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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEAGUE OF WILDERNESS DEFENDERS-BLUE MOUNTAINS BIODIVERSITY PROJECT, an Oregon non-profit corporation; CASCADIA WILDLANDS PROJECT, an Oregon non-profit Corporation; SIERRA CLUB, a California non-profit corporation, Plaintiffs, v. LESLIE A.C. WELDON, in her capacity as Forest Supervisor of the Deschutes National Forest; UNITED STATES FOREST SERVICE, an administrative agency of the United States Department of Agriculture, Defendants.	Civ. Case No. 07-6283-HO PLAINTIFFS' MEMORANDUM OF AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION **EXPEDITED HEARING REQUESTED** **ORAL ARGUMENT REQUESTED**

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I. INTRODUCTION.

Plaintiffs bring this motion for injunctive relief because the Defendants **commenced project activities on the Five Buttes Project, including commercial logging, road building and other ground disturbing activities on Friday, October 5, 2006**. The parties have agreed to an accelerated briefing schedule for the hearing of the preliminary injunction motion to enable a quick resolution. For this reason, Plaintiffs are not currently seeking a temporary restraining order. Plaintiffs seek injunctive relief to prevent irreparable injury to Late-Successional Reserve (LSR) forests, old-growth stands, spotted owls and other old-growth dependent species, and riparian areas. The Defendants failed to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. §4321-4370, the National Forest Management Act ("NFMA"), 16 U.S.C. §1600-1614, the Administrative Procedures Act ("APA"), 5 U.S.C. §702, and their implementing regulations in issuing the Five Buttes Project.

The Forest Service's plan to log large-diameter mature and old-growth trees will downgrade more than 2,000 acres of currently suitable spotted owl habitat for 20-50 years and will prevent the Davis Late-Successional Reserve (LSR) from attaining the objectives for which it was established. Rather than following the Northwest Forest Plan (NFP) directives to focus on younger stands and accelerate the development of late-successional conditions, the Forest Service is logging large trees from old stands and reducing canopy density. Large trees are resistant to fire, and a dense canopy maintains a moist understory and reduces winds - all factors that help reduce the risk of fire.

Plaintiffs have a very strong likelihood of prevailing on the merits of this case, as the claims in this case parallel claims already decided by the Ninth Circuit. Plaintiffs seek a ruling from this court that is consistent with the law of this circuit.

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II. STATEMENT OF ISSUES TO BE DECIDED.

1. Did the Forest Service violate the National Forest Management Act by authorizing logging in the Davis Late-Successional Reserve of large-diameter mature and old-growth trees that currently provide suitable habitat to the spotted owl and other species?

2. Did the Forest Service violate the National Environmental Policy Act by failing to disclose opposing scientific opinion that counsels against the Forest Service's decision to log large-diameter trees as a way to reduce fire risk?

3. Did the Forest Service violate the National Environmental Policy Act by failing to consider and disclose the cumulative impacts of past, present and reasonably foreseeable future actions?

III. LEGAL BACKGROUND

The National Environmental Policy Act ("NEPA")

NEPA is our basic national charter for protection of the environment. 42 U.S.C. § 4321 et seq; 40 C.F.R. §1500.1(a). NEPA's sweeping commitment is to "prevent or eliminate damage to the environment and biosphere by focusing government and public attention on the environmental effects of proposed agency action." Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989) (citing 42 U.S.C. § 4321).

NEPA "declares a broad national commitment to protecting and promoting environmental quality." Robertson v. Methow Valley Citizens, 490 U.S. 332, 348 (1989); see 42 U.S.C. § 4331. "To insure this commitment is infused into the ongoing programs and actions of the Federal Government, the act also establishes some important 'action-forcing' procedures." Robertson, 490 U.S. at 348 (citing 115 Cong. Rec. 40416 (remarks of Sen. Jackson)). NEPA directs that all federal agencies must prepare an Environmental Impact Statement ("EIS")

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whenever they propose "major federal actions significantly affecting the quality of the environment." 42 U.S.C. § 4332(C); Robertson, 490 U.S. at 348.

An EIS must "provide full and fair discussion of significant environmental impacts" to "inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. The EIS must "be supported by evidence that the agency has made the necessary environmental analyses." Id. "Agencies must adequately consider the project's potential impacts and the consideration given must amount to a 'hard look' at the environmental affects." Idaho Sporting Congress, Inc. v. Rittenhouse, 305 F.3d 957, 963 (9th Cir. 2002)(citing Marsh v. Or. Natural Res. Council, 490 U.S. 360, 374 (1989)). In reviewing the adequacy of an EIS, the Ninth Circuit "employs 'a rule of reason' that asks whether an EIS contains a 'reasonably thorough discussion of the significant aspects of the probable environmental consequences." Seattle Audubon Society v. Espy, 998 F.2d 699, 703 (9th Cir. 1993)(citing Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992)).

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." Robertson, 490 U.S. at 349; Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998). By focusing the agency's attention 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." Robertson, 490 U.S. at 349.

NEPA's action-forcing procedures require federal agencies to ensure "that the agency will inform the public that it has indeed considered environmental concerns in its decision

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making process." Baltimore Gas and Electric Company v. NRDC, 462 U.S. 87, 97 (1983). "NEPA procedures must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken." Southern Utah Wilderness Alliance v. Norton, 301 F.3d 1217, 1237 (10th Cir. 2002)(citing 40 C.F.R. § 1500.1(b); Robertson, 490 U.S. at 349). 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." Marsh, 490 U.S. at 374; Friends of the Clearwater v. Dombeck, 222 F. 3d 552, 557-558 (9th Cir. 2000).

1. Opposing Scientific Opinion.

The Forest Service has an affirmative duty to disclose and analyze scientific information counseling against the activities proposed by the agency, or that call into question the expected environmental effects of the proposed action. 40 C.F.R. §§ 1502.9(b), 1502.24. *See also*, 40 C.F.R. § 1508.27(b)(4). "NEPA requires that the agency candidly disclose in its EIS the risks of its proposed action, and that it respond to adverse opinions held by respected scientists." Seattle Audubon Society v. Moseley, 798 F.Supp. 1473, 1482 (W.D.Wash.,1992)(citing Friends of the Earth v. Hall, 693 F.Supp. 904, 934, 937 (W.D.Wash.1988)). This information must be discussed in the body of the EIS. Center for Biological Diversity v. USFS, 349 F.3d 1157, 1167 (9th Cir. 2003); *see also,* Andrus v. Sierra Club, 442 U.S. 347, 350 (1979). The Forest Service must also disclose the extent to which the impact of a proposed action is scientifically controversial. See Id. at §§ 1502.16(a), 1502.16(b), 1508.27(b)(4), 1508.27(b)(5). "An EIS violates NEPA where it fails to 'disclose and discuss the responsible opposing views.'" Pacific Coast Federation of Fishermen's Associations v. National Marine Fisheries Service, 482 F.Supp.2d 1248, 1253 (W.D.Wash, 2007)(citing Center for Biological Diversity, 349 F.3d at 1157 (9th Cir. 2003)).

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2. Cumulative Impacts.

