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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

BARK,
Plaintiff

v.

BUREAU OF LAND MANAGEMENT,
Defendant

Case No.:

COMPLAINT

(Violations of Federal Land Policy and
Management Act; National Environmental
Policy Act; Administrative Procedure Act)

INTRODUCTION

1. One of the most important, and most rare, habitat features of the temperate rainforests in the western Cascades is a large dead tree. Commonly known as “snags”, these standing dead trees provide essential food and shelter to almost 50 sensitive or special-status species in western Oregon’s forests. Over the past 100 years, most of Oregon’s native old-growth forests have been logged, taking with them their potential to die naturally, become large snags, and provide essential habitat. In heavily managed forests like the North Fork Clackamas River Watershed,

wherein lies the Bureau of Land Management's proposed Airstrip Timber Sale, there are now too few snags to meet the minimum viable habitat standards for snag-dependent wildlife.

2. The Airstrip Timber Sale is described as a commercial thin of second-growth stands – but to access a mere 20 acres for logging, the Bureau of Land Management (BLM) proposes to build almost one mile of new road into an area with a high density of old-growth trees and snags. This new road would result in the loss of at least two of the largest snags in the forest, and likely several more old-growth trees. In addition, the logging project itself will remove approximately 10% of other large snags from the area, moving the BLM even further from attaining the snag retention standards of the Salem Resource Management Plan.

3. This action alleges that the January 11, 2012 decision by the Bureau of Land Management (BLM) to authorize the Airstrip Timber Sale violates the Federal Land Policy and Management Act (FLPMA) because the Airstrip Timber Sale does not comply with the Salem District Resource Management Plan (Salem RMP) standards for snag-retention and sensitive species management.

4. It also alleges that the BLM violated the National Environmental Policy Act (NEPA) because it failed to provide the public with adequate information in the Airstrip Timber Sale Environmental Assessment (EA) to support a Finding of No Significant Impact (FONSI). Among other things, the BLM failed to adequately disclose the direct and cumulative impacts from the loss of snag habitat to cavity-dependent species.

5. The violations of law alleged in this complaint are arbitrary, capricious, and not in accordance with NEPA and FLPMA. 5 U.S.C. § 706(2)(A).

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JURISDICTION AND VENUE

6. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (federal question), 2201 (injunctive relief), 2202 (declaratory relief), and 28 U.S.C. § 1346 (United States as a defendant). This cause of action arises under the laws of the United States, including the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 *et seq.*; the Federal Land Policy and Management Act (FLPMA), 43 U.S.C. §§ 1701 *et seq.*; and the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.* An actual, justiciable controversy exists between Plaintiff and Defendant.

7. Venue in this court is proper under 26 U.S.C. § 1391. The Oregon State Director of the Bureau of Land Management authorized the implementation of this decision without administrative stay pending administrative appeal. Defendant is headquartered in Portland, Oregon. The Plaintiff, Bark, has its headquarters in Portland, Oregon. Pursuant to Local Rule 3.4, this case is properly filed in Portland, Oregon.

PARTIES

8. Plaintiff BARK is a grassroots non-profit organization with approximately 7,000 members, dedicated to protecting and restoring the forests, waters, and wildlife of Mt. Hood National Forest and surrounding public lands. Through on-the-ground monitoring, education, and outreach, Bark works to ensure that public forests are managed for the public interest. Central to Bark's philosophy is citizen engagement, which Bark promotes by involving the public in monitoring and challenging federal timber sales to ensure compliance with federal environmental laws. Bark and its members actively participate in government decision-making processes on Forest Service and BLM-managed public lands in NW Oregon.

9. Plaintiff's members, officers, and staff hike, camp, bird watch, view wildlife, photograph scenery and wildlife, and engage in vocational, education, scientific, religious, and recreational activities in and around the Mount Hood National Forest and surrounding public lands, including Ladee Flats, where the BLM's Airstrip Timber Sale is proposed.

10. Plaintiff has an organizational interest in the proper and lawful management of public lands in western Oregon. Plaintiff's aesthetic, recreational, scientific, and religious interests have been and will be adversely affected and irreparably injured if Defendant engages in activities detrimental to sensitive species and their habitat in the project area. These are actual, concrete, injuries caused by Defendant's failure to comply with mandatory duties under FLPMA and NEPA. The injuries would be redressed by the relief sought.

11. Plaintiff commented on, protested, and administratively appealed the Airstrip Timber Sale, alleging, among other issues, that the BLM's failure to adequately analyse the impacts of this sale and its failure to comply with the requirements of the Salem RMP and FLPMA violated federal law.

