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UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

OREGON WILD, KLAMATH-SISKIYOU
WILDLANDS CENTER, THE WILDERNESS
SOCIETY, CASCADIA WILDLANDS PROJECT,
ENVIRONMENTAL PROTECTION INFORMATION
CENTER, THE CENTER FOR BIOLOGICAL
DIVERSITY, PACIFIC COAST FEDERATION OF
FISHERMEN'S ASSOCIATIONS, INSTITUTE FOR
FISHERIES RESOURCES, GREENPEACE, COAST
RANGE ASSOCIATION, AMERICAN LANDS
ALLIANCE, UMPQUA WATERSHEDS, and THE
SIERRA CLUB,

Plaintiffs,

v.

EDWARD W. SHEPARD, State Director,
Oregon/Washington Bureau of Land Management, in
his official capacity, UNITED STATES BUREAU OF
LAND MANAGEMENT, and UNITED STATES
DEPARTMENT OF THE INTERIOR,

Defendants.

Civ. No. _____

COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief against Edward W. Shepard, United States Bureau of Land Management (“BLM”) State Director, the United States Bureau of Land Management, and the United States Department of Interior for their final Records of Decision for the Western Oregon Plan Revisions, revising the Resource Management Plans of the Western Oregon BLM Districts of Salem, Eugene, Roseburg, Coos Bay, and Medford, and the Klamath Falls Resource Area of the Lakeview District, and accompanying final Environmental Impact Statement (“FEIS”).

2. The Western Oregon Plan Revisions, or WOPR, drastically change the management of BLM public forest land in Oregon. WOPR opens previously protected old-growth forests to clear-cut logging; it reduces the size of riparian reserves; and it eliminates Aquatic Conservation Strategy elements previously in place on these federal lands, including protections for key watersheds, required watershed analysis, and the duty to meet and maintain Aquatic Conservation Strategy objectives at all planning levels. WOPR fails to address scientific criticism and ignores the role of global warming and climate change in its analysis. Finally, WOPR fails to adequately explain the departure from the previous, scientifically justified land management plan.

3. Specifically, plaintiffs seek a declaration that the FEIS violates the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 et seq., and its implementing regulations. Plaintiffs also seek a declaration that the final Records of Decision violate the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq.¹

¹ On December 31, 2008, plaintiffs Environmental Protection Information Center, Center for Biological Diversity, Siskiyou Project, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, Umpqua Watersheds, Klamath-Siskiyou Wildlands Center, American Lands Alliance, Oregon Wild, and The Wilderness Society sent a 60-day notice of

4. For these violations of law, plaintiffs seek an order declaring the final RODs invalid and vacating the final RODs.

5. Plaintiffs will also seek such preliminary and permanent injunctive relief against the implementation of the final RODs as may be necessary to preserve the status quo, ensure correction of illegal final agency action, and to prevent unlawful agency action that is likely to cause irreparable harm to the environment and plaintiffs' interests.

JURISDICTION AND VENUE

6. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief).

7. Venue is properly vested in this Court under 28 U.S.C. § 1391(e) as defendant Shepard maintains his official place of business in this district, the Western Oregon Plan Revision office is in this district, the lead plaintiff and several other plaintiffs reside in this district, and the consequences of the defendants' violations of the law giving rise to the claim occurred or will occur in this district.

PARTIES

8. The plaintiffs in this action are:

A. Oregon Wild, a non-profit corporation organized under the laws of the State of Oregon. Oregon Wild is headquartered in Portland, Oregon, with field offices in Eugene and Bend. Oregon Wild's mission is to protect and restore Oregon's wild lands, wildlife, and water as an enduring legacy. Oregon Wild's primary goals include permanent protection of roadless

intent to sue BLM for violation of Section 7(a)(2) of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1536(a)(2). On January 14, 2009, plaintiffs Coast Range Association, Sierra Club, Cascadia Wildlands Project, and Greenpeace sent a similar 60-day notice. Unless BLM takes steps to correct its illegal actions, plaintiffs will amend this complaint to add a claim for a violation of the ESA upon expiration of the mandatory 60-day period.

areas and mature and old-growth forests. Oregon Wild has approximately 4,500 individual and organizational members. Oregon Wild submitted detailed and comprehensive comments during the planning process for the Western Oregon Plan Revisions, including: four-page scoping letter specifically relating to BLM's duties under the Wild & Scenic Rivers Act (Oct. 20, 2005); 151-page scoping comments (Oct. 21, 2005); nominations for Areas of Critical Environmental Concern ("ACEC") in the Medford District (Pacific Crest Trail), Coos Bay District (South Roman Nose and Wasson-Vincent), in Eugene District (Low Elevation Headwaters of the McKenzie), and across districts (Integrated Dynamic Landscape on the Salem, Eugene, Roseburg, Coos Bay, Medford, and Lakeview Districts) (Dec. 2005); 54-page comments on the Proposed Planning Criteria, State Director's Guidance, and the Analysis of the Management Situation (March 17, 2006); conservation group joint 172-page comments on the draft Environmental Impact Statement (Jan. 9, 2008); 88-page individual comments on the draft Environmental Impact Statement (with 380 megabytes of supplemental materials and attachments) (Jan. 10, 2008); conservation group joint 61-page protest on the final Environmental Impact Statement and Proposed Resource Management Plan (Dec. 8, 2008); and 75-page individual protest on the final Environmental Impact Statement and Proposed Resource Management Plan (Dec. 8, 2008).

B. Klamath-Siskiyou Wildlands Center ("KS Wild") is a non-profit organization incorporated in Oregon with offices in Ashland and Williams, Oregon. KS Wild has 1,800 members in over 10 states, with most members concentrated in southern Oregon and northern California. KS Wild advocates for the forests, wildlife, and waters of the Rogue and Klamath Basins. KS Wild works to protect and restore the extraordinary biological diversity of the Klamath-Siskiyou region of southwest Oregon and northwest California and has been actively

engaged throughout the planning process for the Western Oregon Plan Revisions. KS Wild submitted scoping comments, comments on the Planning Criteria and Analysis of the Management Situation, draft Environmental Impact Statement comments, and a protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR. KS Wild delivered dozens of presentations in communities throughout the WOPR planning area to explain the impacts of the plan revision to the public.

C. The Wilderness Society (“TWS”), a non-profit national membership organization that works to protect wilderness and to inspire Americans to care for their wild places. Founded in 1935, TWS is headquartered in Washington, D.C. with over 300,000 members nationwide. TWS uses public education, scientific analysis, and advocacy to work towards its mission. Approximately 43,000 of the 300,000 members reside in Oregon, California, and Washington. TWS submitted comprehensive comments on the Western Oregon Plan Revisions’ draft Environmental Impact Statement, and approximately 14,000 individual TWS members submitted comments. TWS also submitted a protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR.

D. Cascadia Wildlands Project (“CWP”), an Oregon non-profit organization based in Eugene, Oregon. CWP’s mission is to defend the forests, waters, and wildlife of the Cascadia bioregion, including western Oregon, by monitoring environmentally destructive projects and educating, organizing, and advocating for a more compassionate and responsible relationship with the ecosystems we live in. CWP and its members participate in government decision-making processes that impact public lands managed by the BLM and throughout Oregon. CWP submitted comments on the draft Environmental Impact Statement and both a conservation group and an individual protest on the final Environmental Impact Statement and Proposed Resource

Management Plan for the WOPR.

E. Environmental Protection Information Center (“EPIC”), a community based non-profit organization that works to protect and restore forests, watersheds, coastal estuaries, and native species in northwest California. It seeks to achieve its conservation goals through public education, administrative advocacy, and strategic litigation. EPIC maintains offices in Humboldt County, California. EPIC submitted comments on the draft Environmental Impact Statement and a protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR.

F. The Center for Biological Diversity (“The Center”), a non-profit conservation group with over 40,000 members, many of whom reside in Washington, Oregon, and California. Its principal place of business is in Tucson, Arizona with offices in Portland, Oregon; Washington, D.C.; San Francisco, California; and elsewhere. The Center’s mission is to protect endangered species and wild places through science, policy, education, and law. The Center believes that the health of human societies depends upon the integrity of the natural environment. The Center submitted comments on the draft Environmental Impact Statement and a protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR.

G. Pacific Coast Federation of Fishermen’s Associations (“PCFFA”), the largest organization of commercial fishermen on the west coast, with member organizations from San Diego to Alaska, representing thousands of men and women in the Pacific fleet. Many of PCFFA’s members’ livelihoods depend upon fish as a natural resource and, until recent fisheries closures, they generated hundreds of millions of dollars in personal income to the region through commercial fishing. PCFFA submitted comments on the draft Environmental Impact Statement

and a protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR.

