

Brenna Bell (OSB #01519)
Bark
P.O. Box 12065
Portland, OR 97212
Tel: 503-331-0374
brenna@bark-out.org

Jennifer R. Schwartz (OSB #072978)
Law Office of Jennifer R. Schwartz
2521 SW Hamilton Court
Portland, Oregon 97239
Tel: 503-780-8281
Email: jenniferroseschwartz@gmail.com

Nicholas S. Cady (OSB #113463)
Cascadia Wildlands
P.O. Box 10455
Eugene, Oregon 97440
Tel: 541-434-1463
Email: nick@cascwild.org

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

**BARK, CASCADIA WILDLANDS,
OREGON WILD, AND
WILDEARTH GUARDIANS,**

Plaintiffs,

v.

U.S. FOREST SERVICE,
a federal agency,

Defendant,

and

Case No.: 3:18-cv-01645-MO

**PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT AND
SUPPORTING MEMORANDUM**

Oral Argument Requested

HIGH CASCADE, INC.,
a Washington Corporation.

Defendant-Intervenor.

Pursuant to Fed. R. Civ. P. 56 and Local Rule 56-1, Plaintiffs Bark, Oregon Wild, Cascadia Wildlands, and WildEarth Guardians respectfully request this Court grant summary judgment and relief in Plaintiffs' favor in the above-mentioned action. Plaintiffs sought to obviate the need for any litigation and counsel for the parties have conferred pursuant to Local Rule 7-1(a)(1) but are currently unable to resolve the dispute. Plaintiffs request that this Court grant the following declaratory and injunctive relief as specified in Plaintiffs' Complaint:

1. Order, declare, and adjudge that Defendant U.S. Forest Service violated the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et. seq.*, National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600 *et. seq.*, those statutes' implementing regulations, and Subpart A of the Travel Management Rule (TMR), 36 C.F.R. § 212.5(b), in approving a decision for the Crystal Clear Restoration Project ("CCR Project") and in issuing a supporting Environmental Assessment (EA), Decision Notice (DN) and Finding of No Significant Impact (FONSI) that is arbitrary, capricious, an abuse of discretion, and contrary to law under the judicial review standards of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2);

2. Hold unlawful and set aside the final CCR Project DN, supporting EA and FONSI and order the Forest Service to withdraw any associated timber sale contracts until such time as the Forest Service demonstrates it has complied with the law;

3. Order the Forest Service to prepare an Environmental Impact Statement or revise the CCR Project EA to cure all legal violations;

4. Enjoin the Forest Service and its contractors, assigns, and other agents from proceeding with the commercial thinning components and related road construction/re-construction of the CCR Project unless and until the violations of federal law set forth herein have been corrected;

5. Enter such other declaratory relief, and temporary, preliminary, or permanent injunctive relief as may be prayed for hereafter by Plaintiffs;

6. Retain jurisdiction over this matter until such time as the Forest Service has fully complied with the Court's order;

7. Award Plaintiffs their reasonable costs, litigation expenses, and attorney fees associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 *et seq.*, and all other applicable authorities;

8. And any other such further relief as the Court deems just and proper.

In support of this motion, Plaintiffs refer the Court to the Memorandum in Support of Plaintiffs' Motion for Summary Judgment, Exhibit A filed herewith, the administrative record lodged by Federal Defendant with this Court, Plaintiffs' Complaint, and such other and further matters as may be presented to the Court before the decision hereon.

JURISDICTION AND STANDING

The Forest Service's CCR Project DN/FONSI are final agency actions as defined by the Administrative Procedure Act, ("APA") 5 U.S.C. § 551(13). This challenge is brought pursuant to the Act's judicial review provisions, 5 U.S.C. §§ 701-706. This Court has jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 2201 (declaratory relief).

Plaintiffs' standing to pursue this action is set forth in Plaintiffs' Complaint at ¶¶13-22, as well as in the attached standing declarations of Arran Robertson, Josh Laughlin, Gradey Proctor and Mia T. Pisano. In order to establish standing under Article III of the Constitution, Plaintiffs must show that: (1) they have suffered an "injury in fact" due to Defendant's allegedly illegal conduct, (2) which can fairly be traced to the challenged conduct of the Defendant, and (3) which

can be redressed by a favorable decision. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 923 (D.C. Cir. 2008); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007); 28 U.S. 167, 180-81 (2000).

Plaintiffs have standing to bring this action because their members regularly use and enjoy the CCR Project area, and their use and enjoyment will be adversely affected if the proposed timber sale proceeds as planned. Plaintiff Bark's members collectively spent thousands of hours in the area, camping, hiking and gathering site-specific data about the land and ecosystems. As Gradey Proctor and Mia Pisano detail, they are both longtime Bark members and active volunteers, who have visited the CCR Project area multiple times for enjoyment and recreation. *See Decl. of Gradey Proctor* and *Decl. of Mia Pisano* (filed herewith). Plaintiff Cascadia Wildlands has an organizational interest in responsible, scientifically-sound, and forward-looking management of National Forests and represents the interests of its members in recreating in native forests. *See Decl. of Josh Laughlin*. Plaintiff Oregon Wild's members have a specific interest in wildlife in the CCR Project area, especially the White River wolf pack – the first pack to establish territory on Mount Hood National Forest in 70 years. *See Decl. Of Arran Robertson*. Plaintiff WildEarth Guardians has long been working to right-size the Forest road system and has an organizational interest in the Forest Service decommissioning roads to meet the ecological interests of its many members. *See Compl.* ¶¶ 17-18.

The loss of native old growth forest, snag habitat, wildlife diversity, and the incursion of more roads and their associated use, that will occur if the CCR Project proceeds as planned would cause a direct injury to all Plaintiffs' ability to recreate in, and otherwise enjoy, the area. These injuries can be remedied by the relief sought in this action.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7-2(b)(2), the undersigned hereby certifies that the following memorandum contains 35 pages including headings, footnotes, and quotations, but excluding the caption, table of contents, table of cases and authorities, exhibits, and any certificates of counsel.

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LIST OF ACRONYMS

BA	Biological Assessment
BiOp	Biological Opinion
DN	Decision Notice
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
FWS	United States Fish and Wildlife Service
LSR	Late-Successional Reserve
MHNF	Mount Hood National Forest
MRS	Minimum Road System
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
NWFP	Northwest Forest Plan
NRF	Nesting, roosting and foraging habitat for spotted owl
OHV	Off-Highway Vehicle
LRMP	Land and Resources Management Plan (Forest Plan)
ROD	Record of Decision
TMR	Travel Management Rule

INTRODUCTION

Along the eastern shoulder of Mount Hood National Forest (MHNF) lies a complex forest: diverse in species composition, elevation, forest type, past management, and fire history. A mantle of protection overlays this forest – designated critical habitat for the iconic northern spotted owl, a federally threatened species. Across this ecologically critical area, MHNF planned its largest timber sale in over a decade, the nearly 12,000-acre Crystal Clear Restoration Project (“CCR Project”).

The CCR Project, in both process and substance, violates federal law in numerous ways. Despite its euphemistic title, the nature and effects of the CCR Project are far from “crystal clear.” The Forest Service packaged what is primarily a plan to meet timber volume targets as a restoration action. In this context, the Forest Service’s actions (and inactions) throughout this process begin to make sense. While analyzing the CCR Project, the agency consistently refused to critically examine the baseline conditions across this large planning area, carefully consider the full spectrum of adverse impacts, engage the established science and site-specific information provided by Plaintiffs, or meaningfully evaluate any course of action other than its original proposal despite requests for other reasonable alternatives.

Overall, the Forest Service failed to forthrightly address competing mandates—to conserve old forest and the species that rely upon this critical habitat, to foster increased forest resiliency in a warmer and drier climate, and the renewed urgency to meet timber targets. Instead, the agency masks this tension by labeling the entire action a “restoration” project while calling for a revival in logging mature and old-growth forests. The record shows the CCR Project, from its inception, was designed primarily as a timber-producing project, funded internally with a strict, short timeline and a firm numerical goal for timber volume. The agency’s doublespeak cannot withstand judicial scrutiny. For the reasons detailed below, the Forest Service acted arbitrarily and capriciously in violation of the National Environmental Policy Act (NEPA), National Forest Management Act (NFMA), agency regulations and its Travel Management Rule (TMR).

FACTUAL BACKGROUND

The first Interdisciplinary Team (IDT) meeting the Forest Service held about the CCR Project began by discussing the Timber Sale Pipeline Restoration Fund (“TSPR Fund”) and the agency’s intent to create a “streamlined project, with sufficient value, and limited resource concerns” over 14,000 acres on the southeastern slope of MHNF. AR07414. The next IDT meeting twice emphasized that this project provides an opportunity to create “shelf-stock in veg volume.” AR07416. Continuing this narrative, the Barlow District Ranger introduced the Project to the Wasco County Forest Collaborative as planned primarily to provide “shelf stock” to meet MHNF's timber volume quota. AR17518.

