

BARK
PO Box 12065
Portland, OR 97212
503-331-0374
Bark@SpiritOne.com

By Certified Mail, return receipt requested

December 5, 2001

Request for Stay
Statement of Reasons
Request for Relief

**Rusty Saw Commercial Thinning Plan Environmental Assessment EA #
OR080-99-08**

TO:

US Department of the Interior and
Office of the Secretary
Office of Hearings and Appeals
Board of Land Appeals
4015 Wilson Blvd.
Arlington, Virginia 22203

Richard Prather
Cascades Resource Area Manager
Bureau of Land Management
Salem District
1717 Fabry Rd. S.E.
Salem, OR 97306

CC:

Regional Solicitor, PNR
Association of O&C Counties

Appellants:

BARK
PO Box 12065
Portland, OR 97212

Reference:

1840 BARK-5490
Rusty Saw timber Sale
OR080-TS01-504

Pursuant to 43 CFR part 4, Bark hereby appeals the denial of our protest of the Rusty Saw Commercial Thinning Plan. We appeal the decision to approve the Rusty Saw Environmental Assessment; the determination of a "Finding of No Significant Impact" (FONSI); Final Decision Document and Decision Rationale, the auctioning of timber from the project area; and any implementation of the project. Our NOA has already been submitted.

Description of sale:

Rusty Saw Commercial Thinning Plan

EA # OR080-99-08

Eagle Creek Watershed

Cascades Resource Area, Salem District BLM

Legal Description: Sections 11; T.3S., R. 5E., W.M. Clackamas County.

Volume: approximately 23128 CCF

182 acres

EA and FONSI signed May 28, 1999

Final Decision Documentation signed July 23, 2001

Deciding officer: Richard Prather, Cascades Resource Area Manager

I. Appellants' Interests

Appellants' interests will be adversely affected by these projects. Members of Bark use and enjoy the BLM land in the Eagle Creek Watershed, including the area in, around and affected by this timber sale for recreational, educational, aesthetic and other purposes. The value of those activities will be irreparably damaged by this timber sale. We have a long standing interest in the sound management of Salem BLM forests and the right to ask the BLM to comply with applicable plans, regulations and laws.

II. Request for Stay

Appellants request a stay of selling or awarding of sale, and any allowance of logging, road construction, or other site preparations by a purchaser or BLM pending the Department of Interior's final decision on this protest. Appellants petition the Board of Land Appeals (the Board) for a stay of the decision pending appeal, pursuant to 43 C.F.R. 4.21(a), (b) for the reasons described below.

(a) There is a high likelihood of immediate and irreparable harm if the stay is not granted.

A stay is necessary because award and full implementation of the sale will occur before the appeal is decided upon (an average of two years). This will cause immediate and irreparable harm to the forests, soils and wildlife of the Eagle Creek watershed if the stay is not granted. The projects are likely to be partially or completely implemented before the Board ruling. Once the trees are cut, they cannot be put back.

(b) The harm to appellants if the stay is denied far outweighs any potential harm from granting the stay.

As discussed above, denying the stay will have real environmental impacts, whereas no harm would be incurred by the government if a stay is granted. The government can simply award the projects at a later time. The purchasers of these sales currently have numerous government timber sales under contract, as well as a plentiful supply of private timber available, and they will not be harmed by a delay in the award.

The courts have found that, "Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long

duration, i.e., irreparable.” Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 107 S. Ct. 1396, 1404 (1987). When environmental injury is “sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.” *Id.* In contrast, any harm to the government would be economic and “the Government’s economic loss cannot be considered compelling if it is to be gained in contravention of federal law.” Wilderness Society v. Tyrrel, 701 F. Supp. 1473, 1491 (E.D. Cal. 1988), *rev’d on other grounds*, 918 F.2d 813 (9th Cir. 1990) (citing Northern Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988)). The only possible injury to BLM is monetary -- an injury which is not “irreparable” in the equitable sense. Sampson v. Murray, 415 U.S. 61, 90, 94 S. Ct. 937 (1974).

(c) This appeal has a high likelihood of success on the merits.

The likelihood of success of this appeal on the merits is demonstrated in the comments and information we have submitted to the BLM, and by the reasons outlined in our Statement of Reasons below.

Any decision to proceed with the sale would decision violate BLM’s duty under FLPMA to “take any action necessary to prevent unnecessary and undue degradation of the [public] lands.” 43 U.S.C. 1732(b). “Failure to comply with applicable environmental protection statutes and regulations thereunder will constitute unnecessary or undue degradation.” 43 C.F.R. 3809.0-5(k)(4).

(d) The public interest favors granting the stay.