H. Institute for Fisheries Resources (“IFR”), a non-profit corporation that constitutes the conservation arm of PCFFA. IFR works to prevent water pollution and other adverse environmental impacts that affect the ecological health of fisheries, and to prevent further loss of habitat supporting marine fisheries (including preventing further loss of fresh water habitat used by salmon and steelhead). IFR has approximately 850 supporting members, most of them commercial fishermen whose livelihoods are directly or indirectly affected by the loss of salmonid habitat in Washington, Oregon, Idaho, and Northern California. IFR submitted comments on the draft Environmental Impact Statement and a protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR.

I. Greenpeace, a non-profit organization of about 250,000 supporters incorporated in the State of California. Greenpeace is an independent, campaigning organization that uses non-violent, creative confrontation to expose global environmental problems and force solutions essential to a green and peaceful future. Greenpeace submitted comments on the draft Environmental Impact Statement and a protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR.

J. Coast Range Association (“CRA”), a non-profit organization dedicated to the goals of protecting the forests of the Oregon Coast Range from unwise use and fostering new visions of environmental stewardship, long-term sustainability, and biological diversity that include healthy populations of the species that occur naturally throughout the Coast Range. CRA represents members who enjoy fishing and other recreation in the Umpqua River Basin, as well as business members and individuals whose livelihood depends on the tourist industry in

this area, which is, in turn, dependent on the healthy forests and watersheds and thriving native species in the Basin. CRA submitted comments on the draft Environmental Impact Statement and a protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR.

K. American Lands Alliance (“American Lands”), founded in 1992, an Oregon non-profit corporation. American Lands’ mission is to protect and restore America’s forest ecosystems by providing national leadership, coordination, and capacity building for the forest conservation movement. American Lands mobilizes citizens to oppose damaging policies and promote ecologically sound forest practices. American Lands uses public education, advocacy, scientific analysis, and advocacy to work towards its mission. American Lands represents approximately 2,000 local and regional forest conservation organizations and individuals many of whom live, work, or recreate in public forests in the Pacific Northwest and have an interest in the health and welfare of endangered species including the northern spotted owl and the forest habitat upon which it needs to survive. American Lands submitted comments on the draft Environmental Impact Statement and a protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR.

L. Umpqua Watersheds, a non-profit conservation group located in Roseburg, Oregon, whose mission is the protection and restoration of the ecosystems in the Umpqua watershed and beyond. Umpqua Watersheds monitors public land projects, and advocates for the forests and wildlife in the Umpqua, Coos, and Coquille watershed. Umpqua Watersheds has over 1,000 members and submitted comments on the draft Environmental Impact Statement and a both a conservation group and an individual protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR.

M. Sierra Club, the nation's oldest grass-roots environmental organization, founded in 1892. The Sierra Club is incorporated in California, and has its headquarters in San Francisco, California. It has approximately 1.3 million members and supporters nationwide, with roughly 240,000 residing in Washington, Oregon, and California. The Sierra Club is dedicated to the protection and preservation of the natural and human environment, including our national forests and public lands. The Sierra Club has been a key participant in decisions regarding the protection of old-growth forests at the national and state levels. The Sierra Club was an active participant in the Forest Conference convened and chaired by President Clinton in April 1993 to discuss issues of old-growth forest protection, and it has consistently promoted legislation to provide greater protection for remaining old-growth forests. It has also participated in numerous lawsuits to save the spotted owl and its old-growth forest habitat, including the original lawsuit that forced FWS to list the spotted owl and designate critical habitat, as well as actions challenging forest management plans on federal and state lands and actions challenging specific timber sales. Sierra Club submitted comments on the draft Environmental Impact Statement and a protest on the final Environmental Impact Statement and Proposed Resource Management Plan for the WOPR.

9. Plaintiffs and their members use the BLM public lands that are managed under the Western Oregon Plan Revision for recreational, scientific, aesthetic, and commercial purposes. Plaintiffs have members who reside near, visit, or otherwise use and enjoy BLM public lands in Oregon in a variety of ways, including recreation, hunting and fishing, wildlife viewing and education, and aesthetic and spiritual enjoyment. Plaintiffs and their members derive recreational, scientific, aesthetic, and conservation benefits of and enjoyment from the Oregon BLM lands. The past, present, and future enjoyment of these benefits by plaintiffs and

their members has been, is being, and will continue to be irreparably harmed by defendants' disregard of their statutory duties and by the unlawful injuries imposed on United States BLM lands by their actions.

10. Plaintiffs and their members have participated in the public process surrounding the Western Oregon Plan Revision, including by attending meetings and submitting comments and protests. Plaintiffs have encouraged members of the public to participate in the Western Oregon Plan Revision process through their newsletters, websites, and presentations.

11. The aesthetic, conservation, recreational, commercial, scientific, and procedural interests of plaintiffs and their respective members have been, are being, and, unless the relief prayed for herein is granted, will continue to be adversely affected and irreparably injured by defendants' failure to comply with federal law as described below. Plaintiffs have no adequate remedy at law.

12. The defendants in this action are:

A. Edward W. Shepard, State Director, Oregon/Washington Bureau of Land Management, in his official capacity. Director Shepard heads the BLM office in Portland, Oregon that prepared the FEIS and the final RODs.

B. The United States Bureau of Land Management ("BLM"), an agency within the United States Department of the Interior charged with the management of the public lands administered by Secretary of the Interior.

C. The United States Department of the Interior.

BACKGROUND

I. THE NORTHWEST FOREST PLAN

A. Adoption of the Northwest Forest Plan

13. Years of controversy over management of the old-growth forests in the Pacific

Northwest led the Forest Service and BLM to develop regional forest management standards and guidelines for these forests. In 1991, upon uncovering “a remarkable series of violations of the environmental laws,” and “a deliberate and systematic refusal ... to comply with the laws protecting wildlife,” a Washington district court issued an injunction halting timber sales in old-growth forests. Seattle Audubon Soc’y v. Evans, 771 F. Supp. 1081, 1089-90 (W.D. Wash.), aff’d, 952 F.2d 297 (9th Cir. 1991). The following year, this Court enjoined BLM from proceeding with further timber sales in old-growth forests pending compliance with NEPA. Portland Audubon Soc’y v. Lujan, 795 F. Supp. 1489 (D. Or. 1992), aff’d sub nom. Portland Audubon Soc’y v. Babbitt, 998 F.2d 705 (9th Cir. 1993).

14. To end the gridlock, President Clinton convened a forest conference and directed the land management agencies to craft a comprehensive, long-term management strategy that is “scientifically sound, ecologically credible, and legally responsible.” To meet this goal, the agencies assembled a team of leading scientists, called the Forest Ecosystem Management Assessment Team (“FEMAT”), to develop ecosystem management strategies that would meet this goal. FEMAT evaluated ten alternative land management options and compared their consequences in depth.

15. In April 1994, the Secretaries of Agriculture and Interior signed the Northwest Forest Plan, selecting what had come to be known as “Option 9.” Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl (Apr. 13, 1994). The Northwest Forest Plan has been heralded as the first science-based ecosystem management strategy for federal lands. The Plan contained standards and guidelines for managing both Forest Service and BLM public lands, created old-growth and riparian reserves, and provided for continued timber harvest. The

Northwest Forest Plan Record of Decision amended the existing forest plans for 19 national forests and was incorporated into the newly developed plans for BLM districts within the range of the northern spotted owl.

16. Both the timber industry and several environmental organizations challenged the Northwest Forest Plan. A Washington district court upheld the Plan, and the Ninth Circuit affirmed. Seattle Audubon Soc’y v. Lyons, 871 F. Supp. 1291, 1303-05 (W.D. Wash. 1994), aff’d sub nom. Seattle Audubon Soc’y v. Moseley, 80 F.3d 1401 (9th Cir. 1996). In rejecting the timber industry’s challenge to the agencies’ authority to adopt an ecosystem plan that covered lands administered by both the Forest Service and BLM, the district court noted that both agencies’ planning statutes required an integrated, scientific approach; both agencies had to comply with NEPA’s mandate to consider ecosystem effects; and both agencies had to comply with the Endangered Species Act. The court held that “[g]iven the current condition of the forests, there is no way the agencies could comply with the environmental laws *without* planning on an ecosystem basis.” Id. at 1311 (emphasis in original).

