LSR, the NFP requires the Forest Service to "focus on retaining snags that are likely to persist until late-successional forest conditions have developed and the new stand is again producing large snags." Exhibit 1, at C-14.

In Oregon Natural Resources Council Fund, the court held that the NFP "affirmatively require[s]" retention of the snags that are likely to persist until the next forest develops. Oregon Natural Resources Council Fund, 2004 WL 2554575. In that case, a challenge was brought against the Bureau of Land Management's (BLM) proposal to salvage log in a LSR, leaving between 8 and 12 snags per acre. Id. After briefing on the merits, the court issued a permanent injunction:

> Defendants' arguments that the harvest prescriptions for the two timber sales will result in retaining some snags in all size classes across the landscape, and that this is sufficient to meet the requirements of the NFP and RMP is misplaced. Defendants fail to provide any citation to the NFP or RMP to support their assertion that retention of "some snags" in sufficient, particularly given the fact that both documents affirmatively require the BLM to retain the snags that will persist until the next forest develops.

Id.

The Forest Service here has concluded that it needs to retain no more than 6 snags per acre: three snags greater than 20 inches DBH and three snags between 12 and 20 inches DBH. Exhibit 4 at 22. The NFP requires more; at a minimum it requires the Forest Service to make some

rationally based determination of which snags are most likely to persist and to focus on retaining those snags. In this case, the Forest Service has failed to make any such determination or offer any scientific explanation why the 12-20 inch snags it plans to retain as wildlife trees are more likely to persist than the 40+ inch snags it plans to cut and remove.

Because the Forest Service has failed to demonstrate that logging within the Black Crater project area qualifies for a special exception to the broad prohibition on logging dead trees available for wildlife in LSRs, the logging project violates the NFP. Therefore, this court should declare the Black Crater logging project unlawful and set aside the Forest Service's decision to implement the sale as agency action that is "arbitrary, capricious and not otherwise in accordance with law." 5 U.S.C. § 706(2)(A).

2. Logging in LSRs for narrow short-term economic purposes violates the NFMA.

The NFP requires the Forest Service to manage LSRs to "protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species." Exhibit 1 at C-12. Because of the LSR objectives, "[n]o programmed timber harvest is allowed inside the [LSRs.]" Exhibit 2 at 8. After a large-scale disturbance, the NFP permits some "salvage" logging in LSRs. Exhibit 1 at C-13–C-16. However, salvage in LSRs "will not be driven by economic or timber sale program factors." Exhibit 3 at F-21. Instead, "planning for salvage [in LSRs] should focus on long-range objectives, which are based on desired future conditions of the forest." Exhibit 1 at C-14. "Salvage operations should not diminish habitat suitability now or in the future." Id. at C-13.

The Forest Service's stated purpose for logging 194 acres of LRSs in the Black Crater logging project area is to recover the economic value of logs. Exhibit 4 at 2. For the remaining 7 acres, the only purpose for post-fire logging in LSRs is to improve safety along haul routes to

facilitate logging. Id. The remaining purpose for the Black Crater logging project - to reforest desired tree species where natural seed sources are lacking - is not related to, or dependant upon, post-fire logging. Nothing in the DM for the Black Crater logging project establishes or even suggests that post-fire logging is a necessary precursor to planting seedlings. As Dr. Jerry Franklin, co-author of the Northwest Forest Plan, describes, "[t]here is no scientific or operational linkage between reforestation and post-fire logging… Salvage and reforestation are often presented as though they are interdependent activities, which they are not from either a scientific or operational perspective. From a scientific perspective, policy and practice should consider each activity separately." Plaintiffs' Exhibit 9, Franklin, J.F. et al., *Ecological Science Relevant to Management Policies for Fire-prone Forests of the Western United States* (2006), 10. Moreover, the DM for the Black Crater logging project clearly states that "natural regeneration is the preferred method to restock stands" and that planting will be authorized only if "natural regeneration is deemed to be inadequate." Exhibit 4 at 4; see also Plaintiffs Exhibit 11, Shatford, J.P.A. et al., *Conifer Regeneration after Forest Fire in the Klamath-Siskiyous: How Much, How Soon?* (2007).