In April 2016, the Forest Service’s Regional Office formally agreed to provide MHNF \$250,000 in TSPR funds for the CCR Project; directing MHNF’s Forest Supervisor to produce 100,000 CCF¹ of timber (approximately double MHNF’s annual timber volume). AR07951-52 (Letter from Regional Forester to local Forest Supervisor). As noted in the letter, “an objective of the TSPR Fund is to provide for the efficient, timely, and cost-effective preparation of non-salvage sales to restore a pipeline of sales ready for offer. . . NEPA should be completed within 1 year from TSPR fund expenditure, and volume should be advertised for sale within 1 year from the time when sale preparation has been completed.” *Id.* Because of this strict timeline, the Forest Service decided not to engage the Wasco County Forest Collaborative or Stew Crew (the Hood River collaborative group) in planning this project. AR08457.

More than a year after planning began, the rationale of logging for fuels reduction first appears in the record – in the public-facing preliminary scoping letter. AR12514-17. Given the expected timber volume in the TSPR agreement, which was not disclosed in the agency’s NEPA documentation, as well as the location of the Project, fuel loading and fire behavior are not the principle drivers here. The CCR

¹ “CCF” is a measure of volume for one hundred cubic feet. One cubic foot is equivalent to a 12"x12"x12" solid cube of wood.

Project is not located on land prioritized for fuels reduction by the Wasco County Community Wildfire Protection Plan (“WCCWPP”). Rather, it is in Zone 3 of the WCCWPP; recommendations for Zone 3 focus exclusively around protecting settled communities, of which there are none in the proposed Project area. AR06704-05. Neither is the CCR Project a priority under the MHNFS Strategic Fuel Placement Plan, as it is not in a priority area of a Community Wildfire Plan, nor primarily outside its natural vegetation condition class. AR07189. The majority of the CCR Project is within Fire Regime Condition Class 1, meaning that it is least departed from its natural (historic) range of variability of vegetation characteristics including fuel composition, fire frequency, severity and pattern. AR16215. According to the Final Environmental Assessment (FEA), 95% of the “moist fuel treatment” acres and 97% of the “moist forest health treatment” are in Condition Class 1. AR 20840. In the drier, more fire-influenced forest, 51% of the “dry forest health” treatment acres and 28% of the “dry fuel treatment” are also in Condition Class 1. *Id.*

Plaintiffs support aspects of the CCR Project designed to restore natural ecosystem processes to drier forests that have departed from historical conditions and/or have significantly departed from their natural fire regime, including thinning saplings and plantations (homogenous tree stands resulting from past clearcuts). Compl. ¶¶4-5. However, these aspects of the project will not meet the Forest Service’s directive to produce substantial timber volume, hence the inclusion of older forests with larger trees.

Approximately 2,970 acres of the CCR Project units are mature and old-growth forest with stands as old as 332 years, all of which are located within federally designated critical habitat for the threatened northern spotted owl. AR21097-122, 16335 (Project is within Critical Habitat Unit Eastern Cascades North, subunit 7 (ECN 7)). The final rule designating this forest as spotted owl Critical Habitat determined that all unoccupied and likely occupied areas are **essential** for the conservation of the species to meet the recovery criterion. 77 Fed. Reg. 71876 (Dec. 4, 2012). Spotted owls rely on

older forest habitats because they generally contain the structures and characteristics required for the owl's essential biological functions of nesting, roosting, foraging, and dispersal. AR18279-80. These structures include: a multi-layered and multispecies tree canopy dominated by large overstory trees; moderate to high canopy closure (60 to 80 percent); a high incidence of trees with large cavities and other types of deformities; numerous large snags; an abundance of large, dead wood on the ground; and open space within and below the upper canopy for owls to fly. *Id.* Forested stands with high canopy closure also provide thermal cover as well as protection from predation. *Id.*; AR18257.

In its final revised Recovery Plan and Critical Habitat designation for the spotted owl, the U.S. Fish & Wildlife Service (FWS) recommended land management agencies focus active management in younger forests, lower quality owl habitat, or where ecological conditions are most departed from the natural or desired range of variability. *See* Decl. of Jennifer R. Schwartz and Ex. A, pp. 54-59 (Revised Recovery Plan (2011); 77 Fed. Reg. 71876, 71881-82 (Dec. 4, 2012)). This Critical Habitat subunit is degraded from decades of high-volume logging and the ongoing expansion of barred owls into spotted owl habitat. AR18394 (Biological Opinion). The Forest Service approved logging that will downgrade 1,059 acres of suitable nesting, roosting and foraging (NRF) habitat and remove 895 acres of dispersal habitat. AR20899. While not disclosed in its analysis of the CCR Project, the Forest Service also recently approved other timber sales in this same subunit that remove an additional 2,899 acres of spotted owl habitat. AR17562.

Since the owl was listed as threatened under the Endangered Species Act (ESA) in 1990, its population continues to decline on a range-wide basis. Ex. A, pp. 38, 81-82. Demography data discussed in the Recovery Plan showed a three percent annual rate of decline in the overall spotted owl population. *Id.*; AR18153, 18179-81 (Biological Assessment). The most recent meta-population analysis from 2016 found the annual rate of decline increasing in many areas, with continued declines in virtually all areas due to habitat loss and new competition from the barred owl. AR18319. In 2015,

FWS determined that uplisting the northern spotted owl from threatened to endangered status under the ESA may be warranted. AR18273.

The CCR Project must be implemented consistent with the MHNH Land and Resources Management Plan (Forest Plan), as amended in 1994 by the Northwest Forest Plan (“NWFP”). AR01298-01925 (MHNH Forest Plan); AR04160-04395 (NWFP). The NWFP established seven land allocations, including the designation of Late-Successional Reserves (LSRs), that overlie the pre-existing Forest Plan land allocations. AR04171-72. LSRs are managed to protect and enhance conditions of mature and old-growth forest ecosystems to serve as habitat for species like the spotted owl. AR04303. The NWFP strictly limits logging within LSRs, however thinning or other silvicultural treatments in stands up to 80 years of age may occur within LSRs *if* the treatments are beneficial to the creation of late-successional forest conditions. AR04305. Given the spotted owl’s continued decline, the revised Recovery Plan emphasizes conserving older moist forest stands wherever they occur, regardless of the NWFP’s system of reserved or non-reserved lands. Ex. A, pp. 37-38, 56. As part of the CCR Project, the Forest Service authorized logging on roughly 440 acres of the White River LSR. AR21080-81. Of these, approximately 180 acres constitute mature and old-growth forest with stands ranging from 96 to 229 years of age. AR20973-74, 20997.

The Forest Service issued its draft Environmental Assessment (DEA) for the CCR Project in August 2017. AR16113-512. The DEA considered a “No Action” alternative (as required by 40 C.F.R. § 1502.14(d)) and a single “Proposed Action.” AR16149. All plaintiff organizations filed timely comments on the DEA, urging the Forest Service to consider more reasonable alternatives. AR16884-17201, 17406-18, 17429-510, 17516-86. Chief among suggestions was excluding mature and old-growth trees from commercial logging, which, as plaintiffs contend, are not in need of “restoration” and

are functioning as suitable habitat for old-growth dependent species such as the spotted owl. AR16897-98, 17523-27, 17407-09, 17442-60.

As required by the ESA, the Forest Service prepared a Biological Assessment (BA) for the CCR Project's potential impacts to federally listed threatened and endangered species and designated critical habitat. AR18125-373. The BA determined the CCR Project was "likely to adversely affect" (LAA) the spotted owl and its critical habitat due to degradation of the owl's nesting, roosting, and foraging habitat (NRF) and loss of dispersal habitat. AR18193-94. Section 7 of the ESA requires the Forest Service to formally consult with FWS over the CCR Project's anticipated effects to listed species in the area (the northern spotted owl, Oregon spotted frog, and gray wolf) and designated critical habitat. AR18389. Just one week after receiving the Forest Service's request for formal consultation, FWS issued a cursory 14-page Biological Opinion (BiOp) generally concurring with the Forest Service's LAA finding for the spotted owl and its critical habitat. AR18389-404.²

In February 2018, the Forest Service issued a Draft Decision Notice (Draft DN) and final Environmental Assessment (FEA) for the CCR Project. AR16152-55. WildEarth Guardians, Cascadia Wildlands, Oregon Wild, and Bark were among 15 individuals and organizations that submitted pre-decisional objections to the Draft DN. *See* AR19174-191, 19233-339, 19402-20126. At every opportunity, Plaintiffs reiterated their concerns associated with the adverse ecological impacts of the CCR Project and provided alternatives that could resolve these conflicts while also meeting the Project's purpose and need. *Id.*

A few weeks after hosting a pre-decisional objection resolution meeting, the Forest Service proposed resolving the pending objections by remove 2.2 miles of temporary roads and removing and

² *Id.* (Also concurring that the Project was "not likely to adversely affect" the other listed species). FWS revised its BiOp to include information previously only incorporated from the BA by reference, without any change to the ultimate conclusions. AR21726-87 (Revised BiOp and correspondence).

modifying 327 acres of harvest units.³ AR21070. Some individual objectors agreed to the changes, and the decision maker made those modifications in the final decision. AR21070. The Finding of No Significant Impact (FONSI) and Final Decision Notice (Final DN) was released June 27, authorizing: 4,244 acres of sapling thinning, 4,004 acres of plantation thinning, and 3,494 acres of commercial logging in non-plantation mixed-conifer forests; a variety of fuel treatments throughout the Project area; and the use, construction and/or maintenance of approximately 35.8 miles of roads. AR21071 (Final DN), 20793-809 (Final EA).

