

Docket No. 19-35665

**UNITED STATES COURT OF APPEALS FOR THE NINTH
CIRCUIT**

BARK, CASCADIA WILDLANDS, OREGON WILD
Plaintiffs-Appellants

v.

U.S. FOREST SERVICE, a federal agency,
Defendant-Appellee

and

HIGH CASCADE, U.S., INC.,
Defendant-Intervenor-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF OREGON

No. 18-cv-01645-MO, Honorable Michael Mosman

REPLY BRIEF OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, Plaintiffs-Appellants state that they have no parent corporations and do not issue shares of stock, and accordingly no publicly held corporation owns 10% or more of its stock.

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GLOSSARY OF ACRONYMS

APA	Administrative Procedure Act
BLM	Bureau of Land Management
BMP	Best Management Practice
CH	Critical Habitat
DN	Decision Notice
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
FWS	U.S. Fish & Wildlife Service
Forest Plan	Land and Resource Management Plan
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
NSO	Northern Spotted Owl

I. INTRODUCTION

The instant case poses a challenge for the reviewing Court as the narratives offered by the parties contrast dramatically. Appellees, Forest Service & Intervenor High Cascades, present a well-considered restoration-driven action to save forests from fire and protect threatened owls, suggesting any adverse impacts are minimal in reference to the scale of the much larger Crystal Clear Restoration (CCR) project and Mt. Hood National Forest as a whole. Appellants, Bark, Cascadia Wildlands and Oregon Wild, present a volume-driven timber sale masquerading as restoration, in which factual inaccuracy and various legal violations shed light on an overall lack of integrity from the federal government in its management of the public's land.

How can the Court know which narrative is accurate? In this case, it requires a deep dive into the record to determine which story best matches the facts and science. Even as excerpted, the record is voluminous, but the following brief provides cites and guidance to relevant information illuminating the disconnect between the agency's general conclusions and actual details.

To introduce the overall pattern, consider one specific assertion: that commercial logging in the Late Successional Reserves (LSRs) complies with the

White River LSR Assessment ("WRLA").¹ In short: this assertion is unambiguously false; showing why provides a useful key to understanding the rest of the case.

The WRLA, despite being over 20 years old, shows what meaningful environmental analysis looks like and how it can provide long-term guidance for restoring ecosystems. It is not long, yet it includes numerous useful charts, combined with non-repetitive text, outlining past and existing conditions, desired future conditions, and specific, tangible steps to get there. SER 28-174. In planning, it should have been simple for CCR to follow the guidance of the WRLA. This did not happen. The WRLA describes the steps necessary for planning implementation projects:

- "Validate desired stand structures at the stand, landscape unit, and adjacent landscape unit level.
- Update or validate ecological data with walk-through stand evaluation.
- Develop final site-specific desired conditions for each landscape element and reconcile at landscape level for connectivity, refugia, interior habitat.

¹ Intervenor repeatedly invokes compliance with the WRLA throughout its brief. See AFRC at 7, 13, 21, 39-40, 55 ("[T]he CCR Project was carefully designed to avoid impacts to the White River LSR ... [by being] consistent with the ... White River LSR Assessment.").

- Prepare prescriptions or projects which will move the area to the DFC's [desired future conditions] while maintaining as much late-successional habitat as will be stable for at least 20 years." SER140.

The WRLA then provides a detailed list of each landscape unit, which *"includes an estimate of the intermediate stand structures expected **after treatment**. These structures are defined on page II-4 indicating what the post treatment canopy closure, acceptable snag and downed wood levels, species composition of each layer, and size classes in each layer would be."* SER143, emphasis in original. Finally, it provides *"generalized guides"* for how to plan a specific project based on the above information, emphasizing that planning varies greatly depending on site-specific details. SER54-57.

This is what ecologically-based planning looks like. Following the WRLA in CCR would require site-specific information about stand-level ecological conditions and how best to improve them, which is exactly what Appellants provided in comments but FS failed to incorporate. Instead, it provided virtually identical unit prescriptions that violate the WRLA's requirements. It justified this approach by claiming that quantitative compliance with the minimum possible canopy coverage allowed by the WRLA sufficed. But a detailed read of the WRLA shows that CCR's minimum post-treatment canopy cover is *lower* than that

allowed by the WRLA, meaning almost all LSR units violate the WRLA requirements.

This example applies to many other claims in this case. While the FS confidently claims it follows the law, whether to analyze environmental impacts or to follow substantive requirements, a review of the **details** indicates that it has, instead, produced generic statements based on shallow or inconsistent data, to justify actions more suited to generating timber volume than ecological restoration.

Preliminary matters unaddressed by Appellees

Appellees' briefs don't acknowledge the agreement between MHNF and the Regional Office of the FS that MHNF would receive \$250,000 from the Timber Sale Pipeline Restoration (TSPR) Fund to plan CCR, commit to fast track the NEPA process, and produce 100,000 CCF of timber. ER957-58. FS brushes this aside by describing this agreement as "preliminary meeting notes" that "evolved," suggesting the FS "changed its mind entirely." Forest Service Reply ("FS") at 27, 28. While details of CCR changed slightly, there is no evidence the TSPR agreement was revoked. It remains a primary, unacknowledged, driver of the Project, with timelines and timber volume targets that guided the Forest Service's decisions and cannot be ignored simply because it does not match Appellees' narrative.

Similarly, neither brief addresses the fact that the designation of Critical Habitat for a threatened species changes the way land can be managed by making *habitat* protection the paramount management value. This applies to **all** federal lands, regardless of the underlying land designation. SER454. Land designated "Matrix" under the NWFP, but more recently deemed Critical Habitat, must be managed in a manner that makes ecological protection of late-successional characteristics the primary consideration for agency action. Under this framework, reducing canopy closure such that suitable spotted owl habitat no longer functions would require an exceptional justification not found in this record. By ignoring the factual and legal context of this project, Appellants' arguments that the court should defer to the agency's expertise ring hollow.

