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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,

v.

WILLIAM ANTHONY, in his capacity as
District Ranger for the Sisters Ranger District
of the Deschutes National Forest; **UNITED
STATES FOREST SERVICE**, an administrative
agency of the U.S. Department of Agriculture,

Defendants.

Case No. CV-07-6147-AA

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' MOTION FOR
FOR PRELIMINARY INJUNCTION**

Oral Argument Requested

Defendants hereby submit this memorandum in response to Plaintiffs' motion for preliminary injunction (Dkt. #3) in the above-captioned action, in which Plaintiff seek judicial review of the Black Crater Fire Timber Salvage Project ("Black Crater Project") pursuant to the Administrative Procedure Act ("APA"). In their motion, Plaintiffs futilely try to meet their burden to establish that they have a likelihood of success on the merits of their claims by effectively ignoring the most salient fact in the record (and on the ground) – which is that the project area was subject to the highest-severity fire it has experienced in a century that burned more than 9000 acres. Thus, for example, when Plaintiffs refer to the alleged importance of the project area for the northern spotted owl, they are living in a pre-fire world. The Black Crater fire substantially changed the landscape and forest stand structure of the area. The Forest Service has responded by adopting a very carefully crafted and narrowly focused salvage timber sale project on approximately four percent of the more than 5000 acres of the burn area on Forest Service lands. Plaintiffs' unwillingness to account for the impact of the fire to the area, or the modest size of the salvage harvest authorized by the Project, skews virtually all of their arguments in support of their motion. For similar reasons, their attempts to show that a preliminary injunction is necessary to forestall irreparable environmental injury are also ill-fated. Therefore, Defendants respectfully submit that the Court should deny Plaintiffs' motion for preliminary injunction given that Plaintiffs have failed to satisfy their burden to establish that the conditions that would justify such a remedy are present in this case.

STATUTORY & REGULATORY FRAMEWORK

Plaintiffs bring claims alleging that the Black Crater Project violates the National Environmental Policy Act ("NEPA") and National Forest Management Act ("NFMA").

Defendants will therefore provide a brief overview of these statutes before delving into the underlying facts.

A. The National Environmental Policy Act

In 1970, Congress enacted NEPA, 42 U.S.C. § 4321 *et seq.* to establish a consistent process for federal agencies to consider the environmental impacts of proposed major federal actions. Vermont Yankee Nuclear Power v. NRDC, 435 U.S. 519, 558 (1978). The statute requires Federal agencies to prepare an environmental impact statement (“EIS”) for all proposed “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). Thus, NEPA only requires an agency to prepare an EIS for those proposed actions that will “significantly affect[]” the environment. Id. The Supreme Court has long recognized that the statute imposes purely procedural, and no substantive, duties on agencies. Therefore, so long as “the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

NEPA also established the Council on Environmental Quality (“CEQ”) to, among other things, assist agencies in complying with the statute. 42 U.S.C. § 4344. In 1978 CEQ adopted regulations governing federal agency compliance with NEPA. 40 C.F.R. Parts 1500-08. These regulations instruct agencies to identify classes of actions, referred to as “categorical exclusions” (“CEs”) that generally “do not individually or cumulatively have a significant effect on the human environment” and are therefore ordinarily do not trigger the duty for the agency to perform a more detailed environmental analysis under NEPA. 40 C.F.R. § 1508.4. Because CEs are intended to cover archetypal projects that fit within the category that each covers, the Forest

Service has adopted internal policy direction to evaluate whether, notwithstanding the fact that an individual project fits within the criteria for a particular CE, extraordinary circumstances exist that would warrant preparation of a more detailed NEPA analysis. Forest Service Handbook 1909.15, § 30.3(1). The Black Crater Project fits squarely within one of the Forest Service's CEs for "[s]alvage of dead and/or dying trees not to exceed 250 acres, requiring no more than ½ mile of temporary road construction." FSH 1909.15, Category 13. The United States Court of Appeals for the Tenth Circuit has upheld the validity of this CE against myriad legal claims. Colorado Wild v. Forest Serv., 435 F.3d 1204, 1214-22 (10th Cir. 2006).