On September 14, 2018, the Forest Service received bids for the first 680 acres of logging in the CCR Project, packaged as the Ahoy Stewardship Project. This sale would log 17,829 CCF of timber (equaling 49,000 tons of Douglas Fir and 3,000 tons of other conifer trees). The area under this contract primarily contains mature and old-growth forest (stands up to 220 years old), including suitable spotted owl habitat and LSRs. A second contract, the Bilge Stewardship Project, has been advertised. It would log 16,125 CCF of timber over 631 acres, including old-growth LSRs.⁴; AR18410, 17655 (emails).

STANDARD OF REVIEW

This action is governed by the Administrative Procedure Act, which directs that the Court “shall” set aside agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989). While review under the “arbitrary and capricious” standard is narrow, a court’s inquiry must be “searching and careful,” and an agency must articulate a rational connection between the facts found and the conclusions made. *Marsh*, 490 U.S. at 378. This Court “must

³ The units modified in the Objection Resolution had little overlap with the units Plaintiffs identified as violating regulation, law and policy.

⁴ See MHN Website:

<https://www.fs.usda.gov/detail/mthood/landmanagement/resourcemanagement/?cid=STELPRDB5306406>

disapprove the agency's action" "where the agency's reasoning is irrational, unclear, or not supported by the data it purports to interpret." *Nw. Coalition for Alternatives to Pesticides v. EPA*, 544 F.3d 1043, 1052 n.7 (9th Cir. 2008) (internal quotes omitted). A decision is arbitrary and capricious if the agency:

"has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). An agency's decision can be upheld only on the basis of the reasoning found in that decision.

Anaheim Mem'l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997).

ARGUMENT

I. THE FOREST SERVICE VIOLATED NEPA

In passing NEPA, Congress declared "a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348 (1989); 42 U.S.C. § 4331. To ensure this commitment is met, NEPA imposes "action-forcing" procedures guaranteeing that: (1) the agency has carefully contemplated a project's environmental impacts, and (2) the relevant information will be made available so the public can play a meaningful role in the decision-making process. *Id.* at 348-49. In order to take the requisite "hard look" agencies must disclose and analyze all foreseeable direct, indirect and cumulative impacts. 40 C.F.R. §§ 1502.16, 1508.7, 1508.8; *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt. ("BLM")*, 387 F.3d 989, 993-94 (9th Cir. 2004). Information must be of high quality. 40 C.F.R. § 1500.1(b). Scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. *Id.*

NEPA's action forcing procedures dictate that if a proposed action *may* significantly affect the environment, the action agency must prepare an Environmental Impact Statement (EIS). *Blue Mts.*

Biodiversity Project v. Blackwood, 161 F.3d 1208, 1211-12 (9th Cir. 1998) (citing 42 U.S.C. § 4332(2)(C)). “As a preliminary step, an agency may prepare an [Environmental Assessment (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). If the agency decides not to prepare an EIS, it must supply a “convincing statement of reasons why potential effects are insignificant.” *Id.*

**A. Failure to Prepare an EIS for the CCR Project and Otherwise
Take the Requisite Hard Look at the Project’s Impacts**

The Forest Service must prepare an EIS “if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor.” *Klamath-Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006) (citing *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). To trigger this requirement, a “plaintiff need not show that significant effects *will in fact occur*, but if the plaintiff raises substantial questions whether a project *may* have a significant effect, an EIS must be prepared.” *Id.* (emphasis in original). This “is a low standard.” *Id.*

“Significance” under NEPA is defined by the context and intensity of a project’s environmental impacts. 40 C.F.R. § 1508.27. For purposes of context, in a site-specific action, significance depends upon “the effects in the locale.” *Id.* at § 1508.27(a); *Anderson v. Evans*, 314 F.3d 1006, 1019 (9th Cir. 2002). Intensity refers to “the severity of the impact” as judged by ten non-exclusive factors, including whether the environmental effects of the project are highly controversial or involve a high degree of scientific uncertainty and impacts to ecologically critical areas like LSRs and critical habitat for an ESA-listed species. *See* 40 C.F.R. § 1508.27(b)(1)-(10). Any one intensity factors may require preparation of an EIS. *Ocean Advocates v. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2004). Several intensity factors show, both individually and cumulatively, that the CCR Project is likely to have a significant environmental impact. *See e.g. Cascadia Wildlands v. U.S. Forest Serv.*, 937 F. Supp.2d 1271, 1283-84

(D. Or. 2012) (holding that when considered individually, certain significance factors present in that case might not have triggered the need for an EIS, but “when considered collectively, they do.”)

1. The CCR Project Involves Highly Controversial and Uncertain Environmental Effects

A proposal is highly controversial, mandating preparation of an EIS when (1) “substantial questions are raised as to whether a project ... may cause significant degradation of some human environmental factor;” or (2) 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). 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.” *Id.* The burden is placed on the agency to “come forward with a ‘well-reasoned explanation’ demonstrating why those responses disputing the EA’s conclusions ‘do not suffice to create a public controversy based on potential environmental consequences.’” *Id.* Further, where “the environmental effects of a proposed action are highly uncertain or involve unique or unknown risks, an agency must prepare an EIS.” *Ocean Advocates*, 402 F.3d at 870 (citing 40 C.F.R. § 1508.27(b)(5)).

a. *Commercial logging to purportedly reduce future fire severity in mature forests not departed from natural conditions is highly controversial and the desired outcome highly uncertain.*

Plaintiffs’ comments, objection letters, and associated scientific literature demonstrate that a substantial dispute exists over the nature and effect of the CCR Project as it relates to using commercial logging to purportedly reduce future fire severity in largely undisturbed and late-successional forests, particularly those in forests that have not departed from their natural range of variability. AR17432-36, 1744 1-52, 17443-79, 17520, 17528-45, 17560-62 (comments); 19235-37, 19251-53, 19264 (objections); 19269-329, 19371-83, 19390-99, 20139-59 (fire science literature); Ex. A, pp. 56-57.

Much of the CCR Project area consists of mature undisturbed forest; scientific research shows large, old trees are not only the most likely to survive a wildfire, but they subsequently serve as

biological legacies and seed sources for ecosystem recovery – these trees are impossible to replace within the relevant time scale. AR17543, 17450. The efficacy of using commercial logging to influence fire behavior and severity, particularly logging large, fire-resistant trees and mature moist forests, is highly controversial and uncertain, with peer-reviewed research showing it may actually *increase* fire risk. AR19252, 19269-75, 20139-59, 20151-52. For instance, a scientific synthesis provided by Plaintiffs found:

The removal of larger, mature trees in thinning operations tends to increase, not decrease, fire intensity by: a) removing large, fire-resistant trees; b) creating many tons of logging “slash” debris – highly combustible branches and twigs from felled trees; c) reducing the cooling shade of the forest canopy, creating hotter, drier conditions on the forest floor; d) accelerating the growth of combustible brush by reducing the mature trees that create the forest canopy, thereby increasing sun exposure; and e) increasing mid-flame windspeeds (winds created by fire) by removing some of the mature trees and reducing the buffering effect they have on the winds associated with fires.

The scientific evidence clearly indicates that, where it is important to reduce potential fire intensity (e.g., immediately adjacent to homes) this can be very effectively accomplished by thinning some brush and very small trees up to 8 to 10 inches in diameter. Removal of mature trees is completely unnecessary.

AR19283 (citations omitted); 17448 (reducing forest canopies significantly dries surface fuels due to increased light levels, surface winds and temperatures; increased sunlight to the forest floor can stimulate regrowth of small trees and shrubs, which become new ladder fuels); 17452 (“though it may appear counterintuitive, when all else is equal, open canopies lead to reduced fuel moisture and increased mid-flame windspeed, which increase potential fireline intensity.”); Ex. A, p. 68 (“These changes in stand structure and composition may be more influential drivers of fire risk and severity than the actual direct increase in fuels caused by beetle outbreaks.”) Recent research also found that the more protected the area (i.e. unmanaged) the less severe the fire. AR20152. Contrary to findings in scientific research, the proposed logging will dramatically reduce canopy cover in most units. AR21097-122.

