



April 10, 2020

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Jeffrey Davis, Myrtlewood Field Manager  
BLM Coos Bay District  
1300 Airport Lane  
North Bend OR 97459

**RE: Protest – Upper Rock Divide timber sale**

Pursuant to 43 CFR §5003, Cascadia Wildlands, Oregon Wild and Klamath-Siskiyou Wildlands Center hereby protest the Decision Record for the Upper Rock Divide Timber Sale (ORC04-TS-2020.0032), part of the Upper Rock Creek Environmental Assessment (DOI-BLM-OR-C040-2016-0007-EA) and Finding of No Significant Impact, signed and released in April, 2019 by Jeff Davis.

**I. Background**

Cascadia Wildlands is a public interest nonprofit organization with 10,000 members and supporters throughout the Cascadia bioregion. Our mission is to defend and restore Cascadia's wild ecosystems in the forests, in the courts, and in the streets. We envision vast old-growth forests, rivers full of wild salmon, wolves howling in the backcountry, and vibrant communities sustained by the unique landscapes of the Cascadia bioregion. Our members and staff use and enjoy the impacted timber sale unit (image below).

Oregon Wild represents 20,000 members and supporters who share our mission to protect and restore Oregon's wildlands, wildlife, and water as an enduring legacy. Our goal is to protect areas that remain intact while striving to restore areas that have been degraded.

KS Wild is committed to the ecological and biological integrity of late-successional forests and aquatic ecosystems in the region. KS Wild members and staff use and enjoy the public lands proposed for logging for dispersed recreation, wildland studies, and spiritual renewal. KS Wild members hike, camp, bird watch, identify plants, and otherwise learn from the terrestrial forest ecosystems in the project area where timber sale and road construction activities are proposed. They want to see the forest canopy remain intact, hear songbirds, encounter rare plants and animals, enjoy clear healthy streams, and be in the presence of ecologically functional forest ecosystems. KS Wild and its members will be directly harmed by the BLM's timber sale activities within the project area.







The above organizations also have an organizational interest in providing their members and the general public with information that the National Environmental Policy Act (NEPA) requires the BLM to compile and disclose in its environmental documents. Members and staff of KS Wild have a right to know the environmental costs and tradeoffs involved in site-specific resource management decisions such as the one to log mature stands via the Upper Rock Divide timber sale. These interests are adversely impacted by the BLM's failure to comply with NEPA in this instance, particularly so in these extraordinarily trying times.

### Decision Summary

The Timber Sale Decision Record would:

- Clearcut (Regeneration Harvest) 84 acres in one unit (EA Unit # UR13)
- Road work including 0.08 miles of new road, 2.9 miles of renovation;

## II. Statement of Reasons

The agency has erred in making its decision to approve this timber sale, and the Upper Rock Creek EA and FONSI on which it depends. The issues raised in this protest were addressed in detail in Cascadia Wildlands and Oregon Wild's scoping and draft EA and FONSI comments dated March 13, 2019. We incorporate by reference all of the comments previously sent to BLM, as well as the administrative record related to the underlying RMP. Additional new information has also come to light, most strikingly an unforeseen global pandemic and state of emergency.

### A. NEPA Violation – Agency failure to take a hard look at significant impacts of the Decision, in light of the COVID19 Pandemic.

This Decision Record, despite being issued during the rapidly escalating global health emergency, takes no heed whatsoever to the radically changed world we are living in. The agency is proceeding, very literally, as if there is no Pandemic. Driving blind in such a situation holds potential for disastrous unforeseen consequences. The agency needs to pause and evaluate those implications, in a public way under NEPA and the APA, for the common good.

First, **we are in the midst of a global Pandemic.** On March 8, 2020, Oregon Governor Kate Brown declared a state of emergency.<sup>1</sup> The WHO declared Coronavirus a global pandemic on March 11, 2020. <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>. As I type this, there are 456,712 cases of Coronavirus in the country, and have been 16,231 deaths. So far *today*, 1,443 Americans have lost their lives. <https://www.worldometers.info/coronavirus/country/us/> (accessed 4/9/2020, 12:10 p.m.). Those distressing numbers are increasing very rapidly.

That recognized, it results in many implications that are relevant to this Decision. In addition to the primary public health emergency, the response to the Pandemic is in itself also hugely disruptive. Oregon EO 20-12, "Stay Home, Save Lives: Ordering Oregonians to Stay at Home..."

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<sup>1</sup> Exec. Order 20-03 (at [https://www.oregon.gov/gov/admin/Pages/eo\\_20-03.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-03.aspx))

orders all Oregonians, including everyone involved with this timber project, to “stay home except for essential needs.”<sup>2</sup> states in pertinent part that:

1. It is essential to the health, safety, and welfare of the State of Oregon during the ongoing state of emergency that, to the maximum extent possible, individuals stay at home or at their place of residence, consistent with the directives set forth in my Executive Orders and guidance issued by the Oregon Health Authority. To that end, pursuant to ORS 433.441(3), ORS 401.168(1), ORS 401.175(3), and ORS 401.188(2) to (3), I am ordering the following:
  - a. Non-essential social and recreational gatherings of individuals outside of a home or place of residence (e.g., parties, celebrations, or other similar gatherings and events) are prohibited immediately, regardless of size, if a distance of at least six feet between individuals cannot be maintained.
  - b. Individuals are prohibited from patronizing businesses that are closed pursuant to paragraph 2 of this Executive Order, and from engaging in conduct prohibited by prior Executive Orders or inconsistent with guidance provided by the Oregon Health Authority.
  - c. When individuals need to leave their homes or residences, they should at all times maintain social distancing of at least six feet from any person who is not a member of their immediate household, to the greatest extent possible, and comply with the other Social Distancing Requirements guidance issued by the Oregon Health Authority.
  - d. Individuals may go outside for outside recreational activities (walking, hiking, etc.), but must limit those activities to non-contact, and are prohibited from engaging in outdoor activities where it is not possible to maintain appropriate social distancing (six feet or more between individuals).
  - e. Failure to comply with any of the provisions of this Executive Order constitutes an imminent threat and creates an immediate danger to public health. Any person found to be in violation of this Executive Order is subject to the penalties described in ORS 401.990.

That order also mandates workspace restrictions for businesses that are not closed, such as logging companies and non-profit environmental organizations:

9. Pursuant to ORS 433.441(3)(a), (b), (d) and (f), ORS 401.168(1), and ORS 401.188(1) to (3), and effective March 25, 2020, all businesses and nonprofit entities with offices in Oregon shall facilitate telework and work-at-home by employees, to the maximum extent possible. Work in offices is prohibited whenever telework and work-at-home options are available, in light of position duties, availability of teleworking equipment, and network adequacy.
10. When telework and work-from-home options are not available, businesses and non-profits must designate an employee or officer to establish, implement, and enforce social distancing policies, consistent with guidance from the Oregon Health Authority. Such policies also must address how the business or non-profit will maintain social distancing protocols for business-critical visitors.
11. Businesses and non-profits that fail to comply with paragraphs 9 and 10 of this Executive Order will be closed until they demonstrate compliance.<sup>3</sup>

Similarly, the State of Oregon executive branch offices are closed and work is greatly restricted.

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<sup>2</sup> Oregon website, accessed 4/9/2020 at 12:57 p.m.: <https://govstatus.egov.com/or-covid-19#executiveorders>

<sup>3</sup> EO 20-12, online at [https://www.oregon.gov/gov/admin/Pages/eo\\_20-12.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-12.aspx).

12. Pursuant to ORS 433.441(3)(a), (b), (d) and (f), ORS 401.168(1), and ORS 401.188(1) to (3), and effective March 25, 2020, all state executive branch offices and buildings, to the maximum extent possible, shall close to the public and provide public services by phone and online during regular business hours. To the extent that closure is not feasible, in-person interactions between staff and the public should be by appointment, whenever possible. When public services require in-person interactions, social distancing measures must be established, implemented, and enforced, to the maximum extent possible.

