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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,

vs.

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

Defendants.

Civ. Case No. 07-6147-AA

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

Plaintiffs hereby submit this memorandum in reply to Defendants' response to Plaintiffs' motion for preliminary injunction. In their response, Defendants go to great lengths to paint an ecologically morbid picture of the post-fire landscape at stake and to characterize the Black Crater logging project as "a very carefully crafted an narrowly focused salvage timber sale." Defendants' Response at 1. The record, however, shows that the areas to be logged are rich with life, both new and old, and that fire-killed trees provide very important habitat for wildlife. Wildlife Specialist Report at 4-5; Declaration of Craig Miller at 2-3; Declaration of Marilyn Miller at 2-4; Declaration of Monica Bond at 2-3. Despite the documented vibrancy of the area and its ecologically critical status, the Forest Service has proposed to log every economically feasible acre of the Black Crater Fire area on public land that is not designated Wilderness or Roadless Areas. Decision Memo (Exhibit 4) at 1.

Defendants have also put considerable effort into contrasting the size of the logging units with the overall size of the fire, the Cache-Trout Late-Successional Reserve, and Critical Habitat Unit OR-5. Defendants' Response at 1, 7, 15. Defendants' characterization of the project area as small compared to the surrounding landscape is simply irrelevant. NFMA explicitly requires the Forest Service to comply with the standards of the Northwest Forest Plan on an individual site-specific scale. 16 U.S.C. § 1604(i). NEPA also directs the Forest Service to consider effects of its actions "in the locale rather than in the world as a whole." 40 C.F.R. § 1508.27(a). The fact that Defendants can characterize the size of the logging units as a fraction of the size of other, much larger, geographic areas does give the Forest Service any authority ignore the site-specific environmental standards at issue.

Defendants also highlight the "rigorous analytical process" and "detailed examination" undertaken by the Forest Service in the planning of the Black Crater logging project.

Defendants' Response at 8. Defendants refer to numerous reports and evaluations to illustrate their "detailed considerations." Id. Importantly, however, the Forest Service's "analytical processes" were never documented under NEPA, never offered to the public, and never subject to public comment or scrutiny. NEPA was specifically designed to eliminate this type of private "under the table" planning process. 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 v. Methow Valley Citizens, 490 U.S. 332, 349 (1989)(emphasis added); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998). "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) and Robertson, 490 U.S. at 349)(emphasis added).

Oregon Natural Resources Council Fund v. Brong

To justify logging all but 6 dead trees per acre from a Late-Successional Reserve, Defendants have tried, as would be most necessary for Defendants' to prevail, to distinguish this case from Oregon Natural Resources Council Fund v. Brong, CV-04-693-AA, 2004 WL 2554575 (D. Or. Nov. 8, 2004). In Brong, this court was asked to determine whether the removal of all but 6-12 snags per acre from a Late-Succession Reserve within the Timbered Rock fire area violated NFMA. The court permanently enjoined the Timbered Rock post-fire logging project after full briefing on the merits, holding that the Northwest Forest Plan "affirmatively require[s]" the agency "to retain the snags that will persist until the next forest

develops" and that the agency had "failed to demonstrate that the salvage logging…qualifies for an exception to the prohibition on logging snags in LSRs." Id.

Here, like in Brong, the Forest Service is proposing to log large snags, some more than 40 inches in diameter, from a LSR. Decision Memo at 4. In fact, the Forest Service is proposing to leave fewer snags here than the agency proposed to leave in Brong. Also like in Brong, the Defendants here place great weight on the statement in the NFP that "commercial wood volume removal" is permitted in LSRs. Defendants' Response at 12. However, as the court in Brong noted, "the first part of that sentence states, 'salvage guidelines are intended to prevent negative effects on late-successional habitat, while permitting some commercial harvest.' [NFP S&Gs, C-13]." The court in Brong continued,

> [t]he NFP states that 'salvage will not be driven by economic or timber sale program factors.' NFP Appendix F, F-21. Similarly, one of the primary objectives of LSRs is the 'development of old-growth forest characteristics including snags,' however by definition, this project will specifically interfere with that development by removing the very snags that are likely to persist until the next stand develops. NFP S&Gs B-5.

Id.