Post-fire logging within LSRs authorized in the Black Crater logging project has been justified by the economic value of logs. The Forest Service ignored the full range of goods and services that come from this forest in the short term and long term and instead focused solely on the value of these trees as wood fiber. The proposal does not "focus on long-range objectives" and it will "diminish habitat suitability now or in the future" because it involves the removal of the very resources that numerous species of wildlife, including owls, rely upon – those being the large dead trees that are likely to persist until the next forest develops. Exhibit 1 at C-13, C-14. The sale does not comply with the NFP. The decision to implement the sale is "arbitrary,

capricious and not otherwise in accordance with NFMA." 5 U.S.C. § 706(2)(A).

B. The Black Crater logging project Violates the National Environmental Policy Act ("NEPA")

1. The Forest Service's failure to disclose and analyze the impacts of the Black Crater logging project and prepare an EA violates NEPA.

"A proposed action may be categorically excluded from further analysis and documentation in an environmental impact statement (EIS) or environmental assessment (EA) only if there are no extraordinary circumstances related to the proposed action." FSH 1909.15, 30.3(1)(emphasis added). A proposed action may not be categorically excluded if it "may individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4(emphasis added). The Forest Service must consider the effect of the project "when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. § 1508.7.

The Forest Service has violated NEPA by authorizing the Black Crater logging project using a CE despite the presence of extraordinary circumstances and significance factors. "All that plaintiffs must show to be successful on their NEPA claim is that there is substantial evidence in the record that the exceptions to the categorical exclusion may apply." Forest Service Employees for Environmental Ethics, 2005 WL 1514071; See also California v. Norton, 311 F.3d 1162, 1177 (9th Cir. 2002)("there is substantial evidence in the record that exceptions to the categorical exclusion *may* apply, and the fact that the exceptions may apply is all that is required to prohibit use of the categorical exclusion. 49 Fed. Reg. at 21439.")

"An agency cannot avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. The Steamboaters v. FERC, 759 F.2d 1382, 1393 (9th Cir. 1985); see also, Jones v. Gordon, 792 F.2d

821 (9th Cir. 1986)(CE inappropriate where any exception to CE present; EA necessary for project that arguably raised a public controversy over potential environmental impacts, environmental impacts were uncertain, and unique or unknown risks were present). Here, the Forest Service has merely asserted that the Black Crater logging project will not have a significant effect on the environment, without disclosing or substantiating its assertions. In so doing, the Forest Service has turned a blind eye to numerous extraordinary circumstances and factors that indicate the potential for significant impacts to occur in the Black Crater logging project area.

a. Critical Habitat for the Northern Spotted Owl.

The presence of designated critical habitat for a threatened or endangered species is both an extraordinary circumstance under the FSH and a significance factor under the NEPA regulations. FSH 1909.15, 30.3(2)(a); 40 C.F.R. § 1508.27(b)(9). Every logging unit in the Black Crater logging project is within designated critical habitat for the northern spotted owl, a species listed as threatened under the Endangered Species Act.

The Forest Service asserts that the presence of critical habitat in the Black Crater logging project area is not an extraordinary circumstance because "areas that experienced stand replacement fire no longer function as [spotted owl] critical habitat, therefore fire killed trees can be removed." Exhibit 4 at 21. However, there is substantial evidence in the record, including the Bond study, the Timbered Rock study, and the Jenness study, that shows that areas that experience stand replacement fire do in fact function as spotted owl habitat. Exhibit 6; Exhibit 7; Exhibit 8; Declaration of Monica Bond. The Bond study found that "[r]elatively large wildfires that burned nest and roost areas appeared to have little short-term effect on survival, site fidelity, mate fidelity, and reproductive success of spotted owls, as rates were similar to estimates

independent of fire." Exhibit 6 at 5; Declaration of Monica Bond. The Timbered Rock study found that, "[t]he spotted owls we monitored appear to be using a variety of habitat types within the Timbered Rock Fire, including areas which had experienced moderate and high severity wildfire." Exhibit 7 at 13. The Jenness Study found that "[o]wls were present and reproducing at several sites that experienced severe fires." Exhibit 8 at 5 (marked as 769).

