

Daniel Kruse OSB # 06402  
Cascadia Wildlands Project  
P.O. Box 10455  
Eugene, Oregon 97440  
Tel. (541) 434-1463  
Fax. (541) 434-6494  
dkruse@cldc.org

Ralph O. Bloemers OSB #98417  
Chris Winter OSB # 98435  
Crag Law Center  
917 SW Oak St., Suite 417  
Portland, OR. 97204  
Tel. (503) 525-2725  
Fax. (503) 296-5454  
ralph@crag.org  
chris@crag.org

*Attorneys for Plaintiffs*

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

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

Plaintiffs,

vs.

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

Defendants.

---

Civ. Case No.

COMPLAINT FOR DECLARATORY  
AND INJUNCTIVE RELIEF

(Violation of the National Environmental  
Policy Act, National Forest Management  
Act, and Administrative Procedure Act)

## INTRODUCTION

1. This is a civil action for declaratory and injunctive relief. This action arises under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 et seq., and alleges violations of the National Forest Management Act (“NFMA”), 16 U.S.C. §§ 1600 et seq. and the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq..

2. Plaintiffs Cascadia Wildlands Project, League of Wilderness Defenders - Blue Mountains Biodiversity Project, and Oregon Chapter of the Sierra Club seek a declaration that the United States Forest Service (“Defendant” or “Forest Service”) violated federal laws in planning and approving the Black Crater Fire Timber Salvage Project (“Black Crater Project”) on the Sisters Ranger District of the Deschutes National Forest. Plaintiffs also seek injunctive relief to redress the injuries caused by these violations of law.

3. This action is a challenge to the Forest Service’s February 8, 2007 Final Decision Memo for the Black Crater Project, which authorizes logging on approximately 201 acres of National Forest land impacted by the 2006 Black Crater Fire. The Forest Service approved the Black Crater Project without preparing an Environmental Assessment (“EA.”)

4. Plaintiffs’ first claim is that Defendants violated NFMA by failing to comply with the Standards and Guidelines of the Deschutes Land and Resource Management Plan (“Deschutes LRMP”) as amended by the Northwest Forest Plan (“NFP”). Specifically, Defendants authorized removal of dead trees (“snags”) in a Late-Successional Reserve (“LSR”) that are likely to persist until the next forest develops.

5. Plaintiffs’ second claim is that Defendants planned and approved logging in an LSR for economic and timber sale program purposes, also inconsistent with the Standards and Guidelines of the Deschutes LRMP and NFP and in violation of NFMA.

6. Plaintiffs’ third claim is that Defendants violated NEPA by failing to ensure the scientific integrity of the Final Decision Memo (FDM) for the Black Crater Project and other

planning documents. Specifically, Defendants relied upon inapposite and inapplicable models and guidelines, such as the DecAID Wood Advisor (“DecAID”) and others, to determine snag retention levels. Further, Defendants relied upon inaccurate analysis of scientific data regarding northern spotted owls and their use of burned forests to support the approval of the Black Crater Project.

7. Plaintiffs’ fourth claim is that Defendants violated NEPA by failing to prepare an EA and improperly classifying the Black Crater Project as a Categorical Exclusion (“CE”) despite the extraordinary circumstances in the project area and the potential for significant environmental impacts resulting from the proposed activities.

8. By initiating this action, Plaintiffs seek to: (1) obtain a declaration that the Black Crater Project violates NFMA, NEPA, and the APA; (2) compel the Forest Service to modify the Black Crater Project to comply with applicable laws; and (3) enjoin the Forest Service and its contractors, assigns, and other agents from proceeding with the proposed Black Crater Project, or any portion thereof, unless and until this court determines that the violations of law set forth herein have been corrected.

9. Should Plaintiffs prevail, Plaintiffs will seek an award of costs and attorneys’ fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

### **JURISDICTION AND VENUE**

10. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (federal question), 2201 (injunctive relief), 2202 (declaratory relief), and 1346 (United States as a defendant). This cause of action arises under the laws of the United States. There is a present, actual and justiciable controversy between the parties, and the requested relief is therefore proper under 28 U.S.C. § 2201 (declaratory relief) and § 2202 (injunctive relief), and 5 U.S.C. §§ 701-

706. Plaintiffs exhausted their administrative remedies by filing an administrative appeal of the Final Decision Memo pursuant to 36 CFR Part 215.

11. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because all or a substantial part of the events or omissions giving rise to the claims herein occurred within this judicial district. This case is properly filed in Eugene, Oregon pursuant to Local Rule 3.4 because the Black Crater Project is located in Deschutes County, Oregon.

### **PARTIES**

12. Plaintiff CASCADIA WILDLANDS PROJECT (“CWP”) is an Oregon non-profit corporation headquartered in Eugene, Oregon. CWP’s goals include defending the forests, waters and wildlife of the Cascadia bioregion, including Oregon, by monitoring environmentally destructive projects and educating, organizing and agitating for a more compassionate and responsible relationship with the ecosystems of the bioregion. CWP seeks to defend Oregon’s wild places against logging, road building, mining and other unsustainable resource extraction activities. CWP and its members participate in government decision-making with regard to public lands in the Sisters Ranger District of the Deschutes National Forest and throughout Oregon. The aesthetic, recreational, scientific, and educational interests of CWP and its members have been, are being, and unless this Court grants the requested relief, will continue to be adversely and irreparably impaired by the Black Crater Project.

13. Plaintiff LEAGUE OF WILDERNESS DEFENDERS (“LOWD,”) a 501(c)(3) non-profit corporation, is a coalition of grassroots activists working to defend wilderness and biodiversity from further human degradation. Recognizing the rapid loss of biological diversity as a threat to all life, LOWD members work around Oregon to protect and restore wilderness habitat. LOWD and its members actively participate in governmental decision-making processes on public lands, including national forests, throughout Oregon.

14. BLUE MOUNTAINS BIODIVERSITY PROJECT (“BMBP”) is a project of LOWD with its offices located near Fossil, Oregon. BMBP was established by LOWD to further LOWD’s goals throughout the Blue Mountains. The mission of BMBP is to protect and restore the biodiversity of the Blue Mountains region of Oregon and Washington and to educate the public about threats to forest ecosystems in eastern Oregon. In order to further its mission and protect the interests of LOWD’s members in preserving the biodiversity of the Pacific Northwest forests, BMBP monitors timber sales and other Forest Service activities on the Malheur, Umatilla, Deschutes, and Ochoco National Forests. BMBP’s members use and enjoy the Deschutes National Forest, including the Sisters Ranger District, for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, and recreational activities. BMBP’s members derive recreational, inspirational, religious, scientific, educational, and aesthetic benefit from their activities within this National Forest. Plaintiffs’ members intend to continue to use and enjoy the Deschutes National Forest, including the Sisters Ranger District, frequently and on an ongoing basis in the future.

15. Plaintiff SIERRA CLUB is a national conservation organization with 580,000 members including over 20,000 members in Oregon. Its principal place of business in Oregon is the Chapter Office at 2950 SE Stark, Suite 110, Portland, OR 97214. Its national headquarters is at 85 Second Street, San Francisco, CA 94105. Sierra Club members use the Sisters Ranger District on the Deschutes National Forest for many purposes including hiking, camping, cross-country skiing, backpacking, fishing, bird watching, nature photography, horseback riding, and biological study. In particular, members of the Sierra Club use the Black Crater Project area for recreational and other purposes. Sierra Club and its members have been actively involved in planning processes for activities on the Sisters Ranger District on the Deschutes National Forest.

Sierra Club members will be materially and adversely affected by the proposed post-fire salvage logging project.

16. Plaintiffs' members plan to continue to use and enjoy the Deschutes National Forest frequently and on an ongoing basis in the future, including this summer and fall.

17. The aesthetic, recreational, scientific, and religious interests of Plaintiffs' members have been and will be adversely affected and irreparably injured if the Defendants continue to act and fail to act as alleged herein, and affirmatively implement the action that Plaintiffs challenge herein. These are actual, concrete, particularized injuries caused by Defendants' failure to comply with mandatory duties under NFMA, NEPA, and APA. These injuries would be redressed by the relief sought.

18. The plaintiff organizations have an organizational interest in the proper and lawful management of the Sisters Ranger District of the Deschutes National Forest.