An adequate EIS must consider the direct, indirect, and cumulative environmental impacts of the proposed action. 40 C.F.R. § 1508.8. Direct effects are caused by the action and occur at the same time and place as the proposed project. Id. § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Id. § 1508.8(b). Both types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Id. § 1508. Cumulative impact results when the "incremental impact of the action [is] added to other past, present, and reasonably foreseeable future actions" undertaken by any person or agency. Id. § 1508.7. "The analysis 'must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present and future projects.'" Klamath-Siskiyou Wildlands Center v. BLM, 387 F.3d 989, 994 (9th Cir. 2004)(citing Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1128 (9th Cir. 2004)(internal quotations and citations omitted)).

The National Forest Management Act ("NFMA")

In 1976 Congress enacted the National Forest Management Act ("NFMA"), 16 U.S.C. §§ 1600-1614, which governs the Forest Service's management of the National Forests. NFMA establishes a two-step process for forest planning. It first requires the Forest Service to develop, maintain and revise Land and Resource Management Plans ("LRMP") for each National Forest. 16 U.S.C. § 1604(a). The LRMP guides natural resource management activities across the forest, setting standards, management area goals and objectives, and monitoring and evaluation requirements. Implementation of a forest plan occurs at the site-specific level; once an LRMP is in place, site-specific actions, like this project, are assessed by the Forest Service in this second

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step of the forest planning process. Site-specific decisions must be consistent with the LRMP. 16 U.S.C. § 1604(i). The Deschutes LRMP governs the management of public lands in the Deschutes National Forest.

1. The Northwest Forest Plan.

In 1994, the Bureau of Land Management and the Forest Service issued a Record of Decision (ROD) 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 National Forest LRMPs within the range of the owl. With a small exception, the Deschutes National Forest lies within the range of the northern spotted owl. The Deschutes LRMP incorporates the four basic land allocations created by the NFP: (1) Late-Successional Reserves (LSRs); (2) Adaptive Management Areas; (3) Riparian Reserves; and (4) Matrix. Each land allocation is governed by a different set of Standards and Guidelines.

The objective of the LSRs is to protect and enhance the conditions of old-growth forests that serve as habitat for the northern spotted owl and other wildlife by creating a network of large "reserves" or blocks of habitat. Plaintiffs' Exhibit 12, Northwest Forest Plan Standards and Guidelines (NFP S&Gs), C-9. The management goals for LSRs are 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." Id. at C-12. "Pursuant to these goals, the NFP makes programmed "stand management" activities, such as logging, impermissible in LSRs. *See* NFP ROD at 8" (internal citation in original); Oregon Natural Resources Council Fund v. Brong ("ONRC"), 492 F.3d 1120, 1126 (9th Cir. 2007). The NFP specifically states that "No programmed timber harvest is allowed inside [LSRs.]" Plaintiffs' Exhibit 13, Northwest Forest Plan Record of Decision, 8. A primary objective of LSRs is the "development of old-growth

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characteristics." Plaintiffs' Exhibit 12, B-5. If silvicultural activities are proposed to reduce risk, the NFP directs the Forest Service to "focus on younger stands in Late-Successional Reserves." Id. at C-13. In limited circumstances, the NFP provides for additional management activities that are tightly prescribed by the need, effect and impact of the measures. Id.

Administrative Procedure Act

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).

IV. FACTUAL BACKGROUND

The Five Buttes Project area lies within the Odell Watershed on the Crescent Ranger District of the Deschutes National Forest. 141,772 acres of the project area belong to the Deschutes National Forest, while the remaining acres are privately owned. The project area also includes the entire 48,900-acre Davis Late-Successional Reserve (LSR) and the spotted owl Critical Habitat Unit (CHU) OR-7.

The "Purpose and Need" of the Project is two-fold: 1) reduce fuel loadings and forest vegetation density in order to lessen the risk that insect, disease, and wildfire will lead to large-scale loss of forest, and 2) contribute to the local and regional economies by providing timber and other wood fiber products. FEIS, p. 4.

The Project proposes to accomplish this two-fold purpose through commercial thinning of live trees of all sizes and age classes and fuels treatments, including small tree thinning, limb pruning, and prescribed underburning. Active management activities will take place on 936 acres of the Late-Successional Reserve, 3,254 acres (17%) of the Nesting, Roosting and Foraging

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(NRF) habitat for the spotted owl (including 2,023 acres of commercial harvesting), and 522 acres of the spotted owl Critical Habitat Unit. FEIS, p. 35. The Project will log approximately 14.4 million board feet and construct 5.9 miles of temporary roads. FEIS, p. 16-18.

The Five Buttes Project area includes ten of the thirteen remaining northern spotted owl territories on the Crescent Ranger District. ROD, p. 12. Furthermore, "the majority of the suitable northern spotted owl habitat on the District is present in this planning area." Id. The Project proposes to log many large trees with an unspecified diameter limit. FEIS, p. 21; p. 110. Additionally, the Project will reduce stem density, overall canopy density and the amount of down wood that provides base prey habitat. FEIS, p. 13. These activities "may reduce the quality, effectiveness, and the distribution of habitat available to the northern spotted owl in the planning area for the short- and long-term as well as directly, indirectly and/or cumulatively." Id.

V. STANDARD FOR ISSUANCE OF A PRELIMINARY INJUNCTION.

Plaintiffs are entitled to a preliminary injunction if they demonstrate either: (1) a likelihood of success on the merits and a possibility of irreparable injury; or (2) the existence of serious questions on the merits and a balance of hardships tipping in their favor. National Wildlife Federation v. Burlington N.R.R., 23 F.3d 1508, 1510 (9th Cir. 1994); Fund for Animals v. Lujan, 962 F.2d 1391, 1400 (9th Cir. 1992). The two tests represent "two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." United States v. Nutri-Ecology, Inc., 982 F.2d 394, 397 (9th Cir. 1992) (quoting Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374, 1376 (9th Cir. 1985)).

The traditional test for injunctive relief has been modified in environmental cases. Environmental suits involve the public interest, and therefore, "where the balance of hardships tips decidedly toward the plaintiff, the district court need not require a robust showing of

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likelihood of success on the merits, and may grant preliminary injunctive relief if the plaintiff's moving papers raise 'serious questions' on the merits." Caribbean Marine Services v. Baldridge, 844 F.2d 668, 674 (9th Cir. 1988) (citing Los Angeles Memorial Col. v. Nat'l Football League, 634 F.2d 1197, 1203, n. 9 (9th Cir. 1980)); Fund for Animals, 962 F.2d at 1400.

The nature of public resources involved in an environmental suit also lessens plaintiffs' burden of showing irreparable harm. "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. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987).

"Serious questions" are "questions which cannot be resolved one way or the other at the hearing on the injunction." Republic of the Phillipines v. Marcos, 862 F.2d 1355, 1362 (9th Cir. 1988). Serious questions are "substantial, difficult, doubtful" enough to require more considered investigation. Id. Such questions need not show a certainty of success, nor even demonstrate a probability of success, but rather "must involve a 'fair chance of success on the merit.'" Id.(quoting National Wildlife Federation v. Coston, 773 F.2d 1513, 1517 (9th Cir. 1985)).