12. Defendant BUREAU OF LAND MANAGEMENT is an agency or instrumentality of the United States, and is charged with managing the public lands and resources of the Salem BLM, in accordance and compliance with federal laws and regulations.

STATEMENT OF LAW

The Federal Land Policy and Management Act

13. Congress passed the Federal Land and Policy Management Act (FLPMA) in 1976, in part "to provide for the management, protection, development, and enhancement of the public lands." Pub. L. 94-579; *see also* 43 U.S.C. § 1701 *et seq.* Congress enacted FLPMA to ensure that the

present and future use of public lands be “projected through a land use planning process.” 43 U.S.C. § 1701(a)(2). Furthermore, Congress expressed its belief that public land should be “managed in a manner that will protect the quality of scientific, scenic, historical, environmental, air and atmospheric, water resource, and archeological values.” 43 U.S.C. § 1701(a)(8).

14. FLPMA requires that the BLM, under the Secretary of the Interior, "develop, maintain, and when appropriate, revise land use plans" to ensure that land management be conducted "on the basis of multiple use and sustained yield." 43 U.S.C. §§ 1701(a)(7), 1712(a). Once a land use plan has been developed, the BLM is required to manage its lands in compliance with the plan. 43 U.S.C. § 1732; 43 C.F.R. § 1610.5-3(a).

15. In 1994, the BLM and the United States Forest Service (USFS) issued a Record of Decision for the Northwest Forest Plan (NFP). The NFP established management requirements for all BLM and USFS land within the range of the northern spotted owl. The Salem District lies within the range of the northern spotted owl and its land use plan must incorporate the requirements of the NFP.

16. In 1995, the Salem District of the BLM adopted the Salem Resource Management Plan (Salem RMP), which incorporates the applicable standards and guidelines of the NFP, including the six basic land allocations created by the NFP, with particular focus on the following three: (1) Late-Successional Reserves; (2) Riparian Reserves; and (3) Matrix. *Salem RMP at 9-21*. Each land allocation is governed by a different set of Standards and Guidelines.

17. The majority of the Airstrip Timber Sale is located in the Matrix.

18. Matrix lands are designated to produce a sustainable supply of timber and other forest commodities; provide connectivity between Late Successional Reserves; provide habitat for a variety of organisms associated with both late-successional and younger forests; and provide for

“important ecological functions such as . . . maintenance of ecologically valuable structural components such as down logs, snags and large trees.” *Salem RMP at 20*. The Salem RMP contains several standards and guidelines intended to protect wildlife and their habitat throughout the Matrix.

19. Because of the importance of snag habitat to many species, the Salem RMP directs land managers to retain snags at levels sufficient to support species of cavity nesting birds at 40% of potential population levels. *Salem RMP at 21*. This 40% requirement must be met throughout the Matrix with per acre requirements met on areas averaging no larger than forty acres. *Id.*

20. The Salem RMP sets out specific processes to manage Special Status Species on BLM-managed land. *Salem RMP at 29*. The objective of Special Status Species management is to conserve species and their habitats so as not to elevate their status to any higher level of concern. *Id. at 28*.

21. To conserve Special Status Species, the BLM is directed to determine whether or not special status species are, or may be, present in a project area and clearly describe the impacts of proposed actions to Bureau sensitive species in the environmental analyses. If such species are present the BLM should modify, relocate or abandon a proposed action to avoid contributing to the need to list sensitive species, or their habitats, under the federal Endangered Species Act. *Salem RMP at 29*.

The National Environmental Policy Act

22. Congress enacted the National Environmental Policy Act (NEPA) in 1969, directing all federal agencies to assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA’s disclosure goals are two-fold: (1) to ensure that the agency has carefully and fully contemplated the environmental effects of its

action, and (2) to ensure that the public has sufficient information to challenge the agency's action.

23. The Council on Environmental Quality (CEQ) promulgated uniform regulations implementing NEPA that are binding on all federal agencies. 42 U.S.C. § 4342, 40 C.F.R. §§ 1500 *et. seq.*

24. NEPA requires federal agencies to prepare, consider, and approve an adequate Environmental Impact Statement (EIS) for “any major federal action significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1501.4(a)(1).

25. To determine whether an action requires an Environmental Impact Statement as required by NEPA, an action agency may prepare an Environmental Assessment (EA). 40 C.F.R. § 1501.4(b). An EA is a concise public document that briefly describes the proposal, examines alternatives, considers environmental impacts, and provides a listing of individuals and agencies consulted. 40 C.F.R. § 1508.9. If the agency decides that an EIS is not needed, it must undertake a thorough environmental analysis and supply a convincing statement of reasons that explains why a project's impacts are insignificant.