17. The effectiveness and legality of the Northwest Forest Plan depends on its application to both Forest Service and BLM lands; the Northwest Forest Plan is a “coordinated management direction for the lands administered by the Forest Service and BLM within the range of the spotted owl [that will also] protect and enhance late successional and old-growth forest ecosystems.” FWS Northwest Forest Plan Biological Opinion at 2 (Feb. 10, 1994). Two key assumptions behind the biological analysis of the Northwest Forest Plan were that (1) “[r]iparian and Late-Successional Reserves (LSRs) will retain reserve status and will not be available for timber production other than as provided in Alternative 9” and (2) “[a]lternative 9 applies to Forest Service and BLM lands; all future actions on these lands would be consistent

with Alternative 9, as adopted in the Record-of-Decision (ROD).” Id. at 4.

B. The Aquatic Conservation Strategy

18. The Northwest Forest Plan includes the Aquatic Conservation Strategy (“ACS”) to address the habitat needs of salmonids, clean water, and other aquatic species on federal lands within the range of the northern spotted owl. In upholding the Plan, the district court cautioned that “[i]f the plan as implemented is to remain lawful, the monitoring, watershed analysis, and mitigating steps called for by the ROD will have to be faithfully carried out, and adjustments made if necessary.” Seattle Audubon Soc’y v. Lyons, 871 F. Supp. at 1322.

19. The ACS has four basic components: (1) a system of key watersheds or refugia comprising watersheds with the best aquatic habitat or the greatest potential for recovering at-risk fish stocks; (2) riparian reserves along streams where certain activities are constrained; (3) watershed analysis to be used to tailor activities to specific watersheds needs; and (4) a comprehensive, long-term watershed restoration program. Northwest Forest Plan Record of Decision at B-12; FEMAT at V-32.

20. The ACS imposed constraints on habitat-degrading activities in two ways. First, binding standards and guidelines restrict certain activities within riparian reserves and key watersheds. See Northwest Forest Plan Record of Decision at C-7, C-30 to C-38. Second, FEMAT recognized the need to constrain: (1) activities outside riparian reserves in, e.g., unstable areas; and (2) the cumulative impacts of activities throughout a watershed. FEMAT at V-29. Instead of imposing explicit constraints on such activities, the ACS has nine objectives that require aquatic habitat to be maintained and restored to properly functioning conditions. Northwest Forest Plan Record of Decision at B-11; FEMAT at V-30 to-31. The Northwest Forest Plan Record of Decision (at Attachment A, at I, B-1, B-9 to B-10) gave the ACS objectives binding force as standards and guidelines and explicitly required that federal lands

shall be managed to attain the ACS objectives. “Both FEMAT and the [Northwest Forest Plan] contemplate that projects must be consistent with ACS objectives.” PCFFA v. NMFS, No. 04-1299RSM, Order on Report and Recommendation, slip op. at 4 (W.D. Wash. March 30, 2007).

21. The ACS and Northwest Forest Plan together provide critical protection for aquatic species now listed as endangered or threatened. The FEMAT scientists first convened in April 1993 and assessed the likelihood of having the continued persistence of the species, well-distributed throughout their historical range, on federal lands over the next 100 years. FEMAT at IV-40. They were instructed to assume that the Aquatic Conservation Strategy would be fully implemented. FSEIS at 3 & 4-192. For the salmon species considered, the likelihood of their continued survival on these lands over the next 100 years was only 65%. FEMAT Table V-11, at V-69. Only when the riparian reserves and other mitigation measures were added into the protections of the ACS did the Northwest Forest Plan result in an 80% or greater likelihood of continued existence of salmon and steelhead. FSEIS at 3 & 4-196; App. J2-47-48.

C. Northern Spotted Owls

22. The northern spotted owl occupies mature and old-growth forests from southern British Columbia through Washington, Oregon, and into northern California. To survive, owls need a multi-layered and multi-species tree canopy with moderate to high canopy closure and large overstory trees, trees with large cavities, large snags, or standing dead wood, lots of large, dead wood on the ground, and open space within and below the upper canopy. This habitat provides cover from predators, nesting cavities, protection from temperature extremes, and the ecological complexity to support the owl’s prey. Put another way, this habitat contains the necessary structures to support the owl’s essential biological functions of nesting, roosting, foraging, and dispersing. These terms refer to the owl’s biological needs to rest, eat, reproduce, and for both juvenile and adult owls, disperse to new nesting sites.

23. In response to its declining population, FWS listed the northern spotted owl as a threatened species under the ESA in 1990. 55 Fed. Reg. 26,114 (June 26, 1990). FWS listed the spotted owl “primarily due to concern over widespread habitat loss and modification.” 57 Fed. Reg. 1796 (Jan. 15, 1992).

24. The Northwest Forest Plan outlined an ecosystem management approach for the more than 24 million acres of federal land within the range of the spotted owl and established seven categories of land allocation. “Late successional reserves” or “LSRs” were designed to serve as habitat for late-successional and old-growth related species, including the spotted owl. The late successional reserves are an overlay of habitat that supports and supplements, but does not replace, designated critical habitat.

25. The Northwest Forest Plan also includes protections for the spotted owl beyond the network of late successional reserves, and these protections are necessary to ensure owl conservation. Measures beyond the LSR network were added to the Northwest Forest Plan to increase the likelihood that the plan would provide adequate protection for owl viability. The Northwest Forest Plan is premised on the science of maintaining large blocks of suitable habitat while providing opportunities for owls to safely travel between reserves (i.e., matrix retentions and riparian corridors) as a way of ensuring genetic exchange among metapopulations. Among these additional measures are Standards and Guidelines that restrict the amount of logging in the matrix and riparian reserves, the requirements to retain at least 15% of late successional forests at both the stand and watershed levels, no cut buffers around owl clusters, adhering to restrictions in the underlying forest plans, the Aquatic Conservation Strategy, and the Survey and Manage requirements. All of these measures provide additional benefits to spotted owls beyond the network of LSRs.

D. Marbled Murrelets

26. The marbled murrelet is a robin-sized diving seabird that nests almost exclusively in old-growth coniferous forests within approximately 40 miles of the Pacific coast of North America. Murrelet 5-Year Evaluation Report at 2-5 (2004); USGS Murrelet Range-Wide Status Review at 8 (2007).

27. In 1992, FWS listed the tri-state marbled murrelet population as threatened. 57 Fed. Reg. 45,328 (Oct. 1, 1992). FWS subsequently designated 3,887,800 acres of critical habitat for the tri-state marbled murrelet population. 61 Fed. Reg. 26,255, 26,256 (May 24, 1996). Despite the protections provided by listing and designation of critical habitat, the marbled murrelet population continues to decline at an alarming rate. 5-Year Evaluation Report at 6-28; USGS Status Review at 139. The primary cause of the marbled murrelet's decline is the loss of old-growth nesting habitat upon which the marbled murrelet depends. 5-Year Evaluation Report at 6-27 through 6-34. Due primarily to extensive timber cutting over the past 190 years, up to 90 percent of marbled murrelet nesting habitat in Washington, Oregon, and California has been destroyed. 56 Fed. Reg. 28,362, 28,363-64 (June 20, 1991).

28. Although the murrelet was listed as a threatened species prior to the adoption of the Northwest Forest Plan, in 1996, when designating critical habitat for the small seabird, FWS noted the importance of the Northwest Forest Plan for the murrelet and intentionally designated LSRs as critical habitat because of the complementary benefits of doing so. 61 Fed Reg. 26,256, 26,265 (May 24, 1996).

29. The 1997 Marbled Murrelet Recovery Plan reiterated the importance of the Northwest Forest Plan and its LSR network for the survival and recovery of the murrelet. After noting that “virtually all remaining potential habitat in the [Oregon] Coast Range is on Federal lands,” Recovery Plan at 45, and that “[a]mong all Pacific Northwest birds, the marbled murrelet

is considered to be one of the most sensitive to forest fragmentation,” *id.* at 48, FWS based the murrelet recovery plan around the reserve system of the Northwest Forest Plan. See Recovery Plan at 119. The Recovery Plan found that “[m]aintenance of the suitable and occupied marbled murrelet nest habitat in the . . . Bureau of Land Management-administered forests is an essential component for the stabilization and recovery of the marbled murrelet.” *Id.* at 127.

E. Oregon and California Lands Act Lands

30. The Oregon and California Lands Act (“O&C Act”) governs railroad grant lands that reverted in the federal government due to the railroad company’s breach of its statutory duties. In the Act, Congress sought to put an end to wasteful and destructive logging practices that clearcut large forest areas for short-term gains without safeguarding the forests and other resources. The Act instituted a conservation ethic, marking the first federal statute to impose sustain-yield constraints on timber cutting.