VI. PLAINTIFFS ARE LIKELY TO PREVAIL AND HAVE RAISED SERIOUS QUESTIONS ABOUT THE LEGALITY OF THIS PROJECT.

A. The Five Buttes Project Violates the National Forest Management Act ("NFMA")

1. The proposed logging will downgrade currently suitable spotted owl habitat within Late-Successional Reserves in both the short and long terms, and is therefore inconsistent with the Standards and Guidelines of the Northwest Forest Plan.

The Five Buttes Project must be consistent with the Standards and Guidelines of the Northwest Forest Plan (NFP). 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e). The NFP created a system of Late-Successional Reserves (LSR) dedicated to wildlife and old-growth forest

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conservation, and established Standards and Guidelines that are specific to the Reserves. The objective of Late-Successional Reserves 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." Plaintiffs' Exhibit 12, C-12.

"While the NFP as a whole seeks to strike a balance between environmental protection and resource extraction, its management directives for specified reserve areas give priority to environmental concerns." ONRC, 492 F.3d. at 1125. "LSRs lie at the heart of the NFP's ecosystems based conservation strategy for the Northern Spotted owl and other endangered species." Id. at 1126. Because of this, "No programmed timber harvest is allowed inside [LSRs.]" Plaintiffs' Exhibit 13, 8. In the LSR, "logging and other ground-disturbing activities are generally prohibited." ONRC, 492 F.3d at 1126 (quoting Seattle Audubon Soc'y, 871 F.Supp. at 1304-05); see also Plaintiffs' Exhibit 12, A-4-A-5 (summarizing what activities are permitted within each classification). "NFP clearly prioritizes the preservation of LSR ecosystems over commercial benefits." ONRC, 492 F.3d at 1127.

There are a few limited exceptions to the prohibition against logging in Late-Successional Reserves. For example, the NFP permits some logging within LSRs on the east side of the Cascade Mountains when the logging is aimed at reducing the risk of large-scale disturbances such as fire. Plaintiffs' Exhibit 12, C-12-C-13. Ground disturbing activities that fall within this exception must still meet the overall LSR objectives and follow the specific LSR Standards and Guidelines. Id. at C-13 ("Risk reduction efforts are encouraged where they are consistent with the overall recommendations in these guidelines.") The Guidelines specifically state, "[s]ilvicultural activities aimed at reducing risk shall focus on younger stands in Late-Successional Reserves." Id. (emphasis added). "The objective will be to accelerate development

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of late-successional conditions while making the future stand less susceptible to natural disturbances." Id. (emphasis added).

> Activities in older stands may be appropriate if: (1) the proposed management activities will clearly result in greater assurance of long-term maintenance of habitat, (2) the activities are clearly needed to reduce risks, and (3) the activities will not prevent the Late-Successional Reserves from playing an effective role in the objectives for which they were established."

Id. (emphasis added). Risk reduction treatment "should not generally result in degeneration of currently suitable owl habitat or other late-successional conditions." Id.

The Five Buttes Project will affect 936 acres (11%) of the Davis Late-Successional Reserve and 618 of these acres will be commercially logged. FEIS, p. 113. Within these 618 acres, the Forest Service is not thinning young stands for the purpose of reducing risk and accelerating late-successional characteristics as is contemplated by the NFP, but is instead logging live mature and old-growth trees from currently suitable late-successional habitat of the northern spotted owl. Declaration of Asante Riverwind. The Five Buttes Project is inconsistent with both the overall LSR objectives and the specific LSR Standards and Guidelines because (1) the logging focuses on mature and old-growth stands within the Late-Successional Reserve, not "younger stands" as required by the NFP; (2) the logging will delay, not accelerate, the development of late-successional conditions by removing live, mature, and old-growth trees from the Late-Successional Reserve; and (3) the logging will result, by the Forest Service's own estimation, in the degeneration of currently suitable spotted owl habitat and other late-successional conditions within the Reserve for up to 50 years.

(a) Logging large-diameter trees from mature and old-growth stands within the intact Late-Successional Reserve is inconsistent with the NFP.

The NFP states, "[s]ilvicultural activities aimed at reducing risk shall focus on younger stands in Late-Successional Reserves." Plaintiffs' Exhibit 12, C-13. (emphasis added). Any

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activity in older stands must meet all of three requirements: (1) the activity must "clearly result in greater assurance of long-term maintenance of habitat," (2) the activity must be "clearly needed to reduce risks," and (3) the activity must not "prevent the Late-Successional Reserves from playing an effective role in the objectives for which they were established." Id.

The Five Buttes Project authorizes commercial logging within 618 acres of mature and old-growth forests within the Davis Late-Successional Reserve. While the proposed activity is cloaked with terms like "risk reduction" and "fire prevention," it does not meet any of the three requirements for silvicultural activities within the LSR. First, there is no assurance that the proposed activities will maintain habitat in the long-term. In fact, the Forest Service predicts that habitat in the long-term may not be maintained. The Five Buttes Project Record of Decision (ROD) states:

> "the intensity of treatments, their timing, and placement on the landscape may have a negative effect on the northern spotted owl, a federally listed species. Silvicultural activities aimed at making forested stands more resistant to insects, disease, and fire may also cause a short- and long-term modification and degradation of suitable habitat."

ROD, p. 12. *(emphasis added)*. "Suitable habitat" for spotted owls is habitat that supports nesting, roosting, and foraging (NRF), and the FEIS further states, "In those units proposed for commercial harvest the conversion of existing NRF habitat to a foraging and dispersal condition is expected to be at least a short-term effect." FEIS, p. 115-116 (emphasis added). "The return to NRF conditions will take 2-5 decades depending on the thinning intensity prescribed and how quickly canopy cover re-establishes to meet a NRF habitat definition. Id. at 391 (emphasis added). For example, the average lifespan of a spotted owl under ideal conditions can be up to 17 years, notably shorter than the time needed for the area to recover. Declaration of James Anderson, 3. As a result, barred owls may take over this area over the next 20 to 30 years. Id. at p. 3-4; see also FEIS at 119. Barred owls prefer the type of open forest habitat that will result

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from the Five Buttes logging, and these owls are known to displace, kill, and potentially interbreed with spotted owls. Given the Forest Service's own expectation that the proposed logging could cause "long-term modification and degradation of suitable habitat," ROD, p. 12, it is obvious that the Five Buttes Project will not "clearly result in greater assurance of long-term maintenance of habitat."