B. The National Forest Management Act

The Forest Service manages the Deschutes National Forest, on which the Black Crater Project is located, pursuant to the National Forest Management Act ("NFMA") and its implementing regulations, which provide for forest planning and management at two levels: the forest level and the individual project level. See Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 729-30 (1998). At the forest level, the Forest Service develops a land and resource management plan ("LRMP" or "Forest Plan"), which is a broad, long-term programmatic planning document for an entire National Forest. See League of Wilderness Defenders v. Bosworth, 383 F. Supp. 2d 1285, 1300 (D. Or. 2004). Forest Plans establish planning goals and objectives for particular National Forests and set forth planning elements that the Forest Service uses in managing the forest's natural resources. Id.; see also 16 U.S.C. § 1604(g)(1)-(3).

Implementation of the Forest Plan occurs through site-specific projects. See Idaho Conservation League v. Mumma, 956 F.2d 1508, 1512 (9th Cir. 1992). Each project is to be consistent with the plan, analyzed as necessary pursuant to NEPA, and approved by the

responsible Forest Service official. See 16 U.S.C. § 1604(i), Mumma, 956 F.2d at 1511-12; Inland Empire Public Lands Council v. U.S. Forest Serv., 88 F.3d 754, 757 (9th Cir. 1996).

In 1994, Agriculture Secretary Mike Espy and Interior Secretary Bruce Babbitt adopted the Northwest Forest Plan (“NWFP”) to effectuate amendments to the plans of all of the National Forests and Bureau of Land Management districts that are wholly or partially within the range of the northern spotted owl, including the Deschutes National Forest. See Exh. 2 to Declaration of Daniel Kruse at 1 & 74. President Clinton set forth five principles on which the NWFP was developed, including: (1) to never forget the human and economic dimensions of forest-management issues such that timber harvest built on sound management policies should proceed; (2) to protect the long-term health of the forests; (3) to develop a strategy that would be scientifically sound, ecologically credible, and legally responsible; (4) to produce a predictable and sustainable level of timber sales; and (5) to achieve collaboration among federal agencies. Id. at 3. The strategy reflected in the NWFP is built on a series of different land allocations as well as “standards and guidelines” (“S&Gs”) that provide management direction. The Black Crater Project is contained within a “Late Successional Reserve” (“LSR”) land allocation.

LSRs comprise nearly 7.5 million acres in all and, together, they form a network of large contiguous areas of extant or potential late-successional and old-growth forest habitat that are designed to function as the backbone of interactive ecosystem. Id. at 6. Along these same lines, the objective of LSRs as defined in the S&Gs 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[,] including the northern spotted owl.”¹ NWFP S&Gs at C-9 & C-11.

In the S&Gs applicable to LSRs, there is a special subsection authorizing and providing guidelines for salvage timber harvest projects within their boundaries. NWFP S&Gs at C-13 - C-16. These LSR Salvage Guidelines provide that they are “intended to prevent negative effects on late-successional habitats, while permitting some commercial wood volume removal. In some cases, salvage operations may actually facilitate habitat recovery.... While priority should be given to salvage in areas where it will have a positive effect on late-successional forest habitat, salvage operations should not diminish habitat suitability now or in the future.” *Id.* at C-13. This guidance was further clarified in the Secretaries’ response to comments included in their NWFP ROD when they stated that, “[t]o ensure that salvage in late-successional reserves is consistent with the intent of the standards and guidelines, salvage is subject to review by the Regional Ecosystem Office and approval by the Regional Interagency Executive Committee. Salvage is not required to be beneficial, but is designed to permit the recovery of timber volume in those instances where catastrophic events clearly kill more trees (resulting in more snags and down logs in the short and long term) than are needed to maintain late-successional conditions.” NWFP ROD at 67.

¹ Plaintiffs cite to Section B of the NWFP, which describes the basis for the S&Gs, in seeking to define the objectives of the LSRs. In particular, the excerpt of the text in this section to which Plaintiffs cite is a partial sentence under the section entitled “The Role of Silviculture;” the total sentence reads as follows: “Silvicultural systems proposed for late-successional reserves have two principal objectives: (1) development of old-growth forest characteristics including snags, logs on the forest floor, large trees, and canopy gaps that enable establishment of multiple tree layers and diverse species composition; and (2) prevention of large-scale disturbances by fire, wind, insects, and diseases that would destroy or limit the ability of the reserves to sustain viable forest species populations.” NWFP at B-5. This statement describing the kinds of silvicultural treatments appropriate in LSRs is not applicable to salvage treatments, however, as the LSR Salvage Guidelines expressly state that “[s]alvage of dead trees is not generally considered a silvicultural treatment within the context of these [S&Gs].” *Id.* at C-13.