31. The Oregon and California Lands Act guides the management of the reverted O&C lands in western Oregon. The Act provides that:

such portions of the reverted [O&C] grant lands . . . which have heretofore or may hereafter be classified as timberlands . . . shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational [facilities].

43 U.S.C. § 1181a.

32. Under the O&C Act, the BLM has discretion in its management of the O&C lands.

33. Several federal courts have interpreted the O&C Act. Headwaters v. BLM held that “[t]he BLM did not err in construing the O&C Act as establishing timber production as the dominant use.” 914 F.2d 1174, 1183-84 (9th Cir. 1990). Portland Audubon Society v. Babbitt

subsequently held that there was no unavoidable conflict between the O&C Act and an injunction stopping old-growth logging pending compliance with NEPA, even though the O&C Act's timber targets (stated as minimums) could not be met under the injunction. 998 F.2d 705, 709 (9th Cir. 1993). And relying on both Headwaters and Babbitt, Seattle Audubon Society v. Lyons held that the Northwest Forest Plan did not violate the O&C Act, noting that “management under the [O&C Act] must look not only to annual timber production but also to protecting watersheds, contributing to economic stability, and providing recreational facilities.” 871 F. Supp. 1291, 1314 (W.D. Wash. 1994) (appeal history omitted).

34. Not all the BLM public forest lands governed by WOPR are O&C lands.

II. THE WESTERN OREGON PLAN REVISIONS

A. Settlement Agreement

35. Immediately following its 1994 adoption, timber industry groups filed a lawsuit in the United States District Court for the District of Columbia challenging the Northwest Forest Plan. AFRC v. Clarke, Civil No. 94-1031-TPJ (D.D.C.). Almost a decade later, following two rulings by the district court dismissing the timber industry plaintiffs' claims and while an appeal to the D.C. Circuit was pending, the Secretary of the Interior entered into a settlement agreement with the timber industry groups. Under the 2003 settlement agreement, the BLM agreed to revise its resource management plans in western Oregon and agreed to consider in the revisions an alternative that would allow for substantial increases in the land available for timber harvest. Settlement Agreement: AFRC v. Clarke, Civil No. 94-1031-TPJ (D.D.C.), appeal pending No. 02-5024 (D.C. Cir.) (“Settlement Agreement”), available at http://www.blm.gov/or/plans/wopr/settlement/files/settlement_agreement_image.pdf.

36. In the 2003 settlement agreement, the BLM committed to finalize its revision of the resource management plans for the six Western Oregon districts considered in the WOPR

FEIS by December 31, 2008. Settlement Agreement ¶ 3.5. The Secretary further committed that: “At least one alternative to be considered in each proposed revision will be an alternative which will not create any reserves on O&C lands except as required to avoid jeopardy under the Endangered Species Act. All plan revisions shall be consistent with the O&C Act as interpreted by the 9th Circuit Court of Appeals.” Id.

B. WOPR Final Environmental Impact Statement and Proposed Resource Management Plan

37. BLM began the process of revising its resource management plans in western Oregon with a formal scoping process, conducted during September and October 2005, and BLM’s Analysis of the Management Situation, released in October 2005. The scoping report and planning criteria were released in February 2006. The draft environmental impact statement was released in August 2007 and made available for public comment until January 2008. The BLM received approximately 29,500 communications with comments on the draft environmental impact statement. Final Environmental Impact Statement for the Revision of the Resource Management Plans of the Western Oregon Bureau of Land Management (“WOPR FEIS” or “FEIS”) at 1-15, available at <http://www.blm.gov/or/plans/wopr/index.php>.

38. On October 17, 2008, the BLM published the initial Notice of Availability of the Final Environmental Impact Statement for the Revision of the Resource Management Plans of the Western Oregon Bureau of Land Management Districts of Salem, Eugene, Roseburg, Coos Bay, and Medford, and the Klamath Falls Resource Area of the Lakeview District. 73 Fed. Reg. 61,905 (Oct. 17, 2008); see also 73 Fed. Reg. 66,253 (Nov. 7, 2008) (amended notice of availability).

1. Statement of Purpose and Need

39. The WOPR FEIS lists three primary considerations in its purposes and needs

section. First, BLM claims that the WOPR revisions are necessary because BLM's timber harvest levels were not being achieved under existing plans. FEIS at S-2. Second, BLM claims that the revisions will harmonize BLM's management plans with recent revisions to the Northern Spotted Owl Recovery Plan and Critical Habitat Designation. FEIS at S-2 to S-3. Third, BLM claims that the revisions will re-focus on the statutory mandate of the O&C Act. FEIS at S-3.

2. *Alternatives and the Proposed Resource Management Plan*

40. The FEIS includes the three alternatives considered in the draft EIS, FEIS at 118-185, and also includes the Proposed Resource Management Plan ("PRMP"), FEIS at 22-117, which is based primarily on Alternative 2. See FEIS at 2-24.

41. The PRMP includes land use allocations and management objectives and directions. See FEIS at 2-24 to 2-117.

42. All of the alternatives, including the PRMP, depart from the standards, guidelines, and use designations of the Northwest Forest Plan. The FEIS does not analyze the cumulative impact of removing the BLM lands from the ecosystem-wide management plan.

43. The FEIS does not include any individual past actions in its cumulative effects analysis. Instead, the FEIS relies on a CEQ guidance statement which provides that "agencies can conduct an adequate cumulative effects analysis by focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions." FEIS at 4-485 (quoting CEQ Guidance issued on June 24, 2005).

44. None of the alternatives in the FEIS considers managing the BLM lands to meet all of the purposes listed in the O&C Act. Instead, BLM concludes that the O&C Act precludes managing the O&C lands for the goals other than timber production that are listed in the Act, including "protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational [facilities]." 43 U.S.C.

§ 1181a.

3. *Environmental impacts of the alternatives*

45. The FEIS, at over 7,000 pages, contains analysis of many of WOPR's effects, including analysis of the plan's effects on water temperature, aquatic habitat protection, northern spotted owls, marbled murrelets, and climate change.

a. Water Temperature

46. Sufficiently cold water, present at all times of year, is essential for the survival, growth, reproduction, and migration of the aquatic species present on WOPR lands. FEIS at 3-334. "Highly shaded streams often enjoy cooler stream temperatures due to reduced input of solar energy." FEIS at 3-336. "Increased stream temperatures can result from removal of shade-producing riparian vegetation along fish-bearing streams and smaller tributary streams that supply cold water to the fish-bearing streams." Id.

47. Streams that occur on BLM lands mostly comprise the smaller, headwater flows that are critical in determining the condition of lower watercourses. FEIS at 3-331.

48. High stream temperature is the most common existing violation of water quality standards on the 948 miles of streams owned and administered by the BLM and listed as water quality limited under section 303(d) of the Clean Water Act. FEIS at 3-336. Specifically, 760 miles of BLM streams in 105 watersheds are listed as temperature impaired by the Oregon Department of Environmental Quality. FEIS at 3-337.

49. The PRMP reduces riparian reserves significantly as compared to the Northwest Forest Plan. See FEIS at 2-32 to 2-34; id. at 4-759. By one calculation, the PRMP will reduce riparian reserve protections by 112,370 acres in western Oregon municipal watersheds.

50. Despite these substantial reductions, the FEIS concludes that the PRMP will have only minimal impact on stream temperature and will not lead to violations of Oregon's

temperature TMDLs. FEIS at 4-753, 4-759 to 4-764; see also FEIS App. I at 250-253, FEIS App. T at 822, 824-25.

51. The conclusion in the FEIS that all alternatives, including the PRMP, “would result in the retention of sufficient shade during the summer months to avoid any measurable increase in water temperature,” FEIS at 4-759, is based on two assumptions. First, the FEIS assumes that significant temperature rises do not occur when effective shade of streams is equal to or greater than 80%. FEIS App. I at 251. Second, the FEIS assumes that 80% effective shade or greater is normally met within 100 feet of a stream. FEIS at 4-759.

52. In comments on the draft EIS, the U.S. Environmental Protection Agency criticized both of these assumptions, and noted that the FEIS did not consider multiple scientific studies that directly contradicted these assumptions. FEIS App. T at 926.