Public interest clearly favors granting the stay. Refusal of administrative agencies to comply with environmental laws “invokes a public interest of the highest order: the interest in having government officials act in accordance with the law.” Seattle Audubon Society v. Evans, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991), *aff’d*, 952 F.2d 297 (9th Cir. 1991). Local citizens oppose this project and deserve to have the issues reviewed by the Board.

A stay will be in the public interest, because it will protect the status quo of the environment on, near, and downstream of the project area, and will protect the interests of appellants and local citizens until the Board can make a decision on the merits.

III. Requested Relief

Because of the violations of the Northwest Forest Plan, the Appellants request a full remand of the Rusty Saw commercial thinning plan EA, FONSI, Final Decision Documentation and Decision Rationale.

IV Statement of Reasons

1. Water Quality and Fisheries

The Rusty Saw sale is located in the Eagle Creek Watershed, a Tier 2 Key Watershed. As stated in the Northwest Forest Plan (NWFP), the BLM must reduce road mileage and give Key watersheds highest priority for watershed restoration. Rusty Saw does neither.

Failing to protect the watersheds could impact fisheries. In the project area and downstream from the proposed project are fish including Chinook salmon, steelhead and cutthroat trout.

A survey from May 1998 found cutthroat trout in a stretch of the NF Eagle Creek (Fish Presence/Absence Survey Form, 5-28-98). This stretch is adjacent to unit RR B1 of Rusty Saw, which involves thinning in the Riparian Area with only a 75-foot no-cut buffer. According to the National Marine Fisheries Service (NMFS) letter in the Rusty Saw Project File, sea-run cutthroat trout are proposed for listing.

None of the NEPA documents or any documents in the Rusty Saw TS Project File discuss the impacts of logging and road work on fish. The Appellants would expect this, and certainly, with some of the thinning being done so close to a stretch of creek with proposed-to-be-listed fish in it, that the BLM would take the “hard look” required by NEPA at the possible impacts to fish by the project.

(A) Impacts of Sediment from logging

The proposed action involves commercially thinning 176 acres of Matrix lands with ground-based logging systems and cable yarding. Ground-based systems and cable yarding (one end of log suspended off ground) have the potential to disturb soils, resulting in a potential for soil erosion to bleed into watersheds. This is not discussed in the Rusty Saw planning documents.

Compaction from ground-based systems can break down the moisture-absorbing capability of the soil which can result in decreased water absorption. This can increase surface erosion and peak flows. The Rusty Saw planning documents do not discuss the potential of how this can affect the watersheds.

There are six acres of thinning in Riparian Reserves using cable systems with suspending one end of logs off the ground. 75-foot no-cut buffers are prescribed in the Reserves. Nowhere in the planning documents or even in the NWFP does it explain the rationale for using 75 foot no-cut buffers in Riparian Reserves.

Under the Environmental Consequences section, the only mention of the possible effects to fisheries from Rusty Saw is that the Riparian Reserves will be adequate and that no adverse effects are anticipated. There is, however, an admission in the EA that logging can produce sediment:

“Any increases in sedimentation due to the proposal would be minimal and temporary. The riparian reserves would serve to filter any sedimentation before reaching a stream.” (p. 26, EA).

This brief and optimistic statement does not explain how the BLM knows the Reserves will filter out the sediment, and how much sediment they will filter out. The planning documents do not discuss what would happen if any sediment reaches the streams; the BLM apparently is assuming that won't happen. But, there is no guarantee that sediment will not enter the streams.

The Soils/Hydrology Report also says *“Risk of significant sediment inputs are reduced by the employment of mitigating measures for ground disturbing activities and decommissioning of new and existing roads. Sediment generated as a result of this*

proposal would be limited in scope, duration and intensity, and would decrease as natural vegetation recovery takes place.”

Again, no explanation of how much sediment they are talking about and how they are so sure that the amount generated would be “limited in scope, duration and intensity.”

The planning documents also fail to discuss and evaluate the possibility of landslides and debris flows and their impact on the water quality and fisheries. Riparian buffers do not prevent channelized landslides or debris flows. This was affirmed by the court TWS v. Bosworth (D. Idaho, 1999).

Another problem is the analysis does not discuss the possibility of sediment being produced from thinning in the Riparian Reserves. There is no reason to expect this is not a possibility, especially compounded with the fact that the Riparian Reserves have fragile soils (see Soils/Hydrology Report).

Whereas the Rusty Saw planning documents apparently assumes no sediment will be produced by logging in Riparian Reserves (by its omission of even mentioning it) another federal land agency, the USFS, has stated in its own EAs for different timber sales that there is a risk with thinning in Riparian Reserves:

The EA for the Imp Timber Sale on the Mt Hood National Forest carries this warning: *“The ground disturbing activities associated with thinning in riparian reserves does have the potential to allow sediment to enter the stream channel from surface erosion and run-off, causing a temporary reduction in water quality.”* (Attachment 1: Imp EA, p. 15).

