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UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON

HELLS CANYON PRESERVATION  
COUNCIL, and OREGON WILD,  
Oregon non-profit corporations,

Plaintiffs,

v.

The UNITED STATES FOREST SERVICE,  
a department of the United States Department  
of Agriculture,

Defendant.

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Case No.: 07-1134-SU

MEMORANDUM IN SUPPORT  
OF PLAINTIFFS' MOTION FOR  
PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

## TABLE OF CONTENTS

INTRODUCTION.....	1
STANDARD OF REVIEW.....	2
LEGAL AND FACTUAL BACKGROUND.....	3
<b>I.    National Environmental Policy Act.....</b>	<b>3</b>
<b>II.   National Forest Management Act.....</b>	<b>5</b>
<b>III.  The Wallowa-Whitman Land and Resource Management Plan.....</b>	<b>8</b>
A. <u>Management Indicator Species.....</u>	8
B. <u>Road Densities.....</u>	9
<b>IV.   The Bald Angel Vegetation Management Project.....</b>	<b>10</b>
JURISDICTION.....	12
ARGUMENT.....	13
<b>I.    Plaintiffs Are Likely To Succeed On The Merits And Have Raised Serious Questions.....</b>	<b>13</b>
A. <u>The Bald Angel EA violates NEPA by failing to adequately analyze the direct, indirect and cumulative impacts of the project.....</u>	13
1. <i>The EA fails to disclose the direct and indirect impacts of the project.....</i>	14
a.    Pileated Woodpecker and pine marten.....	14
b.    Primary cavity excavators.....	18
c.    Elk.....	19
2. <i>The EA fails to disclose the cumulative impacts of the project.....</i>	22
B.    The Bald Angel Project violates NFMA because it fails to comply with the Wallowa-Whitman LRMP and NFMA regulations.....	24
MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION	

1.	<i>The Bald Angel Project does not comply with LRMP standards</i> .....	24
a.	Management Indicator Species.....	25
b.	Old growth.....	27
c.	Road density.....	29
i.	<u>The project does not meet road density standards</u> .....	29
ii.	<u>The Forest Service failed to determine that an exception is needed</u> .....	30
d.	Elk cover.....	31
2.	The Forest Service violated the 2000 NFMA regulations by failing to consider the best available science for the Bald Angel Project.....	31
<b>II.</b>	<b>Plaintiffs Will Suffer Immediate And Irreparable Injury In The Absence Of A Preliminary Injunction</b> .....	33
<b>III.</b>	<b>No Bond Should Be Required In This Case</b> .....	34
	<b>CONCLUSION</b> .....	34

**TABLE OF AUTHORITIES**

Amoco Prod. Co. v. Village of Gambel,  
480 U.S. 531 (1987) .....2, 33

Bark v. U.S. Forest Serv.,  
2007 U.S. Dist. LEXIS 21272 (D. Or. 2007).....31, 32, 33

Blue Mountains Biodiversity Project v. Blackwood,  
161 F.3d 1208 (9th Cir. 1998) .....4, 13

Caribbean Marine Services v. Baldrige,  
844 F.2d 668 (9th Cir. 1988).....2

Citizens for Better Forestry v. U.S. Dept. of Agriculture,  
341 F.3d 961 (9th Cir. 2003).....5

Citizens for Better Forestry v. U.S. Dept. of Agriculture,  
481 F.Supp.2d 1089 (N.D. Cal. 2007).....7

Citizens for Better Forestry v. U.S. Dept. of Agriculture,  
2007 U.S. Dist. LEXIS 51378 (N.D. Cal. July 3, 2007).....7-8

City of Davis v. Coleman,  
521 F.2d 661 (9th Cir. 1975).....13

Defenders of Wildlife v. Johanns,  
2005 U.S. Dist. LEXIS 42273 (N.D. Cal. 2005).....7

Earth Island Inst. v. U.S. Forest Serv.,  
351 F.3d 1291 (9th Cir. 2003).....2, 7, 25