13. State executive branch offices and buildings shall facilitate telework and work-at-home by employees, to the maximum extent possible. When telework and work-from-home options are not possible, agencies must designate an employee or officer to establish, implement, and enforce social distancing policies, consistent with guidance from the Oregon Health Authority.

14. Paragraphs 12 and 13 of this Executive Order apply to all offices and buildings owned or occupied by the state executive branch. This Executive Order does not apply to offices and buildings owned or occupied by the state legislative and judicial branches, federal government, local governments, and tribal governments, but those governments are nonetheless strongly encouraged to adhere to the policies underlying these directives.<sup>4</sup>

Not only that, but even outdoor recreation and travel are heavily restricted by the State:

#### Outdoor Recreation and Travel

18. Pursuant to the powers vested in me by ORS 433.441(3), ORS 401.168(1) and (3), and ORS 401.188(1) to (3), I hereby order all private and public campgrounds to be closed immediately. This order does not prohibit camp hosts or veterans from remaining in state campgrounds, nor does it extend to RV parks and other housing.

19. I authorize the Oregon Parks and Recreation Department to close any property or facility, when proper social distancing cannot be maintained.

20. I order the immediate closure of all pools, skate parks, outdoor sports courts, and playground equipment areas.

21. For public recreational areas that are permitted to remain open subject to this Executive Order, signs requiring social distancing must be posted at all entrances, exits, and in prominent areas. On-site restrooms must have trash cans, and soap and water or hand sanitizer available. Users of open public recreational areas must strictly adhere to social distancing guidelines.

22. Individuals are directed to minimize travel, other than essential travel to or from a home, residence, or workplace; for obtaining or providing food, shelter, essential consumer needs, education, health care, or emergency services; for essential business and government services; for the care of family members, household members, elderly persons, minors, dependents, persons with disabilities, or other vulnerable persons, pets or livestock; travel as directed by government officials, law enforcement, or courts; and other essential travel consistent with the directives of my Executive Orders and guidance from the Oregon Health Authority.<sup>5</sup>

These are in addition to a shifting array of closures of private, state, local and federal facilities, and recently even entire National Parks and National Forests!<sup>6</sup>

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<sup>4</sup> EO 20-12, online at [https://www.oregon.gov/gov/admin/Pages/eo\\_20-12.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-12.aspx).

<sup>5</sup> *Id.*

<sup>6</sup> See Zach Urness, 4/1/2020, *Statesman Journal*, accessed 4/10/2020.  
<https://www.statesmanjournal.com/story/news/2020/04/01/coronavirus-closures-oregon->

The BLM office is physically closed. An attempt to call during business hours today (4/9/2020) lead only to a message machine, which relates that access to the office is restricted and (in circular logic reminiscent of Catch-22) advising the caller to phone during business hours. This Protest is being hand-delivered, although as of this typing (the day before) we are not assured of any approved method for delivery.

Travel on roadways is strictly advised against under Governor Brown's Stay Home Save Lives Order 20-12. In fieldchecking this unit, as we headed out of town, we passed under a big lit highway sign saying "Stay Home Save Lives." Illustrating the danger inherent in travel, despite taking every precaution, we were fortunate that log truck drivers are excellent and cautious drivers, having a close call on the smaller road up that required the log truck to stop on a steep downhill corner. These ordinary risks, acceptable in normal times, have particular new weight now.

Public gatherings, even of two people, are effectively prohibited and at least strongly advised against. Oregon Executive order 20-05, issued March 12, prohibited large gatherings of more than 250 people, and announced a sudden closure of all public schools. EO 20-07, issued March 17, closed restaurants, and prohibited gatherings of 25 or more people.<sup>7</sup> This has a massive impact on many sectors, including on non-profit organizations like Cascadia and Oregon Wild, the BLM and other oversight agencies, and timber operators. Even when we are all able to continue *functioning*, it is at a diminished level.

Non-essential businesses are closed.<sup>8</sup> And that is only the beginning. We have sunk into a Global Recession, at least. One in every eight Oregon workers, and one in ten American workers, has lost their job and filed for unemployment in the last three weeks. Moments ago, the Swanson Group plywood mill there in Douglas County laid off 300 workers with "severe oversupply."<sup>9</sup> Matt Hill of Douglas Timber Operators was quoted:

"In terms of the broader COVID-19 impact on the forest products economy, we can expect to see additional tightening as long the American economy is effectively placed on hold," Hill said. "This is a

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[state-parks-beaches-forests-campgrounds-blm-land/5092333002/?fbclid=IwAR3Q95kDEQTevZejnY4Q0Cb-bfIETYEiP-7WdVJWZNrmKT3Nf8rib6Tu4ZE](https://www.oregon.gov/land/5092333002/?fbclid=IwAR3Q95kDEQTevZejnY4Q0Cb-bfIETYEiP-7WdVJWZNrmKT3Nf8rib6Tu4ZE)

<sup>7</sup> [https://www.oregon.gov/gov/admin/Pages/eo\\_20-07.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-07.aspx)

<sup>8</sup> Oregon EO 20-07 (closing on-site dining); EO 20-12 (closing a long list of non-essential businesses that cannot follow social distancing).

<sup>9</sup> *Oregon Live*, "Swanson Group plywood mill laying off 300 workers in Douglas County due to coronavirus," April 9, 2020, 12:04 p.m., at <https://www.oregonlive.com/business/2020/04/swanson-group-plywood-mill-laying-off-300-workers-in-douglas-county.html>

demand side problem and it is rippling through the supply chain: first with the mills, then loggers and truckers and so on.<sup>10</sup>

Many others are impacted too. Seneca Sawmill Co. is cutting hours for 470 at three Eugene mills, and closing its log yard. Timber Products Co. in Medford closed last week after an employee tested positive.<sup>11</sup> We have been unable to research availability of the various required supply chains for all of the mitigation and implementation measures involved for BLM sales, but it is reasonable today to foresee that there could be shortages and deficiencies of critical supplies. At least, there will be if those risks aren't recognized and addressed.

In this context, the economic impacts and implications of the timber sale are radically changed. In the context of "a severe oversupply" and radically declined orders,<sup>12</sup> added capital commitments and volume-loading may not be beneficial. The EA, FONSI and Decision assumptions about the value and impact of timber sales are radically altered. It is no longer the case (if it ever was) that selling another million board feet will result in 13 jobs, or *any* jobs, being created. Now, putting that timber on the books looks like resulting in extra volume at inflated prices. It could even result in over-committing operators and result in layoffs, or unfairly advantaging operators who happen to be harder hit by the pandemic.

Those economic implications, weighty as they are, quickly pale when pausing to reflect on the facts that (1) coronavirus has been present in the local timber community<sup>13</sup>; (2) it is impracticable, even if possible, to conduct logging while observing social distancing recommendations; and (3) the community at risk is especially vulnerable. Rural areas generally and Douglas County in particular would suffer even more than other areas. At least as of a few days ago there were no cases of COVID in Coos County, making that a high priority (one would think) to keep people from traveling to.

Emergency responders are busy, prioritizing pandemic response over typical activities. Even regular medical care is being postponed.<sup>14</sup> As one of the Governor's several orders says,

If immediate action is not taken to conserve PPE, Oregon runs the risk of running out which puts our health care providers on the front line of this public health emergency at risk. We must conserve PPE by

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Oregonian*, "Swanson Group plywood mill laying off 300 workers in Douglas County due to coronavirus," April 9, 2020, 12:04 p.m., at <https://www.oregonlive.com/business/2020/04/swanson-group-plywood-mill-laying-off-300-workers-in-douglas-county.html>

<sup>13</sup> Witness the case at the Medford mill, and an earlier one of an employee at a Hampton Lumber mill on March 16. See <https://www.woodworkingnetwork.com/news/woodworking-industry-news/hampton-lumber-shuts-down-plant-after-employee-tested-coronavirus>

<sup>14</sup> See Oregon EO 20-10

eliminating all elective and non-urgent procedures that use PPE, including but not limited to masks and gowns. This action also helps to preserve other essential items that will be needed during this emergency such as intensive care unit beds, ventilators, and terminal cleaning supplies.