C. Designation of Critical Habitat Under the Endangered Species Act

Finally, a brief word is in order about critical habitat designation under the Endangered Species Act (“ESA”), given that Plaintiffs try to place a significant amount of weight on the fact that the Black Crater Project is within a critical habitat unit for the northern spotted owl. The ESA directs the Fish and Wildlife Service to designate areas determined to be critical habitat for species listed under the statute. 16 U.S.C. § 1533(b)(2). This is accomplished through a formal notice-and-comment regulatory process culminating in issuance of a regulation identifying the “critical habitat,” as defined by the ESA, for the listed species. *Id.*; 16 U.S.C. § 1532(5)(A). There is also a formal process prescribed under the statute that must be followed before a listed species’ critical habitat may be revised. 16 U.S.C. § 1533(b)(3)(D), (5), & (6). Thus, an area may continue to be officially designated “critical habitat” under the ESA long after it has ceased to function as such or meet the statutory definition that had earlier justified its designation.

FACTUAL BACKGROUND

In July 2006 the Black Crater fire burned approximately 9,407 acres, including 5,147 acres of Deschutes National Forest lands. Black Crater Project Decision Memo (“DM”) at 1 (Exh. 4 to Kruse Declaration). The fire was what is known as a “stand-replacing fire,” meaning that, for the most part, it burned with a very high degree of severity and intensity. The Forest Service evaluated whether and what kind of management activities might be appropriate as a response to the fire. Ultimately, the agency settled on three major purposes for the Black Crater Project: (1) salvage fire-killed timber with economic value; (2) reforest with desired tree species to aid in the accelerated development of late-successional and old-growth forest conditions; and (3) improve safety by removing danger trees along commercial haul routes. *Id.* at 1-2.

With respect to the salvage harvest element of the project, the Forest Service initially identified about 416 acres on which salvage operations might be appropriate, for example, outside the Three Sisters Wilderness and Inventoried Roadless Area that overlapped with the burn area. Id. at 1. Eventually, the agency narrowed the salvage acres down to 201 by evaluating whether the initially identified acres would be economical to salvage and by using a project design process that was focused on ensuring that the project would not have any significant impacts or extraordinary circumstances. Id. Because of its relatively minimal size, the project only encompasses some four percent of the Forest Service lands within the burn area. In addition, even though the project is within the 28,747-acre Cache-Trout LSR, it will affect less than one percent of LSR acres. Id.

In adopting the decision, the Forest Service explained its rationale for designing the project the way it did. To ensure that the project would have negligible adverse effects and that resources will be protected, the Forest Service carefully designed the project so as to accomplish the following objectives. First, the agency applied mitigation measures and best management practice to protect soils and the remaining unburned forest in the area, and the 1/4-mile of temporary road to be constructed will be closed after logging is completed. DM at 3. Second, to protect the northern spotted owl, timber salvage is only authorized to occur in areas of stand-replacement fire that no longer function as northern spotted owl habitat and will not function as such habitat in the immediate future. Id. Third, to protect snag habitat for wildlife, the Forest Service developed a specific detailed snag retention strategy for the Black Crater Project that includes landscape and site-level consideration of a wide range of snag-dependent species preferences and will result in six of the larger snags per acre and many more smaller snags being

retained within the logging units and across the landscape. Id. at 4; Snag Retention Strategy (attached as Exh. 1). This strategy was reviewed and approved by the Regional Ecosystem Office, a body that is composed of staff from multiple agencies and that was created for the express purpose of developing, evaluating, and recommending resolution of NWFP consistency and implementation issues. NWFP S&Gs at E-16. The NWPF expressly provides that salvage activities within LSRs are subject to REO review. Id. at C-13.