In Forest Service Employees for Environmental Ethics, 2005 WL 1514071, the District Court for the Northern District of California addressed the exact same issue presented in this case. In that case, plaintiffs challenged a post-fire salvage logging project in spotted owl critical habitat that was categorically excluded by the Forest Service from documentation in an EA or EIS. Id. The Forest Service claimed that, despite the presence of critical habitat, no extraordinary circumstances existed because the fire had made the forest unsuitable as spotted owl habitat. Id. The court enjoined the timber sale, holding that the Timbered Rock study was "evidence in the record that exceptions to the categorical exemption may apply, which is all that is required to prevent the use of the categorical exemption." Id.

Like in Forest Service Employees for Environmental Ethics, there is substantial evidence on the record for the Black Crater logging project that extraordinary circumstances exist. Plaintiffs referenced and submitted to the Forest Service copies of the same Timbered Rock study that was submitted to the Forest Service in Forest Service Employees for Environmental Ethics. Two additional studies, the Bond study and the Jenness study, were also submitted to the record of the Black Crater logging project. All of these studies show that burned forests, including severely burned forests, function as spotted owl habitat. The Forest Service has ignored the presence of documented extraordinary circumstance, despite the substantial evidence that is before the agency.

The Forest Service has also failed to consider that the snags and down wood, which will be removed by the Black Crater logging project across 201 acres, are "primary constituent elements" of spotted owl critical habitat and "physical and biological attributes that are essential to a species conservation." 57 Fed. Reg. 1796, 1797, 1798 (Jan. 15, 1992). The DM for the Black Crater logging project does not contain any analysis of snag removal and its impacts on the spotted owls that reside near the Black Crater logging project area. An agency decision may be set aside as arbitrary and capricious where the agency "entirely failed to consider an important aspect of the problem." Motor Vehicles Mfrs. Ass'n. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 42 (1983). Here, the Forest Service "entirely failed to consider" that spotted owls may be utilizing the forests in the Black Crater logging project area or the fact that the proposed action will remove the primary constituent elements of spotted owl suitable habitat.

b. Cumulative Impacts.

The Forest Service failed to consider the impact of the Black Crater logging project "when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. Under the NEPA regulations, to determine if a proposed action will have a significant impact, the Forest Service must consider "whether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). Specifically, the Forest Service has failed to analyze the cumulative impacts of (1) past logging activities on federal land within the Black Crater logging project area, (2) past logging activities on private lands adjacent to the Black Crater logging project area and directly bordering half of the proposed logging units, and (3) concurrent post-fire salvage logging that is taking place on federal land within the Black Crater logging project area.

Past logging on federal lands within the Black Crater logging project area has been severe. Declaration of Josh Laughlin at 3. Many of the proposed units, including units 1, 2, and 6, are on the only land in the area that has not been heavily degraded by past logging. Id. The Black Crater logging project would turn what is already a fragmented landscape into a large continuous clearcut. Id. Past logging on private land within the Black Crater logging project area has also been severe and extensive. Id. Directly adjacent to the Black Crater logging project area, and bordering units 1, 3, 7, and 8, is a block of private land that is several square miles and that has been recently and heavily logged. Id. The DM for the Black Crater logging project does not contain any analysis of cumulative impacts from the past logging on federal or private land, thereby rendering the Forest Service's decision that this project fits within a CE category arbitrary, capricious, and an abuse of discretion.

c. Connected Actions.