26. NEPA documents must consider the direct, indirect, and cumulative environmental impacts of the proposed action. 40 C.F.R. § 1508.8. Direct effects are caused by the action and occur at the same time and place as the proposed project. *Id.* § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distances, but are still reasonably foreseeable. *Id.* § 1508.8(b). Both types of impacts include “effects on natural resources and on the components, structures, and functioning of affected ecosystems,” as well as “aesthetic, historic, cultural, economic, social or health [effects].” *Id.* § 1508. Cumulative impact results

when the “incremental impact of the action [is] added to other past, present, and reasonably foreseeable future actions” undertaken by any person or agency. *Id.* § 1508.7.

27. NEPA requires that environmental information be available to public officials and citizens before agency decisions are made and before any actions occur to implement the proposed project. 40 C.F.R. § 1500.1 (b). The information released must be of high quality and sufficient to allow the public to question the agency rationale and understand the agency’s decision making process. *Id.*

Administrative Procedure Act

28. The Administrative Procedure Act (APA) confers a right of judicial review on any person that is adversely affected by federal 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.” *Id.* § 706(2).

STATEMENT OF FACTS

29. The Airstrip Timber Sale, as proposed, would commercially thin 207 acres of naturally regrown second-growth forest in Matrix and Riparian Reserves in the Ladee Flat area of the North Fork Clackamas River and Lower Clackamas River watersheds. This project includes constructing 1.6 miles of new road, and approximately 50 log landings and yarding corridors.

30. One of the planned new roads, in Unit 7B, is almost one mile in length and located in an area with a high density of legacy old-growth trees and snags. It would be used to facilitate the thinning of just 20 acres, or 10% of the project area, on steep slopes above tributaries to the Clackamas River.

31. Two of the only large old growth snags in the project area (which are 14 & 16 feet in circumference) are in the Right-of-Way for this new road, and would be cut down. *EA at 78.* Live old-growth trees in Units 7B and 7A may also be felled for road construction, landing locations and/or to establish cable logging corridors. *Airstrip Wildlife Specialist Report at 25.*
32. In addition, approximately 10% of snags larger than fifteen inches diameter within Airstrip Timber Sale units could be cut or knocked over during logging operations. *EA at 73.*
33. Snags are important resources for vertebrate and invertebrate species in forested ecosystems. Snag removal may result in long-term influences on forest stands because large snags are not produced in natural stands until trees become large and begin to die from natural mortality. Snags are used extensively by cavity-nesting birds and mammals such as woodpeckers, nuthatches, chickadees, squirrels, red tree voles, and American marten. Removal of snags can reduce the carrying capacity for these species for many years. *Northwest Forest Plan at B-8.*
34. The hairy woodpecker, red-breasted sapsucker, and pileated woodpecker are all cavity-dependent species that are present in the project area. *EA at 70.* Pileated woodpeckers require snags to be in late seral (old-growth) condition. *North Fork Clackamas Watershed Analysis (WA) at 2-47.* Four special status bat species that use large snags for roosting habitat are also presumed to occur in the Sale area. *EA at 71.*
35. Because of its long history of industrial logging, the North Fork Clackamas River watershed is currently deficient in large snags. *WA at 2-47.* The Airstrip Environmental Assessment acknowledges that snag habitat in the project area does not currently meet the Salem Resource Management Plan's requirement of sufficient snags to support cavity nesting birds at 40% of potential population levels throughout the Matrix. *EA at 69.*

36. In addition to felling existing snags, the Airstrip Timber Sale would “remove most of the trees which would die from suppression mortality and create small snags.” *Airstrip Decision Notice at 34*. Thus, the BLM is removing both existing snags *and* the trees that would likely become snags in the near future, without any plan to create new snags.

37. Decreasing the number of large snags in the project area will “reduce high value habitat for bats, primary excavators, and cavity users in the watershed by an **unknown percentage**.” *EA at 78 (emphasis added)*.

38. Plaintiff commented on and administratively protested the Airstrip Timber Sale decision. BLM rejected plaintiff’s protest, and on July 27, 2012, plaintiff appealed to the Interior Board of Land Appeals (IBLA) and requested a stay of the decision.

39. On September 11, 2012, the 45-day automatic stay expired, and the IBLA had issued no stay of the decision.

FIRST CLAIM FOR RELIEF

(Violation of FLPMA and 5 U.S.C. § 706(2)(A))

BLM’s Further Reduction of Snags Violates FLPMA and is Arbitrary and Capricious

40. Plaintiff incorporates by reference all preceding paragraphs.

41. The BLM is required to develop land use plans that govern the use of the land it manages. 43 U.S.C. § 1712. Once a land use plan has been developed, the BLM is required to manage its lands in compliance with the plan. 43 U.S.C. § 1732; 43 C.F.R. § 1610.5-3(a).