The Forest Service went through a rigorous analytical process in its design and development of the Black Crater Project. Particularly, the Forest Service undertook a detailed examination of all major categories of the environmental effects of the Black Crater Project to ensure that the Project did not present any “extraordinary circumstances.” For example, in determining that reliance on the Salvage CE was appropriate, the Forest Service analyzed the subject-matter areas of burn severity, potential recovery of the most suitable and long-term sustainable late-successional habitats, and the abundance and deficiencies of snag habitats across the landscape for a variety of species. Additionally, the Forest Service made a detailed consideration of the degree to which any of the resources listed as extraordinary circumstances in FSH 1909.15 might be affected, and the potential cumulative effects of past, present, and reasonably foreseeable future actions on private and national forest lands. See, e.g., Black Crater Salvage Fuels Specialist Report (Nov. 2006)(attached as Exh. 2); Aquatic Biological Evaluation for Threatened, Endangered, and Sensitive Species (Nov. 16, 2006)(attached as Exh. 3); NWFP LSR Salvage Guidelines Review (Nov. 21, 2006)(attached as Exh. 4); Hydrology Resource Report (Nov. 22, 2006)(attached as Exh. 5); Soil Resource Specialist Report (Dec. 2006)(attached as Exh. 6); Biological Evaluation of Threatened, Endangered, and Sensitive

Species (Dec. 11, 2006)(attached as Exh. 7); Wildlife Specialist Report (Dec. 11, 2006)(attached as Exh. 8).

In addition, the REO reviewed the project for consistency with the NWFP Standards and Guidelines applicable to salvage harvest within LSRs, including consideration of economic recovery of timber volume from LSRs; and consistency with the Deschutes National Forest 2006-09 Programmatic Biological Assessment project design criteria. REO Concurrence Letter (Dec. 8, 2006)(attached as Exh. 9). The Black Crater Project was evaluated for consistency with specific standards and guidelines for salvage operations. The REO review concluded that the proposed treatments in LSRs meet the objectives for managing LSRs. Id.

STANDARD OF REVIEW

A preliminary injunction is an extraordinary remedy, and Plaintiffs have the burden to prove by clear and convincing evidence that the remedy is appropriate. See Granny Goose Foods, Inc. v. Teamsters, 415 U.S. 423, 442 (1974). To obtain a preliminary injunction, a party must show either: (1) a combination of probable success on the merits and the possibility of irreparable injury; or (2) that serious questions are raised and the balance of hardships tips sharply in its favor. Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc., 240 F.3d 832, 839-40 (9th Cir. 2001). These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as probability of success decreases. Roe v. Anderson, 134 F.3d 1400, 1402 (9th Cir.1998). Under either formulation of the test, Plaintiffs must still demonstrate a significant threat of irreparable injury. Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374 (9th Cir. 1985).

Additionally, if the public interest is involved, as it is here, a court must determine

whether the balance of public interests supports the issuance of an injunction. Caribbean Marine Serv. v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988). The relative hardship to the parties is the critical element in deciding at which point along the continuum a stay is justified. Benda v. Grand Lodge of Intl. Ass'n of Machinists, 584 F.2d 308, 314-315 (9th Cir. 1978). These traditional equitable rules for injunctive relief are not altered by the invocation of environmental statutes such as NEPA, and there is no presumption that an injunction automatically follows the violation of environmental statutes, even if a violation is shown. See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987); Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982). In balancing the relative hardships, there is also no presumption that environmental harm should outweigh other harm to the public interest. See Fund for Animals, Inc. v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992).

ARGUMENT

I. PLAINTIFFS HAVE NOT ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS OF ANY OF THEIR CLAIMS UNDER EITHER NFMA OR NEPA.

A. Plaintiffs Are Not Likely to Prevail on their NFMA Claims.

1. The Black Crater Project's Snag Retention Strategy Is Consistent with the NWFP.

Plaintiffs argue that the Black Crater Project violates snag requirements in the NWFP.

Pls.' Op. PI Brf. at 13-14. Plaintiffs are not likely to prevail on this claim.

Plaintiffs' argument relies this Court's decision in Oregon Natural Resources Council Fund v. Brong, CV-04-693-AA, 2004 WL 2554575 (D. Or. Nov. 8, 2004). But the facts in this case are distinguishable from those of Brong. First, the Bureau of Land Management, the agency party in Brong, was trying to justify its logging treatments inside an LSR, which included some