Defendants distinguish this case from Brong by asserting that the holding was specific to "research logging" in LSRs and that different Standards and Guidelines were therefore at issue. The Defendants are mistaken. In Brong, the court addressed "research logging" in a specific portion of the case that focused on that particular issue. However, not all logging in Brong was "research logging," and in a different section of the case the court addressed snag removal from LSRs in general. In this section of Brong, which is the section that Plaintiffs have quoted and cited to, the court addressed the very same Standards and Guidelines that apply to the Forest Service in this case.

Defendants also distinguish this case from Brong by asserting that "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 characteristics." Defendants Response Memorandum, p. 11. This argument is wrong for several reasons. First, Defendants do not cite to or provide the court or the Plaintiffs with any research that establishes this contention. Defendants instead reference and rely entirely upon a declaration that is not in the record for this case. Second, Defendants fail to offer any explanation why the 12-20 inch snags they are leaving as wildlife habitat are more likely to persist than the 40-50 inch snags they are cutting and removing. Third, Defendants incorrectly assume, again without citation, that it is consistent with the LSR objectives to log snags that are unlikely to persist for 100 years. This simply is not true; the NFP specifically states that late-successional characteristics begin to return in 80 years. NFP S&Gs C-14. Moreover, the NFP states that "salvage operations should not diminish habitat suitability now or in the future." Id. at 13 (emphasis added). Webster's Dictionary defines "diminish" as "to make less or cause to appear less; to lessen the authority, dignity, or reputation of." As evidenced in the record, the Black Crater logging project area is currently habitat for a myriad of late-successional dependant species, not limited to the spotted owl, and logging and removing all but 6 dead trees per acre will certainly "diminish" or "lessen" this habitat both now and in the future. Wildlife Specialist Report at 4-5; Declaration of Craig Miller at 2-3; Declaration of Marilyn Miller at 2-4; Declaration of Monica Bond at 2-3; Declaration of Asante Riverwind; Plaintiffs' Exhibit 14.

The Defendants also fail to mention that the Brong case was distinguished factually in another case in this District. Klamath-Siskiyou Wildlands Center v. Medford Dist. of Bureau of

Land Management, 400 F.Supp.2d 1234, 1236 (D. Or., 2005). In that case, the court upheld a post-fire timber sale in an LSR, distinguishing it from Brong because the agency had given a thorough and detailed analysis in an EIS that articulated its compliance with the LSR objectives. Id. ("Unlike the record in Brong, the defendant's conclusions here were supported with a thorough analysis of the cumulative effects of the project, and a through analysis of the mitigation measures and restoration measures…")("The defendant gave thorough consideration to whether the proposed salvage would comply with the NWFP, and articulated its analysis in detail.") In the current case, the Forest Service has given no explanation, much less a detailed and thorough analysis, of how the removal of all but 6 snags complies with the LSR objectives. The Forest Service in this case has not published an EIS or even an EA, and there has not been any discussion or even acknowledgement of cumulative effects.

Defendants have not given any persuasive reason why this case is factually distinguishable from Brong. In fact, the only pertinent factual differences are that Defendants here propose to leave fewer wildlife snags and have provided even less of an informed analysis than was provided in Brong to explain how the logging project complies with LSR objectives. Plaintiffs ask this court to follow its prior ruling in Brong. Because of the similarities between this case and Brong, Plaintiffs have demonstrated their likelihood of prevailing on the merits, and at a very minimum have raised "serious questions."

Snag Retention

To support the Forest Service's snag retention strategy, Defendants assert:

> 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 least likely to have snag that were likely to persist until the next old growth stand was developed."

Defendants' Response at 11. Defendants offer no citation for this statement and it is contradicted by the project record. Decision Memo at 1. According to the Decision Memo, of the 416 acres of burned forest outside the Wilderness and Roadless Areas, the Forest Service identified 201 acres of "economical ground-based salvage opportunities." Id. As is clear from the Decision Memo, economic feasibility was the driving force behind the ultimate placement of the logging units, not plant association groups or habitat needs.