II. THE CRYSTAL CLEAR PROJECT VIOLATES NEPA

A. Failure to Prepare an EIS for CCR

If the agency decides not to prepare an Environmental Impact Statement ("EIS"), it must set forth a "convincing statement of reasons" explaining why the action will not significantly impact the environment. *Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). Despite the context of spotted owl critical habitat, and presence of several "intensity" factors, the CCR DN/FONSI does not supply a convincing statement of reasons as to why the

impacts of this project would not be significant, thereby requiring analysis in an EIS.

- i. Commercial logging of mature trees to purportedly reduce fire severity and benefit spotted owls is highly controversial and the desired outcome highly uncertain.

A proposal is highly controversial when there is “a substantial dispute [about] the size, nature, or effect of the major Federal action.” 40 C.F.R. § 1508.27(b)(4), *Nat’l Parks & Conservation Ass’n. v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001) (“*NPCA*”). During the administrative process, Appellants presented extensive evidence demonstrating that logging mature forests would reduce fire resiliency and harm owl habitat in contradiction of FS assumptions. Opening Brief (Op.Br.) at 21-23. When evidence of a scientific dispute about effects of a project is presented, NEPA places the burden on the agency to come forward with a “well-reasoned explanation” demonstrating why that evidence does “not suffice to create a public controversy based on potential environmental consequences.” *NPCA*, 241 F.3d at 736. In the instant case, the FS has no explanation, let alone a well-reasoned one, that counters the extensive record evidence contradicting the fundamental assumptions and overall purpose of CCR.

1. Evidence of scientific dispute about fire severity

Appellants repeatedly submitted research showing that CCR’s proposed logging of mature forests and extensive canopy cover removal would increase risk

factors associated with wildfire. Record evidence explains that logging mature trees, thereby reducing canopy cover, will **increase** surface fuels and surface fuel fire intensity and rate of spread. ER776-77. The Forest Service argued in response that logging of mature trees reduces the risk of crown fire spread, but in doing so, ignores its own evidence that the risk of active crown fire is minimal in the CCR project area. SER467-468. Modeling in the EA shows there is a **much** higher likelihood of surface or passive crown fire than active crown fire² in all forest types in all fuel moisture scenarios, with the likelihood of active crown fire at 0% in several scenarios. *Id.* This is echoed elsewhere in the record. *See* ER623 (“[a]ctive crown fire is such a rare event that it should not drive forest management objectives”), ER625. While removal of mature overstory trees helps meet timber targets, it is highly controversial and uncertain that it will decrease the severity of the most likely type of fires in CCR.

Despite Appellees’ claims to the contrary, there is no indication that the FS *ever* evaluated this research. Appellees’ briefs restate the FONSI’s unsupported assertion that FS conducted “a thorough review of relevant scientific information” without any cites to the record where such a review occurred, despite ample

² Surface fire describes fire that remains on the surface burning litter and surface fuels, unlike crown fire. Passive crown fire describes fire that is torching, meaning individual trees or small groups of trees burn along with surface fuels. Active crown fire describes a situation in which fire actively spreading through the canopy and along the surface. SER466-67.

requests to do so. *See* ER702-704. Intervenor points to anecdotal evidence of decreased flame lengths in a fire in the Billy Bob project, but Billy Bob has little in common with CCR as it was 500 acres of small diameter fuels reduction and under-burning in low elevation dry forest. Unlike CCR, the fuels treatments in Billy Bob was planned under the Healthy Forest Restoration Act (HFRA) which requires retention of all large trees, the opposite of the FS's approach here.³

Intervenor suggests FS explained the science upon which it relied to conclude opening the canopy reduces the potential for a severe fire (SER530) and that in moist-mixed conifer stands “there is a need to address firefighter safety concerns related to stand-replacing fire events” (SER594). These cites do not provide support. At SER530, the FS simply repeats its reliance on its own models but does not address any contrary research. SER594 repeats the EA: there is a “need to address firefighter safety” without explaining how this project would do so. Again, Appellees do not, and cannot, cite anywhere in the record where the FS addresses extensive scientific research that suggests this project is likely to increase risk of surface fire by logging mature and old growth overstory trees. Because the purpose of an EIS is to obviate the need for speculation about environmental impacts, preparation of an EIS is mandated where uncertainty may

³While this project-specific information is not in the record before this court, Appellant Bark worked with the Forest Service in collaboratively planning the Billy Bob fuels reduction project.

be resolved by analysis of competing scientific research or further collection of data. *See NPCA*, 241 F.3d at 734.

Finally, Intervenor appeals to the WRLA to demonstrate the consequences of its activities are “well-established.” Int. at 21. But the WRLA encourages management based on site-specific assessment of current and desired forest conditions: “[s]tand structure type is a poor predictor of existing fuel loading since each structure type covers a range of actual stand conditions.” SER159. This is nothing like the uniform approach FS takes here, in which reducing canopy closure is prescribed everywhere, even mature moist forest. Moreover, while the WRLA contemplates careful thinning to achieve long-term desired structure, and prescribed burning to manage fire risks, it does *not* include thinning as a way to reduce fire risk. SER154, 161-3. Thus, as the district court found, Appellants have raised questions of scientific controversy which the agency has not “convincingly refuted.” *Oregon. Wild v. BLM*, 2015 WL 1190131, *9 (D. Or. March 14, 2015).

2. Evidence of scientific uncertainty regarding long-term impacts to spotted owl critical habitat.

As highlighted in Appellants’ opening Brief, the record includes evidence that it is scientifically controversial to assert that reducing the overstory to an extent that the forest no longer provides suitable habitat will nonetheless benefit spotted owls. The FS suggests there is no scientific controversy concerning impacts to owls, FS at 36, without addressing the record evidence that, in the absence of a *high* risk of

imminent habitat loss, logging older trees in currently suitable habitat does not benefit threatened owls. See Op.Br. at 23-24.