In addition, by limiting all non-essential visitation at hospitals and other health care facilities, and screening all visitors, we can protect health care providers from possible exposures to COVID-19.

Doctors and first responders are clearly the front line, but the general disturbance and closures of parts of our society and economy has been profound, impacting all of us in extreme ways. Public schools are closed, putting an unforeseen, unmitigated and very significant burden on every parent.<sup>15</sup>

Courts are variously closed, closing, staying and continuing civil matters. Even assuming all this is warranted, the result is restricted access to justice.

Even essential workers are asked to stay home if they feel unwell, “even with mild symptoms.” <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/advice-for-public> (accessed 4/9/2020, 12:26 p.m.). As the mill closures after workers tested positive illustrates, the disruptive impact of even one positive test can be profound.

In addition to the sheer *scale and intensity* of the disruption, it is important to recognize that these effects are extremely disparate and inequitable across many groups. An older person with asthma and kids home from school is in a much different situation than a single, healthy 20 year-old. It violates basic principles of decency and equity to advance adversarial positions during our collective struggle against the Pandemic.

To our knowledge the federal timber sales program has not been designated an essential or a critical business, in a sense that it is legally mandatory, or that something horrible would happen if the agency were to be slower and more deliberate. Nothing in the Decision or on the BLM’s project webpage really addresses the issue specifically. Federal homeland security guidance as regards “critical infrastructure”<sup>16</sup> is just that, guidance, and it is subject to State adoption or enforcement. The Dep’t of Homeland Security CIC directive itself states, in bold type, that **“this list is advisory in nature. It is not, nor should it be considered to be, a federal directive or standard in and of itself.”** For its part, “Oregon has not issued an essential business list. The state, instead, has provided a list of business categories that should STOP OPERATING...”<sup>17</sup>

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<sup>15</sup> Oregon EO 20-08, at [https://www.oregon.gov/gov/admin/Pages/eo\\_20-08.aspx](https://www.oregon.gov/gov/admin/Pages/eo_20-08.aspx).

<sup>16</sup> “critical infrastructure,” it should be noted, is a very different thing from “mission critical.” It is offensive to medical workers and others on the front lines of the Pandemic to put one’s personal business interest “critical,” for no better reason than that it makes money. The BLM timber program is not a *007* or *Mission Impossible* assignment here. This is for profit resource extraction happening as it has for generations; it is not the search for a cure.

<sup>17</sup> Oregon EO website, accessed 4/9/2020, 12:54 p.m.: <https://govstatus.egov.com/or-covid-19#executiveorders>



*Even if* logging is considered critical in some sense, and we agree that logging and mill jobs are critical economically, it doesn't follow at all that advancing controversial public land timber sales is helpful. The worst case obviously is that this decision results in spread of the disease and lost lives. Even short of that (realistic!) concern, the BLM is pursuing its parochial interest in selling forests for timber volume, not the collective interest in saving the lives and the economy. Another possible unforeseen impact of this Decision could be to favor larger companies in bidding, pushing out smaller operators who are suffering more due to the Pandemic.

In those and many other ways, the Pandemic has direct and serious implications for this project, and this projects' impacts to the quality of the human environment. Among the implications:

- Project implementation creates unforeseen public health risks and consequences (see Protest Point B below, hereby incorporated by reference into this protest point, explaining how the decision undermines Pandemic response);
- Feasibility of BMPs and PDFs is potentially changed in light of social distancing recommendations, both because of lack of personnel directly, and/or because typical methods (such as involve people in close proximity, and shared tools) conflict with health recommendations;<sup>18</sup>
- Restoration and mitigation, such as snag creation, road decommissioning, or culvert replacements, are not going forward. Thus the EA and finding of no significant impact, which is based on effective mitigation, no longer have even a rational basis.
- BLM staff and contractors, and those of other oversight agencies, lacking physical access to their office and hard-copy materials, are working half-blind and one-handed. There is no telling what information is and is not available, and apparently no assurance that operations have met any minimal standard.
- As evidenced by the neighboring sales, where careless litter is evident, a perception of unaccountability on the part of those few workers in the woods creates risk of carelessness and even bad faith exploitation of the situation. The several old-growth trees logged at Kenyon Mountain especially are troubling.

The agency Decision, FONSI, EA, and every other public document, entirely fails to consider the implications of the Pandemic. The Decision Record is surreal, written in some kind of insulated bureaucratic bubble where there is no Pandemic to consider.

*At minimum*, the Decision ought to have addressed this extraordinary situation. The total failure to do so, combined with the Decision's conflict with the Stay Home Save Lives strategy, is

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<sup>18</sup> Without analysis it is impossible to say, but at least one of two things has to be true: (1) effectiveness is reduced (e.g. inspections not done or restoration missed), and/or (2) effectiveness is unchanged, but at the expense of imposing public health risks on workers and the broader public.

independently a violation of the Administrative Procedures Act, which requires rational decision-making that is fairly presented to the public.

The total failure to acknowledge the Pandemic violates NEPA's ongoing hard look requirement, which requires supplementation to NEPA documents if "there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1); *see also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 373 (1989). The need for public comment and public involvement is obvious in this situation, because so many are impacted by this disease in so many different ways. The two major categories of impact are (1) implications of the pandemic on environmental effects of the project generally, and (2) impacts of this project on the pandemic. Both are environmental impacts under NEPA and need to be considered.

In addition, the above rationale indicates that the FONSI is in error, and that impacts are reasonably significant and so an EIS should be prepared. 40 CFR 1508.27.

#### B. Decision Record Undermines COVID-19 Pandemic Response

In addition to urging more careful consideration, we also Protest specifically that the Decision needlessly undermines the Pandemic response.

Because the agency has so completely neglected the issue, it is difficult for the impacted public to discern exactly what the implications of the pandemic are on this and other timber sales. That is a problem in an of itself, but beyond that, based only on the available evidence, we can tell that this Decision would result in significant adverse impacts. In several direct, material ways, the Decision Record here directly undermines State, Local, Federal and Global response to the ongoing COVID19 Pandemic, putting lives at risk. A few of the ways this could happen:

1. Timber Sale bidders traveling to the woods to cruise and evaluate the stand, in close proximity of both space and time. This was directly observed this Wednesday;
2. BLM Staff and contractors are required to do fieldwork and office work, requiring travel and potentially in conflict with social distancing recommendations.
3. Public and nonprofit organizations are drawn to the field, imposing health burden on them (us) and the public;
4. BLM's inflexible procedures require additional travel to deliver hard-copy Protest, involving risk from travel as well as physical hand-off of the document. This is particularly egregious, in light of the fact the rule is a senseless bureaucratic burden to begin with;
5. Mixed messages coming from the Executive Branch undermines credibility of public health advisories. This situation is potentially bad enough to even violate the fundamental constitutional principle of the Unitary Executive, with different parts of agencies working under their own alternative facts.
6. Active logging, hauling and milling potentially involves risk of COVID spread. We know for a fact the disease has been present in the industry;
7. Active operations undermine Shelter In Place orders;

The State website makes clear that **“Staying at home as much as possible during this time will save lives.”**<sup>19</sup> By working against that mandate, it necessarily follows, that the proposed action will **cost lives**.

The myopic timber-over-everything approach of the BLM, long exercised with tragic effect on our natural environment, has here reached a feverish new apex. It is outrageous that timber volume goals are being put ahead even of American lives during an all-hands-on-deck global emergency.

**C. Old growth logging on neighboring timber sale gives rise to renewed concern for protection of old growth**

Several other items of new information from the neighboring, ongoing sales under this EA give rise to special new concern. As with the above protest points, this new information too suggests unaddressed significant impacts to the present sale, warranting supplemental analysis under NEPA. 40 C.F.R. § 1502.9(c)(1); 1508.27.

We have been dismayed to see that numerous old growth trees have been logged and yarded on the nearby Kenyon Mountain timber sale, an earlier Decision on this same EA. The stump in the image below shows over 200 rings. The tree was yarded towards the road, and was hauled away, in apparent violation of the RMP standard.