This isn't an anomaly-another timber sale on USFS land, the Mutt timber sale, again on the Mt Hood NF, admits the risk of sediment delivery to watersheds by thinning in Riparian Reserves. The logging methods (cable) are similar to the ones used in Rusty Saw (see Attachment 2, p.7):

“The ground disturbing activities associated with thinning in riparian reserves does have the potential to allow sediment to enter the stream channel from surface erosion and run-off, causing a temporary reduction in water quality.” (Attachment 2, p. 17).

As no tractors are allowed in the Reserves in the Mutt TS, the “ground-disturbing activities” must be from the cable logging and dragging logs. This is the same prescription as for Rusty Saw, yet the Rusty Saw EA does not mention any possible ground-disturbing activities from cable logging in the Reserves and that there is any risk of sediment or water temperature changes.

Hence, there is indeed risk of sediment being produced from logging in Riparian Reserves and risk of it entering watersheds. Yet the planning documents for Rusty Saw do not even mention it.

For protection of watersheds from logging, the information in the planning documents is scant. On page 6 of the Environmental Assessment (EA), it states that stream protection buffers would provide ample protection. The BMPs associated with thinning include: “minimize practices that disrupt natural drainage” and “avoid scarification.” Yarding will be done in the dry season (p. 8, EA). Downhill cable logging during dry times of the year would keep compaction and erosion to minimal levels (p. 24, EA). The BLM feels that the Riparian Reserves buffers will be adequate to filter sediment before reaching a stream (p. 26, EA).

These BMPs are vague and hopeful but carry no quantitative assurances; how much sediment will be minimized? The planning documents also do not explain what would happen if BMPs fail. This level of vagueness has also been proven in the courts to be illegal (see appropriate section below).

The Appellants' concern over surface erosion, landslides and debris flows comes from BLM's own reports on the geology and hydrology of the area.

The Soils/Hydrology Report for the Rusty Saw TS notes that one of the soils type in units A, B, and C is Zygore gravelly loam, whose management considerations states: "Erosion, landslides and slumping on the roads when wet."

Portions of Unit A are in the transient snow zone (TSZ). As stated in the Soils/Hydrology Report, transient snow zones are areas where snow normally accumulates and melts several times a winter, often rapidly during warm winter rain storms. Watersheds with transient snow zones may experience floodflows of great magnitude. Openings in the TSZ affect snowpack by allowing greater amounts of snow to accumulate on the ground, increasing water availability for runoff during a rain-on-snow event.

The Eagle Creek Watershed Analysis (EGWA) at p. 67 notes "The weak rock type on steep slopes which has the highest potential for landslides exists all along Eagle Creek and the lower sections of...North Fork... The dominant sediment transport mechanisms of these three rock types are debris flows, debris slides and stream bank failures."

The EGWA (p. 37) adds that there have been at least 42 recent landslides and recent debris flows. It adds that management activities such as timber harvest and road construction "has influenced or initiated 14 landslides."

The failure of the BLM to adequately analyze the risks violates NEPA's requirement for taking a "hard look" and using scientific accuracy. The NWFP's requirements are also violated.

(B) Peak flows analysis

The WAR model indicates that peak flows are at or less than 10% higher than levels that would occur in a fully forested condition, which the BLM considers low. The Soils/Hydrology report says that mitigating measures for minimizing erosion potential from ground disturbing activities will occur and that peak flows from rain-on-snow events would increase by less than one percent and would not affect the magnitude, duration or spatial distribution of flows.

The BLM concludes this would maintain the current physical integrity. This is not backed up by scientific evidence. Less than one percent could still be high.

According to the Eagle Creek Watershed Analysis (EGWA), about one third of the North Fork has moderate to low infiltration rates and moderate to high runoff rates (p. 35). Further, "The recent timber harvest and active agricultural activity within areas with low infiltration rates and high runoff capabilities may have increased peak flows in...North Fork..." (p.35, EGWA).

Therefore, the Appellants conclude that there is a real risk of increased peak flows from Rusty Saw that have not been adequately addressed in the planning documents. NEPA requires a “hard look” and scientific integrity. Failure to do so also violates the NWFP.

(C) Impacts from road work and NWFP requirement to reduce miles of road in watershed

The NWFP requires that road density be reduced where needed. In response to Appellants’ protest letter, the BLM said they have reduced the length of existing road on another sale in the Eagle Creek watershed (Delph Creek TS) by 4440 feet recently as well as doing stream restoration projects.

In a conversation with BLM employee Jim Englen on December 3, 2001, we discussed the Delph Creek TS, which is in a tributary to Eagle Creek downstream of the North Fork watershed. Mr. Englen explained some things that were not revealed in the response to our protest letter.