53. The National Marine Fisheries Service (“NMFS”) likewise criticized the water temperature analysis in comments on the draft EIS. NMFS found that BLM’s analysis “relies heavily on dated literature and unpublished sources, and does not include a broad or representative treatment of the extensive literature on physical controls of stream temperature and how land management affects temperature.” FEIS App. T at 883. NMFS also concluded that “[t]he assertion in the DEIS that areas greater than 100 feet from streams cannot contribute shade to streams is not adequately demonstrated,” and pointed to specific studies not considered by BLM that contradict the BLM’s assumptions. FEIS App. T at 884.

54. A recent letter from EPA to the BLM regarding the FEIS noted that the PRMP was unlikely to meet thermal TMDLs: “The aquatic protection currently in place [the ACS] has resulted in demonstrated improvements to watershed conditions across BLM lands. . . . We believe that the proposed reduction of protection for riparian areas, landslide prone areas, and

key watersheds has implications for water quality and sensitive beneficial uses, such as municipal water supply and salmonid spawning and rearing. While the PRMP is an improvement over the preferred alternative in the Draft EIS, our independent analysis leads us to believe that the analysis used in the WOPR overestimates the ability of the PRMP to fully meet shade goals and stream temperature water quality standards.” Letter to Edward W. Shepard, BLM, from Christine B. Reichgott, EPA (Nov. 25, 2008).

55. The Oregon Department of Environmental Quality (DEQ) developed a model of the effect of the WOPR riparian reserve widths on stream temperature. The model uses data from Canton Creek, a water body in the Umpqua Basin for which a temperature TMDL was recently completed. Based on the model, DEQ concluded that, in the Canton Creek area, the WOPR would lead to temperature increases of up to 0.7 degrees, in violation of the applicable TMDL, rather than the 0.2 degree increase predicted by the BLM. In response, the FEIS asserts that the Canton Creek model is “atypical,” that there are “discrepancies within the simulations,” and that the threshold of error for stream temperature measurements is 0.9 degrees and that therefore the study results may be disregarded. FEIS App. T at 824-25, 842; see also id. at 927 (letter from EPA discussing the DEQ Canton Creek model and concluding that the WOPR riparian management scenario would seriously compromise BLM’s ability to meet water quality standards for temperature).

b. Aquatic Species and Habitat

56. There are numerous endangered or threatened aquatic species present on WOPR land. Lower Columbia River chinook, Upper Willamette River chinook, Southern Oregon/Northern California coho, Lower Columbia River coho, Oregon Coast coho, Lower Columbia River chum, Lower Columbia River steelhead, and Upper Willamette steelhead are the anadromous populations listed as threatened under the ESA. Also protected as threatened or

endangered are Shortnose suckers, Lost River suckers, Bull Trout, and Oregon Chub. FEIS at 3-362 to 3-363; see also FEIS App. J.

57. The PRMP departs from the ACS by reducing riparian reserves, eliminating the concepts of key watersheds and watershed analysis, and eliminating the mandate that BLM find that each action proceeding under WOPR will meet, attain, not retard, or not prevent attainment of ACS objectives, which in turn require that BLM manage its lands to maintain and restore nine functions of healthy aquatic ecosystems.

58. The FEIS does not discuss or consider scientific views that support management of riparian and aquatic habitats in the Pacific Northwest under the prescriptions of the ACS. See, e.g., Reeves et al. 2006 (“The science emerging since the NWFP was developed supports the framework and components of the ACS, particularly for the ecological importance of smaller, headwater streams.”).

c. Northern Spotted Owls

59. All of the action alternatives analyzed in the FEIS will eliminate reserves or allow logging within reserves that formerly served as habitat for the northern spotted owl. The No-Action Alternative – compliance with the Northwest Forest Plan – would result in the greatest increase in large blocks of suitable owl habitat by 2056. All other alternatives result in less suitable habitat in large blocks, with a decrease of 9% through 2036 under the PRMP. FEIS at 4-645.

60. In discussing the effects of the WOPR on the Northern Spotted Owl, the FEIS states that “scientists currently cannot separate the effects of [habitat-related and non-habitat-related] influences on spotted owl populations,” and that therefore “the BLM has no credible means to evaluate how the alternatives . . . would affect those populations.” FEIS at 4-680.

Instead, the FEIS evaluates how the alternatives would affect the owl’s habitat. Id. The FEIS

states that “[t]his analysis cannot predict how the northern spotted owl population would respond numerically to the alternatives,” but finds that its analysis of habitat “provides an indication of how spotted owls would respond to the alternatives.” Id.

61. The WOPR FEIS fails to discuss or consider any of the scientific studies finding that further loss of owl habitat may drive the owl to extinction. See Lamberson, R., R. McKelvey, B. Noon, and C. Voss, A Dynamic Analysis of Northern Spotted Owl Viability in a Fragmented Forest Landscape, *Conservation Biology* 6: 505-512 (1992); Lande, R., Extinction thresholds in demographic models of territorial populations. *American Naturalist* 130: 624-635 (1987); Lande, R., Demographic models of the Northern Spotted Owl (*Strix occidentalis caurina*). *Oecologia* 75: 601-607 (1988). These studies were reviewed in the 2004 owl status review, Sustainable Ecosystems Institute (SEI), Scientific Evaluation of the Status of the Northern Spotted Owl (2004). See SEI Report at 8-4.

d. Marbled Murrelets

62. All the FEIS’s alternatives predict a decrease in habitat for the Marbled Murrelet over the next 50 years. See FEIS at 4-685 to 4-686 (“Marbled murrelet nesting habitat on BLM-administered lands would decrease 2% in 20 years under the PRMP, but would recover to show a net 5% increase by 2056.”). In the short term (50 years), Alternatives 2 and 3 will result in a decline in habitat conditions, with a decrease in patch size and an increase in edge density. Under the PRMP, “short-term effects (20-50 years) are anticipated.” FEIS at 4-696 to 4-697.

63. The FEIS fails to discuss or consider the findings, recommendations, and requirements of the Marbled Murrelet Recovery Plan. The Murrelet Recovery Plan states that the “[m]aintenance of suitable and occupied marbled murrelet nesting habitat in . . . Bureau of Land Management-administered forests is an essential component for stabilization and recovery of the marbled murrelet,” see Recovery Plan at 127, and that the Northwest Forest Plan’s Late

Successional Reserves are critical for the murrelet's recovery. See Recovery Plan at 131. The Recovery Plan also stresses the importance of the riparian reserves under the Northwest Forest Plan to the murrelet's recovery. "Additional habitat is protected through other designations such as . . . riparian reserves. . . . The [Northwest] Forest Plan provides a substantial contribution towards protecting nesting habitat on Federal lands, especially habitat that is currently occupied by marbled murrelets, and represents the backbone of this Recovery Plan strategy." Recovery Plan at 119. See also Recovery Plan at 127-28 (specific recovery actions of "decreasing the time for development of new habitat"); at 143 (recommendation to protect additional recruitment habitat). The FEIS and PRMP do not address or consider any of these scientific findings.

e. Climate Change

64. There is overwhelming evidence that anthropogenic carbon emissions from fossil fuel combustion and land use (like forestry) are driving dangerous and effectively irreversible changes in our climate, which will have severe repercussions on ecosystems, water quality, agriculture, and human health and well-being. Carbon dioxide has a very long residence time in the atmosphere, and the oceans are storing large amounts of heat that will affect our climate for years to come.

65. Climate change is relevant to the environmental effects of the WOPR for two reasons. First, climate change alters and often augments the environmental effects that WOPR will have. Second, WOPR contributes to climate change by affecting the amount of carbon that is stored in western Oregon forests.

i. Assumption of a Static Climate

66. The environmental effects that WOPR will have vary substantially depending on what assumptions regarding future climate change are used. The WOPR FEIS assumes a static climate over the next 100 years in its analysis of the WOPR's effects. See FEIS at 4-488 to 4-

490.

67. There are numerous studies showing that rising temperatures will affect our ecosystems in numerous ways. The FEIS does not consider or discuss these studies, or analyze how the effects of WOPR may change if temperatures increase in any degree over the next 100 years.

68. The assumption of a static climate affects the FEIS's analysis of environmental impacts in many respects. For example, none of the landscape ecology or timber growth models presented in the FEIS explicitly account for any degree of climate change. The FEIS does analyze stand structural class distribution and corresponding fire hazard, but stand structural class distribution and corresponding fire hazard vary substantially under different assumptions regarding climate. See FEIS at 4-808 to 4-812; see also FEIS App. E (Timber).