The Forest Service's argument turns on two claims: 1) logging the overstory will reduce stand-replacing fires in the long-term, resulting in better habitat in the future; which 2) outweighs habitat loss from logging. These claims presume there *will* be an active crown fire in the project area which *will* destroy spotted owl habitat. It is difficult to predict when and where a fire severe enough to degrade more than 1,000 acres of suitable spotted owl habitat may occur. As noted above, there is an extremely low likelihood of active crown fire in CCR area. SER467-468. However, "[n]ot all stand-replacing fires are crown fires . . . underburning can also result in stand replacement by scorching, not burning, tree crowns and by killing the cambium near the tree bases or roots." SER159. As canopy reduction increases surface fuels, logging the overstory may *increase* risk of stand-replacing underburns. Thus, claiming long-term benefit based on the behavior of a possible future fire is uncertain at best, especially as research finds the adverse impacts to habitat from fuels reduction outweigh the uncertain benefits of reducing the risk of fire. ER759-73.

Intervenor tries to distinguish *Oregon Wild v BLM* by suggesting that CCR was not scientifically controversial "from its inception." The most cursory record review shows the same scientific controversy – whether harvesting mature forest in

critical habitat is "ecological restoration" – accompanied CCR every step of the way. 2015 WL 1190131, *1-2, 7-9. The distinction between logging prescriptions – “variable retention harvest” (VRH) and “variable density thinning” (VDT) – is not dispositive. While VRH results in less canopy cover than VDT, both projects degrade suitable spotted owl habitat. As the *Or. Wild* court explained, the controversy turned on the fact that the BLM proposed logging in mature forests within suitable NSO critical habitat, without record support that it was restorative and would benefit the owl in the long-term. *Id.* at *2, 7-9. The instant case is directly analogous. Further, while applying VRH to stands over 80 years of age was a shift in the BLM’s management practices which had focused on thinning younger stands since adoption of the NWFP, *Id.* at *2, 9, so too is CCR MHNH’s first large-scale logging project in mature and old growth forests in the same time frame. In *Or. Wild*, the court found that the record demonstrated evidence of a “substantial dispute” casting “serious doubt upon the reasonableness” of BLM’s decision to log stands over 80 years old, and that the agency did not meet its burden to convincingly refute evidence of controversy. *Or. Wild v. BLM*, *9, citing *NPCA*, 241 F.3d at 736. Precisely the same can be said of the FS for CCR.

Or. Wild is far more applicable to CCR than *Conservation Cong. v. USFS*, a hazardous fuels reduction case Intervenor cites. The Smokey Project was planned in forest severely departed from historic fire conditions (FRCC 3). 235 F.Supp.3d

1189, 1200 (E.D. Cal. 2017). This contrasts with the healthy late-successional forests at issue here, most of which are in FRCC 1 (least departed from natural range of variability). ER401. Unlike CCR, the Smokey Project was planned under the HFRA and did not remove large trees thus not downgrading suitable spotted owl habitat. *Id.* at 1208 (“No loss of NSO habitat is expected”). CCR proposes logging approximately 2,970 acres of mature forest 90-332 years old, claiming a restoration benefit. ER126-152, ER182-89. While Intervenor argues there is no basis in the record to distinguish between thinning in plantation stands versus non-plantation mature forest, Appellant’s comments detail this ecological difference concluding that thinning older forest has little to no restoration benefit. *See* ER606-608.

Appellees ask the court to find that, because the agency has the discretion to “rely on the reasonable opinions of its own qualified experts”, there is no evidence of scientific controversy and uncertainty in this case. FS at 30. In oral arguments, the district court clearly articulated that if this was the case, there would never be scientific controversy, rendering that part of the NEPA statute without effect. ER293-307 (transcript). This cannot be the Court’s interpretation, as it contradicts this court’s clear direction on scientific controversy. A substantial dispute exists “when evidence, raised prior to the preparation of an EIS or FONSI, casts serious doubt upon the reasonableness of an agency’s conclusions.” *NPCA*, 241 F.3d at 736. In the instant case, even the district court agreed that Appellants’ brought forth

such evidence. ER9. Thus, the burden is on the agency to “convincingly refute evidence of controversy,” which the FS did not do. *Or. Wild* 2015 WL 1190131, *9. Despite Appellants’ repeated requests for the FS to review and discuss this extensive body of contrary science, it consistently failed to do so, violating NEPA’s “hard look” requirement. *See e.g. Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). While FS asks the court to defer to its expert conclusions, no deference is due to agency conclusions or decisions where they are not supported by the facts in the record. *Ariz. Cattle Growers’ Ass’n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001).

Finally, despite it being a key part of the D.Ct’s reasoning, the government’s brief does not address the appropriate context in which to determine whether the scientific controversy and uncertainty may be significant. Intervenor simply reiterates the D.Ct’s decision that unreasonably shrinks the impacted area to less than 1% of the project area, and then expands the locale so that the project is 1% of the entire MHNF, without addressing the many reasons Appellants raise as to why this approach counters both logic and law. See Opening Brief at 27-28; and 31-34.

This is tantamount to a concession to the district court’s artificial rendering of “context” cannot withstand appellate scrutiny. This is crucial, as the D.Ct found that there *was* evidence of scientific controversy, but manipulated the scale of analysis avoid finding for Appellants. Moreover, nothing in Appellants’ briefing,

or the record, restricts its concerns to moist forests, or to "late-seral multistory" as narrowly defined in one chart, which is only one of several land designations that have high canopy closure, and big, fire-resistant trees. In the case of a site-specific action, significance usually depends on the effects in the locale. 40 C.F.R. § 1508.27(a), *see also Anderson v. Evans*, 314 F.3d 1006, 1019 (9th Cir. 2002). The D.Ct's errant interpretation of "context" cannot stand.

ii. Potentially significant direct impacts to Spotted Owls and Critical Habitat.