The Delph Creek TS involved 6280 feet of new road construction, and 4280 feet of that was obliterated. Hence, there was a net gain of 2000 feet. As part of the sale, another 6445 feet of existing road was obliterated. Therefore, the net difference was 4445 feet road obliterated. This was a 1998 timber sale, so the road building and obliteration activities occurred between 1998 and summer of 2001. The EA for Rusty Saw is dated May 28, 1999. There is no mention of the Delph Creek TS in the Rusty Saw planning documents.

NEPA requires that all past, present and future impacts be considered in cumulative impacts analysis, which includes timber sales. Why weren’t the impacts of road building and obliteration from the Delph Creek TS discussed?

The Rusty Saw EA originally called for 8000 feet of road to be reconstructed. It increased to 13,000 feet in the Final Decision Document/Decision Rationale (FDD/DR). These roads are overgrown so the recommissioning is akin to building new roads. The road density is very high in this watershed, according to the EA. Therefore, road density should be decreased.

In any case, there is no explanation on how improving and reconstructing 13,000 feet of road for the Rusty Saw TS will help the health of the watershed. This goes against the ACSOs in the Northwest Forest Plan.

The Soils/Hydrology Report says that road renovation is restricted to periods of dry soil conditions which would be sufficient to limit surface runoff and potential erosion. However, it gives no quantitative estimate of how much runoff and erosion is possible. Certainly, there is some risk.

While road renovation being done in periods of dry soil conditions reduces the risk of erosion and surface runoff, the soil is most likely disturbed when the rainy season begins and disturbed soil can runoff into watersheds. There is no discussion of what the risks of erosion is from this, and how much sediment may be involved due to surface erosion.

In both the EA/FONSI and FDD/DR there is a mention that surface runoff and erosion could occur: *“Road renovation restricted to periods of dry soil conditions would be*

sufficient to limit surface runoff and potential erosion. Rock surfacing for wet weather hauling would also reduce surface runoff and erosion.” (p. 24 EA). And: “The increase of 5,255 feet of road renovation and 200 feet of road improvement should only result in a slightly short-term increase in sedimentation...” (p.4 FDD/DR).

While the planning documents mention an increase in sediment, there is no discussion of how this will effect water quality and fish. There is no discussion of how much sediment is expected to enter the watersheds.

Sediment continues to be delivered into watersheds from these roads even if they aren't used by vehicles, yet there is no analysis of this.

Besides violating the NWFP, NEPA's requirements for scientific accuracy and taking a "hard look" are also violated.

(D) Lack of adequate analysis is illegal

There is no quantitative analysis of sediment possibly produced by the thinning and road work. According to Jim Englen of the BLM, there was no sediment modeling done. This is curious, because the Appellants are familiar with sediment modeling done on USFS timber sales. Why not here?

The lack of quantitative analysis does not bode well with recent court cases. In *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213 (9th Cir. 1998), the court found:

"We find no documentation of the estimated sediment that would result from the logging and accompanying roadbuilding or the impacts of increased sediment on fisheries habitat.

"Despite its lack of data, the Forest Service asserts throughout the EA that the expected level of increased erosion and sediment delivery will be small in comparison to that caused by the fire. Whether the increased erosion from logging and roadbuilding is smaller or larger than that produced by the fire is irrelevant. The proper evaluation should identify the impact of the increased sediment from the logging and roadbuilding on the fisheries habitat in light of the documented increases that already have resulted from the fire.

"We have warned that **"general statements about "possible" effects and "some risk" do not constitute a "hard look" absent a justification regarding why more definitive information could not be provided.**" *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir.1998).

NEPA requires that agencies

"insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements. They shall identify any methodologies used and shall make explicit reference by footnote to the scientific and other sources relied upon for conclusions relied upon in the statement..." (40 CFR 1502.24).

Failure to use any model or data analysis to conclude the lack of effects for a project involving a known sediment-generating activity is in no way insuring the professional and scientific integrity of the document.

See also ONRC v. Lowe, 109 F.3d 521, 526-27 (9th Cir. 1997) (agency violates NEPA and APA when it fails to take a “hard look . . . at the probable environmental consequences,” fails to “consider the relevant factors,” and sweeps “stubborn problems or serious criticism . . . under the rug”).

(E) Reliance on Best Management Practices (BMPs)

The courts have determined that just stating that BMPs will be used does not guarantee compliance with standards for water quality. BMPs are just an effort to protect water quality, but the NEPA analysis must describe the likely implementability and efficacy of those efforts and the environmental consequences of the proposed BMPs and a range of reasonable alternative measures to protect water quality.

There should be a site-specific analysis of water quality consequences for each harvest unit, each road segment and each stream segment.

The BLM seems to claim that the direct sediment input from timber harvest in addition to any other sources of sediment will be sufficiently mitigated by the use of BMPs.