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<sup>19</sup> Oregon Covid 19 Resources website, accessed 4/9/2020 at 1:00 p.m.:  
<https://govstatus.egov.com/or-covid-19#executiveorders>



That is only one of many large stumps. Our time was limited, but additional stumps and rings were relayed by other citizens, including this 220-year old stump that potentially exceeded the 40" standard. We have also just obtained information suggesting this unit may include a 320-year old forest stand, raising important new questions about the adequacy and accuracy of surveys.





This sale also gives rise to concern for snag conservation in units. This snag in Kenyon Mtn sale was cut down, for example, confounding the EA's assumption that snag retention PDFs and BMPs will be adequate to meet RMP objectives for snags and down wood.



The sale also gives rise to concern for retention standards more broadly. While the BLM insists otherwise, this unit, and others on the Lookout sale, look for all the world like clearcuts.





We are particularly concerned, based on numerous field visits to BLM sales, that many old-growth hemlock and cedar and other slow-growing species are being systematically and tragically eliminated from the landscape because they fall just below the 40" threshold. The log on the right of the picture above counted 147 rings, even though it was far below the 40" threshold.



All of this information giving rise to need for additional analysis and mitigation to supplement the RMP with regard to legacy tree conservation. The intent behind the RMP 1850 tree rule is



to preserve old-growth trees that have survived the onslaught of civilization and industrialization. These elders are incredibly valuable on the landscape, *especially* where industrial logging eliminates most other forest structure. There is reason to doubt the adequacy of the RMP standard for 1850 trees of 40" dbh in this stand. Whether the cause is poor early surveys, or in implementation, or an unforeseen result of the RMP standard, it calls for a hard look. The BLM says it is not clearcutting old growth, yet here we are seeing old growth trees falling in clearcuts. What is going on!?

Further problems potentially arise with litter and pollution, if operators get sloppy in light of extreme isolation and perceived unaccountability. Lookout Sale (below)<sup>20</sup>



We were able to quickly visit the proposed Upper Rock Creek unit on April 8, and what we saw gives rise to concern based on the above information. Flagging and marking was all over the place, with many old trees and valuable forest structure slated to be destroyed. Please take a hard look.

#### D. Inadequate Consideration of Alternatives

The EA, FONSI and Decision remain flawed in that they have failed to consider reasonable thinning alternatives.

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<sup>20</sup> Minor things like leaving behind garbage and oil are more worrisome now. Without PPE it is not safe even to pick up litter.

discussion of alternatives is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. The purpose of NEPA’s alternatives requirement is to “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” *Id.* All reasonable alternatives must receive a “rigorous exploration and objective evaluation..., particularly those that might enhance environmental quality or avoid some or all of the adverse environmental effects.” *Id.* § 1500.8(a)(4).

*Envtl. Prot. Info. Ctr. v. United States Forest Serv.*, 234 Fed. Appx. 440, 442-443 (9th Cir. 2007).

The EA and Decision, sadly, refused to consider commercial thinning of this unit. Field review suggests that the stand could be commercially thinned, with adequate trees per acre and volume. The agency refusal to consider that alternative is purely arbitrary.

#### E. Purpose and Need is unreasonably narrow—and the EA failed to consider reasonable alternatives such as thinning

The Upper Rock Creek EA purpose and need statement is unreasonably narrow in that it narrows options, unreasonably so, to only regeneration harvest. Courts have held that agencies must not define the purpose and need in an arbitrary and capricious manner when doing so will preclude consideration of reasonable alternatives.

The Court, however, does recognize that agencies may attempt to define the objectives of its actions in unreasonably narrow terms. "One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing 'reasonable alternatives' out of consideration (and even out of existence)." *Simmons v. U.S. Army Corps of Eng'rs*, 120 F.3d 664, 666 (7th Cir. 1997). On the other hand, an agency may not "frame its goals in terms so unreasonably broad that an infinite number of alternatives would accomplish those goals and the project would collapse under the weight of the possibilities." *Citizens Against Burlington*, 938 F.2d at 196. Instead, agencies must take a hard look at "the factors relevant to the definition of the purpose," and must follow the mandates of NEPA when considering reasonable alternatives. *Id.*

*Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. United States DOT*, 524 F. Supp. 2d 642, 663 (D. Md. 2007)

The defined **purpose** of a project certainly affects the possibility of alternatives for that particular project. If the **purpose** is defined "so unreasonably narrow that only one alternative from among the environmentally benign ones in the agency's power would accomplish the goals of the agency's action, [the] EIS would become a foreordained formality." *Citizens Against Burlington*, 938 F.2d at 196.

*Audubon Naturalist Soc'y of the Cent. Atl. States, Inc. v. United States DOT*, 524 F. Supp. 2d 642, 663 (D. Md. 2007).

Here the purpose and need for regeneration harvest are used as a bludgeon to forego otherwise reasonable alternatives, and to skip analysis of important issues. For example, the otherwise reasonable alternatives of commercial thinning, and/or of non-commercial removal of competing vegetation, are eliminated as not meeting the purpose and need to conduct regeneration harvest. The actual mandate of the RMP is actually only that sustained yield forestry be practiced; a much broader mandate that would open up this action to other reasonable alternatives.



A related protest point is that the agency failed to consider reasonable alternatives, notably commercial thinning. That failure to adequately evaluate alternatives is fatal.

discussion of alternatives is “the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. The purpose of NEPA’s alternatives requirement is to “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” Id. All reasonable alternatives must receive a “rigorous exploration and objective evaluation..., particularly those that might enhance environmental quality or avoid some or all of the adverse environmental effects.” Id. § 1500.8(a)(4).

*Envtl. Prot. Info. Ctr. v. United States Forest Serv.*, 234 Fed. Appx. 440, 442-443 (9th Cir. 2007) (“EPIC”).

The agency here takes the erroneous position that regeneration harvest is required under RMP because these lands are harvest land base. Our EA comments remain valid:

### **The RMP does not require clearcutting every inch of HLB**

The EA mistakenly works from an assumption that deferring “regeneration harvest now would fail to allow generation of a successive stand of timber for future harvest in accordance with sustained yield timber management.” EA at 3. It is incredibly disappointing to us to see that BLM blinders are on so tight that it interprets a direct “need to conduct regeneration harvest” on all HLB in the District. That view is needlessly narrow, and is contrary even to the most timber-centric goals of the RMP or O&C Act.

Closer to correct are the stated needs related to contributing towards the ASQ volume, and managing age class distribution “to provide a predictable even flow of available timber.” EA @ 3. We agree that the RMP calls for the BLM to manage this forest to provide an even flow of good timber volume to the local timber industry, but strongly object to the myopic approach that imagines timber management is a simple matter of clearcutting every inch of forest.

It is ironic that the narrow mandate to clearcut has the effect of actually growing less timber, less profitably, and for a smaller social benefit.

The EA briefly refers to and explains a pre-NEPA site-selection process for this project that dates back to 2014-15. EA @ 2. Several of the “myriad” important factors and conditions in the process are disclosed in the EA, and include avoidance of occupied marbled murrelet habitat, seeking inland areas, minimizing NRF habitat and spotted owl sites; predominance of HLB; and presence of a well-developed road system.

We have several comments regarding this site-selection process. First, we appreciate the disclosure in the EA of important conditions for selection, as well as the conscious effort to avoid many ecologically valuable areas. Second, we remind the agency that its decisions cannot escape scrutiny under NEPA simply by re-characterizing decisions as a part of the Purpose and Need. *Simmons v. U.S. Army Corps of Eng’rs*, 120 F.3d 664, 666 (7th Cir. 1997) (“One obvious way for an agency to slip past the strictures of NEPA is to contrive a purpose so slender as to define competing ‘reasonable alternatives’ out of consideration (and even out of existence).”). The choice to pursue maximum-clearcutting is a choice that has consequences for the environment, and NEPA mandates those be disclosed and considered and reasonable alternatives considered.