Defendants also state, again without any citation, that "research shows a snag gap is likely to exist with or without harvest prior to development of the next stand." Defendants' Response at 11. This statement is also contradicted by the record, which states that "no snag gap will be created as a result of this decision because large and small snags (six per acre) that are likely to persist (i.e. ponderosa pine) will be retained for wildlife." Decision Memo at 23. Defendants' snag gap claim is based upon an inaccurate reading of the project record. Defendants assert that the most likely to persist snags will fall within 30 years, and cite to the Biological Evaluation to support their assertion. Defendants' Response at 11. Importantly, the Biological Evaluation does not say that no snags will remain after 30 years; it simply states that there will be fewer snags after 30 years, a fact that Plaintiffs do not dispute. Biological Evaluation at 26 ("within the first 30 years after a fire there is a decrease in dispersal habitat due to the amount of trees that will have fallen down.")(Emphasis added). The fact that snags in the project area will decrease in number over 30 year weakens Defendants' argument that snag removal now will not diminish habitat suitability now or in the future, particularly because Defendants have failed to explain why the snags they are leaving are more likely to persist than the snags they are removing. The removal of snags from the project area only increases the

likelihood that there will be a gap of time, before the next late-successional forest develops, where no snags will remain.

Economics

Defendants offer two rebuttals to Plaintiffs' claim that post-fire logging in LSRs for narrow short-term economic reasons is inconsistent with the LSR objectives. First, Defendants stress that the NFP "expressly contemplates and authorizes carefully crafted salvage timber harvest like the Black Crater Project within LSRs." Defendants' Response at 12. Again it is important to clarify that the "carefully crafted" salvage project referenced by Defendants was authorized without any environmental review in even a basic EA, is entirely within designated critical habitat for a threatened species, and includes every economically feasible acre of burned forest that is not within Wilderness or Roadless Areas.

Defendants' vapid rhetoric rests upon a narrow reading of the NFP. While the NFP permits some salvage logging in LSRs in certain circumstances, economic output in LSRs must be ancillary to a greater ecologically driven scheme. NFP S&Gs C-13 ("salvage guidelines are intended to prevent negative effects on late-successional habitat, while permitting some commercial harvest"); NFP Appendix F, F-21 ("salvage will not be driven by economic or timber sale program factors.") Defendants have failed to differentiate between ecologically driven management of LSRs with some commercial output, which is allowed, and an economically driven timber sale, which is not allowed in LSRs. The Decision Memo not given any ecological reason for salvage logging in the Black Crater area, and the Forest Service has not provided any explanation of how this project qualifies for "an exception to the prohibition on logging snags in LSRs." See Brong, CV-04-693-AA, 2004 WL 2554575 (D. Or. Nov. 8, 2004). Because the objectives of LSRs are centered on preserving wildlife habitat and promoting old-

growth characteristics, the NFP explicitly states that "salvage will not be driven by economic or timber sale program factors." Id. (quoting NFP Appendix F-21).

Second, Defendants state that "the Black Crater Project cannot be construed as simply or exclusively designed with economic objective 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." Defendants Response at 12. Again, Defendants are mistaken and fail to support their statement with any citations. Salvage logging in Black Crater area was designed with an economic objective; the Decision Memo for the project plainly states that the "Purpose and Need" for the post-fire (salvage) logging is the recovery of economic value of burned timber. Decision Memo at 1-2. The fact that the Forest Service has adopted unspecified "mitigation measures" does not change the Purpose or Need for the project. Lastly, while the fire did burn over 5,000 acres of National Forest lands, the Forest Service authorized logging of only 201 acres because it found that only 201 acres were economically feasible to log. Id. It is inaccurate and disingenuous for Defendants to claim that the 201 acre figure demonstrates a non-economic motive, particularly because the Decision Memo for the project shows that the figure was based specifically upon economic feasibility.

Critical Habitat

According to Defendants, Plaintiffs' claim that every logging unit within the Black Crater logging project is designated critical habitat for the northern spotted owl is "meritless." Defendants' Response at 12-13. Again, this familiar response is nothing more than a refrain, not supported by analysis, citation to the record, or basic logic. The record for the Black Crater logging project unequivocally shows that every logging unit is in fact designated critical habitat.

Decision Memo at 5. Defendants have given no legal authority to support their belief that the Black Crater Fire itself somehow reversed the final agency rule designating the critical habitat. See 57 Fed. Reg. 1796-1838 (1992).

Defendants further assert that that the Black Crater logging project will not affect functioning spotted owl habitat, and cite to the project's Biological Evaluation to support this assertion. Defendants' Response at 13. Again, Defendants are mistaken; the Biological Evaluation referenced by Defendants specifically found that the Black Crater logging project "May Affect" both the northern spotted owl and its critical habitat. Biological Evaluation at 7, 30; Decision Memo at 3. This "May Effect" determination is enough to preclude the use of a CE and require an EA, because to exclude a project from NEPA the Forest Service is required to determine that the project will have "no effect" on the environment. 40 C.F.R. § 1508.4.