Second, the Forest Service fails to provide evidence that the activities are "clearly needed to reduce risks." The "Fuels and Fire" section of the FEIS never specifically addresses the risk of fire in the affected Late-Successional Reserve. There is significant scientific controversy about whether the proposed mechanical fuels treatments and commercial logging actually reduce the fire risk in the short- and long-term. See Declaration of Chad Hanson, 4; Plaintiffs' Exhibit 5 (Perry et al, 2004)("Cutting large, old trees to reduce risk could exacerbate future risk by allowing a dense understory to develop"); Plaintiffs' Exhibit 6 (Raymond et al, 2005)("larger fuels generally do not contribute to the spread of surface fires"); Plaintiffs' Exhibit 8 (Carey et al, 2003)("slash resulting from logging is a key factor in predicting subsequent fire risk and… removal of large diameter trees alone may contribute to increased fire severity."); Plaintiffs' Exhibit 9 (Martinson et al, 2003)("Treatments that increase the average diameter of residual trees through removal of the smallest stems appear most effective."); Plaintiffs' Exhibit 10 (Stephens et al, 2005); Plaintiffs' Exhibit 11 (Brown et al, 2004)("Based on current knowledge…it appears that the most credible restoration efforts will… maintain the most fire-resistant, large-tree component of the forest in active-management schemes.") There is also evidence in the record that thinning to reduce fire hazard is effecting without removing over story trees and without a reduction of crown bulk density. Plaintiffs' Exhibit 8 ("In general, thinning from below (removing the smallest trees) is assumed to be more effective at altering fire behavior than

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thinning from above (removing the largest trees)")("…high crown bulk densities, by themselves, did not support crown fire. Likewise, stands opened up from thinning to reduce crown bulk density did not necessarily have less tree mortality"); Plaintiffs' Exhibit 9 ("removal of the smallest stems appear most effective")("treatments that reduce canopy fuels may increase and decrease fire hazard simultaneously"). Given the substantial evidence in the record that logging large trees from old growth forests is both controversial and antithetical to risk reduction efforts, and given the Forest Service's failure to address and incorporate this substantial evidence, the Forest Service has failed to demonstrate that the proposed activities are "clearly needed to reduce risks."

Third, the Forest Service fails to demonstrate that the proposed activities "will not prevent the Late-Successional Reserve from playing an effective role in the objectives for which [it was] established." The portion of the NFP that describes Late-Successional Reserves states the LSR objectives:

> **Objectives -** Late-Successional Reserves are to be managed to protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species including the northern spotted owl. These reserves are designed to maintain a functional, interacting, late-successional and old-growth forest ecosystem. See additional information in the Ecological Principles for Management of Late-Successional Forests discussion in Section B of these standards and guidelines.

Plaintiffs' Exhibit 12, C-11 (emphasis added). The referenced "Section B" reiterates the objective of "maintaining" the currently existing late-succession forest characteristics and species diversity:

> One goal of these standards and guidelines is to maintain late-successional and old-growth species habitat and ecosystems on federal lands. Another goal of forest management on federal lands is to maintain biological diversity associated with native species and ecosystems in accordance with laws and regulations.

Id. at B-1 (emphasis added).

These standards and guidelines include reserves designed to maintain and enhance late-

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> successional forests as a network of existing old-growth forest ecosystems, although their size, distribution, and management varies.

Id. at B-4 (emphasis added).

> Until more experience and knowledge about active management to produce late-successional ecosystems is gained, sustaining late-successional ecosystems in the landscape will be best accomplished through retention of existing areas of late-successional forest.

Id. at B-4 (emphasis added).

According to the Forest Service, the logging that is proposed and is currently underway within the Davis Late-Successional Reserve will convert what is currently suitable habitat into unsuitable habitat for late-successional species like the spotted owl. This conversion may last for up to 50 years, assuming no other logging projects occur in the planning area in the future. FEIS, p. 109. The proposed activities may cause "long-term modification and degradation of suitable habitat." ROD, p. 12. "Consequences of active management may have a negative impact on the northern spotted owl and its ability to establish and maintain breeding territories, find sufficient prey base habitat, and disperse across the landscape." Id. The proposed logging will prevent the affected areas from "playing an effective role" in "maintain[ing] late-successional and old-growth species habitat and ecosystems." By the Forest Service's own analysis, the proposed logging will do just the opposite of what the NFP requires.

The NFP does contemplate the use of silvicultural activities in Late-Successional Reserves to reduce the risk of fire and other large-scale disturbances. However, the unequivocal direction given by the NFP is to focus silvicultural management on younger stands, where the risk of fire is greater, where the potential to accelerate the development of late-successional characteristics is greater, and where the danger of damaging existing late-successional forests is much smaller. "Stand management in Late-Successional Reserves should focus on stands that have been regenerated following timber harvest or stands that have been thinned." Id. at B-6.

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"[S]ilviculture can accelerate the development of young stands into multilayered stands with large trees and diverse plant species, and structures that may, in turn, maintain or enhance species diversity. Id. "[M]anagers need to seek a balanced approach that reduces risk of fire while protecting large areas of fire-prone late-successional forest. Id. at B-8 (emphasis added).

By logging large live trees from mature and old-growth stands within the Late-Successional Reserve, the Forest Service has ignored the plain language of the binding direction of the Northwest Forest Plan. The Forest Service is abusing an exception to the NFP's general prohibition against logging in LSRs. This exception allows restoration of unhealthy and previously logged areas; it does not authorize the degradation of more late-successional habitat.

b. Logging will delay, not accelerate, the development of late-successional conditions by removing live, mature, and old-growth trees from the Late-Successional Reserve and is inconsistent with the NFP.

The NFP states that objective of silvicultural activities aimed at reducing fire risk "will be to accelerate development of late-successional conditions while making the future stand less susceptible to natural disturbances." Plaintiffs' Exhibit 12, C-13. Although there is ongoing controversy over whether the proposed logging will in fact make the future stands less susceptible to natural disturbances, there is a consensus among the parties to this action that the proposed logging will remove components of late-successional habitat and delay the development of late-successional forest conditions for several decades. See ROD, p. 12. While the NFP requires the Forest Service to meet both objectives contemporaneously ("accelerate development of late-successional conditions while making the future stand less susceptible…"), the Forest Service has chosen instead to sacrifice one objective for the other. This is plainly inconsistent with the language of the NFP.

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Had the Forest Service decided to focus on thinning younger stands, as directed by the NFP, the dual objectives of accelerating the development of late-successional characteristics and reducing risk of large-scale disturbances could have been met simultaneously and without controversy. According to the NFP, thinning young stands not only reduces the risk of catastrophic disturbances, but "can accelerate the development of young stands into multilayered stands with large trees and diverse plant species, and structures that may, in turn, maintain or enhance species diversity." Plaintiffs Exhibit 12, B-6. But the Forest Service has instead decided to log older stands, placing the two objectives at odds with one another, and requiring the agency to choose one objective and leave the other behind. The maintenance and acceleration of late-successional forest conditions cannot be sacrificed or made subordinate to another objective simply because the Forest Service refuses to "focus on younger stands" as required by the NFP.

c. Logging will remove and degenerate currently suitable owl habitat and other late-successional conditions, and is inconsistent with the NFP.