Moreover, fuel reduction projects are likely only effective for 10 to 20 years. AR16232-33 (EA). Therefore, even if scientific research supported the Forest Service’s assertion that the proposed logging

will reduce the severity of a future fire, there remains the fact that it is highly unlikely that a fire will burn in the treated area during the limited time that the treatment is effective. AR19269-75 (study finding there is a 2 to 8% chance that a fire will occur in a treated area within the window in which the fuels treatment could alter fire behavior.) Another study concurred: “the effectiveness of this [fuel reduction] approach at broad scales is limited. . . [R]oughly 1% of US Forest Service forest treatments experience wildfire each year, on average. The effectiveness of forest treatments lasts about 10–20 y, suggesting that most treatments have little influence on wildfire.” AR17446-47.

Research shows that weather (drought, low humidity, high temperatures and most importantly, high winds), not fuel, is the primary driver of fire behavior. AR17541-42. Even in forests with a restored fire regime, wildland fire can still produce large-scale, high-severity fire effects under the type of weather conditions that often prevail when fire escapes initial suppression efforts. AR19382. Despite this massive statistical uncertainty raised throughout the record, the Forest Service’s evaluation of the Project’s impact still remains premised on the assumption that when a fire burns in the Project area, it would be less severe because of the logging. *See* AR21072.

This large body of sound science runs counter to the Forest Service’s decision to commercially log moist mixed-conifer ecosystems, at least 750 acres of which are mature and old-growth forest, “cast[ing] serious doubt upon the reasonableness of the agency’s conclusions.” *Nat’l Parks*, 241 F.3d at 736; AR21097-122 (also showing logging in both moist and dry sites would occur on a total of roughly 2,970 acres of mature and old-growth forest between 90 to 332 years of age); AR20795-96 (showing Project will treat 5,646 acres of moist forest). As noted *supra*, the FEA shows the vast majority of moist forest has not measurably departed from its natural range of variability for vegetation characteristics, fire frequency, severity and pattern. AR20840 (95% of the “moist fuel treatment” acres and 97% of the

“moist forest health treatment” acres are in the “least departed” condition class).⁵ Further, the agency’s Fuels Report shows that modeling of future fire severity under a “moderate moisture scenario” indicates a 0% chance of an active crown fire in the Project area and a 13% chance of an active crown fire under a “low moisture scenario.”⁶ Significant, unaddressed controversy and uncertainty regarding logging moist and/or mature forests under the guise of reducing future fire severity indicates the need for an EIS to further develop the scientific rationale for such a controversial action. 40 C.F.R. § 1508.27(b)(4) & (5).

This record shows that public comments, starting in the pre-scoping phase and continuing throughout the administrative review process, provided the Forest Service with numerous scientific studies undercutting its assertion that logging mature backcountry forests will decrease the severity of a future wildland fire. *See, e.g.*, AR12627-56, 17538-45, 17443-52, 20139-59. Despite Plaintiffs’ repeated requests for the Forest Service 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 Mts.*, 161 F.3d at 1213-14 (holding EA inadequate where it failed to reference material containing scientific viewpoints opposing agency’s conclusions about the environmental consequences of post-fire logging); *N. American Wild Sheep v. USDA*, 681 F.2d 1172, 1179 (9th Cir. 1982) (agency failed to take the requisite ‘hard look’ where “significant questions raised by respondents to the initial draft of the EA were ignored or, at best, shunted aside with mere conclusory statements.”); 40 C.F.R. § 1500.1(b) (government has a duty to use high quality information and accurate scientific analysis).

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⁵ These departure classes account for “a wide array of ecosystem, vegetation, or fuels characteristics including fire frequency, severity, and pattern.” AR18635 (Fuels Report).

⁶ Importantly, this report distinguishes between “active crown fire” where fire is actively spreading through the canopy and along the forest surface, and “passive crown fire” where fire only torches individual or small groups of trees that burn along with surface fuels. AR18642-63. The EA, in contrast, does not explain this distinction and combined results for passive and active crown fires. AR20842.

- b. *The alleged ecological benefits to the spotted owl from commercially logging mature and old-growth forest is highly controversial and scientifically uncertain.*

This district court recently held, in light of the spotted owl’s continued decline and dependence on mature and old-growth forest for its survival and recovery, that logging previously unmanaged older forests for the alleged benefit of the species is highly controversial and involves a substantial degree of scientific uncertainty. *Or. Wild v. BLM*, 2015 WL 1190131, *7-9 (D. Or. March 14, 2015). The court in *Or. Wild v. BLM* recognized the Recovery Plan’s primary goal of conserving “older stands that are either occupied or contain high-value spotted owl habitat.” *Id.* (Ex. A, p. 56). It also recognized the Plan’s recommendation that “active management” strategies focus on younger stands in less diverse forests (i.e. plantations), outside of moist old-growth. *Id.* at 7; *see e.g.* Ex. A, pp. 58-59 (further emphasizing that “[c]ases where facilitating a thinning operation necessitates felling existing remnant trees over 120 years old should be rare.”)

The record evidence also highlights the controversy regarding the effects of fire on spotted owls and, importantly, the substantial debate over whether the benefits of commercial logging to potentially lower the risk of a future high-severity fire clearly outweigh the well-recognized negative impacts such logging has on the owl and its habitat. *See e.g. Or. Wild v. BLM*, 2015 WL 1190131, at *8 (scientific literature critical of active management logging techniques that fail to adequately protect trees over 80 years old shows controversy weighing in favor of an EIS); AR17560-62, 17460-79 (Plaintiffs’ comments) citing *e.g.* AR19308-322 (a study concluding the long-term benefits of commercial thinning *do not* clearly outweigh adverse impacts, *even if* much more fire occurs in the future). Specifically, those scientists concluded:

“Even an immediate doubling of fire rates due to climate change or other factors would result in far less habitat affected by high-severity fire than thinning. In addition, much of the high-severity fire might occur regardless of thinning, especially if the efficacy of thinning in reducing high-severity fire is reduced as fire becomes more controlled by climate and weather.”

Id. at 19317-18 (the combination of thinning and maintenance reduced 6.7 times more late-successional forest than it increased). While proposed “treatments” would only be effective at altering fire behavior, if at all, for the next 10 to 20 years, spotted owl habitat would be removed for 75 to 100 years. AR16233, 16327. As the spotted owl’s Recovery Plan cautions, “[s]ilvicultural treatments are generally not needed to maintain existing old-growth forests on moist sites. Efforts to alter either fuel loading or potential fire behavior in these sites could have undesirable ecological consequences.” Ex. A, pp. 56-57.

Further, a growing number of peer-reviewed studies indicate that spotted owls are adapted to fire and preferentially utilize burned forests for foraging, while fuels treatments are causing the loss of mature forests needed for owl recovery. AR17267-68; Ex. A, p. 87.⁷ Even if a future high-severity fire was a given, the science strongly indicates that spotted owls respond *better* to natural disturbances than to logging. AR14375 (citing Recovery Plan, Ex. A, pp. 69-70). Indeed, the Recovery Plan recommends against land managers being “so aggressive that they subject spotted owls and their habitat to treatments where the long-term benefits *do not clearly outweigh* the short-term risks.” Ex. A, p. 38.⁸ Hence, the controversy and uncertainty surrounding this Project that the Forest Service failed to squarely address.

While the Forest Service did acknowledge in its BA that “there are still many unknowns regarding how much fire benefits or adversely affects northern spotted owl habitat,” its ultimate conclusion in the FONSI – that there are no potential effects of the Project that are highly controversial or uncertain – runs counter to the wealth of contrary evidence in the record. AR18290-91 (BA, also acknowledging “the ability to protect spotted owl habitat and viable populations of spotted owls from

⁷ Describing results from three radio-telemetry studies of spotted owls in post-fire landscapes that indicate spotted owls use forest stands that have been burned (Bond et al. 2009).

⁸ See also Ex. A, p. 50 (recommending land managers implement forest restoration activities *where* the best available science suggests ecosystems and spotted owls would benefit in the long-term)

large fires through risk-reduction endeavors is uncertain.”); AR21078 (FONSI). Removing existing high-quality spotted owl habitat to address a hypothetical future fire risk is highly controversial, particularly when spotted owls are being outcompeted by barred owls and require all the suitable, closed canopy forest they can get to decrease competitive exclusion. *See infra* Section I.A.2. For many of the same reasons outlined in *Or. Wild v. BLM*, this significance factor favors preparation of an EIS. 2015 WL 1190131, at *7-9.

At a minimum, the Forest Service must revise the EA and forthrightly acknowledge the contrary research regarding spotted owls. The Forest Service acted arbitrarily and capriciously and did not take the required ‘hard look’, by failing to adequately consider a critical aspect of the issue relating to its assessment of the Project’s direct and indirect effects. *Motor Vehicle Mfrs.*, 463 U.S. at 43; 40 C.F.R. §§ 1500.1(b), 1502.16; 1508.8.