In Riverhawks v. Zepeda, 228 F.Supp.2d 1173 (D. Or., 2002), this court granted summary judgment in favor of environmental organizations that challenged the use of a categorical exclusion when the agency determined the excluded action "May Affect" a threatened or endangered species. In that case, the Decision Memo "explicitly state[d] that the permitted actions 'may affect' the Western Pond Turtle and are likely to adversely effect threatened coho salmon. A categorical exclusion, however, is appropriate only when the agency determines that the proposed action will have 'no effect' on the environment. 40 C.F.R. § 1508.4; Southwest Center, 100 F.3d at 1450." Id. at 1189. (internal citation included).

Moreover, Defendants fail to account for the substantial evidence on the record showing that burned forests do function as habitat for spotted owls. Exhibit 6; Exhibit 7; Exhibit 8; Declaration of Monica Bond. If, as is the case here, there is substantial evidence on the record that an extraordinary circumstance exists, an EA must be prepared. California v. Norton, 311

F.3d 1162, 1177 (9th Cir. 2002)("there is substantial evidence in the record that exceptions to the categorical exclusion *may* apply, and the fact that the exceptions may apply is all that is required to prohibit use of the categorical exclusion. 49 Fed. Reg. at 21439."); Forest Service Employees for Environmental Ethics, 2005 WL 1514071 (N.D. Cal 2005)("All that plaintiffs must show to be successful on their NEPA claim is that there is substantial evidence in the record that the exceptions to the categorical exclusion may apply.")

Defendants now make the unbelievable claim that the agency made an "editorial error" when they directly cited to the Bond study for the proposition that severely burned forest cannot function as spotted owl habitat. As the record shows, the Bond study found that severely burned forests can and do function as spotted owl habitat – not just for nesting, but also as roosting, foraging, and dispersal habitat. Defendants' assertion that they meant to cite to a study by Gaines, et al, and mistakenly cited to the Bond study is hard to believe. First, not only is a short cite to the Bond study found in the text of the Decision Memo, but the full citation is also listed in the "References" page of the Decision Memo. The Bond study is also cited to in the Biological Evaluation and fully cited in the Reference page of that document as well. Nowhere in either the Decision Memo or the Biological Evaluation did the Forest Service cite to a study by Gaines, et. al. In addition, during both the planning process and the appeal resolution meeting, Plaintiffs asked the Forest Service biologist and District Ranger to explain their inaccurate reference to the Bond Study. Declaration of Asante Riverwind at 8. Neither the biologist nor the District Ranger mentioned anything about an editorial error or a Gaines et al study. Id. Plaintiffs also questioned the use of the Bond Study in their administrative appeal, and no mention of an editorial error or the Gaines study was given in the Forest Service's appeal denial. Despite several questions raised by Plaintiffs about the use of the Bond study at varying

stages of the planning process, Defendants' response memorandum is the first and only time the Forest Service mentions any editorial error.

Even if the study by Monica Bond was reference by mistake, it is still in the record for this case, as Plaintiffs submitted it during the planning stage of the project. It, along with Exhibits 7 and 8 and the Declaration by Monica Bond, is "substantial evidence" in the record that extraordinary circumstances *may* be present in the Black Crater logging project area, and that is all that is needed to require an EA. See California v. Norton, 311 F.3d at 1177. Defendants argue that "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 documents in the Black Crater Fire Timber Salvage Decision Memo." Defendants' response at 14. Defendants not only fail to offer any indication of which studies they are referring to, but also fail to explain how this "number of studies" changes the fact that there is substantial evidence on the record that spotted owls do use burned forests.

Defendants try to bolster their argument by asserting that in the past three years, "both before and after the wildfire, the Black Crater Fire Timber Salvage project has no record of spotted owl use in the area." Defendants' Response at 14. Defendants again state the facts incorrectly. The Biological Evaluation specifically states that "two known spotted owl home ranges lie partially within the Black Crater Timber Salvage project area." Biological Evaluation at 17. According to the Biological Evaluation, surveys conducted by the Forest Service in 2006 found spotted owl use of the Black Crater logging project area. Id. at 18 (table 11).