regeneration harvest prescriptions, on the basis of the research S&Gs applicable to LSRs. Here, the Forest Service acted in accordance with the LSR Salvage Guidelines within the NWFP. Second, unlike the facts presented in Brong, research indicates that the snags slated to be removed from the harvest units of the Black Crater Project are not likely to persist for 100 years, which is the minimum amount of time that would be required for the return of late-successional conditions. Declaration of Lauri Turner at ¶¶ 10-11. In developing its snag retention strategy for the Black Crater Project, the Forest Service sought to avoid areas that had the highest representation of needed and likely to persist snags across the landscape (ponderosa pine plant association group) and focused on mixed conifer dry plant association groups – those landscapes that were the least likely to have snags that were likely to persist until the next old growth stand was developed. As noted, research shows a snag gap is likely to exist with or without harvest prior to development of the next stand. Likely to persist tree species (ponderosa and Douglas-fir) fall around 30 years and it takes 100 years or more with thinning to produce replacement snags. DM at 23; Wildlife BE at 26; WL Rpt. at 48-74.

It also is worth noting in this regard that snag habitat is abundant across the Sisters Ranger District of the Deschutes National Forest, including within the LSRs, with the Cache Mountain, Eyerly, Link, B&B, Black Crater, and Lake George fires all occurring within the last 5 years. The majority of the burned trees in these fires have not been harvested.

2. The Black Crater Project Is Consistent with the Salvage S&Gs of the NWFP.

Plaintiffs argue that the Black Crater Project violates the NWFP because one of its purposes is to recover economic value from the severely burned stands before their value is wholly lost. Pls.' Op. PI Brf. at 14-16. Their argument is meritless on its face because, as

explained above, the NWFP expressly contemplates and authorizes carefully crafted salvage timber harvest like the Black Crater Project within LSRs. Moreover, it must be noted that the Black Crater Project cannot be construed as simply or exclusively designed with economic objectives in mind given the number of mitigation measures the Forest Service adopted for the project and the plain fact that the Forest Service has authorized a timber sale of less than 200 acres for a fire that burned on more than 5000 acres of National Forest System lands.

In addition, the Forest Service explicitly evaluated the Black Crater Project to assess its consistency with standards and guidelines for LSR salvage operations. S&Gs at C-13 - C-16. The REO also reviewed the proposed treatments in LSRs and concurred that they meet the objectives for managing LSRs. DM at 9-10; REO Concurrence Letter (Exh. 9); LSR Salvage Guidelines Consistency Evaluation (Exh. 4). Finally, the Black Crater Project is not diminishing habitat suitability for late-successional and old-growth related species. Large snags likely to persist and downed woody material will be retained. The magnitude of salvage logging will not impact or diminish the ability of this habitat to support cavity nesters or their prey base. See DM at 4; WL Rpt. at 54-56.

B. Plaintiffs Are Not likely to Prevail On their NEPA Claims.

1. The Forest Service's Reliance on the Categorical Exclusion Was Proper.

- a. The Presence of Designated Northern Spotted Owl Critical Habitat In the Project Area Does Not Represent An Extraordinary Circumstance Because the Project Area No Longer Contains the Requisite Elements of Critical Habitat.

Plaintiffs argue that every logging unit within the Black Crater Project is a designated critical habitat for the northern spotted owl. Pls.' Op. PI Brf. at 17-19. This argument is

meritless.

Plaintiffs' assertion that the majority of known spotted owl activities centers on the Deschutes National Forest or on the Sisters Ranger District is outdated. Historically there were 23 spotted owl pairs/singles located on the Sisters Ranger District. Currently, due to recent wildfires and the loss of NRF (nesting, roosting, and foraging) habitat, only 10 spotted owl pairs/singles remain. The majority of known spotted owl activity centers on the Deschutes NF are located on the Crescent Ranger District (13 known). (Prog. BA p. 17-19 and Appendix B, 2006-2009).

Nor will the Black Crater Project affect functioning spotted owl habitat. This conclusion (DM) is supported by a variety of science and current site-specific surveys. (BE and Turner Decl). Plaintiffs erroneously state the Black Crater Fire Timber Salvage Project will remove the primary constituent elements of spotted owl habitat from CHU OR-5 and the Cache-Trout LSR. As defined by the 50 CFR Part 17 – Final Rule for the Determination of Critical Habitat for the Northern Spotted Owl, primary constituent elements are “forested lands that are used or potentially used by the northern spotted owl for nesting, roosting, foraging, or dispersing.” (FR Vol 57, No. 10 @1838). Features that support nesting and roosting habitat include, among others, a moderate to high canopy closure (60- 90 percent) that is not within the stand-replacement fire areas. Features that support roosting habitat include similar conditions, but may not support successfully nesting pairs, while dispersal habitat, at minimum, consists of stands with adequate tree size and canopy closure to provide protection from avian predators and at least minimal foraging opportunities. Prey habitat for a variety of species is being maintained (Turner Decl; WL report).