While the use of BMPs is to be encouraged in timber projects, Appellants note that the use of these measures are not themselves sufficient to ensure compliance with the Clean Water Act (CWA). Northwest Indian Cemetery Protective Ass'n v. Peterson 795 F.2d 688, 697 (9th Cir. 1986) (holding that compliance with BMPs does not equate to compliance with the CWA).

Indeed, the BLM assumes that the implementation of BMPs will sufficiently mitigate any problems that the proposed project will have on aquatic systems, but offers no proof of this assertion. Consequently, this assumption is flawed and violates the law.

A recent USDA Office of the Inspector General Report concluded that reliance on speculative mitigation measures in order to reach a FONSI significantly compromised environmental quality. OFFICE OF INSPECTOR GENERAL, U.S. DEPT' OF AGRIC., EVALUATION REPORT NO. 08801-10-AT: FOREST SERVICE TIMBER SALE ENVIRONMENTAL ANALYSIS REQUIREMENTS (1999). The OIG concluded that: "Applicable mitigation measures contained in 10 of 12 decision notices and referenced environmental assessments reviewed, were not always implemented. In addition, mitigation measures were either omitted or incorrectly incorporated into 4 of 12 accompanying timber sale contracts.

In addition, "Findings of No Significant Impact" conclusions were questionable . . . Timber sale field visits disclosed that mitigation measures designed to protect key resource areas were not adequately implemented. The measures involved mitigation of riparian areas and stream management zones, wildlife habitat, heritage resource sites, visual quality, and soils."

(F) Thinning in Riparian Reserves and NWFP

The Aquatic Conservation Strategy Objectives (ACSOs) make it clear that silvicultural activities in Riparian Reserves are allowed only if “needed” to attain ACSOs. Thinning in the Reserves in this sale is not “needed” as it is only meant to hasten what would naturally occur if left alone.

The standards and guidelines for timber management activities in Riparian Reserves prohibits timber harvest in the Reserves except in the following cases:

- (a) Where catastrophic events have occurred and salvage and fuelwood cutting to attain ACSOs is needed;
- (b) "Salvage trees only when watershed analysis determines that present and future coarse woody debris needs are met and other ACSOs are not adversely affected;"
- (c) "Apply silvicultural practices for Riparian Reserves to control stocking, reestablish and manage stands, and acquire desired vegetation characteristics needed to attain ACSOs." (p. C-32, Standards and Guidelines, NWFP).

The EGWA states that for the North Fork Subwatershed, "Large and small woody debris, and pool frequency did not meet LMP standards (table 12 and 13). (p. 49 EGWA). It goes on to say:

"habitat complexity is low in the sections of stream surveyed. There is a lack of instream wood in the channel making riffles dominated with few of the pools that are essential to fish survival. The low levels of LWD has eliminated secondary channels, stream slowing and provides few refuge areas for fish... Sediment production is believed to have been increased from disturbances (timber harvest, road building, etc.) causing siltation of the stream substrate and decreasing the productivity of fish...there has been a loss of stream shading and there is low potential for LWD recruitment." (p. 49, EGWA).

Although the BLM has done some in-stream restoration by adding LWD, still, removing more trees in the riparian area removes potential large and small woody debris and violates the NWFP requirements.

The EGWA notes that, in relation to ACSO #3, that "*Loss of riparian vegetation along the North Fork has decreased the aquatic habitat complexity including: pools, LWD and spawning gravel. Stream bank erosion and two debris flows on Bear Creek, along with unstable geologic conditions next to North Fork are contributing to sediment deposition in the lower North Fork subwatershed.*" (p. 96, EGWA).

Therefore, as coarse woody debris needs are not met, the Rusty Saw TS violates the NWFP by logging in the Riparian Reserves and removing volume needed for Coarse Woody Debris requirements.

In fact, the Northwest Forest Plan (NWFP) states that "Standards and Guidelines prohibit and regulate activities in Riparian Reserves that retard or prevent attainment of the Aquatic Conservation Strategy objectives." (p. B-12, NWFP).

(G) Volume scheduled to be removed

The sale does not follow the recommendations of the Eagle Creek Watershed Analysis (ECWA) which recommends no more than 10.3 mmbf of timber be taken from federal lands in this watershed every decade. The Eagle Creek timber sale (a USFS timber sale) was scheduled to remove 28.1 mmbf of timber in three years and has already removed 10.1 mmbf timber.

Even though the Upper Eagle sale, a BLM sale, was removed from the timber base recently, during the NEPA analysis, it still was being considered, and therefore the analysis should have taken that into account. However, it did not, and to say after the fact that it has been dropped misses the point. NEPA requires scientific accuracy and presenting to the public such an analysis and then changing it later violates this requirement.