FS brief expresses confusion about the interplay of the claim above and that of direct impacts to a threatened species and its critical habitat. FS at 34. To clarify, the former claim, as it pertains to owls, revolves around the fact that the Forest Service's prediction that habitat loss from logging **now** will be better for the owls at some point in the **future** is both uncertain and highly controversial. In contrast, for this intensity factor, no party argues that CCR benefits the NSO and its critical habitat in the here and now. 40 C.F.R. §1508.8(a) (direct effects "are caused by" project activities and "occur at the same time and place."). As much as Appellees' describe project as beneficial, CCR is "likely to adversely affect" (LAA) the spotted owl and its critical habitat. ER920. While this does not automatically require an EIS, it does require the agency to provide detailed support for its FONSI.

Appellees' briefs emphasize that no spotted owls were found during surveys. FS. at 32, Int. at 28. This has little bearing on Appellants' claim, as the key issue is the significance of the loss of critical *habitat*. See 40 C.F.R. §1508.27(b)(9). The purpose of critical habitat is to ensure sufficient habitat to support stable, healthy populations of spotted owls across the range and within each of the recovery units. ER244. Protection of critical habitat is not contingent on the presence of a species within the habitat. Indeed, as with any threatened species, the goal of the ESA is to increase the population of owls over time, which means there needs to be more habitat available than is currently occupied. The definition of critical habitat recognizes this: critical habitat is occupied *or unoccupied* habitat essential to the conservation of the species and which may require special management considerations or protection. 16 USC §1532(5), *see also* ER898 (“[temporarily unoccupied] sites provide conservation value to the species by providing habitat that can be used by spotted owls on nearby sites while also providing viable locations on which future pairs or territorial singles can establish territories.”).

As an intensity factor that points to significance, given the broader context (declining populations, ongoing habitat loss and increasing competitive pressure from barred owls) many courts have found similar, albeit smaller, projects required an EIS. Op.Br. at 31-33. Such findings depend on many factors, all of which influence the “*degree* to which an action may adversely affect a threatened species

or critical habitat.” 40 C.F.R. §1508.27(b)(9). Intervenor relies heavily on *EPIC* to support its contention that CCR will not have significant impacts. *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1010 (9th Cir. 2006). However, the degree to which the challenged Knob Timber Sale impacted critical habitat is minuscule compared to that of CCR. Knob logged 578 acres, of which 125 acres were critical habitat with only 65 acres deemed “suitable.” *Id.* While the court found it reasonable that FS found this minimal habitat loss insignificant, this holding is fact specific and cannot cross-apply to degrading over 1,000 acres of suitable critical habitat in CCR.

In contrast, the Beaver Creek Project adjudicated in *Klamath-Siskiyou Wildlands Center v. U.S.F.S.* resulted in the loss of 500 acres of suitable habitat within two designated critical habitat units. 373 F.Supp.2d 1069, 1082 (E.D. Cal. 2004). Similar to CCR, FS concluded loss of critical habitat is not significant because the CHUs will continue to “provide habitat for reproductively capable owls by retaining large amounts of suitable habitat, and will maintain connectivity between CHUs at the local scale by continuing to provide dispersal habitat.” *Id.* at 1082. But, focusing on the degree of impact, the court disagreed: “[w]hile the [CHU] may still function post-harvest, the destruction of a significant percentage of the suitable habitat within the CHU is an important factor supporting the need for an EIS.” *Id.* The District Court of Oregon followed this in *Cascadia Wildlands*

v. US Forest Service for a project that downgraded 406 acres and removed 82 acres of existing suitable spotted owl habitat, finding: “[s]imilar to *Klamath–Siskiyou*, the adverse effect on a threatened species, combined with the uncertainty of the actual effects, contribute to this Court's finding that the Project may have a significant effect on the environment.” 937 F. Supp. 2d 1271, 1283 (D. Or. 2013). While Appellees focus on impacts to individual owl sites, it is clear that impacts to critical habitat also indicate the degree of significance of adverse impact. If this were not so, a declining species, in which there are fewer and fewer remaining individuals, would be deemed less and less significant for purposes of NEPA.

Again, Appellees ignore the issue of “context” upon which the district court’s opinion relied, even though it was thoroughly discussed in Appellants’ opening brief. Op.Br.at 31-33. Intervenor briefly suggests that the BA analyzed the impact to owls at many spatial scales. Int. at 28, citing ER246-247. The BA simply *lists* the different spatial scales at which the impacts could be analyzed but provides no analysis. ER246-247. Also, the Forest Service’s justification must be found in its NEPA documents, which never analyze the degree of impacts to owls at the spatial scale the district court adopts. Finally, the very definition of direct effects directs the agency to evaluate the effects that “occur at the same time and place” as the project. 40 C.F.R. § 1508.8(a). As the D.Ct. rightly noted, ““every

project in [spotted owl] habitat has a significant effect when viewed at a small scale.” ER13.

iii. Potentially significant cumulative impacts to Spotted Owls and Critical Habitat

An agency 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). If several actions have a cumulative environmental effect, “this consequence must be considered in an EIS.” *Blue Mtns.*, 161 F.3d at 1214. Here, the FS failed to include three projects that recently removed spotted owl critical habitat in the same critical habitat unit and the minimal information about such cumulative impacts does not meet the “hard look” standard.

Less than half of sub-unit ECN-7 provides suitable spotted owl nesting, roosting and foraging habitat. ER162. CCR is the fourth, and by far the largest, timber sale the FS planned in ECN-7 over the past five years. ER217. The Dalles II, North Fork Mill Creek, and Polallie Cooper removed suitable owl habitat within this critical habitat unit. When combined with CCR, they remove more than 5% of all the suitable habitat in this sub-unit, in which all unoccupied and likely occupied areas were deemed **essential** for the conservation of the species. 77 Fed. Reg 71876, 71929. At no point did FS address this cumulative loss of critical habitat, nor provide a *convincing* statement of reasons as to why these impacts would not be significant.