Moreover, the Forest Service has proposed another logging project in the wake of the Black Crater Fire. On December 8, 2006, the Sisters District Ranger signed a Final Decision Memo for the Black Crater Roadside Danger Tree Removal Project ("Roadside Project,") a second post-fire logging project within the perimeter of the Black Crater Fire. Plaintiffs' Exhibit 10, Final Decision Memo for the Black Crater Fire Roadside Danger Tree Removal. The Final Decision Memo for the Roadside Project authorizes logging of 150 thousand board feet of timber along 8.9 miles of roads within in and around the project area for the Black Crater logging project. Exhibit 10 at 2. The Black Crater logging project and the Roadside Project both share the same purposes: (1) recover economic value of fire-killed timber and (2) improve safety along roads. Exhibit 4 at 2; Exhibit 10 at 1.

Despite sharing the same purposes and immediate geographic area, the two projects were planned separately and without reference to the other. Each project was approved under a separate Categorical Exclusion, and there was no analysis of the cumulative impacts of the two projects in either project record.

The NEPA regulations state explicitly that "[s]ignificance cannot be avoided by terming an action temporary or by breaking it down into small component parts." 40 C.F.R. § 1508.27(b)(7)(emphasis added). "Connected actions" or "cumulative actions" must be analyzed in a single NEPA document. 40 C.F.R. § 1508.25(a) "A single NEPA review document is required for distinct projects when there is a single proposal governing the projects, see Kleppe, 427 U.S. at 399, 96 S.Ct. 2718, or when the projects are 'connected,' 'cumulative,' or 'similar' actions under the regulations implementing NEPA." Native Ecosystems Counsel v. Dombeck, 304 F.3d 886, 893-94 (9th Cir. 2002). Although federal agencies are given considerable discretion to define the scope of NEPA review, connected, cumulative, and similar actions must be considered together to prevent an agency from "dividing a project into multiple 'actions,' each of which individually has an insignificant environmental impact, but which collectively have a substantial impact." Id. at 894 (quoting Thomas v. Peterson, 753 F.2d 754, 758 (9th Cir.1985)). The Ninth Circuit has required the Forest Service to prepare a single EIS for multiple timber sales when they (1) formed part of a single timber salvage project, (2) were announced simultaneously, (3) were reasonably foreseeable, and (4) were located in the same watershed. Blue Mountains Biodiversity Project, 161 F.3d at 1214-15.

The Black Crater logging project and the Roadside Project are in the same immediate geographic area and watershed; the logging authorized by the Roadside Project is between and around the timber sale units of the Black Crater logging project. The projects were both panned

in the wake of the Black Crater Fire, and the only two "Purposes and Needs" for the Roadside Project are also "Purposes and Needs" for the Black Crater logging project.

The Forest Service would not have had the option of approving the two post-fire logging projects with a CE if they had been organized as a single project; combined they do not fit within any defined CE category. The Forest Service cannot avoid documenting its actions in an EA simply by splitting a single project into two smaller ones. The DM for the Black Crater logging project does not even acknowledge that there is another logging project simultaneously occurring in project area. The Forest Service's failure to disclose this connected action and consider the potentially significant cumulative impacts of the two projects in a single NEPA document renders the Forest Service's decision that this project fits within a CE category arbitrary, capricious, and an abuse of discretion.

d. Controversy and Uncertainty.

Other significance factors include "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial" and "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks," 40 C.F.R. § 1508.27(b)(4), (b)(5). The Forest Service has failed to analyze or disclose the controversy, uncertainty, and unique and unknown risks surrounding post-fire logging in the Black Crater Fire area.

In Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986) the court held that a federal agency improperly relied on a categorical exclusion where the record showed "the arguable existence of public controversy based on potential environmental consequences." Here, the record shows much more than an "arguable existence" of public controversy. Plaintiffs have documented and submitted to the Forest Service scientific studies that contradict and undercut the Forest

Service's conclusions, news articles reporting "an extraordinary ruckus in the Northwest" in reference to the debate over the ecological effects of post-fire logging, and other reports showcasing that post-fire logging is "one of the most contentious natural resources issues in the US today." Plaintiffs' Exhibit 13, Noss, R.F. et al., *Managing Fire-Prone Forests in the Western United States* (2006).