NEPA 43 CFR 1500.1 (b) states that:

“NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”

2. Range and analysis of alternatives is inadequate

There are only two alternatives. Analysis of alternatives should “present the environmental impacts of the proposal and the alternatives in a comparative form, thus sharply defining and providing a clear basis for choice among options by the decision maker and the public.” 40 CFR Sec 1502.14. The no action alternative should be as fully explored as the proposed action. 40 CFR Sec. 1502.14(b), (d).

The No Action alternative received three paragraphs on the last page of the EA. It discussed the effect of not proceeding with Alternative A on vegetation growth and snag creation. However, it did not discuss the effect on water quality, quantity and fisheries. The reader is not told how not thinning up to 75 feet of watersheds will affect water quality and how it will affect vertebrates and invertebrates. The no action alternative received a scant three paragraphs and doesn't discuss issues of wildlife, fish, water quality, soils. Just that the trees won't grow as fast.

In addition, the range of alternatives is too narrow to satisfy the Purpose and Need. The Purpose and Need is to both provide forest products and to “retain important ecological components within the forest management area.” (p. 1, Rusty Saw EA).

The scope of activities in this sale allow for more alternatives. For example, there could be a thinning without removing trees in certain areas. There could be horse logging. There could be thinning not in Riparian Reserves. Such examples of other alternatives satisfy both components of the Purpose and Need.

The response to the protest letter explains that because the FEIS for the Salem RMP analyzed a “range of alternative land allocations and management options” that it doesn't need to “revisit these decisions every time a site-specific implementation of these lands is proposed (40 CFR 1508.28).” So, they say that they can limit the range of alternatives.

This is incorrect, according to the courts:

In *Friends of Bitterroot, Inc. v USFS*, 900 F. Supp. 1368 (D. Mont. 1997), the court stated:

"Defendants maintain the plaintiffs' preferred alternative 'would not have met the management goals, standards and objectives defined the Beaverhead National Forest by the BH Forest Plan.' Specifically **defendants maintain that 'because the management decisions to harvest timber in those areas have already been made**

at the Plan level, it did not need to be revisited.'

"The fact the Beaverhead Forest Plan designates certain land as suitable for timber management does not, however, obligate the Forest Service to proceed with the timber harvesting, nor does it preclude the Forest Service from exercising its discretion to consider other courses of action.

Accordingly, to the extent defendants maintain an alternative aimed at preserving the Beaver Lakes roadless area would be 'pointless' based upon the goals of the Beaverhead Forest Plan, the court concludes defendants' summary judgment motion is not well taken.

Defendants' position is contrary to NEPA's underlying tenet, i.e. that agencies consider all reasonable alternatives so as to ensure an EIS fosters informed decision making. See *Idaho Conservation League v Mumma*, 956 F.2d at 1519-20.

In the Environmental Consequences of the Alternatives for Rusty Saw, the discussion for the No Action alternative only discusses snags and vegetation. For example, it does not discuss (or even mention) the effect of not doing Alternative A (proposed action) on red tree voles.

Where for Alternative A, the effects are stated that red tree vole habitat may be degraded, the reader may want to know how not doing Alternative A will effect red tree vole habitat. Then, what about other alternatives that conceivably exist, that may impact the red tree vole differently than Alternatives A and B? Having more alternatives to consider the impacts of various management options on species such as mollusks, voles, lichens, herpetofauna, etc, is necessary to make an informed decision.

"[A]n agency may not define the objectives of its action in terms so unreasonably narrow that only one alternative . . . would accomplish the goals of the agency's action, and the EIS would become a foreordained formality." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991), cert. denied, 502 U.S. 994, 112 S. Ct. 616 (1991). See also *Ayers v. Espy*, 873 F. Supp. 455, 467-68 (D. Colo. 1994) (rejecting timber sale EA because USFS considered only even-age management).

The Seventh Circuit recently explained:
No decision is more important than delimiting what these "reasonable alternatives" are. . . . One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing "reasonable alternatives" out of consideration (and even out of existence). . . . If the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role.

In *California v. Block*, 690 F.2d 753, 767-68 (9th Cir. 1982), the court held that the agency had not considered an adequate range of alternatives in its review of National Forest land to determine how to allocate that land among management categories.

"NEPA "does not mandate particular results," but "simply provides the necessary process" to ensure that federal agencies take a "hard look" at the environmental consequences of their actions. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). We conclude that in this case, the Forest Service failed to take the

necessary hard look at the environmental impacts of the exchange and similarly failed to consider adequate alternatives to the proposed exchange."

(3) Wildlife and Botany

The planning documents fail to thoroughly analyze the impact of Rusty Saw on the northern spotted owl. The proposed action occurs within known spotted owl habitat and may adversely impact the owl. But the planning documents fail to provide a mitigation plan for owl habitat.