19. In addition to the activities described above, members of each plaintiff organization have participated extensively in administrative actions to protect the Sisters Ranger District on the Deschutes National Forest from potentially damaging timber sales. Plaintiffs' members have participated extensively in Forest Service decision-making processes regarding post-fire logging and other post-fire activities within the Black Crater fire area of the Deschutes National Forest. Members have actively participated in the public process leading to the Black Crater Project, and have exhausted any available administrative remedies.

20. Defendant WILLIAM ANTHONY is the District Ranger of the Sisters Ranger District of the Deschutes National Forest who signed the Final Decision Memo for the Black Crater Project on February 8, 2007, and is sued in that capacity.

21. Defendant UNITED STATES FOREST SERVICE ("Forest Service") is an agency or instrumentality of the United States, and is charged with managing the public lands and resources within the Sisters Ranger District on the Deschutes National Forest, in accordance and compliance with federal laws and regulations.

## LEGAL BACKGROUND

### The National Forest Management Act

22. NFMA requires the Forest Service to develop comprehensive land and resource management plans (LRMPs) for each unit of the National Forest System. 16 U.S.C. § 1604(a). Site-specific decisions must be consistent with the LRMP. 16 U.S.C. § 1604(i).

23. The Deschutes LRMP is the adopted land use plan governing the management of public lands on the Deschutes National Forest.

24. In 1994, the Forest Service and Bureau of Land Management issued a Record of Decision for the Northwest Forest Plan (“NFP”). The NFP established management requirements for all Forest Service land within the range of the northern spotted owl, and amended all LRMPs within the range of the northern spotted owl. The Black Crater Project is in the portion of the Deschutes National Forest that lies within the range of the northern spotted owl.

25. The NFP established a system of Late-Successional Reserves (“LSR.”) The objective of LSRs is 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. NFP C-9.

26. No programmed timber harvest is allowed inside LSRs. NFP 8. In restricted circumstances, such as after a large stand-replacing disturbance like fire, the NFP permits some “salvage” logging to occur within LSRs when the purpose of the logging is to prevent negative effects on late-successional habitat. NFP 8. Salvage logging in LSRs is not to be driven by economic or timber sale program factors. NFP Appendix F-21. Additionally, the NFP requires

the Forest Service to retain live trees, dead trees (“snags”) that are likely to persist until the next forest develops, and adequate quantities of coarse woody debris. NFP C-14.

### **National Environmental Policy Act**

27. The National Environmental Policy Act (“NEPA”) is “our basic national charter for protection of the environment.” 40 C.F.R. § 1500.1(a). NEPA seeks to prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action. 42 U.S.C. § 4321.

28. NEPA requires that federal agencies prepare an Environmental Impact Statement (“EIS”) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C § 4332(2)(C).

29. “‘Significantly’ as used in NEPA requires considerations of both context and intensity.” 40 C.F.R. § 1508.27. With regard to context, “significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole.” 40 C.F.R. § 1508.27(a). With regard to intensity, agencies are directed to consider “[u]nique characteristics of the geographic area such as proximity to...ecologically critical areas,” “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial,” “[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks,” “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts,” and “[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.” 40 C.F.R. § 1508.27(b)(3), (4), (5), (7), (9).

30. “Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. §1508.27(b)(7).

31. If it is uncertain whether the proposed action may have a significant effect on the environment, the agency must prepare an environmental assessment (“EA”) analyzing the effects of the action. 40 C.F.R. § 1501.3. An EA is “a concise public document” that “[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.” 40 C.F.R. §1508.9(a).

32. NEPA’s disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) to insure that the public has sufficient information to challenge the agency. By focusing the agency’s action on the environmental consequences of its proposed action, NEPA ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.

33. A central purpose of NEPA is to ensure that an agency will not act on incomplete information, only to regret its decision after it is too late to correct. NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.

34. “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500.1(b)

35. In few instances, an agency is not required to complete either an EA or EIS. NEPA allows agencies to adopt Categorical Exclusions (“CE”) for categories of actions that will not have a significant effect on the environment. 40 C.F.R. § 1508. “Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations and for which, therefore, neither an environmental

assessment nor an environmental impact statement is required.” 40 C.F.R. §§ 1508.4 (emphasis added.)