The Black Crater project will also not impact habitat in the CHU, because the impacts were caused by the Black Crater fire. No NRF or dispersal habitat is being impacted. Harvest is focused within stand replacement stands and adequate levels of snags and down wood will be retained to provide habitat elements for the future stand. (See Snag Retention Strategy, Wildlife Report p. 54-56 and DM p. 21-23) In addition, planting of desired tree species will accelerate habitat development (BE p. 22, 30 and DM p. 5).

Plaintiffs also erroneously allege that the Forest Service relied upon “a spotted owl study to reach a conclusion directly at odds with the key findings of the study.” In fact, the Forest Service did not rely solely on one spotted owl study to reach a conclusion affected, nor were the findings at odds with the substantive weight of scientific research combined with site-specific data. There was an editorial error that resulted in an incorrect citation that attributed the results of a Gaines, et al study to a Monica Bond study (Turner Decl), not a substantive error. There are a number of studies that support the scientific integrity of the conclusions about the use of burned areas by spotted owls that were documented in the Black Crater Fire Timber Salvage Decision Memo. Also supporting the body of credible research are three years of surveys of burned areas on the Sisters Ranger District conducted to Regional protocols. During all of that time, both before and after the wildfire, the Black Crater Fire Timber Fire Salvage project had no record of spotted owl use in the area. Nonetheless, habitat considerations for spotted owl prey base was included in the snag strategy developed for the project. (BE; Turner Decl).

The Cache Trout LSR will not be impacted by the implementation of the Black Crater project. Impacts to suitable spotted owl habitat were realized at the time of the fire, not from the project. No NRF or dispersal habitat will be impacted with this project. Snags and down wood

will be retained in each harvest unit to provide for future habitat (BE p. 12-15, WL Rpt. 48-74, DM p. 21-23). In addition, the Black Crater project was reviewed by the Regional Ecosystem Office and they concurred the project was consistent with the Northwest Forest Plan (DM p. 4, 19).

With respect to the potential impact to CHU OR-5, the harvest of the 201 acres authorized by the Black Crater Project equates to some two percent of the unit. The majority of the CHU is still functioning. As indicated above, primary constituent elements of habitat are forested lands that are used or potentially used by spotted owls. Stands identified for harvest have experienced stand replacement fire and are therefore, not functioning as critical habitat. Adequate levels of snags and down wood will be retained within each harvest unit to provide for the future stand. See Snag Retention Strategy, Wildlife Report p. 54-56 and DM p. 21-23.

b. Cumulative Effects

Plaintiffs argue that the Forest Service failed to consider the cumulative impact of the Black Crater Project in the context of past and future actions. Pls.' Op. PI Brf. at 19-20. This argument is meritless.

Cumulative impacts to a variety of resources were considered, including past, present and reasonably foreseeable future actions, including but not limited to effects to NSO habitat (nesting, roosting, foraging) within the project area, across the Sisters Ranger district and across the Deschutes National Forest. This included past fire suppression activities, and forest management activities. The Black Crater Roadside Danger Tree Project was considered in that evaluation. The following summarizes relevant citations in the specialists reports:

Biological Evaluation: northern spotted owl: page 27, Pacific Fisher page 36, California Wolverine: page 39

Wildlife Report: northern goshawk: page 10, Cooper's and sharp-shinned hawks: page 15, red-tailed hawks: page 20, olive-sided flycatcher: page 25, brown creeper: page 31, hermit thrush: page 34, bats: page 38, American marten: page 42, big game: page 46, snags and down wood: page 69.

Soil Quality- Soil Scientist specialist report: pages 14 and 18

Aquatic Species – Acquatic Specialist report: pages 8 and 9

Hydrologist report: page 7

Air Quality: page 3 of fuels specialist report.

c. Connected Actions

Plaintiffs argue that the Forest Service as proposed another related logging project sharing the same purposes as the Black Crater Project. Pls.' Op. PI Brf. at 20-22. This argument is meritless.