Cumulative Effects

Defendants state, "[c]umulative impacts to a variety of resources were considered, including past, present, and reasonable foreseeable future actions, including but not limited to

effects to NSO habitat (nesting roosting and foraging) within the project area, across the Sisters Ranger District and across the Deschutes National Forest." Defendants' Response at 15. However, the cumulative effects analysis in the Decision Memo simply states that "[b]y definition, categorical exclusions do not individually or cumulatively have significant effects."[1] Decision Memo at 17. There is no further cumulative effects analysis in the Decision Memo and no discussion of the "variety" of resources that were supposedly considered. In their response, Defendants offer a list of "specialist reports" that consider cumulative impacts. Defendants' Response at 15-16. However, it has already been noted that these reports were never documented or analyzed under NEPA, never given to the public, and never subject to public comment or scrutiny. By conducting their analysis behind closed doors, Defendants have effectively circumvented NEPA and its fundamental purpose of facilitating public involvement in agency decision-making. Defendants place heavy emphasis on the specialist reports, but cannot explain why the public was left out of the process.

[1] Defendants repeatedly rely on the "definition" of a Categorical Exclusion to claim that any project that fits within a CE category "by definition" can have no significant effect. This is wrong; the NEPA regulations make it clear that projects that fall within a CE category can still have a significantly effect because of extraordinary circumstances, and in such circumstances an EA is required. 40 C.F.R. § 1507.3(b)(2)(ii); 40 C.F.R § 1508.4. It is also important to note that, in recent years, the Forest Service has substantially expanded its CE designations, and projects that used to require an EA are now being categorically excluded. The 250 acres of salvage CE used in this case is a perfect example. The original salvage logging CE required the Forest Service to prepare an EA for any salvage logging projects greater than 1 million board feet. 57 Fed. Reg. 43180 (September 18, 1992). To put this in context, the Black Crater logging project authorizes logging of more than twice this amount. DM at 2. On July 5, 2003, the Forest Service expanded its former "1 million board feet" rule to "250 acres" of salvage logging, excluding from NEPA several projects such as Black Crater that had formerly required an EA. 68 Fed. Reg. 33813 (June 5, 2003). While Plaintiffs do not challenge the new CE designation facially, the fact that CE categories are expanding and that CE projects are getting bigger makes it increasingly common for projects that fit within the CE designation to have extraordinary circumstances and significant impacts.

Connected Actions

Defendants assert that Plaintiffs' "connected action" claim is meritless because the two logging projects do not share the same Purposes and Needs. Defendants' Response at 16. The Decision Memos for the two logging projects, however, clearly state that both projects' Purposes and Needs are the same: to recover economic value of burned trees and to improve safety along roads. Decision Memo at 1-2; Roadside Project Decision Memo (Exhibit 10) at 1. Defendants attempt to distinguish the two projects on the basis that one will improve safety along roads used as log haul routes and the other will improve safety along roads used by the public. However this distinction is semantic only; Defendants have omitted the fact that the log haul routes are public roads and are open for public use. Any distinction Defendants make is overshadowed by the projects' similarities: they are both in the same immediate geographic area and watershed and they were both planned after and in direct response to the same natural fire event.

Defendants further claim that the two projects are not connected because "the combined acreage for the two projects are about 209 acres, well below the 250 acre threshold considered in the Categorical Exclusion." Defendants' Response at 16. This statement is unsupported by any citation, it is factually and legally erroneous, and it is irrelevant. There is no evidence in the record that the two project combined are less than 250 acres. To the contrary, the two Decision Memos state that 201 acres will be logged in the Black Crater logging project, and that both sides of 8.9 miles of roads will be logged in the Roadside Project. Decision Memo at 1; Roadside Project Decision Memo at 2. While the Roadside Project Decision Memo does not provide any specific acreage figure for the hazard tree removal, logging up to 150 feet from both sides of 8.9 miles of road could affect up to 323 acres. There is nothing in the record to support the assertion that the Roadside Project will affect only 8 acres.