The EA/FONSI states that "This proposed action may adversely affect the spotted owl" and "**Approximately 167 acres of dispersal habitat would be degraded as a result of commercial thinning.**" (p. 29, EA/FONSI). The EA states that seasonal restrictions on all units would minimize the risk of disturbance if nesting spotted owls are encountered within the disturbance range (p. 29, EA).

The FDD/DR states that "Based upon the fact that this project will not remove spotted owl dispersal habitat, there is no nesting habitat in the project vicinity and a seasonal restriction was imposed on all activities between March 1 and July 1, the likelihood of owl disturbance is remote." (p. 4, DR).

This statement conflicts with the statement in the EA/FONSI of degrading 167 acres. This violates NEPA's requirement for scientific accuracy. How can the public make an informed decision when the facts aren't presented to them straight?

The planning documents also fail to explain how the seasonal restrictions will help prevent impacts to the owl. What about removing dispersal habitat? How will that affect the owl?

Correspondence between Fish and Wildlife Service (FWS) and the BLM is interesting in regards to the spotted owl. A letter dated May 29, 2001 to the BLM from FWS mentions the Programmatic Biological Assessment (BA) for FY 1999 Habitat Modification Projects in the Willamette Province. The FWS writes: "The overall determination for all sales and activities addressed in that document was "likely to adversely affect" owls. However, you have more recently determined, with concurrence of the Level 1 team, that these two thinning projects (Rusty Saw and another TS), by themselves, will not result in take of spotted owls or their habitat and are not likely to adversely affect spotted owls."

The FWS concludes that that the two sales "...may degrade, but will not remove spotted owl dispersal habitat." The BLM obviously agreed with this, but there is no discussion in their own documents about how cumulatively, each timber sale adds up. Unless they have dropped some of the sales and activities mentioned in the FY 1999 Habitat Modification Projects in the Willamette Province, each sale should be considered as contributing to the overall impact to spotted owl habitat.

For Bureau Sensitive and SEIS Special Attention Species, regarding red tree voles, the EA says that they could be present and that vole habitat would be harmed from the sale. This violates the NW Forest Plan. It also says that herpetofauna habitat may be destroyed. There is no discussion on what the destruction of habitat of red tree voles and herpetofauna would mean to the overall population health of these species. This

violates both the NWFP and the National Forest Management Act's (NFMA) requirement for maintaining species viability.

The EA also presents inadequate plans for protecting habitat for other Sensitive and Special Attention Species such as red legged frog and slender salamander. The EA only mentions these species, says there will be a loss of habitat and vaguely mentions mitigation measures. The law is clear that mitigation measures must be specifically described and analyzed.

As the Ninth Circuit has noted, "sensitive" species deserve special attention to protect their viability: "This duty to ensure viable, or self-sustaining, populations, applies with special force to 'sensitive' species." *Inland Empire*, 88 F.3d at 757, citing *Oregon Natural Resources Council v. Lowe*, 836 F.Supp. 727, 733 (D.Or. 1993), and *Forest Conservation Council v. Espy*, 835 F.Supp. 1202, 1206 (D.Idaho 1993).

The lack of analysis of impacts to these species violates 43 CFR 1500.1 (b) which states that:

"NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. The information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."

The lack of mitigation efforts also violates 43 CFR 1502.22 addressing incomplete or unavailable information, because of the lack of analysis. Section 1502.22 provides:

"When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall always make clear that such information is lacking."

(4) Soils

Soil compaction is a known effect from ground-based logging operations. This sale uses ground-based logging systems.

The Soils/Hydrology report states that cable logging would have the following effects: *"Uphill cable yarding 55 acres with partial suspension will result in 1-5% aerial compaction over the units depending on season of yarding resulting in a 1-3% loss in long-term productivity compared with the same area without compaction."*

And, ground-based logging would cause up to 12% compaction of the surface area, resulting in a 6% loss in productivity.

There is no analysis about what these effects mean to soil health, both short-and long-term, as well as how it could affect vegetation growth and erosion.

(5) Vegetation

On page 15 of the EA it says: "Snags of any size are almost non-existent." Later in the EA it says some snags may be destroyed during yarding.

Page 29 of the EA says that due to the very low quantities of snags, “it is anticipated that the affect of this alternative on these features would be high.” There is no discussion on the impact of this, especially as the intent of the logging is to create better habitat through thinning; it is counterproductive to ruin an important component of a forest by removing snags.

This violates NFMA’s requirement for species diversity (affecting snag-dependent species) and NEPA (a full discussion of the impacts-nothing on the effect on snag-dependent species mentioned in the EA). And, of course, it violates the NW Forest Plan.