36. If “extraordinary circumstances” exist “in which a normally excluded action may have a significant environmental effect,” an agency may not rely upon a CE, but must complete an EA or EIS. 40 C.F.R. §§ 1507.3(b)(2)(ii) and 1508.4. According to the Forest Service’s directives, “[a] proposed action may be categorically excluded from further analysis and documentation in an environmental impact statement (EIS) or environmental assessment (EA) only if there are no extraordinary circumstances related to the proposed action.” Forest Service Handbook 1909.15, 30.3(1)(emphasis added).

37. The Forest Service Handbook (FSH) provides a non-exhaustive list of “extraordinary circumstances.” FSH 1909.15, 30.3(2)(a). Further, NEPA’s implementing regulations provide a list of factors to be considered in determining whether the effect of an action will be “significant.” These “significance factors” must be taken into account when determining whether extraordinary circumstances exist. *See* 40 C.F.R. 1508.4 (extraordinary circumstance is one “in which a normally excluded action may have a significant environmental effect;”) *see also* 57 Fed. Reg. at 43208.

**Administrative Procedure Act**

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

/ / / /

/ / / /

/ / / /

## FACTUAL BACKGROUND

### *The Black Crater Project*

39. On July 24, 2006, the Black Crater Fire started in the Three Sisters Wilderness and burned a total of 9,407 acres. 5,147 acres burned within the Deschutes National Forest.

40. On February 8, 2007, Sisters District Ranger William Anthony of the Deschutes National Forest signed a Final Decision Memo for the Black Crater Project, authorizing logging of approximately 2.25 million board feet of timber from approximately 194 acres of the Black Crater Fire area, and construction of .25 miles of temporary roads. After logging, an average of 6 snags per acre will remain in the logging units. The Final Decision Memo further authorized logging of seven acres of roadside danger trees. The stated purposes of the Black Crater Project are (1) to recover economic value of burned timber, (2) to replant desired tree species where natural on-site seed sources are lacking, and (3) to, for the seven acres of danger tree removal, improve public, administrative and operational safety along Forest Roads used as log haul routes.

41. The entire Black Crater Project is within an area designated by the United States Fish and Wildlife Service as critical habitat for the northern spotted owl. The entire Black Crater Project is also within a designated LSR.

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

43. The Critical Habitat Unit impacted by the Black Crater Project, "CHU OR-5," was designated to provide and maintain essential nesting, roosting, and foraging habitat situated

along the eastern crest of the Cascades, and to help maintain the north-south dispersal habitat along the eastern slope of the Cascades Mountains.

44. The LSR impacted by the Black Crater Project, the “Cache-Trout LSR,” is part of a regional network of LSRs designated to maintain habitat and viability for late successional and old growth related species including the northern spotted owl. The Cache-Trout LSR is located at the eastern edge of the range of the northern spotted owl.

45. Protection of the northern spotted owl in this fringe habitat is especially important for the viability of the species.

46. The Final Decision Memo for the Black Crater Project authorizes logging of snags from 201 acres of LSR and designated spotted owl critical habitat. The types of trees to be removed are “primary constituent elements,” the “physical and biological attributes that are essential to a species conservation,” for which this habitat was deemed critical. 57 Fed. Reg. 1796, 1797, 1798 (Jan. 15, 1992).

47. The Black Crater Project is located approximately half a mile from the Three Sisters Wilderness.

### ***The Roadside Project and Other Cumulative Impacts***

48. On December 8, 2006, the Sisters District Ranger signed a Final Decision Memo for the Black Crater Roadside Danger Tree Removal Project (“Roadside Project,”) a second post-fire logging project within the Black Crater Fire area. The Decision Memo for the Roadside Project authorizes logging of 150 thousand board feet of timber along 8.9 miles of roads in and around the project area for the Black Crater Project. Both projects are in the same immediate

geographic area, and share the same purposes: (1) recover economic value of fire-killed timber and (2) improve safety along roads.

49. Each project was planned separately and without reference to the other, and both projects were approved under separate Categorical Exclusions and without NEPA documentation in an EA or EIS.