The NFP states that risk-reduction treatment "should not generally result in degeneration of currently suitable owl habitat or other late-successional conditions." Plaintiffs' Exhibit 12, C-13 (emphasis added). The Forest Service estimates that more than 2,000 acres of currently suitable spotted owl nesting and roosting habitat will be degenerated by the proposed logging, and will not be suitable nesting and roosting habitat up to 50 years. FEIS, p. 391. Over 600 of those acres are in the Davis Late-Successional Reserve. The Record of Decision for the Five Buttes Project states that the proposed logging may cause "short- and long-term modification and degradation of suitable habitat." ROD, p. 12. "In those units proposed for commercial harvest the conversion of existing [nesting, roosting, and foraging] habitat to a foraging and dispersal

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condition is expected to be at least a short-term effect." FEIS, p. 115. The proposed short- and long-term degeneration of currently suitable spotted owl habitat is inconsistent with the NFP.

In summary, the Forest Service has made the unilateral decision to downgrade hundreds of acres of currently existing suitable spotted owl habitat on the premise that it will reduce the risk of stand replacement due to natural disturbance. In doing so, the Forest Service has turned the objectives of Late-Successional Reserves completely upside down. First and foremost, the objective of Late-Successional Reserves is to protect and enhance late-successional habitat for the spotted owl and other old-growth dependant species. The Forest Service is permitted to use logging to accelerate development of late-successional characteristics in areas that currently lack them (young stands), and to reduce the risk that a large-scale disturbance results in the loss of currently suitable habitat, but these activities are permitted only insofar as they fulfill the broader LSR objective of protecting late-successional habitat. If any one objective is subordinate to the other, it is the risk-reduction objective that is subordinate to the overarching habitat protection objective. Indeed, the risk-reduction objective in LSRs is consecrated only by its ability to help fulfill the larger goal of habitat protection. The Forest Service's position – that the risk-reduction objective gives it license to degrade existing late-successional habitat in both the short and long terms – is a misplaced interpretation of the NFP. Logging mature and old-growth stands from within the Late-Successional Reserve is inconsistent with the plain language of the NFP, particularly due to the loss of so much currently suitable spotted owl habitat.

The Forest Service's interpretation of the NFP is not entitled to deference when it "is plainly inconsistent" with the NFP itself. ONRC, 492 F.3d at 1125 ("Though we normally afford deference to an administrative agency's interpretation of its own regulations, 'an agency's interpretation does not control, where ... it is plainly inconsistent with the regulation at

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issue.'")(citing Native Ecosystems Council v. U.S. Forest Serv., 418 F.3d 953, 960 (9th Cir. 2005)). Where an agency's interpretations are not entitled to deference, the reviewing court must make its own evaluation of the Project "to determine whether its specific elements comply with the NFP." Id. at 1127. In ONRC, the Bureau of Land Management (BLM) interpreted the LSR Guidelines to allow logging after a fire to "salvage" the economic value of burned timber. Id. at 1125-1127. The Ninth Circuit held that the BLM's interpretation was not entitled to deference, because it was plainly inconsistent with LSR Guidelines and the failed to give priority to environmental concerns. Id.

The Forest Service's interpretation of the LSR Guidelines here is as plainly inconsistent with the NFP as the BLM's interpretation was in ONRC. First, like in ONRC, the Forest Service here has erroneously balanced economic needs with environmental needs:

> I weighed the trade-offs carefully between all three alternatives and how they respond to economic opportunity. I recognize the need for forest products from forest ecosystems to help maintain the stability of local and regional economies. Within the Late-Successional Reserve, it is very important to manage for dependent late- and old-growth dependent species. However, silvicultural activities with an attendant benefit of providing timber are an appropriate way to manage these lands. Providing forest products to the economy is one of the two "needs" identified for this project.

ROD, p. 27. As the court stated in ONRC, "[w]hile the NFP as a whole seeks to strike a balance between environmental protection and resource extraction, its management directives for specified reserve areas give priority to environmental concerns." ONRC, 492 F.3d. at 1125. Second, the Forest Service's sacrifice of currently suitable spotted owl habitat in the name of fire risk-reduction is plainly inconsistent with the NFP, particularly because the risk-reduction objective is a subsidiary of the habitat preservation objective.

For all the above reasons, the Five Buttes Project is inconsistent with Standards and Guidelines of the NFP. The Forest Service's failure to comply with the NFP is arbitrary,

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capricious, and not in accordance with NFMA and NEPA. 16 U.S.C. §1600-1614; 42 U.S.C. §4321-4370; 5 U.S.C. § 706(2)(A).

B. The Five Buttes Project Violates the National Environmental Policy Act ("NEPA")

1. Failure to Disclose Opposing Scientific Opinion that Counsels Against the Forest Service's Decision to Log Large-Diameter Trees Violates NEPA.

The Forest Service fails to disclose and address scientific information that counsels against the proposed logging in the Five Buttes Project area. Specifically, the Forest Service has ignored scientific information that counsels against reducing forest canopy densities and logging large-diameter mature and old-growth trees as ways to reduce the risk of catastrophic fire. The Forest Service has also failed to disclose and address scientific information that calls into question the agency's purported need to reduce the risk of fire. Specifically, the Forest Service has ignored the conclusions of multiple scientific studies showing that burned forests, including severely burned forests, continue to function as suitable spotted owl habitat.

The Forest Service is required to disclose and analyze scientific information counseling against the activities it proposes, or that calls into question the expected environmental effects of a proposed action. 40 C.F.R. §§1502.9(b), 1502.24. Furthermore, the agency must disclose the extent to which the impact of the proposed action is scientifically controversial. See Id. at §§ 1502.16(a), 1502.16(b), 1508.27(b)(4), 1508.27(b)(5), 1508.8. Failing to disclose and analyze the scientific uncertainty of the evidence upon which the agency bases its decisions is a violation of NEPA. Ecology Center, Inc. v. Austin, 430 F.3d 1057 (9th Cir.2005); see also, Seattle Audubon Society v. Espy, 998 F.2d 699 (9th Cir.1993). "An EIS violates NEPA where it fails to 'disclose and discuss the responsible opposing views.'" Pacific Coast Federation of Fishermen's Associations v. National Marine Fisheries Service, 482 F.Supp.2d 1248, 1253 (W.D.Wash,

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2007)(citing Center for Biological Diversity, 349 F.3d at 1157 (9th Cir. 2003)).

In the name of risk reduction, the Forest Service has authorized logging of live large-diameter trees from more than 2,000 acres of mature and old-growth forests. There is no diameter limit to the trees being logged in the Five Buttes Project, and there is no age cap on the areas being treated. Field surveys of the project area have revealed that many of the largest trees in the stands are marked for removal, while many of the smallest trees are marked for retention. Declaration of Riverwind, 3. While the Forest Service has ensured that the "fuel load" it is removing is commercially viable, it has ignored the scientific information counseling against logging large diameter trees and reducing forest canopy densities in risk-reduction activities.