(6) Fire risk

The EA admits this project will increase fire hazard from low/moderate to moderate/high (p. 13). The mitigation mentioned is adjacent wildlife reserves and Riparian Reserves. The EA does not explain how these areas would mitigate fire. In fact, this simply adds areas that may burn-wildlife and Riparian Area Reserves are supposed to be protected, so what is the effect on wildlife and their habitat should a fire move into these areas? The EA does not discuss this.

The fuel loadings of small woody material will increase from 5 tons per acre to 12 tons per acre after logging. This is the size of woody material most likely to burn. With the risk of wildfire so incredibly high right now, it is foolhardy for the BLM to increase the risk even more.

There is no mitigation mentioned except “Fire hazard would be mitigated by the lower fuel loadings in adjacent wildlife reserves and the Riparian Reserves that adjoin the thinned areas,” The EA also says that: “The added hazard of activity fuels will decrease over time as the fine fuel rots and is incorporated into the soil.” Meanwhile, the area could burn.

Where it is true that the fire risk is lower in this area than in, say, Southern or Eastern Oregon, the area is not immune from large, stand-replacing fires. The most recent ones were in the early 1900’s in the Eagle Creek area. There are also fire scars that suggest even in wet areas, there are occasional non-stand-replacing fires.

According to the Eagle Creek Watershed Analysis, there were large fires between 1900-1950 and 1850-1900 in various parts of the watershed. It says that large-scale fires have not occurred in the watershed since the 1950’s, and that stand replacement crown fire was the presettlement fire behavior in this watershed. Therefore, fire is a normal occurrence in this watershed.

Further, logging itself is risky, even with careful supervision of the operation. Many fires originate from logging operations.

(7) Cumulative Effects

There is a clear lack of cumulative effects analysis. The EA has only a summary of cumulative impacts to watersheds.

The EA also failed to consider other sales in the watershed. The Upper Eagle sale, a proposed sale that the BLM was considering then, was not mentioned in the EA. If it had, the WAR and ECA values would surely be different. Again, accurate information must be presented to the public.

Cumulative impacts of sediment—all those amounts of dirt here and there add up! This is how pools get filled up—over time, all the little amounts here and there accumulate. But the planning documents do not discuss this.

There is no discussion on the impact to the watershed from Longview Fiber, an adjacent landowner. Longview prefers clearcut logging with no or little riparian buffers. How will this cumulatively impact the watershed? The EA does not say.

NEPA regulations at 40 CFR § 1508.7 define “Cumulative impact”:

“Cumulative impact” is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

It is clear that the regulations require discussion of the sum total of all combined impacts—impacts of the proposed action plus the impacts of past, present, and foreseeable actions—not just cursory mention of the impacts of other actions alone.

See ONRC v. Lowe, 109 F.3d 521, 526-27 (9th Cir. 1997) (agency violates NEPA and APA when it fails to take a “hard look . . . at the probable environmental consequences,” fails to “consider the relevant factors,” and sweeps “stubborn problems or serious criticism . . . under the rug”).

(8) Consistency with NWFP

The Ninth Circuit recently confirmed the importance of NFMA's consistency requirement, finding that the Tongass National Forest violated its own Forest Plan in failing to perform procedural steps required in the Tongass Land Management Plan prior to approving the Ushk Bay timber sale. *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1067-71 (9th Cir. 1998). The court there stated: “Under *Neighbors of Cuddy Mountain*, we must affirm the district court's decision to enjoin the Ushk Bay timber sale if that sale is inconsistent with the Tongass Land Management Plan.” *Friends of Southeast*, 153 F.3d at 1068.

Under *Friends of Southeast*, then, the burden is on the BLM to show that the Rusty Saw TS will maintain consistency with all NWFP requirements. It has plainly not met this burden.

(9) Significant changes made in Final Decision Documentation and Decision Rational (FDD/DR)

Renovation of the road increases from 8000 feet to 13,255 feet; almost doubling. There is also 200 feet added of improvement, increased from zero in the original EA. This is a significant increase.

Also, there is no discussion of what “improvement” of the road involves. Page 4 states that mature forest will be lost due to the “improvement” and this leaves the reader wondering why this is necessary. There is no explanation of why there is road improvement needed and why the increase of road renovating.

A “Survey and Manage component 1 and 3 fungus” named *Gymnopilus punctifolius* exists in the planning area. (page 21, EA). The EA says that its habitat “needs to be maintained by retaining old growth forest structure and soil conditions...” (page 22, EA). However, there is admitted logging of old growth in this sale. This is depicted in the new decision-less than one acre of fragmented mature forest habitat due to the increase of 200 feet of road improvement. There needs to be an analysis and explanation of how this will affect species like this fungus.

Due to the significance of the new information, an EIS is warranted.

(10) Conclusion

This concludes our statement of reasons, request for stay and request for relief. Please cancel the EA/FONSI, FDD/DR.

Sincerely,

Natalie Shapiro
Greg Dyson
for
Bark