The Forest Service's attempt to ignore and minimize the significant environmental effects raised by this project, particularly because it is in an LSR, and to proceed to move it through under a categorical exclusion in the face of extraordinary circumstances is not in accordance with law, is arbitrary and capricious, and a clear error of judgment.

2. The Forest Service's failure to ensure the scientific integrity of the Black Crater logging project Decision Memo violates NEPA.

The Forest Service is required to ensure the scientific integrity of its environmental analysis. 40 C.F.R. § 1502.24. The Forest Service is also required to disclose reliable scientific evidence that contradicts the agency's analysis. Center For Biological Diversity v. United States Forest Service, 349 F.3d 1157 (9th Cir. 2003); 40 C.F.R. §§ 1502.9(b), 1502.16(a), 1502.16(b), 1508.27(b)(4), 1508.27(b)(5). "Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b) "Although the Court must defer to an agency's expertise, it must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts." Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 685 (D. D.C. 1997) (citing Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 483 (W.D. Wash. 1988)).

In the DM for the Black Crater logging project, the Forest Service asserts that "areas that experienced stand replacement fire no longer function as [spotted owl] critical habitat, therefore fire killed trees can be removed." Exhibit 4 at 21. The scientific study the Forest Service relies upon to support this claim is Bond, M.L., et al., *Short-Term Effects of Wildfires on Spotted Owl*

Survival, Site Fidelity, Mate Fidelity, and Reproductive Success (2002)("Bond study")(Exhibit 6). Specifically, the Forest Service claims that "[w]hile there is evidence that spotted owls are able to withstand the short-term effects of fire occurring at low to moderate severities (0-70% canopy kill) without displacement, those in high severity (71-100% canopy kill) were displaced to the nearest available habitat, if they survived the fire (Bond et al. 2002)." Exhibit 4 at 20. The Forest Service relies upon and cites to the Bond study for a conclusion that is almost entirely inconsistent with the key findings of the Bond study. Declaration of Monica Bond at 2-3.

The Bond study was a collection of data from more than 2,000 spotted owls, more than 300 owl territories, and 7 wildfires. Exhibit 6 at 4; Declaration of Monica Bond at 2-3. The data represented 38 observation years. Id. In the areas studied, fires occurred in 11 spotted owl territories, affecting 21 owls (10 pairs and 1 single owl.) Id. The Bond study found that 18 (86%) of the 21 spotted owls affected by fires were sighted again at least one year after the fires. Id. at 5. Half of the sites studied by Bond et al experienced high severity fires. Id. at 4-5. "In 2 of 3 cases where more than 50% of the territory was burned by high severity fire, we found that both members of the owl pairs returned the following year." Declaration of Monica Bond at 3. According to the study, "[r]elatively large wildfires that burned nest and roost areas appeared to have little short-term effect on survival, site fidelity, mate fidelity, and reproductive success of spotted owls, as rates were similar to estimates independent of fire." Exhibit 6 at 5.

The Bond study demonstrates that spotted owls do utilize burned forests, including severely burned forests. Id. Other studies on the record for the Black Crater logging project support the same conclusion. Plaintiffs' Exhibit 7, Andrews, S. and Anthony, R.G., *Winter Habitat Use by Spotted Owls on Bureau of Land Management within the Boundaries of the Timbered Rock Fire* (2004)("Timbered Rock study"); Plaintiffs' Exhibit 8, Jenness, J.S., et al.

Associations between Forest Fire and Mexican Spotted Owls (2004)("Jenness study").

Significantly, the misrepresentation of the Bond study's findings is where the Forest Service finds its support for the assertion that there are no extraordinary circumstances, i.e., spotted owl critical habitat, in the project area. The failure of the Forest Service to ensure the scientific integrity of its analysis, particularly with regard to such a central issue, is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

VII. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE INJURY IN THE ABSENCE OF A TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION.