When asked about the absence of these projects, FS responded: “Cumulative impacts were analyzed based in the analysis area [the Crystal Clear Restoration project boundary and a 1.2 mile buffer] and do not include the projects mentioned in the comment: Dalles II, North Fork Mill Creek, and Polallie Cooper.” SER571. Limit its cumulative effects analysis to the project area and slight buffer violates CEQ direction⁴ and the suite of Ninth Circuit cases that found cumulative impacts analyses “must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project.” *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1126 (9th Cir. 2007) (“*Brong*”), citing *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 998 (9th Cir. 2004).

FS asks the court to defer to FS’s “identification of the geographic area” for analysis as it is within the agency’s “special competency”. FS at 42-3. Although “agencies have discretion to determine the physical scope used for measuring environmental impacts,” this only applies “so long as they do not act arbitrarily and their choice of analysis scale...represent[s] a reasoned decision.” *WildWest Inst. v. Bull*, 547 F.3d 1162, 1173 (9th Cir. 2008). An approach that violates CEQ direction and Ninth Circuit caselaw on this exact standard is not entitled deference

⁴ CEQ, *Considering Cumulative Effects Under the [NEPA]*, at 1 (Jan. 1997).

especially as the FS never explained *why* it limited its evaluation of cumulative impacts to the project-level analysis area.

FS argues that the “scale of analysis is consistent with the current recommended method for critical habitat consultation” citing SER454, however, consultation requirements are separate from the cumulative effects analysis required by NEPA *and* the cited page provides no such recommendation. Int. argues that “because” CCR follows the Recovery Plan’s direction, citing the Recovery Plan (ER898), Biological Opinion (SER644) and Biological Assessment (BA) (SER279), it somehow analyzed these cumulative effects. No cites contain the FS’s “reasoned decision” about the geographic scope of the cumulative effects analysis. Even if this analysis **was** contained in the cited reports, this would not satisfy NEPA as an agency’s defense of its positions must be found within the body of the EA, not buried somewhere in project files. *Blue Mountains*, 161 F.3d at 1214.

Int. argues the FS “evaluated the cumulative effects of future state or private activities that were reasonably certain to occur with CCR action area,” incongruously citing the Biological Opinion (SER 664-65), whereas the FS suggests that the EA evaluated the cumulative impact of other timber sales in ECN-7 by incorporating the BA. Br. at 43. These assertions are not accompanied by any details and are contradicted by the Response to Comments quoted above. SER 571.

Tellingly, neither brief mentions the extensive discussion in Appellants’

Opening Brief about the correct scale with which to evaluate cumulative impacts, including numerous on point decisions from this court. *See* Op.Br. at 36-38. None of Int.'s cases counter this compelling Ninth Circuit precedent. In two cases, the agency used an area much larger than the challenged projects to assess cumulative impacts. In *Selkirk*, the FS evaluated cumulative effects on grizzly bears in the context of the larger LeClerc Bear Management Unit. *Selkirk Conservation All. v. Forsgren*, 336 F.3d 944, 947 (9th Cir. 2003). In *Native Ecosystems*, the FS used a 29,900-acre area to analyze cumulative effects to goshawks from the 1,500-acre Jimtown project. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233 (9th Cir. 2005).

While *Conservation Congress v. U.S.F.S.* is more analogous, the district court's decision is based, in part, on the fact that Plaintiffs did not identify any projects the FS should have accounted for. 235 F.Supp.3d at 1206 (The Court would "not speculate that any such 'reasonably foreseeable' actions were omitted."). In contrast, Appellants repeatedly asked that specific timber sales in ECN-7 be analyzed for cumulative impacts. *See* ER217, ER567. In *Bark v. BLM*, the court found that the agency provided a "rational explanation" to limit the scope of analysis to the provincial home range of known owl pairs. 643 F.Supp.2d 1214, 1226 (D. Or. 2009). Unlike CCR, this timber sale was not in critical habitat so focusing on the range of the individual *owl*, rather than the cumulative impacts to

critical *habitat*, was appropriate. Similar to *Conservation Congress*, Plaintiff also had “not cited any future activities . . . that would contribute to cumulative impacts.” *Id.* at 1227. None of these sales are as directly on point as *Klamath Siskiyou Wildlands Center v. BLM*, in which this court affirmed the need to assess multiple logging projects within the same critical habitat unit to ensure their cumulative impact was adequately analyzed. 387 F.3d at 998.

Int. also claims that FS “aggregated” the cumulative effects analysis into its baseline and this is enough for a “hard look”. Notwithstanding the fact that FS clearly stated it did not address the other timber sales in ECN-7, the EA does not include a clear “aggregated” baseline. See, e.g. *Conservation Congress*, 235 F.Supp.3d at 1206-1207 (describing a what a aggregated baseline includes). The CCR EA simply has a table listing the names of projects considered in the cumulative effects analyses, with **no** additional information. See ER391.

Ninth Circuit caselaw firmly established that a cumulative effects analysis “must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.” *Klamath-Siskiyou*, 387 F.3d at 994. To that end, a cumulative impacts analysis must not only describe related projects but also “enumerate the environmental effects of those projects.” See *Brong*, 492 F.3d at 1133, citing *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir.2005) (cumulative effects analysis violated NEPA because it did not

explain "how different project plans and harvest methods affected the environment"). Neither the list of projects nor the EA's unhelpfully vague conclusion that cumulative actions "have reduced the amount of suitable habitat on the landscape" and "could "continue to do so into the future" provide useful analysis or the hard look necessary to comply with NEPA. ER486.

iv. Proximity to Ecologically Critical Areas

Neither brief addresses the key issue: critical habitat and Late Successional Reserves are ecologically critical areas and was arbitrary and capricious of the FS to not recognize them as such. 40 C.F.R. § 1508.27(b)(3), ER107. Appellants do not dispute that these areas are, in fact, ecologically critical, nor do they show that the FS acknowledged this when assessing the significance of CCR's impact.