We are disappointed primarily that the BLM, during the site-selection process, sought out “maximum regeneration opportunities.” EA @ 2. The EA incorrectly supposes that deferring regeneration harvest here now “would fail to allow generation of a successive stand of timber for future harvest in accordance with sustained yield” under the RMP. EA @ 3. While we appreciate and agree with BLM’s general intent here of being efficient, it could be the case that logging that got volume from more commercial thinning, rather than only clearcuts, would be just as or more efficient. It could also be the case that the BLM is losing forest-growth efficiency (cutting down the ASQ) by clearcut logging adolescent stands like these, that have not yet reached CMAI, when the same ASQ volume could be achieved with a greater portion of

commercial thinning in younger plantations. It could be that the increased danger of high-severity fire associated with clearcut logging prescriptions such as is proposed counter-balance whatever gains are made in volume production, such that fire-wise commercial thinning would be smarter.

#### F. EA fails to disclose and consider fire hazard associated with regeneration logging and plantation forestry

The EA failed to disclose the fact that regen harvest followed by dense replanting results in a very hazardous fuel condition that persists for 40 years or more. This hazard is all the worse in light of the repeated entries and road work that is envisioned, increasing chances of ignition. Zald & Dunn (2018) conducted a careful study of the effects of forest management on fire severity in SW Oregon and found that plantation forestry tends to increase fire severity under a wide range of weather conditions.

ABSTRACT: ... In 2013, the Douglas Complex burned over 19,000 ha of Oregon & California Railroad (O&C) lands in Southwestern Oregon, USA. O&C lands are composed of a checkerboard of private industrial and federal forestland (Bureau of Land Management, BLM) with contrasting management objectives, providing a unique experimental landscape to understand how different management practices influence wildfire severity. Leveraging Landsat based estimates of fire severity (Relative differenced Normalized Burn Ratio, RdNBR) and geospatial data on fire progression, weather, topography, pre-fire forest conditions, and land ownership, we asked (1) what is the relative importance of different variables driving fire severity, and (2) is intensive plantation forestry associated with higher fire severity? Using Random Forest ensemble machine learning, **we found daily fire weather was the most important predictor of fire severity, followed by stand age and ownership, followed by topographic features. Estimates of pre-fire forest biomass were not an important predictor of fire severity.** Adjusting for all other predictor variables in a general least squares model incorporating spatial autocorrelation, mean predicted RdNBR was higher on private industrial forests ( $\text{RdNBR } 521.85 \pm 18.67$  [mean  $\pm$  SE]) vs. BLM forests ( $398.87 \pm 18.23$ ) with a much greater proportion of older forests. **Our findings suggest intensive plantation forestry characterized by young forests and spatially homogenized fuels, rather than pre-fire biomass, were significant drivers of wildfire severity.** This has implications for perceptions of wildfire risk, shared fire management responsibilities, and developing fire resilience for multiple objectives in multi-owner landscapes.

...

TABLE 2. RdNBR (mean with SE in parentheses) and predictor variables on sampled plots for Bureau of Land Management (BLM) vs. private industrial (PI) ownership.

Variable	BLM	PI	<i>w</i>	<i>P</i>
RdNBR	408.75 (298.53)	536.56 (299.88)	111,124	<0.0001
Biomass (Mg/ha)	234.75 (87.24)	163.88 (74.47)	215,166	<0.0001
Age (yr)	108.81 (55.53)	52.18 (36.78)	236,021.5	<0.0001
BI (index)	62.99 (14.16)	63.64 (14.54)	142,575.5	0.2782
Elevation (m)	653.79 (153.48)	609.46 (161.62)	171,200	<0.0001
TPI fine	0.55 (32.51)	-1.08 (32.12)	152,275	0.4296
Heat load (MJ·cm <sup>-2</sup> ·yr <sup>-1</sup> )	0.77 (0.2)	0.77 (0.2)	150,363	0.6734
Slope (%)	48.4 (13.4)	47.05 (14.01)	156,435	0.1115

Notes: The *w* values and associated *P* values are from Mann–Whitney–Wilcoxon tests. TPI, topographic position index.

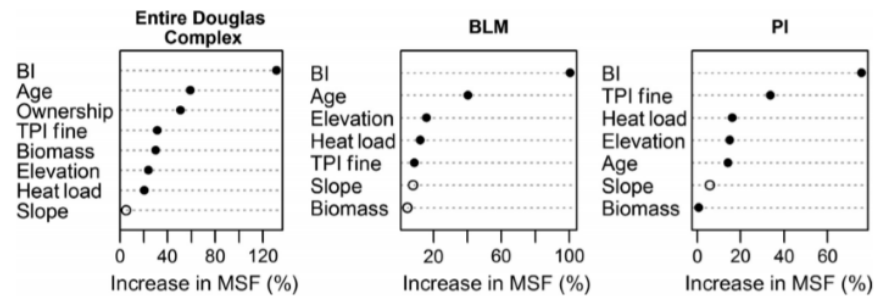


FIG. 3. Variable importance plots for predictor variables from Random Forest (RF) models of RdNBR for 1090 sample plots across the entire Douglas Complex (left panel), 571 plots on Bureau of Land Management (BLM) forests (middle), and 519 plots on private industrial (PI) forests (right). Solid circles denote variables retained in two-stage variable selection, open circles denote variables removed from the final RF models during variable selection. BI, burning index; MSE, Mean Squared Error.

...

## RESULTS

... RdNBR was consistently higher in young forests on both ownerships. RdNBR declined rapidly on BLM forests between stand ages of 20 and 80 yr old, and remained roughly level in older forests. In contrast, RdNBR in private forests declined linearly with age across its range, although private lands had few forests greater than 100 yr old. ...

## DISCUSSION

... After accounting for fire weather, topography, stand age, and pre-fire biomass, intensively managed private industrial forests burned at higher severity than older federal forests managed by the BLM. Below we ... argue that younger forests with spatially homogenized continuous fuel arrangements, rather than absolute biomass, was a significant driver of wildfire severity ...

Fire weather was a strong top-down driver of fire severity, while bottom-up drivers such as topography and pre-fire biomass were less important. ... [B]ottom-up drivers of fire severity can be overwhelmed by top-down climatic and weather conditions when fires burn during extreme weather conditions ... Fire severity was consistently higher on private lands across a range of fire weather conditions for the majority of days of active fire spread (Appendix S1: Fig. S3), leading us to conclude that while fire weather exerted top-down control on fire severity, local forest conditions that differed between ownerships remained important, even during extreme fire weather conditions. ...

Variation in pre-fire forest conditions across ownerships were clearly a significant driver of fire severity, and we believe they operated at multiple spatial scales. Private industrial forests were dominated by young trees, which have thinner bark and lower crown heights, both factors known to increase fire-induced tree mortality (Ryan and Reinhardt 1988, Dunn and Bailey 2016). At the stand scale, these

plantations are high-density single cohorts often on harvest rotations between 30 and 50 yr, resulting in dense and relatively spatially homogenous fuel structure. In contrast, public forests were dominated by older forests that tend to have greater variability in both tree size and spatial pattern vs. plantations (Naficy et al. 2010), arising from variable natural regeneration (Donato et al. 2011), post-disturbance biological legacies (Seidl et al. 2014), and developmental processes in later stages of stand development (Franklin et al. 2002). Fine-scale spatial patterns of fuels can significantly alter fire behavior, and the effects of spatial patterns on fire behavior may increase with the spatial scale of heterogeneity ...

Management-driven changes in fuel spatial patterns at tree and stand scales could also reconcile differences in prior studies that have found increases (Odion et al. 2004, Thompson et al. 2007) and decreases (Prichard and Kennedy 2014) in fire severity with intensive forest management. ... [F]orests [that] have lower productivity compared to those studied in the Klamath ecoregion, with more open canopies and longer time periods to reach canopy closure after harvest, [ ] likely results in more heterogeneous within stand fuel spatial patterns.