Though the effectiveness of thinning younger stands to achieve a lower risk of large-scale disturbance is not disputed, the thinning of older stands and the removal of large trees to achieve the same result is highly controversial. See Plaintiffs' Exhibit 5 (Perry et al, 2004); Exhibit 6 (Raymond et al, 2005); Exhibit 8 (Carey et al, 2003); Exhibit 9 (Martinson et al, 2003); Exhibit 10 (Stephens et al, 2005); Exhibit 11 (Brown et al, 2004). Carey et al. states, "In general, thinning from below (removing the smallest trees) is assumed to be more effective at altering fire behavior than thinning from above (removing the largest trees)." Plaintiffs' Exhibit 8, 8. "Slash resulting from logging is a key factor in predicting subsequent fire risk… removal of large diameter trees alone may contribute to increased fire severity." Id. at 12. Martinson et al. states, "Treatments that increase the average diameter of residual trees through removal of the smallest stems appear most effective." Plaintiffs' Exhibit 9, 10-11. "Treatments that reduce canopy fuels may increase and decrease fire hazard simultaneously." Id. at 7. Brown et al. states, "Based on current knowledge (adapted from Brown 2000; Allen et al. 2002), it appears that the most credible restoration efforts will… maintain the most fire-resistant, large-tree component of the

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forest in active-management schemes." Plaintiffs' Exhibit 11, 909. Perry et al. states that "cutting large, old trees to reduce risk could exacerbate future risk by allowing a dense understory to develop." Plaintiffs' Exhibit 5, 924. Raymond et al. states, "larger fuels generally do not contribute to the spread of surface fires." Plaintiffs' Exhibit 6, 2991. This technical matter is explained by expert Dr. Chad Hansen, who is familiar with the Five Buttes Project:

> The stated purpose of the project is to, through intensive logging which includes substantial removal of mature and old growth trees, reduce the risk of severe wildland fire effects, which the project documents suggest is necessary to benefit and protect spotted owls. These claims lack a scientific basis, and are starkly contradicted by existing scientific studies. Where a project goal is to effectively reduce the potential for high severity fire in conifer forests, it is not necessary to remove mature trees in order to accomplish this goal. Recent studies have found that precommercial thinning of sapling and pole-sized trees (subcanopy trees10 inches in diameter and smaller) can effectively reduce fire severity (see, e.g., Omi and Martinson 2002, Perry et al. 2004). Such prescriptions would likely tend to remove relatively little of the total standing biomass, but they would remove most of the subcanopy foliar fuel. Further, mechanical thinning (i.e., wherein a substantial portion of the standing biomass is removed, including some mature trees, and canopy cover is significantly reduced) will often tend to increase, not decrease, fire severity, due to accelerated brush growth due to increased sun exposure, increased midflame windspeeds, slash debris, and drying of surface fuels (Hanson and Odion 2006, Platt et al. 2006, Raymond and Peterson 2005)."

Declaration of Hansen, 2-3.

The Forest Service fails to reference any of the above-cited studies. More importantly, the Forest Service fails to even acknowledge the existence of this entire body of science. The Forest Service additionally fails to acknowledge the body of science that addresses the habitat suitably of burned forests. Plaintiffs' Exhibit 1, (Bond et al. 2002)("Relatively 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."); Plaintiffs' Exhibit 3, (Andrews et al.)("The spotted owls we monitored appear to be using a variety of habitat types within the Timbered Rock Fire, including areas

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which had experienced moderate and high severity wildfire.")

The scientific information omitted from the FEIS counsels against the proposed action, raises uncertainties in the Forest Service's analysis, and discredits the very purpose of the Five Buttes Project. In Land Council v. McNair, the Ninth Circuit stated that an EIS "must 'be supported by evidence that the agency has made the necessary environmental analysis,' (40 C.F.R. §1502.1) and must 'address in [a] meaningful way the various uncertainties surrounding the scientific evidence.'" 494 F.3d 771, 777-8 (9th Cir.2007)(quoting Ecology Center, 430 F.3d at 1065 (quoting Seattle Audubon Soc'y v. Espy, 998 F.2d 699, 704 (9th Cir.1993))." The Five Buttes Project FEIS fails to do this. The Forest Service's failure to disclose opposing scientific information and acknowledge scientific uncertainty in the Five Buttes Project FEIS is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A).

2. The Failure to Consider the Cumulative Impacts of the Five Buttes Project Violates NEPA.

The Five Buttes Project FEIS violates NEPA because it fails to adequately consider the cumulative impacts of the Project "when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.7. In determining whether a project will have a significant impact on the environment, an agency must consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). "Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment." Id. "Cumulative impact" is defined in NEPA's implementing regulations as "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

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impacts can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.7.

In the past three years, a series of Ninth Circuit cases has "firmly establish[ed] that a cumulative effects analysis 'must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects.'" ONRC, 492 F.3d at 1133(quoting Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, 387 F.3d 989, 994 (9th Cir. 2004); Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108, 1128 (9th Cir. 2004)); The Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005). In 2004, the Ninth Circuit held in Klamath-Siskiyou that "proper consideration of the cumulative impacts of a project requires 'some quantified or detailed information; ... [g]eneral 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.'" Klamath-Siskiyou, 387 F.3d at 993 (quoting Ocean Advocates, 361 F.3d at 1128; Neighbors of Cuddy Mountain v. United States Forest Serv., 137 F.3d 1372, 1379-80 (9th Cir.1998)). In Klamath-Siskiyou, the Ninth Circuit rejected the agency's analysis as inadequate because it did not "provide any objective quantification of the impacts" and did not provide a "sufficient description of the actual environmental effects." Id. at 994, 995.

In 2005, the Ninth Circuit decided Lands Council, 395 F.3d 1019 (9th Cir. 2005), and again found the Forest Service's cumulative effects analysis inadequate:

> The Final Environmental Impact Statement generally describes the past timber harvests, gives the total acres cut, with types of cutting, per decade, and asserts that timber harvests have contributed to the environmental problems in the Project area. But there is no catalog of past projects and no discussion of how those projects (and differences between the projects) have harmed the environment. Apart from a map in the Project file that shows past harvests, with general notes about total acres cut per watershed, there is no listing of individual past timber harvests. Moreover, there is no discussion of the connection between individual harvests and the prior environmental harms from those harvests that the Forest Service now acknowledges. Instead, the Final Environmental Impact Statement contains only vague discussion of the general impact of prior timber

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> harvesting, and no discussion of the environmental impact from past projects on an individual basis, which might have informed analysis about alternatives presented for the current project.

Id. at 1027.

> Here, while the Final Environmental Impact Statement discloses tables with types of past harvesting, there was no inclusion of the specific projects that comprise the totals. Though the Forest Service asserts that the Final Environmental Impact Statement had a "comprehensive accounting" of past timber harvests, in fact the prior harvests from different projects were not separately discussed, neither as to their method of harvest, nor as to the consequences of each. Although the agency acknowledged broad environmental harms from prior harvesting, the data disclosed would not aid the public in assessing whether one form or another of harvest would assist the planned forest restoration with minimal environmental harm. For the public and agency personnel to adequately evaluate the cumulative effects of past timber harvests, the Final Environmental Impact Statement should have provided adequate data of the time, type, place, and scale of past timber harvests and should have explained in sufficient detail how different project plans and harvest methods affected the environment. The Forest Service did not do this, and NEPA requires otherwise. Muckleshoot, 177 F.3d at 809-10.

Id. at 1028 (internal citation included).