In line with its seeming refusal to acknowledge the existence of critical habitat, Int's brief focuses wholly on why logging in LSRs is good. While debunked in many places in this brief, Int's argument misses the point that LSRs *are* ecologically critical areas and should have been included in this intensity factor. Likewise, FS suggests that because the FWS did not find jeopardy or adverse modification, critical habitat need not be recognized as an ecologically critical area. This does not address Appellants' claim. While this intensity factor, standing alone, may not be enough to find significance, when added to scientific controversy, uncertain outcomes, and direct & cumulative impacts to a threatened

species' critical habitat this project may impact the environment to a level that required the more comprehensive analysis provided by an EIS. *See* Op.Br. at 39-40.

B. The Forest Service Violated NEPA by Failing to Take a Hard Look at Climate Change.

The key to taking a “hard look” at environmental impacts is the mutual sharing of high-quality information between the public and the action agency. *League of Wilderness Defenders/Blue Mtns. Biodiversity Project v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014). Accordingly, Appellants provided extensive comments about climate change at all stages of the project. FS summarily dismissed them. The EA’s extremely brief, generalized “analysis” does not take the necessary hard look at this urgent environmental issue.

Appellees’ briefs rely on the IPCC’s report listing forestry as contributing 12% of anthropogenic emissions. ER499. Intervenor dismisses this as a "small portion." Int. at 42. However, referring to a global report tellingly neglects local and regional specifics. In Oregon, forestry is one of the state's top carbon polluters.⁵ Moreover,

⁵ In western Oregon, emissions from logging average 9.75-19.35 million metric tons carbon dioxide equivalent (MMT CO₂-e) per year since 2000. This represents 16%-32% of 60.8 MMT CO₂-e “in-boundary” emissions estimated for Oregon as of 2012 GHG inventory, making forestry Oregon’s #2 contributor to greenhouse gas emissions. ER 227-28.

the global report does not consider the long-term decrease in the forest's ability to sequester and store carbon *after* logging. ER229.

Arguing that “a project of this magnitude makes an infinitesimal contribution to overall emissions,” FS implies it is impossible to assess climate impacts of any given project. Br. at 39. This court has rejected this excuse, finding the fact that “climate change is largely a global phenomenon that includes actions that are outside of [the agency's] control . . . does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming.” *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008). Furthermore, the claim that CCR's carbon impacts are “infinitesimal” is demonstrably false. According to the Merriam-Webster dictionary, this means “immeasurably or incalculably small.” However, as emphasized in comments, BLM calculated carbon emissions of its 290-acre Airstrip thinning sale. ER231. While imperfect, their EA included model outputs comparing CO₂ emitted under action alternatives, including proportion of regional and global totals.⁶

⁶ Extrapolating those conservative estimates to CCR suggests net decrease in carbon storage over 30 years would exceed 300,000 metric tons, six times the 2017-18 emissions of City of Portland government. See <https://www.portlandoregon.gov/bps/article/592164> .This is a rough estimate because FS failed to provide project-specific data. However, it suggests climate impacts are not negligible.

Int. suggests cut-and-pasting the Polallie Cooper EA climate change discussion meets legal requirements because the sales are similar. *Int. at 41*. However, Polallie Cooper thins just 2,830 acres including ~710 acres of mature forest. Three times larger overall, CCR contemplates logging **four times more** mature forest – where most carbon is stored. Int. offers two cases for its proposition that FS took a “hard look.” In *Hapner v. Tidwell*, the challenged project authorized logging 810 acres, a “relatively small amount of land.” 621 F.3d at 1245. Given its small size, the Court found climate change discussion adequate. *Id.* Similarly, in *LOWD v. Martin*, the Court addressed thinning just 1,963 acres. 2011 WL 2493765 (D. OR, June 23, 2011). Neither opinion indicates whether these smaller fuels reduction projects located in sparser eastside forests treated mature trees, plantations, or both.

In contrast, CCR proposes logging 11,742 acres, with 3,494 acres of mature and old growth, including 1,200 acres of mature moist mixed conifer forest. CCR far exceeds the size of projects challenged in *Hapner & LOWD*. Moreover, it is increasingly clear that National Forests in the Cascade Range play a globally-significant role in regulating and sequestering carbon. *See* ER581-6, 710. Research shows that decreasing logging on National Forests in the Northwest is a top land use strategy to mitigate climate change. ER835-40. Indeed, any removal of significant biomass (not just “deforestation”) limits forests’ ability to sequester

carbon for a period after the disturbance and can even turn the forest into a carbon source. ER230-231.

Finally, neither brief addresses the other aspect of this claim: FS failed to take a hard look at how changing climate exacerbates impacts. See Op.Br. at 42-43. In context of rapidly changing climate, mature forests cool local habitat and provide refugia and their loss may have increasingly greater impacts. See ER227. The complete failure to discuss the impacts *from* climate change indicates the FS failed to take a hard look at an “important aspect” of environmental impact, thus violating NEPA. *AquAlliance v. U.S. Bureau of Reclamation*, 287 F.Supp.3d 969, 1028 (E.D. Cal. 2018).

C. The Forest Service Violated NEPA by Failing to Analyze a Reasonable Range of Alternatives.

Despite clear direction from NEPA, Appellees offer different theories to limit the range of alternatives in an EA. FS suggests the range in an EA is narrower than an EIS because an EA “must include only a *brief discussion* of reasonable alternatives.” FS at 44. Intervenor argues the requirements of an EA are “less rigorous” than an EIS, met automatically by considering proposed action and no-action alternative. Int. at 44-5. Both are incorrect, given the statutory and analytical frameworks.