50. In addition to the impacts from the Black Crater Project, the Roadside Project, and the Black Crater Fire itself, the Black Crater Project area has been severely impacted by past management activities. The large area of private land directly bordering the Black Crater Project has been logged extensively within the past year. Federal Land within the Black Crater Project area has also been heavily logged.

51. Many of the proposed logging units, including units 1, 2, and 6, encompass all the land in the surrounding area that has not yet been logged.

### **FIRST CLAIM FOR RELIEF**

#### **The Forest Service's Authorization of Snag Removal in a Late-Successional Reserve Violates the National Forest Management Act**

52. Plaintiffs incorporate by reference all preceding paragraphs.

53. The Forest Service is required to ensure that activities on public lands comply with the Deschutes LRMP and the NFP. 16 U.S.C. § 1604(i).

54. A primary objective of LSRs is the “development of old-growth forest characteristics including snags.” NFP B-5. Following stand a replacing disturbance in an LSR, the Forest Service should “focus on retaining snags that are likely to persist until late-successional conditions have developed and the new stand is again producing large snags.” NFP C-14. In an LSR, “salvage operations should not diminish habitat suitability now or in the future.” NFP C-13.

55. The NFP affirmatively requires the Forest Service to retain the snags that will persist until the next forest develops.

56. There is a direct correlation between the size of a snag and the length of time it will stand before naturally falling to the ground. Scientific literature indicates that snags greater than 16 inches in diameter at breast height (DBH) are likely to persist on the landscape until the new forest is again producing snags, in about 80 years.

57. The Final Decision Memo for the Black Crater Project authorizes the removal of all but three snags per acre greater than 20 inches DBH and three snags per acre less than 20 inches DBH. Many snags between 16 inches DBH and 40 inches DBH will be logged.

58. The Forest Service has not provided information explaining why the snags that will be logged will not persist, and why it is therefore permissible to remove them.

59. The removal of large diameter snags from the LSR “diminishes habitat suitability now or in the future,” is inconsistent with the LSR objective of developing snags, and does not “focus on retaining snags likely to persist until the next stand develops.” The Black Crater Project does not comply with the provisions of the NFP and is arbitrary, capricious, and not in accordance with NFMA. 5 U.S.C. § 706(2)(A).

## **SECOND CLAIM FOR RELIEF**

### **Post-Fire (Salvage) Logging in a Late-Successional Reserve for Primarily Economic Purposes Violates the National Forest Management Act**

60. Plaintiffs incorporate by reference all preceding paragraphs.

61. Management activities within LSRs must be designed to enhance late-successional forest characteristics. The NFP states, “In all cases, planning for salvage should focus on long-range objectives, which are based on the desired future condition of the forest.

Because Late-Successional Reserves have been established to provide high quality habitat for species associated with late-successional forest conditions, management following a stand-replacing event should be designed to accelerate or not impede the development of those conditions.” NFP S&Gs, C-14. “Management planning for Late-Successional Reserves must acknowledge the considerable value of retaining dead and dying trees.” NFP S&Gs, C-13.

62. Specifically, the NFP states that “salvage will not be driven by economic or timber sale program factors.” NFP Appendix F, F-21.

63. Post-fire (salvage) logging associated with the Black Crater Project is driven entirely by economic and timber sale program factors. The only purpose or need for post-fire logging on 194 acres of the 201 total acres is to recover the economic value from burned timber. For the remaining seven acres of post-fire logging, there is a single additional purpose and need to improve safety along the commercial haul routes to facilitate the greater salvage logging proposal. The Forest Service has not demonstrated or claimed that replanting desired tree species is in any way related to or dependant upon post-fire salvage logging.

64. The logging activities associated with the Black Crater Project are inconsistent with LSR objectives and the Standards and Guidelines of the NFP, and are arbitrary, capricious, and not in accordance with NFMA. 5 U.S.C. § 706(2)(A).