Most recently, in July of 2007, the Ninth Circuit again rejected an agency's cumulative effects analysis and reaffirmed its holdings in Klamath-Siskiyou and Lands Council. ONRC, 492 F.3d at 1120. In ONRC, the Court held that there are "two critical features of a cumulative effects analysis:"

> First, it must not only describe related projects but also enumerate the environmental effects of those projects. See Lands Council v. Powell, 395 F.3d 1019, 1028 (9th Cir.2005) (holding a cumulative effects analysis violated NEPA because it failed to provide "adequate data of the time, place, and scale" and did not explain in detail "how different project plans and harvest methods affected the environment"). Second, it must consider the interaction of multiple activities and cannot focus exclusively on the environmental impacts of an individual project. See Klamath-Siskiyou, 387 F.3d at 996 (finding a cumulative effects analysis inadequate when "it only considers the effects of the very project at issue" and does not "take into account the combined effects that can be expected as a result of undertaking" multiple projects).

Id at 1133. (internal citation included). The court stressed that the agency "cannot fulfill its responsibility to conduct a cumulative effects analysis by merely reciting what effects have occurred, no matter how many pages it fills by doing so. As we explained in Lands Council in no uncertain terms, the time, type, place, and scale of past activities must be included." Id.

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The cumulative effects analysis in the Five Buttes FEIS fails, by great lengths, to meet the requirements of NEPA and its implementing regulations as expressed by the Ninth Circuit in Klamath-Siskiyou, Lands Council, and ONRC. Table 3-1 on page 37 of the FEIS is the Forest Service's only enumeration of "past, present and reasonably foreseeable future actions." This table only identifies six past projects, lacks information about the time, place, and scope of past projects, and has absolutely no information about the environmental impacts of the listed past projects. Noticeably, none of the projects listed in Table 3-1 occurred before 1996. While different sections of the FEIS refer to "regeneration timber harvests that were conducted across the district from the 1960s through the early 1990s," FEIS, p. 152 and 145, and past "regeneration harvests on all the buttes or mountains," FEIS, p. 143, there is absolutely no mention of these "regeneration harvest" projects in Table 3-1. The entire FEIS is devoid of any quantitative or objective description of where these projects were, how big they were, when they were implemented, or what types of specific environmental impacts they caused. The FEIS fails to include even the names of these projects that were implemented in the project area for over four decades and as recently as the early 1990s. The lack of quantitative and objective information about past projects, and the lack of so much as the names of every project that occurred in the area before 1996, is a clear violation of NEPA and its implementing regulations. The FIES fails to do what is "in no uncertain terms" required of every cumulative effects analysis: it fails to disclose "the time, type, place, and scale of past activities." ONRC, 492 F.3d at 1133.

The section of the EIS titled "Cumulative effects of Past, Present and Reasonably Foreseeable Future Actions" starts on page 36, is less than two pages long, and has no discussion of the environmental impacts of either past, present, or future projects. Instead the FEIS states,

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"An agency is not required to list or analyze the effects of individual past actions…agencies can conduct an adequate cumulative effects analysis by focusing on the currently aggregate effects of past actions without delving into the details of individual past actions." FEIS, p. 37. This statement, and the Forest Service's adoption of it for the Five Buttes Project, is not just inconsistent with the Ninth Circuit's interpretation of NEPA, it is diametrically opposed to it. "As [the Ninth Circuit] explained in Lands Council in no uncertain terms, the time, type, place, and scale of past activities must be included." ONRC, 492 F.3d at 1133.

Even if the Forest Service were permitted to look only at the aggregate effects of past actions to determine the existing conditions of the project area, they have not done even this in the Five Buttes EIS. Chapter 3 of the FEIS, titled "Affected Environment and Environmental Consequences," includes thirty-four separate sections to address cumulative impacts related to wildlife species, soils, fire and fuels, and numerous other resources. FEIS, p. 36 - 326. Instead of addressing the cumulative impacts of the project in one all-inclusive analysis, the Forest Service has broken down the cumulative impacts analysis by each natural resource that is affected. While this approach may be legally adequate and in fact helpful in some cases, it is not so here because each and every one of the individual analyses fails to make the requisite disclosure of the time, type, place, or scope of individual past actions or of the environmental impacts caused by them. When a cumulative impacts analysis fails to make the requisite disclosures, it violates NEPA no matter how many different sections it takes up and "no mater how many pages it fills by doing so." ONRC, 492 F.3d at 1133.

The Five Buttes Project FEIS itself best illustrates the shortcomings of the Forest Service's approach to analyzing cumulative impacts. Page 167 of the FEIS contains the section that addresses the cumulative environmental impacts to a bird species called the Olive-Sided

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Flycatcher. The analysis makes no reference to specific past projects itself, but states, "all past and present activities are included in the existing condition analysis." FEIS, p. 167. A reading of the "existing condition" analysis for the Olive-Sided Flycatcher, however, finds absolutely nothing about past or present projects or their impact to the Olive-Sided Flycatcher. FEIS, p. 166. The cumulative impacts analysis for another bird species, the Northern Goshawk, is also silent on both the existence of past projects and the impacts caused by past project. FEIS, p. 145. Again, the FEIS states that "past projects have been incorporated in the existing condition discussion," FEIS, p. 145, but again the "existing condition" makes no mention of past projects or their impacts to the Northern Goshawk. FEIS, p. 143.

This exact same thing is true for the cumulative effects analysis on the Chipping Sparrow and Brewer's Sparrow (FEIS, p. 164, 165); the Great Gray Owl (FEIS, p. 158, 159); the Hermit Thrush (FEIS, p. 169, 170); the Clark's Nutcracker (FEIS, p. 174); Elk (FEIS, p. 176, 183); and many others. In total, there are fifty (50) different sections of the FEIS titled "Existing Conditions." FEIS, p. 2, 42, 66, 84, 99, 121, 128, 129, 130, 134, 135, 136, 137, 138, 138, 140, 143, 146, 147, 148, 149, 149, 151, 155, 158, 161, 163, 163, 164, 166, 167, 169, 171, 172, 172, 174, 176, 189, 217, 219, 223, 242, 260, 269, 279, 283, 287, 294, 302, 322). Forty-nine of these fifty "Existing Conditions" sections make absolutely no mention of past projects. The single exception is on page 190 where the FEIS references a single past action, the Davis Fire Recovery Project.

The vast majority of the cumulative effects analyses in the FEIS do not mention any past, present or future activities by name, and do not identify or analyze any environmental impacts of these other projects. There are references to Table 3-1 in a few of the individual analyses, but again this table is silent on the impacts of past projects and fails to give any mention to projects

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implemented before 1996. The Forest Service's reliance on "existing conditions" in the cumulative effects analyses is useless because it to fails to mention past, present, or future projects, or address their environmental impacts. While the FEIS has almost three-dozen different cumulative effects analyses, not one of them includes the information that "must be included." ONRC, 492 F.3d at 1133.