Caselaw confirms that NEPA requires agencies to “study, develop, and describe appropriate alternatives,” whether preparing an EIS or EA. See, e.g., *Ctr. for Biol. Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012). By definition, EAs include the same range of alternatives as an EIS. 40 C.F.R. §1508.9(b) (EA must include “brief discussions of the need for the proposal, of alternatives as required by section §102(2)(E) . . .”). Consideration of alternatives has independent utility in the statutory scheme, even when ultimately finding no significant impact. *Bob Marshall Alliance*, 852 F.2d at 1228–29. Interpreting the “lesser standard” for analyzing alternatives in an EA as referring to *depth* of analysis, not *range* of alternatives, harmonizes this Court’s recent caselaw with statutory and regulatory obligations to consider “appropriate” alternatives where there are unresolved conflicts.

Furthermore, while EAs must contain “brief” discussion of alternatives, this is in context of a regulatory structure envisioning the entire EA as brief. NEPA regulations describe the EA as “a concise public document” evaluating the environmental impacts of the proposed actions and alternatives. 40 C.F.R. §1508.9(b). Today, EAs often are long because they analyze many ecological impacts, and are the primary documents used to analyze federal projects: agencies produce ~50,000 EAs annually, compared to 500 EISs.⁷

⁷Bradley C. Karkkainen, *Whither NEPA*, 12 N.Y.U.ENVTL.L.J. 333, 347-48 (2004).

While EAs are no longer "concise", the obligation to consider all reasonable alternatives to the same extent as an EIS under §102(2)(E) remains unchanged. Moreover, even a "lesser standard" for depth of analysis must eschew simply listing and dismissing alternatives as unviable without well-reasoned, fact-based argument. The requirement for evaluating alternatives is only satisfied if "an appropriate explanation is provided as to why an alternative was eliminated." *Native Ecosystems Council*, 428 F.3d at 1246; see also *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 234 F. App'x 440, 443 (9th Cir. 2007).

The threshold question for adequate EA alternatives analysis is thus: are there unresolved conflicts as to the proper use of resources? If so, are there feasible alternatives? In the instant case, the first answer is unequivocally affirmative. Thus, the question for the Court is whether appropriate alternatives went un- or under-developed, as "[t]he existence of a viable but unexamined alternative renders an EA inadequate." *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013).

To resolve conflicts created by FS planning a volume-driven timber sale in spotted owl critical habitat, and overstating the risk of active crown to justify logging overstory trees, Appellants proposed alternatives that included "one, or all, of the following": focus commercial logging in areas that are outside the natural fire regime and/or are not high-quality spotted owl suitable habitat and/or set a diameter limit on trees logged. See ER178-80, 616. Any of these proposed

alternatives result in effective fuels reduction while protecting critical owl habitat and providing timber volume. The FS violated NEPA by failing to analyze feasible reduced-logging alternatives in detail.

Appellees' briefs argue that the FS properly determined that the proposed action balanced the goals of the purpose & need, while none of Appellants' proposals did. However, like the EA, their briefs focus no commercial logging in suitable spotted owl habitat. Int. quotes the EA claiming this alternative "did not provide any additional assurance that the spotted owl habitat would be retained on the landscape." Int. at 46, citing ER386. This disregards the FS's own modeling showing extremely low likelihood of active crown fire. SER467-468. It also defies common sense, as not degrading suitable habitat **now** ensures that habitat is retained. *See also* ER759-73.

FS suggests that "this alternative would not meet the recommendations of the Recovery Plan for land managers to ... alter fire behavior," (citing ER99) is directly contradicted by its own citations. The Recovery Plan recommends managing habitat in dry "fire-prone" forests, especially those substantially departed from historical conditions. ER887. This is met by Appellants' proposal to log areas outside their fire regime, but contraindicated for moist forests comprising half of CCR, where the Plan advises **against** "[e]fforts to alter either fuel loading or potential fire behavior[.]" ER871.

Intervenor illustrates the illogicality of refusing to analyze an alternative capping logging at 18" dbh. Contrast "one-size-fits-all diameter does not adequately address spacing and ladder-fuel treatments" with "there are [diameter] limits in the LSR units." Int. at 46-7. Why are diameter limits feasible in LSR, but unfeasible in spotted owl habitat or mature moist forest? Why would diameter limits "compromise the ability of the project to meet the purpose and need," especially as retaining larger trees decreases fire risk? Int at 47. While diameter limits would decrease timber volume, this is not acknowledged as relevant. In fact, there is **no** reason given in the record why a diameter limit or focusing fuels reduction in dry forests outside their fire regime, are not feasible alternatives meeting the purpose and need. See *Conservation Congress* at 1213 (USFS's decision not to consider, or even acknowledge, an alternative with plaintiff's suggested diameter cap was arbitrary and capricious).

In sum, by only analyzing one action alternative, FS missed the opportunity to redesign CCR to better meet its Purpose and Need and failed to conduct a legally adequate alternatives analysis. This renders the EA inadequate. *Western Watersheds Project v. Abbey*, 719 F.3d 1035 (9th Cir. 2013).

III. THE FOREST SERVICE VIOLATED NFMA.

A. Logging in the White River LSR does not comply with the NWFP.

CCR is significantly larger than any other project in MHNF. It's so big that 358 acres in the White River LSR, which might otherwise comprise an entire project, is "only ... three percent" of the whole. Int. at 53. This does not dilute their importance on the landscape nor does it mean, as Int. appears to argue, that less detail is required from the agency to justify its decision. Similarly, FS implies that because the "several small units" are "about 1% of the entire" LSR, this Court should be satisfied with general characterizations and assertions in the EA's discussion of LSR logging. FS at 50.