2. The CCR Project Adversely Affects a Threatened Species and its Critical Habitat

As the Forest Service determined, implementation of the CCR Project is likely to adversely affect the threatened northern spotted owl and its designated critical habitat: “[s]tanding alone, this suggests the need for an EIS.” *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1080 (E.D. Ca. 2004); 40 C.F.R. § 1508.27(b)(9); AR20899-90; 18192-203 (Final EA and BA discussing effects determination for spotted owl and its critical habitat).

As noted, the entire proposed action occurs within designated critical habitat essential to the conservation of the spotted owl, which relies upon older forests with moderate to high canopy closure (60 to 80%). *Supra* Facts; AR18145-47, 18279-82. The CCR Project authorizes logging of roughly 2,970 acres of mature and old-growth forest between 90 to 332 years of age, with many stands averaging over 150 years old. AR21097-122. Forest canopy closure would be reduced to 40% or less for most of the Project area. AR07415 (IDT meeting notes); 21097-122 (showing average target

canopy cover between 35 to 50% for nearly all units). Trees per acre (TPA) in the Project area's moist mixed conifer forests will be substantially reduced from a current average of 1,288 TPA to 200 TPA. AR20836.

Consequently, the Project area will lose over **half** of its high-quality critical habitat suitable for the owl's essential biological functions of nesting, roosting, and foraging. AR20889-91, 18192-203 (1,059 acres of suitable habitat will be downgraded to dispersal only habitat). The Project will also remove 895 acres (42%) of dispersal habitat, fully eliminating the physical and biological features spotted owls rely upon from these forests for the next 75 to 100 years. AR16327. The quality of habitat on an additional 887 acres will also be degraded post-logging. AR18192-203. Fuels reduction activities and the construction of new temporary roads are also likely to adversely affect the owl's prey species and suitable habitat. *Id.* As discussed *supra*, much of the Project's commercial logging component is at odds with the management recommendations of the spotted owl's Recovery Plan. Not only does the CCR Project call for logging an extensive amount of older forest, but also it results in a net reduction of 300 acres of habitat within the eight potential home ranges that occur in the Project area—including two that are already below the 40% suitable habitat threshold. AR18207, 18156-57 (an area is unlikely to support spotted owls when suitable habitat comprises less than 40% of the home range).

Last, while the Forest Service acknowledges competition with barred owls is among the leading threats to spotted owl survival, AR18152-53, the EA does not adequately analyze how this Project is likely to exacerbate the problem. AR20900 (Final EA); *but see* AR18167-68 (BA acknowledging this concern and scientific literature recommending as much late-successional forest as possible be conserved to avoid further increasing competitive pressure from barred owls); 17411-15, 17452-60, 17556-58 (Plaintiffs' comments on the draft EA calling for a hard look at this issue); (Ex. A, p. 38,

recommending “increased conservation and restoration of spotted owl sites and high-value spotted owl habitat to help ameliorate [barred owl] impact.”) At a minimum, the uncertainty surrounding these adverse effects is another factor indicating the need for an EIS. 40 C.F.R. § 1508.27(b)(5); *Cascadia Wildlands v. U.S. Forest Serv.*, 937 F. Supp. 2d 1271, 1281-84 (D. Or. 2013).

The adverse impacts of the CCR Project to the spotted owl and its critical habitat are more far-reaching and dramatic, thus likely to be more significant, than those described in the following cases, all of which required the preparation of an EIS. Most recently in *Or. Wild v. BLM*, this district court held that an EIS was required where the project would log 160 acres of mature forest (over 80 years of age) in spotted owl critical habitat, resulting in the loss of 153 acres of suitable NRF habitat, and where the project’s purported benefits to the species was uncertain. 2015 WL 1190131, at *1-10. The CCR Project, in comparison, would log roughly 18 times more mature and old-growth forest, including many stands that are far older than those at issue in *Or. Wild v. BLM*, which ranged from only 80 to 110 years of age. *Id.*; see also *Cascadia Wildlands*, 937 F. Supp. 2d at 1281-84 (logging that would downgrade 406 acres and remove 82 acres of suitable spotted owl habitat, along with uncertainty regarding interspecies competition with barred owls, required an EIS); *Klamath-Siskiyou Wildlands Ctr.*, 373 F. Supp. 2d at 1080-83 (EIS warranted where project would result in the loss of 500 acres of high/moderate quality spotted owl habitat and effects were highly uncertain due to lack of current owl survey data). Far more critical habitat will be lost and degraded from the CCR Project than in any of these recent cases; an EIS is required.

3. The Potential for a Cumulatively Significant Impact Exists

“Cumulative impacts” are “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions[.]” 40 C.F.R. § 1508.7. Cumulative impacts “can result from individually minor but collectively significant actions taking place over a period of time.” *Id.*

In determining whether a project will have a “significant” impact, agencies must consider “[w]hether an action is related to other actions with individually insignificant but cumulatively significant impacts.”

40 C.F.R. § 1508.27(b)(7). Significance exists, requiring an EIS, “if it is reasonable to anticipate a cumulatively significant impact on the environment[.]” *Id.* If several actions have a cumulative environmental effect, “this consequence must be considered in an EIS.” *N. Plains Resources Council v. Surface Transportation Bd.*, 668 F.3d 1067, 1076 (9th Cir. 2011); *Blue Mts.*, 161 F.3d at 1214.

As explained *infra*, several other timber sales or “vegetation management” projects have affected the White River watershed and the same spotted owl critical habitat subunit that envelops the CCR Project area. *Infra* Section C.1. In short, Plaintiffs have raised substantial questions as to the potential for a cumulatively significant impact to the spotted owl and its old forest habitat at these geographic scales from the CCR Project in combination with other actions. *Id.*

4. The CCR Project Adversely Affects Ecologically Critical Areas

Late-Successional Reserves are “ecologically critical areas” established to provide high-quality habitat for imperiled species like the northern spotted owl. 40 C.F.R. § 1508.27(b)(3); AR04301; *Or. Natural Resources Council v. Brong*, 492 F.3d 1120, 1126-27 (9th Cir., 2007). The Forest Service, however, did not recognize the Project’s inclusion of logging in the White River LSR as a significance factor for determining whether an EIS is warranted. AR21078-79. *See contra Cascadia Wildlands*, 937 F.Supp.2d at 1281-84 (proposed logging within Riparian Reserves, another protective NWFP land allocation, was an ecologically critical area for NEPA purposes, weighing in favor of an EIS).

As noted, because LSRs are to be managed to protect and enhance the niche habitat features that these late-successional forests provide, the NWFP makes programmed “stand management” activities, such as logging, impermissible in these areas. *Brong*, 492 F.3d at 1126; AR04173 (NWFP ROD). In this case, the Forest Service authorized logging 440 acres of LSRs including approximately 180 acres of

mature and old-growth forest. AR20973-74, 20997. Moreover, as discussed *infra*, the logging proposed for these stands is directly at odds with the agency’s own management recommendations. AR04888; *Infra* Section III.1 (NFMA violations) (describing how canopy cover post-treatment will be well below levels prescribed in the LSR Assessment). In short, the Forest Service violated NEPA by failing to discuss why logging mature and old-growth forest within an LSR – and in a manner at odds with its own management recommendations – will have environmental effects so insignificant that an EIS is not required. *Cascadia Wildlands*, 937 F.Supp.2d at 1281-84.

5. The CCR Project Violates Other Legal Requirements

For the reasons presented below in Sections II & III, Plaintiffs have demonstrated the Forest Service’s failure to comply with the requirements of the NWFP and MHNF Forest Plan in violation of NFMA and that the agency additionally violated subpart A of its TMR. These violations further signify that the Forest service must prepare an EIS. 40 C.F.R. § 1508.27(b)(10).

Given the TSPR requirement that MHNF complete its NEPA analysis within one year, it is *understandable* why the Forest Service cut many corners, including the choice not to prepare an EIS. However, it is not legal. The Forest Service’s refusal to prepare an EIS for this highly controversial Project, which is the largest timber sale on MHNF in the last decade and revives logging in ecologically critical mature and old-growth forests, constitutes arbitrary and capricious decision-making under NEPA and the APA. For many of these same reasons, Plaintiffs have also demonstrated that the Forest Service failed to take the requisite ‘hard look’ and, at a minimum, must revise its EA to cure these deficiencies.

B. Failure to Take a ‘Hard Look’ at Other Key Concerns

1. Inadequate Cumulative Impacts Analysis

Agencies must take a “hard look” at all relevant actions in a cumulative impacts analysis.

[A]nalysis of cumulative impacts must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between

the projects, are thought to have impacted the environment. . . Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide.

Te-Moak Tribe of W. Shoshone v. Dept. of Interior, 608 F.3d 592, 603 (9th Cir. 2010) (internal citations omitted) (rejecting EA for mineral exploration operation that had failed to include detailed analysis of impacts from nearby proposed mining operations). A cumulative impacts 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 992.