Furthermore, the FEIS fails to "consider the interaction of multiple activities." Id. While Table 3-1 lists six past projects and eleven present and future projects, it fails to address the interaction among them and the relationship between them and the Five Buttes Project. Most notably, the Forest Service fails to disclose and analyze the interactive environmental impacts of the Seven Buttes Project, the Seven Buttes Return Project, and the Davis Fire Recovery Project, three recent projects within the Five Buttes project area that each merit special attention. The Davis Fire Recovery Project logged 3,785 acres of old-growth forest from the area affected by the Davis fire, all of which is entirely within the Five Buttes Project area. Plaintiffs' Exhibit 14, Davis Fire Recovery Project ROD, 10. The Seven Buttes Project and Seven Buttes Return were large-scale commercial thinning projects, involving 7,000 acres and 16,000 acres respectively, within the Five Buttes Project area. The Five Buttes FEIS does not provide a clear statement of the individual and cumulative impacts from the Davis fire, the suppression of the Davis fire, the Davis Fire Recovery Project, and the two Seven Buttes Projects. The omission of these impacts and the failure of the Forest Service to consider the interaction of past projects is a violation of NEPA.

As the Ninth Circuit stated in Lands Council, "For the public and agency personnel to adequately evaluate the cumulative effects of past timber harvests, the Final Environmental Impact Statement should have provided adequate data of the time, type, place, and scale of past

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timber harvests and should have explained in sufficient detail how different project plans and harvest methods affected the environment. The Forest Service did not do this, and NEPA requires otherwise." Lands Council, 395 F.3d at 1028. The Forest Service's authorization of the Five Buttes Project in the absence of an adequate cumulative impacts analysis is arbitrary, capricious, and not in accordance with NEPA. 5 U.S.C. § 706(2)(A); 40 C.F.R. §§ 1508.7, 1508.27(b)(7).

VII. PLAINTIFFS WILL SUFFER IMMEDIATE AND IRREPARABLE INJURY IN THE ABSENCE OF PRELIMINARY INJUNCTION.

Irreparable injury to Plaintiffs has already occurred and further harm is imminent, as the logging began on Unit 6 on Friday, October 5, 2007, and on Unit 1 on Wednesday, October 10, 2007, logging is scheduled to begin on Unit 5 on October 19, 2007, and a timber sale auction for the additional units totaling 782 acres, including units in the LSR, CHU and NRF habitat, is scheduled for mid-December 2007. "Courts in this circuit have recognized that timber cutting causes irreparable damage and have enjoined cutting when it occurs without proper observance of NEPA procedures and other environmental laws." Portland Audubon Society v. Lujan, 795 F. Supp. 1489, 1509 (D. Or. 1992); aff'd, Portland Audubon Society v. Babbitt, 998 F.2d 705 (9th Cir. 1993); see also Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1057 (9th Cir. 1994) ("timber sales constitute per se irreversible and irretrievable commitments of resources" under ESA); Amoco Production Co., 480 U.S. at 545 (holding 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."). "Irreparable damage is presumed to flow from a failure to properly evaluate the environmental impacts of a major federal action." Thomas v. Peterson, 753 F. 2d 754, 764 (9th Cir. 1985).

Many of the Plaintiffs' members and staff actively hike, mountain bike, photograph,

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survey, and bird-watch in the Five Buttes Project area. See Declaration of Miller, 2-4; Declaration of Riverwind, 2; Declaration of Coulter, 4. "In only two days of hiking the [Five Buttes] area in October I observed numerous species of mammals, birds and two species of amphibians. Spring would bring many more species of wildlife to the area." Declaration of Miller, 5. Logging in the LSR and in old-growth, mixed-conifer forests would cause irreparable degradation to the habitat of the spotted owl and old-growth dependent species while increasing the risk of fire in the area. See Declaration of Riverwind, 6; Declaration of Coulter, 6.

The only harm resulting from a temporary injunction of the further logging, auction and award of the Five Buttes Project is the potential for economic injury to the timber companies. Apart from Units 1, 5 and 6, the Plaintiffs are not aware that any other timber sale contracts have been awarded. See Wilderness Society v. Tyrrel, 701 F. Supp. 1473 (E.D. Cal. 1988), rev'd in part on other grounds, 918 F.2d 813 (9th Cir. 1990) ("because this order comes before a contract has actually been awarded, intervenors' claims are only an expectation, rather than a property right, and such inchoate claims appear less compelling. Clearly, the Government's economic loss cannot be considered compelling if it is to be gained in contravention of federal law"). In any event, the "mightiest economy on earth" can certainly afford a temporary stay from proceeding with one timber sale, on public lands, while the Forest Service ensures that it has properly analyzed and disclosed the environmental impacts. See Seattle Audubon Society v. Evans, 771 F.Supp. 1081, 1096 (W.D. Wash. 1991), aff'd 952 F.2d 297 (9th Cir. 1991).

VIII. NO BOND SHOULD BE REQUIRED IN THIS CASE.

It is well established that in public interest environmental cases the plaintiffs need not post bonds because of the potential chilling effect on litigation to protect the environment and the public interest. Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond. See, e.g., People ex rel. Van de Kamp

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v. Tahoe Regional Plan, 766 F.2d 1319 (9th Cir. 1985) (no bond); Wilderness Society v. Tyrrel, 701 F. Supp. 1473 (E.D. Cal. 1988), rev'd on other grounds, 918 F.2d 813 (9th Cir. 1990) ($100); Scherr v. Volpe, 466 F.2d 1027 (7th Cir. 1972) (no bond); West Virginia Highlands Conservancy v. Island Creek Coal Co., 441 F.2d 232 (4th Cir. 1971) ($100); and Sierra Club v. Block, 614 F. Supp. 488 (D.D.C. 1985) ($20).

IX. CONCLUSION.

For the above stated reasons, Plaintiffs respectfully request a preliminary injunction tailored to the harm that is threatened by this project pending a full hearing on the merits. Plaintiffs have carefully tailored this relief to allow certain project activities to proceed while providing Plaintiffs' temporary relief that maintains the status quo and avoids irreparable harm from the implementation of Defendants' Five Buttes Project. The following relief protects these public resources on the Deschutes National Forest pending a resolution of the merits of this case:

a. In units of Spotted Owl NRF habitat, all activities should be preliminarily enjoined; these units include: 5, 74, 75, 80, 85, 135, 345, 380, 385, 410, 415, 430, 435, 475, 505, 525, 550, 570, 620, 650, 670, 690, 695, and 790;

b. In units that are partially comprised of Spotted Owl NRF habitat, all activities in the NRF habitat portions should be preliminarily enjoined, and activities in the remaining portions should be limited to thinning to 12"dbh; these units include: 226, 227, 420, 520, 671, 675, 677, 679, 692, 693, 691, and 810;

c. In units of high-quality, old-growth ponderosa pine that can serve as connective habitat between the buttes, all activities should be limited to thinning to 12" dbh; these units include: 76, 370, 371, 460, 676, 678, 765, and 811; and

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d. In units of mature, large structure for Spotted Owl and Management Indicator Species in and around Spotted Owl habitat, all activities should be limited to thinning to 16"dbh; these units include: 65, 72, 120, and 155.

Respectfully submitted this 22nd day of October, 2007.

/s/ Ann B. Kneeland

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