Moreover, whether or not the two projects combined may be less than 250 acres is irrelevant; the Forest Service is required either way to document connected, cumulative, or similar actions in a single NEPA document. See Native Ecosystems Counsel v. Dombeck, 304 F.3d 886, 893-94 (9th Cir. 2002)("A single NEPA review document is required for distinct projects when there is a single proposal governing the projects, see Kleppe, 427 U.S. at 399, 96 S.Ct. 2718, or when the projects are 'connected,' 'cumulative,' or 'similar' actions under the regulations implementing NEPA"); 40 C.F.R. § 1508.25(a).

Public Controversy

Defendants assert, without citation to the record, that the Forest Service adequately considered and reviewed controversy and uncertainty. In fact, the Decision Memo never addresses either controversy or uncertainty, but instead simply states that "[t]he interdisciplinary team analysis concludes that the project will not have adverse effects to extraordinary circumstances." Decision Memo at 18. The repeated insistence by Defendants that severely burned forests cannot function as spotted owl habitat, and complete failure of Defendants to consider the three scientific studies on the record that show otherwise, is a perfect example of the Defendants' failure to consider opposing scientific opinions, controversy, and uncertainly.

Defendants also assert that "public controversy is not a measure of whether or not a project could have an adverse effect on extraordinary circumstances." Defendants' Response at 17. Defendants are mistaken. NEPA's regulations require the Forest Service to consider "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). In Jones v. Gordon, 792 F.2d 821, 828 (9th Cir. 1986) the court held that a federal agency improperly relied upon a categorical exclusion where the record showed "the arguable existence of public controversy based on potential

environmental consequences." (Emphasis added).

Plaintiffs have demonstrated that there is substantial evidence in the record that controversy and uncertainty abound in the Black Crater logging project.

Irreparable Injury

Defendants provide two arguments against Plaintiffs' claim of irreparable injury. First, Defendants assert that Plaintiffs' waited too long to file for a PI and that in so waiting Plaintiffs created a "self-generated emergency." Defendants' Response at 18. Defendants' are mistaken. In the time Plaintiffs took to file their Complaint and PI Motion, which was not overly long by any standard, Plaintiffs' lawyers extensively researched the facts and law of this case to assure, as all lawyers should, that Plaintiffs' claims were not only well founded and meritorious, but also strong enough for Plaintiffs to confidently commit their time, money, and resources to a lawsuit. Moreover, the "emergency" referred to by Defendants was created by Defendants' advertisement of the timber sale auction, which occurred on June 22, 2007. Plaintiffs' filed for Preliminary Injunction within a week of this date. It is also important to note that before Plaintiffs filed their PI motion, Plaintiffs contacted counsel for Defendants and offered to forgo filing for PI/TRO and to expedite a summary judgment briefing schedule if Defendants would stipulate to not awarding the timber sale until the case could be heard on the merits. Defendants refused.

Defendants' second and final rebuttal to Plaintiffs' claim of irreparable injury is nothing more than a last incarnation of their blanket denial that the Black Crater logging project will have any impact on the environment. To support their argument, Defendants cite only to a declaration that is not in the record. Defendants have failed to even acknowledge the harm that will be suffered by people such as Declarants Marilyn Miller, Craig Miller, Asante Riverwind, and Josh Laughlin, who have enjoyed and would like to be able to continue to enjoy the Black Crater

logging project area. See Declaration of Marilyn Miller; Declaration of Craig Miller; Declaration of Asante Riverwind; Declaration of Josh Laughlin. This harm is very real, despite Defendants' attempts at downplay. The first-hand accounts by the Declarants of rare and sensitive wildlife species in the project area are supported by the project record. See Wildlife Specialist Report at 4-5 (table of wildlife presence in the project area). After a fire, there is a marked increase in the abundance of cavity excavator birds associated with recently killed trees. Plaintiffs' Exhibit 14. The bird species in western North America that are most restricted to, and therefore most dependent on, severely burned conifer forests during the first years following a fire event depend heavily on the abundant standing snags (dead trees) for perch sites, nest sites, and food resources. Id. These birds are what have attracted so many people to the Black Crater fire area. Declaration of Marilyn Miller; Declaration of Craig Miller; Declaration of Asante Riverwind; Declaration of Josh Laughlin. While the Forest Service claims that logging 201 acres is insignificant when compared to the overall size of the fire, logging will undoubtedly have a significant and irreparable effect on Plaintiffs' ability to use and enjoy the area, because Plaintiffs' enjoyment of the area is dependant upon it existing in a natural and healthy state. Id.

"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).

Respectfully submitted this 11th day of July, 2007.

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