The cumulative impacts analyses in the CCR Project EAs fail to meet this standard. The EAs merely list other projects without providing any quantified assessment of their combined environmental impacts. AR16183-4, 20830. This list did not include date, size, acreage, road mileage, beneficial or adverse impacts, nor any useful information about the projects listed therein despite Plaintiffs’ request that the FEA include such information. AR17521-22. For example, Plaintiffs’ comments noted that several proposed CCR Project units overlap with the Bear Springs timber sale and were recently thinned. AR17535. In response, the Forest Service simply states: “Previously entered stands would be evaluated for desired stand conditions and may not require re-entry thinning, but other aspects of the CCR Proposed Action may be needed to move the stand toward the desired future conditions.” AR21052. This vague, general response is symptomatic of the lack of high-quality site-specific analysis about the current status of the land, and the overlapping impacts of past, current and future projects. These should be determined *before* a final decision is made. *Nat’l Parks*, 241 F.3d at 730, 733 (agency’s “hard look” must be done “before, not after, the environmentally threatening actions are put into effect.”)

Second, the geographic scope of the cumulative impacts analysis for the spotted owl and its critical habitat was improperly limited to the local watershed. *See* AR20907 (agency’s terse 2-paragraph

cumulative effects discussion for this resource). As noted, the entire CCR Project area is within Critical Habitat subunit ECN 7, which covers 139,983 acres. AR16335. This is the fourth (and by far the largest) timber sale the Forest Service planned in this specific subunit over the past five years.

AR17562. In the contiguous northern section of the subunit, the Dalles II project resulted in a total degradation/loss of 785 acres of spotted owl dispersal habitat and 575 of suitable NRF habitat, for a total of 1,360 acres of critical habitat degraded for up to 50 years. *Id.* An additional 365 acres of spotted owl habitat were degraded by the Government Flats fire and subsequent logging in the North Fork Mill Creek Timber sale. *Id.* And 1,174 more acres of owl critical habitat would be degraded by the planned Polallie Cooper Timber Sale. *Id.* None of these timber sales were included in the list of projects considered for cumulative impacts, despite being specifically mentioned in DEA comments. *See* AR17562, 20830. These omissions render the cumulative impacts analysis for the spotted owl inadequate, as does the unhelpfully vague conclusion that cumulative actions “have reduced the amount of suitable habitat on the landscape” and “will continue to do so into the future.” AR16331, 20907.

2. Failure to Establish an Accurate Environmental Baseline

There is “no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA” without “establishing the baseline conditions.” *Half Moon Bay Fishermen’s Mktg. Ass’n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988). The environmental baseline is the heart of the agency’s NEPA analysis, because it is against this information that environmental impacts are measured and evaluated; therefore, it is critical that the baseline be accurate and complete. *Ctr. for Biol. Diversity v. BLM*, 422 F.Supp.2d 1115, 1163 (N.D. Cal. 2006); 40 C.F.R. § 1500.1(b) (“Accurate scientific analysis” and “public scrutiny are essential to implementing NEPA.”). The establishment of a baseline is not “an independent legal requirement, but rather, a practical requirement in environmental analysis often employed to identify the environmental consequences of a

proposed agency action.” *Or. Natural Desert Ass'n v. Jewell*, 840 F.3d 562, 569-70 (9th Cir. 2016). And where an agency relies on inaccurate data for project area site conditions its assumptions concerning the environmental consequences of its proposed actions are arbitrary and capricious. *Id.*

Here, the Forest Service based its decision on an inaccurate and heavily disputed baseline that falls short of these requirements. The EAs repeatedly mischaracterize the affected environment by describing the entire CCR Project area as dense, overstocked and homogeneous. AR16127, 21071 (“The stands included in this project have been examined and those proposed for thinning have been found to be overstocked.”) But, as evidence provided by Plaintiffs shows, this expansive area, spanning thousands of acres from high-elevation moist mixed conifer to low-elevation pine and oak forests, from areas recently logged to unmanaged stands over 300 years old, is quite heterogeneous. Plaintiffs’ members spent thousands of hours field checking the proposed units and found many had stand structures that *currently* meet the Forest Service’s desired future conditions: widely spaced, large diameter trees, with a well-developed understory. *See* AR17528-17530. Many of these stands were previously thinned or are mature native forest that has not been actively managed, in both cases displaying stand structure that is *not* dense and overstocked. AR17527-28. Stand data from the EA also contradicts this vast overgeneralization regarding the lack of structural diversity by showing forest canopy cover currently ranges from 30 to 90%. AR20794-97 (Tables 6-9). Because of past management, many units already have canopy closure levels that are lower than the Project’s desired future conditions. AR17528 (i.e. units 144, 109, 210, 219, and 223). Nowhere in the Final EA does the Forest Service adequately respond to Plaintiffs’ extensive field work and related comments, instead it simply reiterates the need to log all stands to achieve the “desired future condition.” AR21049-52.

By failing to establish an environmental baseline that accurately represents site conditions, or update its baseline in light of extensive, site-specific information provided by Plaintiffs, the Forest

Service did not present an adequate baseline for its own, or the public's review – ultimately resulting in a failure to take a hard look at the CCR Project's impacts. *Jewell*, 840 F.3d at 569-70.

3. Failure to take a Hard Look at Climate Change

As discussed extensively in public comments in the record, National Forests in the Cascade Range of Oregon play an extremely important role in regulating the carbon cycle, while logging is one of the major sources of carbon pollution in the state. *See e.g.* AR17570-17577. Despite the urgent threat of a changing climate, the EAs had little analysis regarding the intersection between this Project and climate change. The DEA's brief analysis did not include the extensive information provided in public comments, including a formula for assessing the actual carbon impacts of individual timber sales. AR16436-37. Rather than taking a hard look at impacts, the DEA's section on climate change was copied and pasted from the MHN's EA for the Polallie Cooper Timber Sale, changing **only** the amount of affected acres from 2,373 acres for Polallie Cooper to 12,700 acres for the CCR Project. AR17570. In responding to comments, the Forest Service claimed "climate change is a global phenomenon," implicating that it is impossible to assess the impact of any given project. AR21033. This excuse was thoroughly rejected by the Ninth Circuit, which found 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). "The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct." *Id.*

C. Failure to Consider Reasonable Alternatives

Federal agencies must "[r]igorously explore and objectively evaluate all reasonable alternatives to a proposed project." *Ctr. for Biological Diversity*, 538 F.3d at 1217. All reasonable alternatives must

receive a “rigorous exploration and objective evaluation..., particularly those that might *enhance environmental quality or avoid some or all of the adverse environmental effects.*” 40 C.F.R. § 1500.8(a)(4) (emphasis added). The Forest Service’s NEPA regulations provide that, for projects with no unresolved conflicts concerning alternative uses of available resources, an EA need analyze only the proposed action and no action without consideration of additional alternatives. 36 C.F.R. § 220.7(b)(2)(i). However, that regulation is clearly not applicable to the present case, as the record is full of “unresolved conflicts concerning alternative uses of available resources,” thus the Forest Service must analyze a full range of reasonable alternatives.

The discussion of alternatives is intended to provide a “clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. This requirement is critical to serving NEPA’s primary purposes of ensuring fully informed decisions and providing for meaningful public participation in environmental analyses and decision-making. *See* 40 C.F.R. § 1500.1(b), (c). The Ninth Circuit has confirmed that an agency’s failure to consider a reasonable alternative is fatal to EAs, as well as EISs. *W. Watersheds Project (“WWP”) v. Abbey*, 719 F.3d 1035, 1049-1053 (9th Cir. 2013) (“The existence of a viable but unexamined alternative renders an [EA] inadequate.”)

Plaintiffs’ repeatedly requested the Forest Service consider reasonable alternatives that would address the Project’s stated purpose to “provide forest products where there is an opportunity to restore resiliency to forested areas and reduce the risk of uncharacteristic wildfire.” AR13319 (scoping letter to the public); 12815-18, 14409-10, 17523-27, 17407-09, 17432. Plaintiffs specifically requested the Forest Service consider alternatives that 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, resulting in more effective fuels reduction while protecting wildlife habitat. *Id.* Plaintiffs additionally urged the agency to consider an alternative that did not involve the construction/re-

construction of roads given the high density of roads in the area, and that roads are counter to the Project's alleged goals of fostering ecological resiliency and decreasing fire risk. *Id.*, 16897-98, 19357-70 (research found that forest roads greatly increase the likelihood of human-caused wildland fires).

Despite these suggested alternatives, the Forest Service chose to consider only a single action alternative: the largest, most volume-driven commercial logging project the agency has undertaken on MHNF in over a decade, which requires an extensive amount of new temporary road construction and re-construction. Plaintiffs' comments highlighted the many ways in which the proposed action's commercial logging component (outside of thinning saplings and plantations) not only fails to comport with the stated purpose and need of the CCR Project, AR13319, but is inconsistent with several of the agency's legal obligations, and counter to best available science. AR13319; 16884-17201, 17406-418, 17429-510, 17516-86.⁹ Nevertheless, in the FEA the agency again failed to consider reasonable alternatives that would have avoided logging in mature and old-growth stands and suitable spotted owl habitat; stating as its rationale that the proposed action strikes an appropriate balance between providing wood products, forest resiliency, and protecting the spotted owl. AR20824-25 (further noting that *not* logging these areas would fail to provide "any additional assurance that spotted owl habitat would be retained on the landscape.")