Irreparable injury to Plaintiffs is imminent, as the timber sale auction for the Black Crater logging project is scheduled for July 3, 2007 and ground-disturbing activities could begin shortly thereafter. "Courts in this circuit have recognized that timber cutting causes irreparable damage and have enjoined cutting when it occurs without proper observance of NEPA procedures and other environmental laws." Portland Audubon Society v. Lujan, 795 F. Supp. 1489, 1509 (D. Or. 1992); aff'd, Portland Audubon Society v. Babbitt, 998 F.2d 705 (9th Cir. 1993); see also Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1057 (9th Cir. 1994) ("timber sales constitute per se irreversible and irretrievable commitments of resources" under ESA); Amoco Production Co., 480 U.S. at 545 (holding that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable."). "Irreparable damage is presumed to flow from a failure to properly evaluate the environmental impacts of a major federal action." Thomas v. Peterson, 753 F. 2d 754, 764 (9th Cir 1985).

Since the Black Crater Fire burned, many of Plaintiffs' members and staff have taken advantage of the unique wildlife viewing opportunities in the Black Crater logging project area.

Declaration of Marilyn Miller at 2-4; Declaration of Craig Miller at 2; Declaration of Josh Laughlin at 2-3. "The Black Crater Project area is an incredible place to view birds and wildlife." Declaration of Marilyn Miller at 2. Plaintiffs' organizations have led group bird watching tours and field outings to the Black Crater fire area, and have enjoyed witnessing new life and vibrancy spring out of the burned forest. Id. Logging this unique habitat type, particularly in summer months when birds are nesting (in the ground in some cases), would do serious and irreversible damage to the landscape, the birds and wildlife in the area, and the people who, like plaintiffs' members, derive great enjoyment from witnessing the forest, birds, and wildlife in their natural states. Id.

The only harm resulting from a temporary injunction of the auction and award of the Black Crater logging project is the potential for economic injury to the prospective timber company. As of this filing, the plaintiffs are not aware that the timber sale contract has been auctioned or awarded. See Wilderness Society v. Tyrrel, 701 F. Supp. 1473 (E.D. Cal. 1988), rev'd in part on other grounds, 918 F.2d 813 (9th Cir. 1990) ("because this order comes before a contract has actually been awarded, intervenors' claims are only an expectation, rather than a property right, and such inchoate claims appear less compelling. Clearly, the Government's economic loss cannot be considered compelling if it is to be gained in contravention of federal law"). In any event, the "mightiest economy on earth" can certainly afford a temporary stay from proceeding with one timber sale, on public lands, while the Forest Service ensures that it has properly analyzed and disclosed the environmental impacts. See Seattle Audubon Society v. Evans, 771 F.Supp. 1081, 1096 (W.D. Wash. 1991), aff'd 952 F.2d 297 (9th Cir. 1991).

VIII. NO BOND SHOULD BE REQUIRED IN THIS CASE.

It is well established that in public interest environmental cases the plaintiffs need not

post bonds because of the potential chilling effect on litigation to protect the environment and the public interest. Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond. See, e.g., People ex rel. Van de Kamp v. Tahoe Regional Plan, 766 F.2d 1319 (9th Cir. 1985) (no bond); Wilderness Society v. Tyrel, 701 F. Supp. 1473 (E.D. Cal. 1988), rev'd on other grounds, 918 F.2d 813 (9th Cir. 1990) ($100); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972) (no bond); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971) ($100); and Sierra Club v. Block, 614 F. Supp. 488 (D.D.C. 1985) ($20).

IX. CONCLUSION.

For the above stated reasons, Plaintiffs respectfully request a temporary restraining order and preliminary injunction enjoining Defendants from auctioning or awarding the Black Crater logging project and enjoining Defendants from authorizing any logging operations in the project area pursuant to the DM, until the Court can address the merits of Plaintiff's claims in this lawsuit.

Respectfully submitted this 27th day of June, 2007.

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