69. The WOPR FEIS's assumption of a static climate over the next 100 years runs counter to the publicly announced policy of the Department of the Interior. On January 19, 2001 Secretary of Interior Bruce Babbitt issued Secretarial Order #3226 requiring all bureaus to consider climate change in all major long-term planning efforts. Despite this directive, the WOPR FEIS dismisses climate change as too uncertain to allow analysis. See FEIS at 4-488.

70. Upon information and belief, BLM has an Instruction Memorandum: IM-171 Guidance on Incorporating Climate Change into NEPA Documents (08/19/2008). This document has not been made available to the public.

ii. Carbon Storage

71. WOPR contributes to climate change because “[f]orest management activities, including timber harvest, prescribed burning, and biomass recovery, can result in losses of onsite carbon storage.” FEIS at S-12. Logging releases stored carbon into the atmosphere; older forests store more carbon, and so release more carbon when logged.

72. The FEIS includes a discussion of the effect of the alternatives on carbon storage, FEIS at 4-537 to 4-543, but the FEIS does not include an accompanying discussion of the changes in climate and ensuing repercussions on ecosystems that will be driven by different levels of carbon storage on the WOPR lands. See FEIS App. T at 774.

73. While the FEIS does account for the cumulative carbon storage in wood products resulting from past harvest, it does not account for the cumulative carbon emissions to the atmosphere from past timber harvest. See FEIS at 4-537 to 4-543.

74. Neither the PRMP, nor any other document prepared by BLM, includes an inventory or any other assessment of all the carbon stored in forests and soils on western Oregon BLM lands and the value of BLM lands to store more carbon if managed appropriately to grow more mature and old-growth forest forests.

f. OHV Area Designations

75. The PRMP proposes the designation of several new ORV areas (termed “OHV emphasis areas” and “Special Recreation Management Areas”). See FEIS at 4-818 to 4-821. This includes the designation of seven OHV emphasis areas in the Medford District alone, totaling almost 68,000 acres and representing an increase of 42,379 acres of BLM land emphasizing OHV use compared to the No Action Alternative (at 25,570 acres in three OHV areas). This would increase the amount of BLM-administered land dedicated exclusively to OHV use by 266 percent.

76. The FEIS acknowledges that “[v]isitors seeking nonmotorized forms of recreation would be displaced from [OHV emphasis] areas. This would be especially pronounced for people seeking solitude as an important element of their overall recreation experience.” FEIS at 4-821.

77. Although the FEIS includes criteria to address the feasibility of managing

proposed OHV Emphasis Areas, FEIS at 4-819 to 4-820, the FEIS does not include a discussion of the criteria listed in 43 C.F.R. § 8342. Instead, the FEIS advises that the 43 C.F.R. § 8342 analysis will be deferred until “development of a Comprehensive Travel Management Plan” that will determine, within the designated OHV Emphasis Areas, the specific “routes and trails that will be open to motorized vehicle use.” FEIS App. T at 851.

78. The FEIS does not discuss the potential impacts of OHV area designations on the many residences that border proposed OHV emphasis areas. These include OHV emphasis area designations in the PRMP for Anderson Butte, Elliot Creek and Timber Mountain/Johns Peak – the latter of which includes within its boundary 292 individual private parcels. FEIS at 2-98.

79. Data listed in Table 3-71 are used to support an estimate that motorized OHV travel on BLM lands in the planning area will increase at an annual rate of change of 2.3 percent during the period 2006 to 2016. FEIS at 3-419. The FEIS concludes that the BLM must provide “a moderate increase in recreation opportunities under the PRMP to accommodate growing demand for off-highway vehicle use area (sic).” FEIS at 4-820.

80. The FEIS does not consider or discuss recent data released by the U.S. Forest Service for national forests in western Oregon that demonstrate that the percent of visitors who participate in OHV use has decreased in the period from 2002 to 2007. USDA Forest Service National Visitor Use Monitoring FY2002 and FY2007. This data shows that visitors who participated in OHV use declined over the past six years by the following percentages for the following western Oregon national forests: Willamette: 2.0% to 0.8%; Umpqua: 2.7% to 1.6%; Siskiyou: 2.7% to 1.8%; Rogue River: 1.7% to 0.1%. The FEIS also does not consider or discuss a recent report by the USDA Forest Service, which documents that OHV sales have decreased nationally each year since 2003 and notes that the proportion of adults who participated in OHV

recreation peaked in fall 2002/summer 2003 and has decreased during the period from 2005 to 2007. Cordell, K, et al. 2008; OHV Recreation in the U.S. and its Regions and States: An Update National Report from the National Survey on Recreation and the Environment (NSRE), USDA Forest Service (February 2008).

g. Areas of Critical Environmental Concern (“ACECs”)

81. In the FEIS, BLM considered protecting a number of ACECs and acknowledged that failing to protect these critical areas that require special management attention “would result in the eventual degradation or loss of many of those important and relevant values.” FEIS at 4-854.

82. For example, none of the alternatives evaluated in the FEIS considered protecting the Low Elevation Headwaters of the McKenzie River Area as an ACEC. FEIS App. N at 488. The McKenzie River Area is a Tier 1 key watershed under the Northwest Forest Plan and includes the McKenzie River and multiple tributaries. The FEIS explicitly acknowledges that the McKenzie River Area possesses a number of the statutory features that entitle it to ACEC protection, including historic, cultural, and scenic values; fish and wildlife values; and natural process or system values. FEIS App. N at 505.

83. BLM did not consider protecting the McKenzie River Area because the BLM claims that the O&C Act requires it to manage every acre on which timber harvest is possible for timber production. See FEIS at 1-11 (the BLM will “not designate other areas of critical environmental concern on O&C lands” where management of the ACEC would conflict with timber production); FEIS App. T at 855 (explaining that it did not consider designating the McKenzie River Area as an ACEC because the “special management attention” required to maintain the “relevant and important values” in the McKenzie River Area “conflicts with the purpose and need . . . for managing the O&C timberlands”).

C. Protest Period

84. BLM published the initial Notice of Availability of the Final Environmental Impact Statement on October 17, 2008. 73 Fed. Reg. 61,905. The Notice of Availability provides that “[t]he Assistant Secretary of the Interior for Land and Minerals Management is the responsible official for the RMP. Accordingly, there will be no administrative review ‘protest’ on the RMP/FEIS under 43 C.F.R. 1610.5-2.” Id.

85. The WOPR FEIS also provides that “[t]he Assistant Secretary of Land and Minerals Management in the Department of Interior is the responsible official for this RMP revision. ... Because this decision is being made by the Assistant Secretary, Land and Minerals Management, it is the final decision for the Department of the Interior. This decision is not subject to administrative review (protest) under BLM or Departmental regulations (43 CFR 1610.5-2).” FEIS at 1-15.

86. BLM had previously communicated to the public that it would allow a protest period following the publication of the WOPR proposed Resource Management Plan and FEIS, and that it would consider revising the proposed Resource Management Plan in response to protests. BLM, Western Oregon Plan Revisions News, Issue No. 3 at 3 (Feb. 2006), Issue No. 1 at 7 (Aug. 2005), available at <http://www.blm.gov/or/plans/wopr/newsletters.php>. The BLM previously solicited public involvement, claiming that “[The public’s] ideas and suggestions can help shape future management” and that “all values and ideas are important to help guide the final decisions that BLM must make.” BLM, Western Oregon Plan Revisions News, Issue No.1, Aug. 2005, at 6.

87. On October 29, 2008, five conservation group plaintiffs filed a complaint in this Court seeking (1) a declaration that BLM’s decision to preclude an administrative protest violated the law and (2) injunctive relief against issuance of final Records of Decision on the

Western Oregon Plan Revisions until the required protest period was allowed. Oregon Wild v. Shepard, Civ. No. 08-1280-MO (D. Or. filed Oct. 29, 2008).

88. On October 30, 2008, the plaintiff groups filed a motion for a preliminary injunction and temporary restraining order asking the Court to order BLM to open a 30-day public protest period from the date of the Court's ruling and enjoin BLM from issuing its final revisions to the WOPR resource management plans until any filed protests are received, considered, and decided.

89. In response, on November 7, 2008, BLM published an amended notice of availability for the FEIS in the Federal Register. See 73 Fed. Reg. 66,253 (Nov. 7, 2008). The amended notice advised that the BLM would now offer a protest period on the proposed revisions to the western Oregon RMPs, and that protests must be received by December 8, 2008 to be considered. Id.

90. On November 10, 2008, the plaintiff groups withdrew their motion for preliminary injunction and temporary restraining order.