This approach is contrary to law and dangerous as precedent. Allowing poorly-planned logging in LSRs by either tucking it into a much larger project in the Matrix, or by saying it's small relative to the entire LSR, allows for "death by a thousand cuts." *Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1035-37 (9th Cir.2001). Indeed, 358 acres comprises 21.4% of the Mustang Landscape Unit (MLU) of the LSR, a more appropriate scale at which to discuss the agency's actions. *See* SER137. As planned, CCR would have major, long-lasting impacts on the site-specific LSR units, much of which contain healthy native forest. *See* ER190-2.

Instead, in their replies, FS and Int. argue that CCR complies with the WRLA, and therefore does not require additional detailed discussion or

consultation with the Regional Ecosystem Office.⁸ However, as discussed *supra*, WRLA provides "*generalized guides* which illustrate the philosophy and methods we use for the detailed prescriptions and marking guides (which are impossible to produce before a project is actually begun)." SER154, emphasis original. There is no sign of such "detailed prescriptions" for the LSRs in CCR, for which WRLA requires not broad-brush generalizations but "[k]nowledge of the role of the stand in terms of thermal cover, late-successional habitat corridors, and relative stability." SER156. Instead, the standard VDT prescription is used, with 35 to 40% target canopy closure. See, eg. ER150. Moreover, "Mature Stem Exclusion" stands specifically require "[t]he retention of sufficient canopy closure to function as late-successional habitat if the stand is stable enough," a consideration absent from the record. *Id.*

It appears that the FS superficially read the WRLA's detailed suggestions for designing appropriate silviculture. FS asserts that because the "post-treatment target canopy cover ... falls within ... 'Open Park-Like' stands, which is 25% to 40%," the FS "reasonably ... achieve[s] a permissible target canopy cover." FS at 50. But this conclusion does not follow the WRLA. First, the desired future condition ("DFC") in the Mustang LU is only 29% "Open Park-Like", with the

⁸ As this exemption is explicitly contingent on complying with the WRLA the REO's exemption from consultation does not apply. See SER700.

remaining 71% in denser "Open Intolerant Multi-story" and "Cathedral". SER 137. That is hardly "not relevant". FS at 50. Second, when thinning "Mature Stem-Exclusion" stands to achieve long-term DFC of "Open Park-Like," the post-treatment stand structure options are **only** "Cathedral" (canopy closure between 60-90%) or "Understory Reinitiation" (40%-60%). SER156, ER 903. Even when it's the long-term DFC, "Open Park-Like" is **not** an option for stand structure right after logging. This is reinforced by the chart detailing project guidelines for the Mustang LU, which include "Expected Post Treatment Stand Structures: OM, FEM, UR, and CA", none of which allow canopy cover below 40%. SER145, ER903. Nonetheless, most CCR units in the LSR target a 35% canopy cover. ER534, 558.

As discussed in the introduction, this plain quantitative violation of the WRLA reveals the underlying qualitative problem: CCR planning ignored the WRLA's guidelines requiring nuanced stand-specific prescriptions that range widely in terms of expected post treatment conditions, based on the details of the stand. Instead, it provides generic logging prescriptions for non-plantation units, identical except for varying between 35% and 40% targeted closure. Furthermore, all prescriptions use identical basal area or spacing numbers as their sole description, despite the WRLA's explicit goal to "get away from ... implement[ing]

commercial thinning prescriptions based on basal area or a particular spacing ... to ensure ... natural conditions." SER142. The contrast could not be starker.

As Int. notes, "carefully controlled logging is a tool expressly authorized by the NWFP for long-term LSR maintenance." AFRC reply at 54. The key, however, is that it must be "carefully controlled." Digging into the record reveals that FS has instead laid a veneer of ecological justification over a timber volume-driven project.

B. The CCR Project is Inconsistent with Forest Plan Snag Retention Standards.

It is undisputed that the proposed treatment units are currently far below Forest Plan standards for snags and that no action "would recruit a greater number of snags over time in both habitat types." ER459, 467. Intervenor raises the novel argument that, because the area will comply with the snag standards "over time," CCR complies with FW-215 **now** and asserts that because "stands would be provided a greater number of larger green retention trees for future snag recruitment" under the Action alternative, this mitigates the current lack of snags. Int. at 57-9, quoting ER 397. But "green retention trees" are just that: live trees, not snags. The reason snags are so rare in these forests is that trees tend to get cut and removed **before** they die, especially in the Matrix. The Forest Service admits increased timber productivity results in stands that become "less susceptible to stress and disease caused mortality over time," resulting in *fewer* snags. ER 467.

Lower mortality may sound like a good outcome, but in the context of a snag deficit, it exacerbates an existing problem.

FS quotes the D.Ct. opinion, which quoted the FS litigation brief: “no exception was necessary because there is no plan to cut snags.” ER25-6. This is wrong, factually and legally. First, the EA never makes this claim - it states the opposite: "snags would be maintained unless they pose a health and safety risk." ER396. This acknowledges that at least some snags will be removed. Moreover, in addition to snags cut for safety reasons, "some snags may be more prone to falling after thinning activities." ER467. Even if CCR proposed cutting zero trees, the short- and long-term impacts of CCR keep it from meeting FW-215. The proposed action would reduce snags in **all** relevant timeframes.

In similar situations, exempting a project from a Forest Plan standard disclosing the impacts in NEPA documents is a standard procedure. ER914. The USFS began the process but abandoned it midway through planning. It matters not whether because of negligence, or because revealing these impacts undermined the restoration narrative, this procedural failure results in a Project that violates NFMA’s consistency requirement. *See Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 932 (9th Cir. 2010).

For these reasons, Appellants respectfully request that this Court reverse the judgment of the district court, and remand with instructions to vacate the CCR

Project Decision Notice and remand the matter back to the Forest Service to cure the legal violations found herein.

Respectfully submitted this 15th day of November, 2019.

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PROOF OF SERVICE

I hereby certify that on November 15, 2019, I electronically filed the foregoing Reply Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. There are no unregistered users participating in this case.

/s/ Brenna Bell