#### LIMITATIONS

... we relied on pre-fire biomass and stand age as proxies for fuel, in part because Landsat and other passive optical sensors have limited sensitivity to vertical and below-canopy vegetation structure (Lu 2006). Accurate and spatially complete quantitative information of forest surface and canopy fuels were not available for the Douglas Complex. More broadly, there are significant limitations to spatial predictions of forest structure and fuels using GNN and other methods that rely on passive optical imagery such as Landsat (Keane et al. 2001, Pierce et al. 2009, Zald et al. 2014), which is why we relied on the more accurately predicted age and pre-fire biomass variables as proxies. Surface and ladder fuels are the most important contributors to fire behavior in general (Agee and Skinner 2005), and surface fuels have been found to be positively correlated to fire severity in plantations within the geographic vicinity of the Douglas Complex (Weatherspoon and Skinner 1995). ...

#### MANAGEMENT IMPLICATIONS

... [W]e believe our results have implications across a much broader geographic area. First, it brings into question the conventional view that fire exclusion in older forests is the dominant driver of fire severity across landscapes. ... [I]n the landscape we studied, intensive plantation forestry appears to have a greater impact on fire severity than decades of fire exclusion. Second, higher fire severity in plantations potentially flips the perceived risk and hazard in multi-owner landscapes, because higher severity fire on intensively managed private lands implies they are the greater source of risk than older forests on federal lands. These older forests likely now experience higher fire severity than historically due to decades of fire exclusion, yet in comparison to intensively managed plantations, the effects of decades of fire exclusion in older forests appear to be less important than increased severity in young intensively managed plantations on private industrial lands.

Furthermore, our findings suggest challenges and opportunities for managing intensive plantations in ways that reduce potential fire severity. Increasing the age (and therefore size) of trees and promoting spatial heterogeneity of stands and

fuels is a likely means to reducing fire severity ... [However] there may be strong economic limitations to increased rotation ages and non-commercial thinning in

young intensive plantation forests. ... [T]he economic viability of such alternative management regimes remains poorly understood. Optimization models integrating spatial allocation of fuel treatments and fire behavior with economic models of forest harvest and operations could be used to determine if alternative management activities in plantations are economically viable. If alternative management activities are not economically viable, but wildfire risk reduction is an important objective on lands adjacent to industrial forestlands, strategic land purchases or

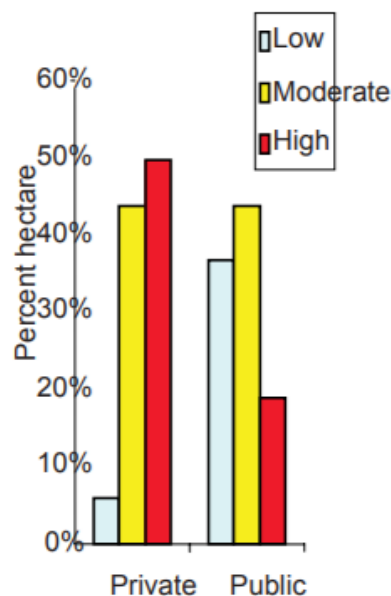
transfers between ownership types may be required to achieve landscape level goals.



Harold S. J. Zald, Christopher J. Dunn. 2018. Severe fire weather and intensive forest management increase fire severity in a multi-ownership landscape. *Ecological Applications*. *Online Version of Record before inclusion in an issue*. 26 April 2018. <https://doi.org/10.1002/eap.1710>. Also, <https://phys.org/news/2018-04-high-wildfire-severity-young-plantation.html>

Similarly, Stone et al (2008) reviewed the conditions before and after the 2003 Cooney Ridge fire in Montana and found that ...

Much more private land burned severely compared to public land [See Figures 3 and 4 below]. Heavily logged areas and tree plantations have been known to burn more extensively than intact forests (Brown 2002). Much of the private land within the fire perimeter had been recently heavily logged for timber extraction, not for the purpose of fire hazard reduction. ... Private lands in this area were recently harvested with large clear cuts.... A much lower proportion of the public land had been recently harvested.



**Figure 4**—Proportional Area % burned in the Cooney Ridge Fire by ownership. Each column represents the burn severity classes illustrated in Fig. 3.

More research is needed to understand the relationship between ownership practices and severity. At the Cooney Ridge fire, patches of unburned vegetation and low severity remained after the fire, while much more of the private land burned uniformly with high severity. These results indicate that more diversified public lands management helped produce a much more diverse fire mosaic, thus better protecting this forested landscape. By comparison most private forested land burned with moderate to high severity, under likely similar weather conditions as on the public land. Our results show that, perhaps counter intuitively, heavy harvest can increase subsequent fire severity.

Carter Stone, Andrew Hudak, Panelope Morgan 2008. Forest Harvest Can Increase Subsequent Forest Fire Severity. PSW-GTR-208, pp 525-534. [https://www.fs.fed.us/psw/publications/documents/psw\\_gtr208en/psw\\_gtr208en\\_525-](https://www.fs.fed.us/psw/publications/documents/psw_gtr208en/psw_gtr208en_525-)

[534 stone.pdf](#), In González-Cabán, Armando, tech. coord. 2008. Proceedings of the second international symposium on fire economics, planning, and policy: a global view. Gen. Tech. Rep. PSW-GTR-208, Albany, CA: Pacific Southwest Research Station, Forest Service, U.S. Department of Agriculture. 720  
p. [https://www.fs.fed.us/psw/publications/documents/psw\\_gtr208en/](https://www.fs.fed.us/psw/publications/documents/psw_gtr208en/)

“Large blocks of old-growth forests – rather than large contiguous blocks of young growth or highly simplified forests – are the best scenario for reducing catastrophic wildfire.” Jerry Franklin, David Perry, Reed Noss, David Montgomery, Christopher Frissell. Simplified Forest Management To Achieve Watershed And Forest Health: A Critique. National Wildlife Federation. <http://www.coastrange.org/documents/forestreport.pdf>.

The March 2003 Wildfire Effects Evaluation Project for the Umpqua National Forest clearly documents this disproportionate fire intensity of young managed vs. mature unmanaged stands. (“The young vegetation, including plantations, experienced a disproportionately high amount of stand replacement mortality caused by crown fires as compared to older, unmanaged forests. ... Plantations had a tendency to increase the rate of fire spread and increased the overall area of stand replacement fire effects by spreading to neighboring stands.” p 4 “This early seral vegetation pattern, and the types and arrangement of fuels present, increased the fire’s rate of spread and the area of stand replacement fire effects.” p 64.) <http://web.archive.org/web/20041118062947/http://www.fs.fed.us/r6/umpqua/publications/weep/weep.html>.

In the 1970s, Judge Burns recognized that regen harvest increases fire hazard. This was a class action case brought on behalf of Portland residents seeking to protect the Bull Run municipal watershed on the Mt Hood NF by enforcing a unique anti-trespassing law, but the judge’s findings with respect to the hazards associated with regen harvest and roads are instructive.

Logging cannot be said to reduce the risk of fire: it cannot affect the incidence of lightning and it raises rather than lowers the risk of man-caused fires. ...

Logging may, however, have an effect on fire hazard.... What is important here is to decide whether the largescale, commercialized, sustained-yield logging program presently carried on by the Forest Service in fact reduces the hazard of fire. The uncomplicated truth is that slash from logging is not removed, the present program annually increases rather than decreases the fuel load, and does so in the types of fuel that are most dangerous as precursors to a crown fire. ... Slash from old growth forests 'nearly always results in an extreme rate of spread and resistance to control. The potential for disastrous fires is high in the latter case unless the slash is disposed of immediately.' ...

Unfortunately, 'logging residue is not being abated--it is accumulating.' ...Even the slash-burned acres may have high ground fuel levels because slash burning does not remove all the fuel. The sustained-yield commercial logging program conducted in Bull Run adds to rather than decreases the fuel levels: to say that large-scale commercial logging increases, rather than diminishes, protection of the forest from fires is to say that black is white.

... [T]he road system which has been constructed since 1958 has not been the system which would have been built if intended primarily for fire fighting and control purposes. The road system largely represents roads to timber--not roads to fires. ... The roads were primarily for logging, and only incidentally for fires.