91. On December 8, 2008, Earthjustice submitted a public protest on behalf of 18 environmental groups, including all of the plaintiffs in this matter. The issues protested included BLM's failure to comply with the Endangered Species Act, the National Environmental Policy Act, the Federal Land Management and Policy Act, the O&C Act, and the Clean Water Act. A number of the plaintiff organizations also submitted individual protests addressing these and other legal failures.

92. On December 29, 2008, the BLM published a report responding to and denying all protests. See Director's Protest Resolution Report, Western Oregon Resource Management Plan Revisions (Dec. 29, 2008), available at

http://www.blm.gov/pgdata/etc/medialib/blm/wo/Planning_and_Renewable_Resources/oregon.P ar.57250.File.pdf/Western_Oregon_Plan_Revisions_Directors_Protest_Resolution_Report.pdf.

D. Records Of Decision

93. On December 30, 2008, the BLM finalized the WOPR by signing the six Records of Decision amending the Resource Management Plans for the BLM Salem, Eugene, Roseburg, Medford, and Coos Bay Districts, and the Klamath Falls Resource Area of the Lakeview District. See, e.g., BLM, Salem Record of Decision (Dec. 2008) available at <http://www.blm.gov/or/plans/wopr/rod/index.php>.

94. All six Records of Decision adopt the PRMP as described in the FEIS. Id. at 1.

CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF

Violation of the National Environmental Policy Act:
Failure to Analyze Direct, Indirect, and Cumulative Impacts

95. NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. § 1500.1. Among other things, NEPA requires all agencies of the federal government to prepare a “detailed statement” that discusses the environmental impacts of, and reasonable alternatives to, all “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). This statement is commonly known as an environmental impact statement (“EIS”).

96. The EIS process is intended “to help public officials make decisions that are based on understanding of environmental consequences” and to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.” 40 C.F.R. § 1500.1(b)-(c).

97. NEPA requires that an EIS analyze “direct effects,” which are “caused by the

action and occur at the same time and place,” as well as “indirect effects which ... are later in time or farther removed in distance, but are still reasonably foreseeable.” 40 C.F.R. § 1508.8.

98. An EIS must also assess the cumulative impacts, i.e., those resulting “from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. ... Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. §§ 1502, 1508.7-1508.8.

99. BLM is a federal agency subject to NEPA, and under BLM regulations, “[a]pproval of a resource management plan is considered a major Federal action significantly affecting the quality of the human environment.” 43 C.F.R. § 1601.0-6. The WOPR RODs are major federal actions significantly affecting the human environment requiring an EIS.

100. Defendants have violated NEPA, 42 U.S.C. § 4321 et seq., and the Council on Environmental Quality’s (“CEQ’s”) implementing regulations, 40 C.F.R. §§ 1500-1517, at least because the FEIS:

a. fails to disclose all of the known and reasonably foreseeable environmental consequences to anadromous and resident fish, northern spotted owls, marbled murrelets, other late successional and old-growth dependent wildlife species, water quality, and climate change from decreased riparian area and old-growth forest protection and increased logging as proposed by the RODs;

b. fails to disclose the cumulative effects of the actions considered in the FEIS when combined with other past and reasonably foreseeable actions on federal and non-federal lands that will affect these species; and

c. fails to address or analyze the direct, indirect, and cumulative impacts of the alternatives on the continuing validity of the Aquatic Conservation Strategy and the

Northwest Forest Plan as a whole.

101. Defendants' failure in the FEIS to consider and evaluate the direct, indirect, and cumulative impacts of WOPR violated and is continuing to violate Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and its implementing regulations. Plaintiffs have a right to review under the APA, 5 U.S.C. § 702, and this Court must hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, and not in accordance with law, *id.* § 706.

SECOND CLAIM FOR RELIEF

Violation of the National Environmental Policy Act: Lack of Scientific Integrity

102. The CEQ regulations explicitly require an EIS to disclose and respond to reasonable opposing viewpoints, specifying that agencies “shall make every effort to disclose and discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action,” 40 C.F.R. § 1502.9(a); and “shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency’s response to the issues raised.” *Id.* § 1502.9(b); see Andrus v. Sierra Club, 442 U.S. 347, 358 (1979) (CEQ regulations entitled to substantial deference). This duty extends to opposing scientific viewpoints and expert agency opinions. See *id.* § 1502.24 (“[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements”); *id.* § 1500.1(b) (“[t]he information must be of high quality. Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA.”).

103. Moreover, “[a]n EIS must also inform the decisionmaker of the full range of responsible opinion on environmental effects.” Seattle Audubon Soc. v. Moseley, 798 F. Supp.

1473, 1479 (W.D. Wash. 1992), aff'd by Seattle Audubon Soc. v. Espy, 998 F.2d 699 (9th Cir. 1993). It is not sufficient for an EIS to consider only science that supports the preferred alternative; instead, an EIS “must . . . disclose responsible scientific opinion in opposition to the proposed action, and make a good faith, reasoned response to it.” Seattle Audubon Soc. v. Lyons, 871 F. Supp. 1291, 1318 (W.D. Wash. 1994); cf. 40 C.F.R. § 1502.9(b) (a FEIS must discuss “any responsible opposing view . . . and shall indicate the agency’s response to the issues raised”). “Where the agency fails to acknowledge the opinions held by well respected scientists concerning the hazards of the proposed action, the EIS is fatally deficient.” Friends of the Earth v. Hall, 693 F. Supp. 904, 934 (W.D. Wash. 1988).

104. NEPA regulations specify how an EIS must address scientific uncertainty surrounding the effects of an action. See 40 C.F.R. § 1502.22. If there is “incomplete or unavailable information” regarding the “reasonably foreseeable significant adverse effects” of an action, agencies must obtain additional information to resolve the uncertainty, if possible and if costs are not exorbitant. Id. If information that would resolve the uncertainty is not available for either of those reasons, then the regulations stipulate that the agency shall include “a summary of existing credible scientific evidence which is relevant to evaluating” the effects of the action in the EIS, and the agency’s evaluation of the action’s impacts based on generally accepted scientific approaches, among other requirements. Id. An EIS must “address in [a] meaningful way the various uncertainties surrounding the scientific evidence.” Seattle Audubon Soc. v. Espy, 998 F.2d 699, 704 (9th Cir. 1993) (finding NEPA analysis inadequate for failure to consider recent science relevant to action’s effects on Northern Spotted Owl); see also Seattle Audubon Soc. v. Moseley, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992).

105. Defendants have violated NEPA, 42 U.S.C. § 4321 et seq., and the CEQ

implementing regulations, 40 C.F.R. §§ 1500-1517, at least because the FEIS:

a. fails to acknowledge and respond adequately or accurately to the body of responsible scientific opinion that contradicts the FEIS's conclusions regarding the risks to anadromous and resident fish, northern spotted owls, marbled murrelets, other late successional and old-growth dependent wildlife species, water quality, and climate change; and

b. fails to acknowledge or assess the risks to northern spotted owls and other species and habitat and fails to acknowledge or assess the risks posed by climate change, as required by the regulations governing scientific uncertainty in NEPA analysis.

106. Defendants' failure in the FEIS to consider and respond to reasonable opposing scientific viewpoints and scientific uncertainty violated and is continuing to violate Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and its implementing regulations. Plaintiffs have a right to review under the APA, 5 U.S.C. § 702, and this Court must hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, and not in accordance with law, *id.* § 706.

THIRD CLAIM FOR RELIEF

Violation of the National Environmental Policy Act: Purpose and Need Too Narrow

107. An EIS must include a statement of purpose and need for the action. 40 C.F.R. § 1502.13. The statement of purpose and need must be reasonable, and must not be so narrow as to constrain the consideration of reasonable alternatives to the proposed action.

108. The WOPR FEIS lists three primary considerations in its purposes and needs section, but none are factually accurate or legally valid. First, BLM claims that the WOPR revisions are necessary because BLM's timber harvest levels were not being achieved under

existing plans. FEIS at S-2. However, data obtained from the Oregon State Office of the BLM shows that BLM generally met the timber targets established by Congress in annual appropriations bills.

109. Second, BLM claims that the revisions will harmonize BLM's management plans with recent revisions to the Northern Spotted Owl Recovery Plan and Critical Habitat Designation. FEIS at S-2 to S-3. The Final Recovery Plan and Revisions to Critical Habitat for the Northern Spotted Owl are changes that post-date the WOPR process, including the issuance of the draft EIS. Both the Final Recovery Plan and the Revised Designation of Critical Habitat are being challenged in federal district court by both the timber industry and conservation groups because they are scientifically and legally flawed.