### **THIRD CLAIM FOR RELIEF**

#### **The Forest Service’s Failure to Ensure the Scientific Integrity of the Black Crater Project Final Decision Memo Violates the National Environmental Policy Act**

65. Plaintiffs incorporate by reference all preceding paragraphs.

66. The Forest Service is required to ensure the scientific integrity of the planning documents, including the Final Decision Memo, for the Black Crater Project. The information

presented by the Forest Service must be of high quality. “Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.” 40 C.F.R. § 1500(1)(b).

67. To determine appropriate levels of snags, the Forest Service has relied upon (1) DecAID, (2) the Deschutes Wildlife Tree and Log Guide (DWTLG), and (3) the Whychus Late-Successional Reserve Assessment (WLSRS). However, the authors of DecAID specifically recognize that it is an inappropriate tool for use on post-fire landscapes. Both the DWTLG and the WLSRA were also developed specifically for green, unburned forests.

68. The Forest Service inappropriately relies on DecAID, the DWTLG, and the WLSRA to meet snag retention standards and fails to adequately disclose scientific opinion (in these cases, by the very creators of the documents) that counsels against the agency’s use of DecAID, the DWTLG, and the WLSRA in designing and authorizing the proposed action.

69. The Forest Service’s reliance on the predictions of DecAID and management directions from the DWTLG and the WLSRA, and its failure to consider opposing scientific opinion is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

70. In determining that there are no extraordinary circumstances in the Black Crater Project area, the Forest Service relied upon a 2002 study by Bond et al (“Bond study”) to support its assertion that “areas that experienced stand replacement fire no longer function as critical habitat” for the northern spotted owl.

71. The Forest Service’s determination is based upon inaccurate scientific analysis. The assertion that severely burned forests no longer function as owl habitat is directly opposed to the findings of the Bond study. The Bond study found that, of 21 spotted owls studied that were affected by fires, 18 (86%) were resighted at least one year after the fires. Half of the sites

studied by Bond experienced high severity fires. According to the study, “[r]elatively large wildfires that burned nest and roost areas appeared to have little short-term effect on survival, site fidelity, mate fidelity, and reproductive success of spotted owls, as rates were similar to estimates independent of fire.”

72. The Forest Service’s determination, using the Bond study, that burned forests no longer function as spotted owl habitat is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

**FOURTH CLAIM FOR RELIEF**  
**The Categorical Exclusion of the Black Crater Project**  
**Violates the National Environmental Policy Act**

73. Plaintiffs reallege all preceding paragraphs.

74. “A proposed action may be categorically excluded from further analysis and documentation in an environmental impact statement (EIS) or environmental assessment (EA) only if there are no extraordinary circumstances related to the proposed action.” Forest Service Handbook (“FSH”) 1909.15, 30.3(1)(emphasis added).

75. A proposed action may not be categorically excluded if it may have significant environmental impacts.

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

77. Cumulative Impacts - Another significance factor under the NEPA regulations is “whether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7). 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.” 40 C.F.R. § 1508.7. The Forest Service has failed to analyze the cumulative impact of past logging activities that have occurred on both federal and private lands within and around the Black Crater Project area. The Forest Service has also failed to analyze the cumulative impact of the concurrent Roadside Project taking place on federal lands within and around the Black Crater Project area.

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

79. The presence of these Extraordinary Circumstances and significance factors requires further review in an EA. The use of a CE for the Black Crater Project is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

### **PRAYER FOR RELIEF**

Plaintiffs respectfully request that the Court:

1. Declare that the Forest Service violated the National Environmental Policy Act, the National Forest Management Act, Administrative Procedure Act, and their

implementing regulations in preparing and approving the Final Decision Memo for the Black Crater Project;

2. Declare that the Defendants' actions as set forth in this complaint are arbitrary, capricious, an abuse of their discretion, are not in accordance with law and are without observance of procedures required by law and therefore must be set aside;
3. Enjoin the Forest Service and its agents from proceeding with the Black Crater Project, or any portion thereof, unless and until the violations of federal law set forth herein have been corrected to the satisfaction of this court;
4. Award Plaintiffs their reasonable fees, costs and expenses associated with this litigation pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412 or other authority; and
5. Grant Plaintiff such additional and further relief, as the Court deems just and equitable.

Dated this 22nd day of June, 2007.

Respectfully Submitted,

---

DANIEL KRUSE  
Attorney for Plaintiffs