Under the Forest Service's theory, to protect the water and the forest, it has to build roads to fight fires; it has to sell timber--lots of it--to get the roads built. Ergo, large-scale timber sales protect the forest. This

may or may not be good logic, given the pitfalls of the federal budget process. But my duty is not to evaluate the logic, but rather to evaluate the law. Good logic or not, I hold this theory is not good law, in light of s 1862.

...[R]oads are not themselves particularly useful in fighting the catastrophic or crown fire. Only nature will suppress such a fire.

Miller v. Mallery, 410 F.Supp. 1283, 1294-1296 (D. Or 1976).

#### G. Tiering with the RMP EIS is inappropriately done

It is certainly true that decisions and EAs such as this take place within the context of the broader RMP NEPA work, and that tiering to that larger effort is appropriate in many ways here. However, it is not appropriate, as has been done here, to use that tiering to avoid, rather than to inform, a site-specific hard look and consideration of alternatives.

The tiering done here is incredibly broad, vague, and conclusory. That the RMP addressed an issue in some sense is taken *per se* as adequate NEPA analysis for this decision, without further analysis considering whether that analysis is actually adequate here. The EA and IDT have not actually applied the RMP NEPA analysis on the tiered issues; rather, the existence of that analysis is simply noted, and that fact alone used as the reason not to seriously consider issues (such as watershed effects, fire danger, economics).

Also, questions about the validity of the new RMP are unresolved. The BLM's tiering to RMP protections & NEPA analysis is invalid.

We note the recent memorandum decision in the court case, Swanson Group Mfg. LLC, et al., v. Bernhardt, Case 1:15-cv-01419-RJL, in the U.S. District Court for the District of Columbia, issued on September 29, 2019. The memorandum decision grants a motion for summary judgement that appears to, in effect, invalidate the 2016 RMP on which this timber sale is based. The November 22, 2019 memorandum decision (attached) is even clearer, plainly stating that RMP reserves are illegal. Because it elected to tier this timber project so closely and irrevocably with RMP mandates, invalidity of the plan results in an unraveling of those mandates and collapse of any rational basis for this Decision.

#### H. EA fails to adequately consider effects to wildlife, in particular marbled murrelet, northern spotted owl, and bureau sensitive species

Flowing largely from the assumption of heavy logging, and bolstered by an aggressive tiering with the RMP FEIS, the EA broadly fails to consider the various significant negative effects on wildlife.

There should be no question that these lands host mature older forests that provide rare and high quality habitat to a variety of species, including imperiled species like spotted owl, marbled murrelet, red tree vole, and various bureau sensitive species.

The approach of the EA is to simply refer to consultation documents and the RMP FEIS, state that the land will be clearcut in any event (so there would be no difference in alternatives, even no-action), and then to move on. This approach is a disappointing failure to conduct the site-specific analysis that is required by NEPA, and that was envisioned by the RMP.



When proposing harvest of mature and old growth forests the agency must disclose the effects on rare and uncommon species such as those protected by the ESA or those formerly protected by the survey and manage program. Just because the RMP or the FWS do not require surveys for rare species, NEPA has an independent mandate to become well-informed of the actual consequences of major federal actions. Before deciding to log suitable habitat the agency must conduct protocol surveys for marbled murrelets, spotted owls and their prey major species.

Similarly, just because the RMP purported to take away the survey and manage program does not mean that they can ignore the impacts to sensitive resources that could be impacts by federal management actions, such as red tree voles. Ignorance of the presence of species is not a license to harm them. In fact, the purpose behind NEPA is informed decision-making, and where relevant information is lacking, NEPA requires that the vacuum be filled with high quality information, full and fair discussion of effects, and accurate scientific analysis. 40 CFR §§ 1500.1(b), 1502.1.

We bring your attention to the District Court holding KS Wild v. USFS, 2004 Eastern District of California in which the Court noted:

The Forest Service asserts that information regarding the presence of owls is unnecessary because to "assumed the presence of owls in preparing the EA" However, the Forest Service only assumed owl presence for the limited purpose of designing mitigation measures to avoid owl mortality and interference with breeding during timber harvest, not for the purpose of supporting its conclusion to conduct the timber sale at all, or in the manner and within the areas described in [the proposed alternative.] In reaching these latter conclusions, the Forest Service relied on ten year old data that, in all likelihood, dramatically misrepresents the number and location of owls within the project area. Without updated NSO survey data, the Forest Service has no knowledge regarding whether it plans to conduct timber harvest in areas where NSO's are actively nesting. As a consequence, the effects of the project are highly uncertain and involve unknown risks which could be resolved by updated protocol surveys. See *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 734 (9th Cir 2001) ("Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data or where the collection of such data may prevent 'speculation on potential...effects.'" The purpose of an EIS is to obviate the need for speculation.'

Pursuant to your duties under NEPA, please survey for rare and uncommon species that are (1) known to be associated with late-successional old-growth forest habitat, or (2) not known to be adequately protected by the reserves and other Standards & Guidelines of the Northwest Forest Plan. Also, please consider the consequences of alternative ways of protecting such species such as special management prescriptions and protection buffers of various sizes.

Judge Aiken said:

BLM declined, without adequate explanation, to consider possible impacts to a species protected under the NWFP. In doing so, BLM made a decision that was not "fully informed and well-considered," and BLM failed to "articulate a rational connection between the facts found and the conclusions reached." *Sierra Club*, 510 F.3d at 1023. The Court finds that BLM did not take a "hard look" at environmental impacts, and its rejection of NEST [citizen red tree vole survey] data without sufficient consideration or explanation was arbitrary and capricious in violation of NEPA.

*Oregon Wild v. BLM*. Opinion and Order of Judge Ann Aiken. Case No. 6:14-CV-0110-AA.  
<http://www.cascwild.org/wp-content/uploads/2015/03/White-Castle-Decision.pdf>

The agency cannot assert that such information is unavailable, because the agency has experience conducting such surveys and survey protocols are available here:

<http://web.archive.org/web/20050214055639/http://www.or.blm.gov/surveyandmanage/sp.htm>. With regard to wildlife, the Decision and EA work from the flawed premise that issues that are not part of the purpose and need cannot be a basis for decision, and therefore those issues will not receive a hard look. That premise is simply false.

We note that the ESA effects are worse in light of the Pandemic, in the event that critical monitoring and mitigation efforts do not take place.

In addition to the NEPA hard look problems here, we note the specific failure of consultation under the ESA. The BiOp assumptions as regards mitigation are no longer valid.

#### I. Mitigated FONSI

As we explained in our EA comments, the issue of the mitigated FONSI bears notice.

The FONSI here is a mitigated FONSI. Other than the (many) proposed mitigation measures being relied on, even the BLM admits that impacts here will be significant, and so ordinarily would require an EIS. There are several requirements of mitigated FONSI that the agency has not squarely addressed in this EA. Please review 76 FR 3843, 3851 (Jan. 21, 2011) (CEQ, Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact)

Mitigation is not assured. The EA simply lists out a large number of standard mitigation approaches (like minimizing stream crossings of roads) without committing to anything. Even critical things like owl surveys are just supposed to occur, without any commitment.

The EA never analyzes effects of mitigation failure, even though mitigation failure is reasonably foreseeable based on past experience. It is not reasonable to suppose roads will be perfectly maintained and constructed, when you have mile after mile of unmaintained road falling apart already. The agency is not credible when it promises to check to make sure spotted owls have abandoned an area, when its past surveys were not done correctly or consistently, and when even the best surveys are subject to such intense uncertainty.

In light of the Pandemic, this issue is even more critical, because the mitigation measures are generally the first-to-go and past happy assumptions may not prove correct.

#### J. The FONSI is arbitrary & capricious; Project may cause significant impacts

For all of the above reasons, the project's impacts are "significant" under NEPA, and so an EIS ought to be prepared if it is to move forward. Clearcut-style "regeneration" logging, of potentially old-growth trees, under this project may result in significant impacts and so an EIS ought to be prepared. See 40 CFR 1508.27.