The Forest Service's claim to "strike a balance" between competing interests (e.g. producing timber volume and protecting spotted owl suitable habitat), does not demonstrate that Plaintiffs' proffered alternatives were, in fact, infeasible. When other feasible alternatives also meet the project's purpose and need, they "should be considered in detail." *WWP v. Abbey*, 719 F.3d at 1052. While the

⁹ Plaintiffs suggested one way to implement such an alternative would be to impose an upper diameter limit on the size of trees to be felled. *See e.g.* AR17524-25 (specifically requesting the agency consider an 18" diameter at breast height (dbh) limit as consistent with the Forest Service's own "Guide to Fuel Treatments in Dry Forests of the Western United States").

TSPR agreement directed the Forest Service to produce a substantial volume of timber from the CCR Project, there is nothing in the agency's stated purpose and need or other NEPA analysis that acknowledges this specific volume target.¹⁰ To have done so would improperly define the project's objectives "in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency's action" thereby rendering the agency's NEPA analysis "a foreordained formality." *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070-72 (9th Cir., 2009) (internal citations omitted); *see also Klamath-Siskiyou Wildlands Ctr.*, 373 F.Supp.2d at 1088-89 (rejecting Forest Service's rationale for dismissing "out of hand any proposal which would have reduced the amount of timber harvest" on account of it being "uneconomical" without adequate support for that proposition); *Native Fish Soc'y v. Nat'l Marine Fisheries Serv.*, 2014 WL 199093, *9- 10 (Jan. 16, 2014) (NMFS' decision to dismiss five alternatives because they might reduce the proposal's "intended benefit of providing fishing opportunities" was unreasonable); *Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165, at *39-40 (D. Or., July 3, 2014) (EA violated NEPA because it never analyzed the reasonable alternative of allowing majority of project to proceed without drilling activities in riparian reserves).

The present scenario is very similar to that in *Or. Wild v. BLM*, where the district court held the agency violated NEPA by failing to consider a reasonable alternative that limited the project to only harvesting younger trees. 2015 WL 1190131, at *4-6. Similarly, the district court in *Conservation Cong. v. U.S. Forest Serv.*, held that the Forest Service violated NEPA by failing to consider an alternative with a diameter limit, as it was reasonable to suggest that retaining the larger trees would meet the agency's stated purpose of fuels reduction. 235 F.Supp.3d 1189, 1210-11 (2017).

In short, the Forest Service did not provide an adequate explanation for not analyzing, in detail,

¹⁰ According to the agency's estimate, just the first commercial sale of the CCR Project, the "Ahoy" sale would generate more than enough money to repay the TSPR funds. *See* AR17655 (email stating: "The stumpage coming off of Ahoy should be able to pay the entirety of the Pipeline funds back (\$376,000).")

feasible alternatives that would: (1) enhance forest resiliency and reduce fuel loads by thinning saplings, plantations, and areas that are departed from their natural range of vegetation and fire regimes, (2) help generate a sustainable supply of timber, and (3) protect mature and old-growth forests within suitable spotted owl habitat. By only analyzing one action alternative that maximizes timber volume, the Forest Service failed to conduct a legally adequate alternatives analysis.

II. THE FOREST SERVICE VIOLATED NFMA

The CCR Project must be consistent with the MHN Forest Plan, as amended by the NWFP. 16 U.S.C. § 1604(i). If there are differences in management guidelines between the two documents, the NWFP controls. AR04177. NFMA requires that “all management activities undertaken by the Forest Service must comply with the forest plan.” *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 932 (9th Cir. 2010) (“In order to ensure compliance with the forest plan and the [NFMA], the Forest Service must conduct an analysis of each ‘site specific’ action, such as a timber sale, to ensure that the action is consistent with the forest plan.”) (internal citations omitted). To document compliance with that statutory requirement, each “project or activity approval document must describe how the project or activity is consistent with applicable plan components.” 36 C.F.R. § 219.15(d).

A. Logging in the White River LSR Does Not Comply with the Northwest Forest Plan

As noted above, LSRs are managed 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 including the northern spotted owl. AR04301-03. Active management in LSRs for risk-reduction “shall focus on younger stands.” AR04305. Logging activity in older stands may be appropriate under very strict parameters, such as when proposed management activities will clearly result in long-term maintenance of habitat, the activities are clearly needed to reduce risk, and the activities will not prevent the LSR from playing an effective role in the objectives for which LSRs were established. *Id.* All

thinning or silvicultural treatments inside reserves are subject to review by the Regional Ecosystem Office to ensure treatments are beneficial to the creation of late-successional forest conditions. *Id.*

Commercial logging is proposed for several units within the White River LSR, AR21080-81, yet the MHNH failed to consult with the Regional Ecosystem Office when planning the CCR Project, and the agency's analysis fails to demonstrate that the Project meets the narrow conditions for logging LSRs. Specifically, units 3, 5, 7, 8L, 9L, and 457 cover 179 acres of mature forest stands from 96 to 229 years old. AR20973-74, 20997 (FEA Appendix 1: Unit descriptions). Some LSR units have already been thinned and include many legacy Douglas fir and Ponderosa pine trees. These units currently have a canopy cover around 50% and are on a trajectory to progress naturally towards a more complex, late successional stands. *Id.* As proposed, the average post-treatment canopy closure in the LSR units would be **35%**, well below the canopy cover necessary for spotted owl habitat. *Id.*

While the FEA purports to follow the guidelines of the White River LSR Assessment, AR20831, the specific logging prescriptions do not. These LSR stands are categorized as "Open Park-like, Cathedral, and Open Intolerant Multi-story" forest. AR20783. The LSR Assessment sets out the Desired Future Condition for "Open Park-like" and "Open Intolerant multi-story" post-treatment as variable canopy closure (40% to 80%). AR04888. "Cathedral" stands should have a post-treatment canopy closure greater than 60% but less than 85% achieved through "retention of **any** remnant large diameter trees, marking trees on the basis of desired canopy closures developed from the overlay of existing structures and eventual desired structures." *Id.* As noted above, CCR post-logging canopy cover would be 35%, violating both the LSR Assessment and NWFP guidelines. AR20973-74, 20997.

It is the Forest Service's burden to demonstrate that the proposed logging is *clearly* needed and will *not* prevent the LSR from providing the habitat for which it was created. In this case, the record does not support removing potential and existing high-quality owl habitat in an LSR, nor does it provide

any information clearly establishing that more logging is needed to ensure spotted owl habitat into the future. Because so much canopy within these units is currently created by large trees, logging these stands would necessarily remove large, mature trees, which is inconsistent with both reducing risk and promoting late-successional structure and owl habitat. By failing to demonstrate consistency with these NWFP requirements, the agency violated NFMA. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.15(d).

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

The MHN Forest Plan requires that wildlife trees be maintained to support 60% of maximum biological potential of cavity nesting species. AR01422. The draft EA admits that this standard will not be met because of the purpose and need for the Project and the on-the-ground conditions present within the stands. AR16180-81. On average, the proposed treatment units are currently far below Forest Plan standards for snags with roughly one snag per acre that is 20 inches diameter at breast height (DBH) and larger, and an estimated two snags per acre that are 11-inch DBH and larger. AR20833. The proposed action would result in **fewer** snags over time compared to the No Action Alternative, with one slight exception for small, dry forest snags. AR18965. The CCR Project will also result in a direct, immediate loss of existing snags, as they will be cut during harvest operations,¹¹ temporary road construction, road decommissioning, road closure, and storm proofing due to safety considerations. AR16383-84. The EA does not provide any estimate of how many snags will be immediately lost, nor acknowledge that the Project will retard creation of future snags by removing most of the trees that would die naturally. In the context of an already snag-depleted ecosystem, increasing the snag deficit for decades does not comply with the Forest Plan. Despite Plaintiffs raising the issue at every point in the public comment process,

¹¹ Occupational Health & Safety Regulations require that each danger tree, including lodged trees and snags, shall be felled or removed using mechanical or other techniques that minimize employee exposure before work is commenced in the area of the danger tree. 29 C.F.R. § 1910.266(h)(1)(vi).

the Final Decision Notice inexplicably does not address consistency with FW-215. *See* AR21081 (approving exceptions for other Forest Plan standards).

III. THE FOREST SERVICE VIOLATED THE TMR

The Forest Service violated the Travel Management Rule (TMR) when it purportedly identified the minimum road system (“MRS”) for the CCR Project area as part of its decision without demonstrating how the resulting road network meets the requirements of 36 C.F.R. § 212.5(b) (Subpart A of TMR). AR21074 (Final DN), 20539 (Objection response).