42. The Airstrip Timber Sale area already does not meet the Salem RMP’s minimum standard for snag retention. As planned, the Airstrip Sale would move the BLM even farther

from meeting the standard and will delay development of sufficient habitat for cavity-dependent wildlife.

43. The BLM's failure to follow the guidelines of the Salem RMP is arbitrary, capricious, and not in accordance with FLPMA. 5 U.S.C. § 706(2)(A).

44. Plaintiff is entitled to its reasonable fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

SECOND CLAIM FOR RELIEF

(Violation of FLPMA and 5 U.S.C. § 706(2)(A))

BLM's Failure to Manage for Special Status Species Violates FLPMA and is Arbitrary and Capricious

45. Plaintiff incorporates by reference all preceding paragraphs.

46. The Salem RMP sets out specific processes to manage special status species on BLM-managed land. *Salem RMP at 29*. These include determining whether special status species are present in a project area, clearly describing the impacts of proposed actions, and modifying, relocating or abandoning a proposed action in order to conserve special status species and their habitats so as not to elevate their status to any higher level of concern. *Id.*

47. The Airstrip Timber Sale, as planned, does not comply with the Salem BLM's Resource Management Plan standards for management of special status species because it removes important habitat for special status bats, without clearly describing the impacts of this habitat loss on the species population. Not knowing the extent of the impacts to special status species, the BLM cannot guarantee that this project will not elevate their status to a higher level of concern.

48. Defendant's approval of the Airstrip Timber Sale Project is arbitrary, capricious, and not

in accordance with the law. 5 U.S.C. § 706(2)(A).

49. Plaintiff is entitled to its reasonable fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

THIRD CLAIM FOR RELIEF

(Violation of NEPA and 5 U.S.C. § 706(2)(A))

The BLM's Failure to Adequately Analyze Direct and Cumulative Impacts of the Airstrip Timber Sale Violates NEPA and is Arbitrary and Capricious

50. Plaintiff incorporates by reference all preceding paragraphs.

51. The Airstrip Timber Sale area is already below the minimum habitat threshold for cavity dependent species. The Airstrip EA provides little to no analysis of the direct and cumulative impacts to cavity-dependent species from further reducing the snag habitat in the project area. *See* 40 C.F.R. § 1508.25(a)(2).

52. Without disclosing the direct and cumulative impact of habitat loss to cavity-dependent species, including sensitive bat species and pileated woodpeckers, the BLM is unable to support its Finding of No Significant Impact.

53. The failure of the BLM to comply with NEPA is arbitrary, capricious, and not in accordance with the law. 5 U.S.C. § 706(2)(A).

54. Plaintiff is entitled to its reasonable fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

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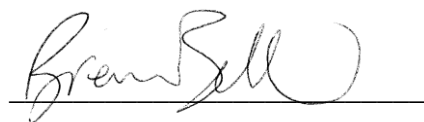
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PLAINTIFF'S PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court:

- a. Declare that Defendant violated FLMPA and the Salem RMP by failing to meet the minimum standards for snag retention;
- b. Declare that Defendant violated FLPMA and the Salem RMP by failing to manage for conservation of special status species;
- c. Declare that Defendant violated NEPA and its implementing regulations by failing to adequately disclose and analyze the direct and cumulative impacts of the Airstrip Timber Sale on cavity-dependent species;
- d. Order Defendant to alter the Airstrip Thinning Sale so that it meets with the requirements of FLPMA and the Salem RMP;
- e. Order Defendant to prepare supplemental NEPA analysis that provides sufficient information upon which to make a finding of significance;
- f. Enjoin Defendant and its contractors, assigns, and other agents from proceeding with the proposed Airstrip Timber Sale, or any portion thereof, unless and until the violations of federal law set forth herein have been corrected;
- g. Award Plaintiff its costs of suit and attorney fees pursuant to the Equal Access to Justice Act; and
- h. Grant Plaintiff such other and further relief as the Court deems just and equitable.

Respectfully submitted this 13th day of September, 2012




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CORPORATE DISCLOSURE STATEMENT

Pursuant to FRCP 7.1, Plaintiff discloses that it does not have parent corporations, nor does the Plaintiff organization have stock.

A handwritten signature in cursive script, reading "Brenna Bell", is written over a horizontal line.

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