The EA and Decision Record inappropriately tier to the NW Oregon RMP FEIS which does not provide site-specific NEPA analysis of many of the important issues that need to be considered in the NEPA analysis for a logging project like this. As we commented on the EA:

The issues for NEPA analysis should be written to get to the site-specific effects, alternatives, and mitigation measures associated with harvest. The EIS for the RMP, by its nature, did not and could not have addressed these site-specific impacts, alternatives or mitigation measures. The EA here instead

mirrors the RMP approach to issues, taking the broad, 30,000-foot view, and so predictably it reaches similar conclusions.<sup>21</sup>

This project may cause significant effects because regen logging will lead to the establishment of dense young plantations that transpire large amounts of water and lead to significant depletion of stream flow and significant increased stream temperature during the dry summer months. This threatens violation BLM's O&C Act mandate to protect watersheds and regulate streamflow. The EA fails to take a hard look at the significant cumulative watershed effects of plantation forestry conducted on public and private lands in the affected watersheds. See Perry, T. D., and Jones, J. A. (2016) Summer streamflow deficits from regenerating Douglas-fir forest in the Pacific Northwest, USA. *Ecohydrology*, doi: [10.1002/eco.1790](https://doi.org/10.1002/eco.1790). <http://onlinelibrary.wiley.com/doi/10.1002/eco.1790/full>.

This project may cause significant effects because regen logging will increase fire hazard. The above protest points are incorporated in full into this point.

This project may cause significant effects because regen logging will reduce root strength that stabilizes slopes and thereby increase risk of landslides.

This project may cause significant effects because regen logging will increase young forest habitat types that are already over-abundant (and reduce the abundance of older forest habitat types that are rare and under-represented on the landscape) due to excessive logging on private land and public land. In addition, young forest types are expected to become even more common as the disturbance rates increase as a result of global climate change. And old forest habitat types are expected to become even more rare and harder to maintain in a warmer climate.

This project may cause significant effects because regen logging will harm wildlife (such as marbled murrelet and spotted owls and cavity dependent species) that prefer to live in older forests with dense cover and abundant dead wood habitat.

This project may cause significant effects because regen logging will cause long-term removal and degradation of designated critical habitat for ESA-listed northern spotted owls. Regen logging will reduce suitable habitat for spotted owls which will increase the adverse competitive interactions between spotted owls and barred owls, and reduce the chances that these two owls species can co-exist. A well-known axiom of the species-area relationship from island biogeography holds that as habitat area increases, the number of cohabiting species also increases. See especially, Part III - Competition in a Spatial World in Tilman, D. and P. Kareiva, Eds. 1997. *Spatial Ecology: The Role of Space in Population Dynamics and Interspecific Interactions*. Monographs in Population Biology, Princeton University Press. 368 pp. The effects of habitat availability on competing species was explored by expert wildlife population modelers who found —

The territorial occupancy model developed by Lande (1987), extended here to include two competing species, represents a useful tool for evaluating how equilibrium breeding numbers could be affected by

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<sup>21</sup> CW/OW/KSW Comments, p.3



changes in habitat availability, demographic parameters, dispersal behavior and interspecific competition ... Its application shows that **increases in the exclusive suitable habitat of each species is the best option to maintain viable populations of territorial competitors** in a same area, given that it reduces competition for territories. Increases in habitat overlap by reducing the exclusive habitat available for one species strongly affected the outcome of competition, resulting in extinction of the species for which exclusive habitat had been eliminated.

Martina Carrete, José A. Sánchez-Zapata, José F. Calvo and Russell Lande. Demography and habitat availability in territorial occupancy of two competing species. OIKOS 108: 125-136, 2005 <http://www.ebd.csic.es/carnivoros/personal/carrete/martina/recursos/13.%20carrete%20et%20al%20%282005%29%20oikos%20108-125.pdf>.

This project may cause significant effects because regen logging will contribute to the cumulative emissions of greenhouse gases that are causing global climate change. See IPCC Reports. NEPA does not allow agencies to avoid disclosure and consideration of alternatives and mitigation.

CEQ recognizes that many agency NEPA analyses to date have concluded that GHG emissions from an individual agency action will have small, if any climate change effects. Government action occurs incrementally, program-by-program and step-by-step, and climate impacts are not attributable to any single action, but are exacerbated by a series of smaller decisions, including decisions made by the government. Therefore, the statement that emissions from a government action or approval represent only a small fraction of global emissions is more a statement about the nature of the climate change challenge, and is not an appropriate basis for deciding whether to consider climate impacts under NEPA.

Moreover, these comparisons are not an appropriate method for characterizing the potential impacts associated with a proposed action and its alternatives and mitigations. This approach does not reveal anything beyond the nature of the climate change challenge itself: The fact that diverse individual sources of emissions each make relatively small additions to global atmospheric GHG concentrations that collectively have huge impact.

77 Fed. Reg. 77802, 77825. (Dec. 24, 2014). On March 28, 2017 the Trump Administration issued an executive order titled “Presidential Executive Order on Promoting Energy Independence and Economic Growth” which attempts to relieve agencies from the requirement to consider the effects of GHG emissions and climate change. <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1>. Among other things, this executive order rescinds the CEQ guidance regarding consideration of climate change in federal decision-making, but the E.O. also recognizes that “[t]his order shall be implemented consistent with applicable law” and “all agencies should take appropriate actions to promote clean air and clean water for the American people, while also respecting the proper roles of the Congress and the States concerning these matters in our constitutional republic.” The Trump administration seems to ignore the Constitutional principle that the job of the executive branch is to faithfully implement the will of Congress expressed through proper lawmaking. Congress passed NEPA which requires agencies to take a “hard look” at ALL relevant direct, indirect, and cumulative effects of major federal actions. The Trump administration cannot tell agencies to put on blinders to the effects of GHG emissions and climate change because NEPA requires that they take the blinders off. In short, Trump’s executive order attempts to unilaterally amend an act of Congress. This is not a proper exercise of executive authority. The

agencies must therefore continue to carefully consider the effects of GHG emissions and climate change in all of their decisions.

Every decision subject to NEPA should recognize climate change as a reasonably foreseeable event and should carefully consider and analyze the issue of climate change from two perspectives: **first**, the cumulative effects of the proposed action plus the anticipated effects of climate change on the resources directly and indirectly affected the proposal, and **second** the extent to which the proposed action (and alternatives) will tend to mitigate or exacerbate climate change by directly or indirectly emitting or sequestering greenhouse gases from both fossil deposits and the biosphere. This will help meet the objectives of NEPA by leading to more informed decision-making at all levels of government. See Petition Requesting That The Council On Environmental Quality Amend Its Regulations To Clarify That Climate Change Analyses Be Included In Environmental Review Documents. The International Center for Technology Assessment, NRDC, Sierra Club. February 28, 2008. <http://web.archive.org/web/20100307220404/http://www.icta.org/doc/CEQ%20Petition%20Final%20Version%202-28-08.pdf>.

### III. Remedy

For all of the above-stated reasons, the Decision Record for the Upper Rock Divide Timber Sale should be withdrawn, the FONSI voided, and an EIS prepared. Additional alternatives that would better protect the environment, in particular human health, need to be considered.

Thank you for thoughtfully considering this protest.

Sincerely,



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Attachments:

Urness, 4/1/2020, "Can you hike, fish or bike in Oregon after Brown's coronavirus order? Here's the details" *Salem Statesman Journal* (updated 4/9)

*The Oregonian*, 4/9/2020, "Swanson Group plywood mill laying off 300 workers in Douglas County due to coronavirus"

Urness 4/7/2020, "Oregon Forests remain open for logging and timber sales during coronavirus pandemic," *Salem Statesman Journal*.

Sickinger, 4/4/2020, "Coronavirus undercuts Oregon's wood products industry, Forestry Department budget," *The Oregonian/OregonLive*.

Executive Order 20-12 *Stay Home, Save Lives*.