110. Third, BLM claims that the revisions will re-focus on the statutory mandate of the O&C Act. FEIS at S-3. No such re-focusing is needed for two reasons. First, the O&C Act applies to "such portions of the revested [O&C] grant lands . . . which have heretofore or may hereafter be classified as timberlands." 43 U.S.C. § 1181a. The O&C Act does not apply to large amounts of BLM lands ostensibly covered by WOPR, because BLM, through the Northwest Forest Plan, re-classified those lands as late-successional reserves and riparian reserves. Therefore these lands are not "classified as timberlands" within the meaning of the O&C Act. *Id.*

111. In the alternative, even if the O&C Act does apply to the WOPR lands, previous land management plans for the WOPR lands, including the Northwest Forest Plan, were found by federal courts to comply with the O&C Act. *See Seattle Audubon Society v. Lyons*, 871 F. Supp. 1291 (W.D. Wash. 1994) (appeal history omitted) (rejecting the contention that the Northwest Forest Plan violated the O&C Act). Because the existing plan complied with the

O&C Act, no “refocusing” was necessary.

112. All three of the stated reasons in BLM’s purpose and need statement are faulty and unreasonable, narrowly and unreasonably constraining the range of alternatives considered in the FEIS. Defendants’ narrow purpose and need statement violated and is continuing to violate Section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C), and its implementing regulations. Plaintiffs have a right to review under the APA, 5 U.S.C. § 702, and this Court must hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, and not in accordance with law, *id.* § 706.

FOURTH CLAIM FOR RELIEF

Violation of the National Environmental Policy Act: Failure to Analyze a Reasonable Range of Alternatives

113. The alternatives analysis is considered the “heart” of an EIS. 40 C.F.R. § 1502.14. An EIS “should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear choice among options by the decisionmaker and the public.” *Id.* BLM is required to “rigorously explore and objectively evaluate all reasonable alternatives,” 40 C.F.R. § 1502.14(a), and must “devote substantial treatment to each alternative ... so that reviewers may evaluate their comparative merits.” 40 C.F.R. § 1502.14(b).

114. In defining what is a “reasonable” range of alternatives, NEPA requires consideration of alternatives “that are practical or feasible” and not just “whether the proponent or applicant likes or is itself capable of carrying out a particular alternative”; in fact, “[a]n alternative that is outside the legal jurisdiction of the lead agency must still be analyzed in the EIS if it is reasonable.” Council on Environmental Quality, Forty Most Asked Questions, Questions 2A and 2B, available at <http://ceq.hss.doe.gov/nepa/regs/40/40p3.htm>; 40 C.F.R.

§§ 1502.14, 1506.2(d). The existence of a viable but unexamined alternative renders an EIS deficient.

115. The WOPR FEIS considers four alternatives: Alternatives 1, 2, and 3 from the draft EIS, and the PRMP, which is based on Alternative 2. FEIS at 2-24 to 2-185.

116. BLM cannot validly confine its consideration of alternatives to ones that fall short of meeting the agency's legal obligations. BLM has duties created by many federal statutes, including the Federal Land Policy and Management Act, the O&C Act, the Endangered Species Act, the Clean Water Act, and the Wild and Scenic Rivers Act. By only considering action alternatives that cannot meet all of BLM's legal duties, BLM is violating the requirement that NEPA documents discuss alternatives to the proposed action, to "provid[e] a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14; see also 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1507.2(d), 1508.9(b).

117. For example, none of the alternatives consider managing all of any part of the BLM lands to maintain or increase the protection of watersheds and regulation of stream flow, as mandated by the O&C Act; instead, all alternatives decrease protections of riparian areas and key watersheds. Nor did any of the alternatives consider promoting permanent forest production, as mandated by the O&C Act, by managing all or any part of the BLM lands for carbon storage. No alternative examines whether management for carbon storage best promotes permanent forest production both by mitigating climate change, and by preparing natural systems for climate change by maintaining biodiversity, providing an expanded system of reserves along north-south and elevation gradients, and providing a permeable landscape that facilitates migration.

118. Defendants' failure to consider and evaluate a reasonable range of alternatives to the chosen action violated and is continuing to violate Section 102(2)(C) of NEPA, 42 U.S.C.

§ 4332(2)(C), and its implementing regulations. Plaintiffs have a right to review under the APA, 5 U.S.C. § 702, and this Court must hold unlawful and set aside agency actions found to be arbitrary, capricious, an abuse of discretion, and not in accordance with law, id. § 706.

FIFTH CLAIM FOR RELIEF

Violation of the Administrative Procedure Act: Failure of Rational Decisionmaking

119. When BLM amended its resource management plans to incorporate the Northwest Forest Plan, it did so following the scientific review of FEMAT of the various options considered. The old-growth reserve structure and the ACS of the Northwest Forest Plan came from that scientifically based process.

120. In 2004, the Forest Service and BLM issued a decision that significantly weakened the Northwest Forest Plan's ACS. See Pacific Coast Federation of Fishermen's Ass'ns v. National Marine Fisheries Services, 482 F. Supp.2d 1248, 1260-61 (W.D. Wash. 2007) ("PCFFA IV"). The amendment eliminated the requirements that the Forest Service and BLM find that each action proceeding under the Plan will meet, attain, not retard, or not prevent attainment of the ACS objectives. In a challenge to the adequacy of the biological opinions analyzing the amendment and its final supplemental environmental impact statement, the district court set aside the ACS amendment for failure to use the best available science and failure to disclose the views of dissenting FEMAT scientists.

121. For WOPR, BLM has failed to adequately explain why compliance with the ACS objectives, standards, and guidelines is no longer necessary. "[W]here an agency has previously made a policy choice to conform to a particular standard, and now seeks to amend that standard, 'the Agencies have an obligation under NEPA to disclose and explain on what basis they deemed the standard necessary before but assume it is not now.'" PCFFA v. NMFS, No. 04-1299RSM,

Order on Report and Recommendation, slip op. at 5 (W.D. Wash. March 30, 2007), citing Northwest Ecosystem Alliance v. Rey, 380 F. Supp. 2d 1175, 1192 (W.D. Wash. 2005). WOPR diminishes the Northwest Forest Plan's ACS protections without explaining how this departure from the ACS complies with the best available science, complies with previous court decisions, and without disclosing the dissenting FEMAT scientists' views already found necessary in PCFFA IV.

122. Similarly, the Northwest Forest Plan discredited prior federal strategies that claimed to be adequate to protect the threatened northern spotted owl. WOPR reverts to the discredited pre-1994 strategy without explaining how it complies with the best available science and previous court decisions. See Seattle Audubon Soc. v. Moseley, 798 F. Supp. 1473, 1479 (W.D. Wash. 1992), aff'd by Seattle Audubon Soc. v. Espy, 998 F.2d 699 (9th Cir. 1993).

123. WOPR deviates from the carefully crafted agency policy for managing Pacific Northwest public forest lands – the Northwest Forest Plan – without adequate explanation. WOPR does not explain how it will fulfill BLM's legal obligations to provide for the health, diversity, and productivity of these forest lands or how it will protect watersheds without all the elements of the ACS.

124. BLM is obligated to protect multiple resource values on its lands and authorized to adopt appropriate rules under FLPMA, 43 U.S.C. § 1701 et seq. BLM also has substantive legal responsibilities under several different statutes, including the Clean Water Act, 33 U.S.C. § 1251 et seq., and the Endangered Species Act, 16 U.S.C. § 1531 et seq.

125. Plaintiffs have a right to review under the APA, 5 U.S.C. § 702, and this Court must hold unlawful and set aside the WOPR Records of Decision as arbitrary, capricious, an abuse of discretion, and not in accordance with law, id. § 706.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

- A. Adjudge and declare that BLM violated NEPA and the APA when it issued the WOPR Records of Decision;
- B. Vacate the WOPR Records of Decision;
- C. Enjoin BLM from offering, approving, or allowing any action based on WOPR and/or inconsistent with the Northwest Forest Plan;
- D. Grant such restraining orders and/or preliminary injunctive relief as plaintiffs may from time to time request to ensure that the BLM public lands do not suffer irreparable harm pending resolution of the merits of this action;
- E. Award plaintiffs their reasonable fees, expenses, costs, and disbursements, including attorneys' fees associated with this litigation under the Equal Access to Justice Act, 28 U.S.C. § 2412.
- F. Grant plaintiffs such further and additional relief as the Court may deem just and proper.

Respectfully submitted this 14th day of January, 2009.

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