A. The Importance of Choosing an Accurate Minimum Road System

The best available science shows that roads cause significant adverse impacts to National Forest resources. *See, e.g.*, 66 Fed. Reg. 3206, 3208 (Jan. 12, 2001) (“Scientific evidence compiled to date [2001] suggests that roads are a significant source of erosion and sedimentation and are, in part, responsible for a decline in the quality of fish and wildlife habitat.”), AR16988-17002 (2014 literature review of the best available scientific information on forest road impacts), 07370-95 (MHNF Travel Analysis Report). Roads can affect streams directly by accelerating erosion and sediment loadings, by altering channel morphology, and by changing the runoff characteristics of watersheds. *Id.* These impacts in turn negatively affect fisheries and aquatic habitat. In fact, roads are often the largest source of sediment in streams, contributing much greater amounts of sediment from unit area of roads than from all other land management activities combined, including log skidding and yarding. *Id.* Roads disturb and fragment wildlife habitat, altering species distribution, interfering with critical life functions such as feeding, breeding, and nesting, resulting in loss of biodiversity. *Id.* Roads facilitate increased human intrusion into sensitive areas, resulting in poaching of rare plants and animals, human-ignited wildfires, introduction and spread of noxious weeds and invasive species that outcompete and displace

native plants, and damage to archaeological resources. *Id.*¹²; 17016-17 (documenting how roads increase fire risk), 17018-28 (documenting adverse impacts of “closed” and/or “temporary” roads).

In addition to the adverse effects roads have on water quality, fish, wildlife, and ecosystems, the Forest Service’s vastly oversized and under-maintained road system is a tremendous financial drain. AR07326-27, 07330-31, 07341-53, 07408-13 (list and map of all MHNH roads and those identified as “likely not needed” in 2015 Travel Analysis Report). Indeed, MHNH’s costs to maintain system roads greatly exceeds its annual maintenance budget. *Id.*, AR20854. These costs and negative impacts underscore the importance of identifying the smallest amount of roads necessary to implement the Forest Plan’s resource management objectives. 36 C.F.R. § 212.5(b).

An extensive road network and route system for off-highway vehicles (OHVs) currently exists within the CCR Project area. AR20855-56 (showing a total of 206.48 miles of motorized routes in the Project area), 07532 (map). All four sub-watersheds within the analysis area have combined road/motorized route densities that greatly exceed the Forest Plan’s road density standards of 1.50 to 2.0 miles per square mile. AR01573, 01586, 01592, 01618, 01628 (MHNH Forest Plan), 20873-74. Such high road/route densities are adversely affecting water quality, fish and wildlife habitat in the proposed action area. AR20870-71, 20904. Like most of MHNH, the agency’s backlog of unmaintained and deteriorating roads in the CCR Project area exacerbates these negative impacts. *See e.g.* AR20855.

B. The Requirements and Process for Determining a Minimum Road System

To address its unsustainable and deteriorating road system, in 2001, the Forest Service promulgated the Roads Rule (referred to as “subpart A”). 66 Fed. Reg. 3206 (Jan. 12, 2001); (codified

¹² Adverse road related impacts to the endangered Oregon spotted frog and endangered gray wolves are of particular concern in this Project area. *See e.g.* AR19187-89 (plaintiff’s objection letter), 19191 (January 16, 2018 press release from FWS & Oregon Dept. of Fish & Wildlife confirming exceptionally rare presence of endangered gray wolf pair in the White River unit of MHNH).

at 36 C.F.R. §§ 212.1 to 212.21). Subpart A of the TMR requires the Forest Service identify the minimum road system needed to meet management objectives adopted in the relevant Forest Plan. 36 C.F.R. § 212.5(b)(1). To further close the gap between the agency's limited resources and the maintenance required to keep up its oversized and deteriorating road system, the Forest Service must also identify unneeded roads to prioritize for decommissioning or to be considered for other uses. *Id.* § 212.5(b)(2).

There are two stages in the process of identifying the MRS for each National Forest. First, as directed by the Forest Service's Washington Office, all National Forests were to submit travel analysis reports by the end of FY 2015, which MHNH completed.¹³; 36 C.F.R. § 212.5(b)(1) ("In determining the minimum road system, the responsible official must incorporate a science-based road analysis at the appropriate scale"); AR07321-407 (MHNH 2015 Travel Analysis Report). Next, and more importantly, the Forest Service must consider the recommendations from its Travel Analysis Report (TAR) in its project-level NEPA analyses for proposed actions at the sub-watershed scale or larger in order to identify the MRS and unneeded roads for decommissioning in project areas. AR17055-57 (described as the "MRS NEPA" stage in the attached flowchart), 07333 (explaining that the TAR is guidance, it did "not make site-specific decisions about which roads will be retained or closed. Those decisions are made at the project scale with public input on site-specific situations.") Given the very large geographic scale of the CCR Project, and the fact that the agency chose to consider changes to system roads as part of the Project, it is precisely the type of action for which the Forest Service must complete the second step of implementing the MRS. AR17029-30.¹⁴

¹³ Memorandum from Leslie Weldon to Regional Foresters *et al.* on Travel Management, Implementation of 36 CFR, Part 212, Subpart A (March 29, 2012).

¹⁴ Memorandum from James Peña, Regional Forester, to Forest Supervisors on Monitoring Travel Management NEPA Decisions for the Minimum Road System (Sept. 6, 2016) (explaining that "[p]roposals to develop the MRS may be incorporated into landscape level restoration projects or stand

Identifying the MRS for any given area of the National Forest, however, must accord with the specific criteria established under subpart A, which directs the agency to consider whether each road segment that it decides to maintain on the system is needed to:

- Meet resource and other management objectives adopted in the relevant land and resource management plan;
- Meet applicable statutory and regulatory requirements;
- Reflect long-term funding expectations; and
- Ensure that the identified system minimizes adverse environmental impacts associated with road construction, reconstruction, decommissioning, and maintenance.

36 C.F.R. § 212.5(b)(1); AR17055-57 (“analyze the proposed action and alternatives in terms of whether, per 36 CFR 212.5(b)(1), the resulting [road] system is needed. [...] The resulting decision [in a site-specific project] identifies the [MRS] and unneeded roads for each subwatershed or larger scale.”)

C. The Forest Service Failed to Demonstrate that the Road System it Identified for the CCR Project Area Meets the Requirements of the TMR, Subpart A

The Forest Service claims that it properly used the recommendations of the 2015 TAR to identify the minimum road system within the Project area, but nowhere in the EA or DN does the agency demonstrate how the road network it allegedly identified as the MRS meets the regulatory criteria listed above from Subpart A of the TMR, 36 C.F.R. § 212.5(b). AR21074 (Final DN), 20539 (Objection response). *See cf. Alliance for the Wild Rockies v. U.S. Forest Serv.*, 899 F.3d 970, 982-84 (9th Cir., 2018) (Forest Service complied with the TMR where its project-level EIS fully explained how the selected action would meet each of the factors listed under 36 C.F.R. § 212.5). As noted, 36 C.F.R. § 212.5(b)(2), also directs the Forest Service to prioritize unneeded roads for decommissioning, but the agency failed to do so. Out of 165.2 miles of roads in the Project area, the Forest Service proposes to

alone as a single purpose proposal,” and “[t]ravel management decisions related to the MRS that require NEPA include removing a route from the Forest transportation system, decommissioning a route or an unauthorized route, closing roads to vehicular travel, putting roads in storage (converting an open road to a Maintenance Level 1 status) or changing the allowed classes of motor vehicles or time of year for motor vehicle use.”)

decommission only 0.7 miles (less than half of one percent). AR20856, 21071. In contrast, it proposes to build or reconstruct 35.8 miles of temporary roads. AR21071. It also proposes to close 5.6 miles (three percent) of system roads in the Project area—some of which already have existing decisions to be decommissioned. *Id.*, AR21093-96. The many miles of “temporary” roads and “closed” roads will have ongoing impacts by remaining on the landscape and continuing to present a risk to forest resources. AR17018-28 (also showing temporary roads have adverse resource impacts for many years following completion of a project). Limited maintenance is planned for roads in storage (“closed” status). *Id.* Relying on temporary roads and closures instead of decommissioning is inconsistent with the Forest Service’s mandate to prioritize unneeded roads for decommissioning or other uses. In short, the Forest Service’s decision fails to comply with the TMR. 36 C.F.R. § 212.5(b).

CONCLUSION

By hastily planning a large, volume-driven project in threatened spotted owl critical habitat, the Forest Service disregarded best available science and public input, failed to take a hard look at environmental impacts, and ultimately made decisions not supported by the record. As detailed above, the ill-conceived CCR Project violates NEPA, NFMA and the TMR. For these reasons, the Court should grant summary judgment and relief in Plaintiffs’ favor.

Respectfully submitted this 11th day of January, 2019.

/s/ Brenna Bell

Brenna Bell
(503) 331-0374
brenna@bark-out.org

/s/ Jennifer Schwartz

Jennifer R. Schwartz
(503) 780-8281
jenniferroseschwartz@gmail.com

Counsel for Plaintiffs