The Black Crater Fire Timber Salvage Project is not a connected action to the Black Crater Danger Tree Removal Project as defined by the CEQ regulations. The Danger Tree Removal Project will provide for long-term public and employee safety in those places of relatively high public use or concentrated administrative use by Forest Service employees. Further, the combined acreage for the two projects are about 209 acres, well below the 250 acre threshold considered in the Categorical Exclusion.

d. Controversy and Uncertainty

Plaintiffs argue that the Forest Service failed to analyze or disclose the controversy and unknown risks surrounding logging in the Black Crater area. Pls.' Op. PI Brf. at 22-23. This argument is meritless.

A variety of scientific literature was reviewed, including the Beschta report and opposing science. See Turner Decl. Scientific and public controversy are not the same, and the amount of public controversy is not a measure of whether or not a project could have an adverse effect on extraordinary circumstances.

2. Scientific Integrity

Plaintiffs argue that the Forest Service failed to ensure the scientific integrity of the Black Crater Project. Pls.' Op. PI Brf. at 23-25. This argument is meritless. See earlier discussion of the rigorous review by REO, Appeal Decision letter, Turner Declaration.

II. NOR HAVE PLAINTIFFS MET THEIR BURDEN TO ESTABLISH A LIKELIHOOD THAT ANY IRREPARABLE INJURY WILL RESULT FROM THE PROJECT.

Plaintiffs argue they will suffer immediate and irreparable harm in the absence of a restraining order. Pls.' Op. PI Brf. at 25-26. This argument is meritless.

First, it must be noted that Plaintiffs' argument about the need for immediate interim relief rings quite hollow indeed upon considering that the Forest Service rejected Plaintiffs' administrative appeals and reached its final decision on the Black Crater Project on May 24, 2007. Letter from Appeal Deciding Officer to Cascadia Wildlands Project Counsel Daniel Kruse (May 24, 2007)(attached as Exh. 10). Thus, nearly five weeks inexplicably elapsed after the Forest Service made its final determination on the Black Crater Project before Plaintiffs asked this Court for a temporary restraining order and preliminary injunction. This is especially

troublesome because the Forest Service had made known how critical it was for the salvage harvest contemplated by the project to occur as soon as possible in its decision memo in February 2007. DM at 1 (“There is a need to salvage dead trees by the late spring or early summer 2007 or up to 60% of the economic value could be lost”). Moreover, lead litigation counsel for Plaintiffs in this case filed one of the administrative appeals, and so it cannot be said that he was totally unfamiliar with the project before filing the complaint. Plaintiffs should not be able to rely on a self-generated emergency as the basis for arguing that a preliminary injunction is necessary.

Plaintiffs have failed to establish that there will be any irreparable environmental injury in any event. In addition to the evidence in the record exhibits that Defendants have supplied that indicate the Black Crater Project will have insignificant environmental effects, they also submit this same date the Declaration of Lauri Turner, a wildlife biologist for the Deschutes National Forest. In her declaration, Ms. Turner thoughtfully addresses four primary issues relevant to the allegedly significant adverse effects to the northern spotted owl and snag-related species that Plaintiffs assert will result from the Black Crater Project. Declaration of Lauri Turner (July 6, 2007). These areas are: (1) snag retention under the Black Crater Project, *id.* at ¶¶ 3-15; (2) the absence of suitable northern spotted owl habitat in the project area, *id.* at ¶¶ 16-19; (3) critical habitat that has been designated for the northern spotted owl pursuant to the ESA, *id.* at ¶¶20-32; and (4) the Bond study and other research that has been done on the extent to which northern spotted owls continue to use an area after it has been burned, *id.* at ¶¶33-35. As to each issue, she effectively rebuts Plaintiffs’ allegations about significant adverse effects. In further support of Ms. Turner’s expert opinion that the project area is not functioning as suitable owl habitat is the results of recent surveys, which have not detected any spotted owls. See Exh. 12.

In addition, Defendants are submitting the Declaration of Dennis Dietrich, the timber sale contracting officer for the Black Crater Project and a silviculturalist, who explains that the dead trees in the project are entering their second summer season and are therefore getting close to the point at which their salvage harvest will no longer be economically viable. Declaration of Dennis R. Dietrich at ¶¶1-4 (July 6, 2007).

Dated this 9th day of July 2007.

Respectfully submitted,

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