Ecology Ctr., Inc. v. Austin,  
430 F.3d 1057 (9th Cir. 2005).....15, 16, 27

Ecology Ctr., Inc. v. U.S. Forest Serv.,  
451 F.3d 1153 (10th Cir. 2006).....32

Found. on Economic Trends v. Heckler,  
756 F.2d 143 (D.C. Cir. 1985).....13

Forest Watch v. U.S. Forest Serv.,  
410 F.3d 115 (2nd Cir. 2005).....31

<u>Friends of Southeast’s Future v. Morrison,</u> 153 F.3d 1059 (9th Cir. 1998).....	30
<u>Fund for Animals v. Lujan,</u> 962 F.2d 1391 (9th Cir. 1992).....	2
<u>Great Basin Mine Watch v. Hankins,</u> 456 F.3d 955 (9th Cir. 2006).....	23
<u>Hells Canyon Preservation Council v. Haines,</u> 2006 U.S. Dist. LEXIS 54884 (D. Or. Aug. 4, 2006).....	30
<u>Idaho Sporting Congress v. Alexander,</u> 222 F.3d 562 (9th Cir. 2000).....	2
<u>Idaho Sporting Congress v. Rittenhouse,</u> 305 F.3d 957 (9th Cir. 2002).....	27
<u>Idaho Sporting Congress v. Thomas,</u> 137 F.3d 1146 (9th Cir. 1998) .....	17
<u>Inland Empire Pub. Lands Council v. U.S. Forest Serv.,</u> 88 F.3d 754 (9th Cir. 1996).....	6
<u>Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Management,</u> 387 F.3d 989 (9th Cir. 2004) .....	5, 15, 17, 19, 22
<u>Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.,</u> 373 F.Supp.2d 1069 (E.D. Cal. 2004).....	22
<u>Lands Council v. McNair,</u> 2007 U.S. App. LEXIS 15749 (9th Cir. July 7, 2007).....	15
<u>Lands Council v. Forester of Region One of the U.S. Forest Serv.,</u> 395 F.3d 1019 (9th Cir. 2005).....	23, 27
<u>League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.,</u> 2004 U.S. Dist. LEXIS 24413 (D. Or. Nonv. 19, 2004).....	24
<u>Los Angeles Memorial Col. v. Nat’l Football League,</u> 634 F.2d 1197 (9th Cir. 1980).....	2

<u>Metcalf v. Daley</u> , 214 F.3d 1135 (9th Cir. 2000).....	4
<u>Motor Vehicles Mfrs. Ass’n v. State Farm Mutual Auto Ins. Co.</u> , 463 U.S. 29 (1983).....	18, 30
<u>Muckleshoot Indian Tribe v. U.S. Forest Serv.</u> , 177 F.3d 800 (9th Cir. 1999).....	22
<u>Nat’l Wildlife Fed’n. v. Coston</u> , 773 F.2d 1513 (9th Cir. 1985).....	3
<u>Neighbors of Cuddy Mountain v. U.S. Forest Serv.</u> , 137 F.3d 1132 (9th Cir. 1998).....	29
<u>Ocean Advocates v. U.S. Army Corps of Engineers</u> , 402 F.3d 846 (9th Cir. 2005).....	21
<u>Or. Natural Resources Council v. Bureau of Land Management</u> , 470 F.3d 818 (9th Cir. 2006).....	4, 22
<u>Or. Natural Resources Council v. Brong</u> , 492 F.3d 1120 (9th Cir. 2007).....	23
<u>Pacific Rivers Council v. Thomas</u> , 30 F.3d 1050 (9th Cir. 1994).....	33
<u>People ex rel. Van de Kamp v. Tahoe Regional Plan</u> , 766 F.2d 1319 (9th Cir. 1985).....	34
<u>Portland Audubon Soc’y v. Lujan</u> , 795 F.Supp. 1489 (D. Or. 1992), aff’d <u>Portland Audubon Soc’y v. Babbitt</u> , 998 F.2d 705 (9th Cir. 1993).....	33
<u>Republic of the Phillipines v. Marcos</u> , 862 F.2d 1355 (9th Cir. 1988).....	3
<u>Robertson v. Methow Valley Citizens</u> , 490 U.S. 332 (1989).....	3, 13
<u>Seattle Audubon Soc’y. v. Evans</u> , 771 F.Supp. 10812 (W.D. Wash. 1991), aff’d 952 F.2d 297 (9th Cir. 1991) .....	34

<u>Sierra Club v. U.S. Dept. of Agriculture</u> , 1995 U.S. Dist. LEXIS 21507 (S.D. Ill. Sept. 25, 1995), aff'd 1997 U.S. App. LEXIS 14635 (7th Cir. 1997).....	21
<u>Thomas v. Peterson</u> , 753 F.2d 754 (9th Cir. 1985).....	33
<u>Wilderness Soc'y v. Tyrrel</u> , 701 F.Supp. 1474 (E.D. Cal. 1988), rev'd on other grounds 918 F.2d 813 (9th Cir. 1990).....	34

STATUTES

5 U.S.C. § 551(13) .....	12
28 U.S.C. § 1331 .....	12
28 U.S.C. § 2201.....	12
28 U.S.C. § 2202 .....	12
16 U.S.C. § 1604(a).....	5
16 U.S.C. § 1604(g)(2)(B).....	6
16 U.S.C. § 1604(g)(3).....	5
16 U.S.C. § 1604(g)(3)(B).....	5, 6
16 U.S.C. § 1604(g)(3)(C).....	6
16 U.S.C. § 1604(i).....	5, 24
42 U.S.C. § 4331 .....	3
42 U.S.C. § 4332(2)(C).....	3

REGULATIONS

36 C.F.R. § 219.12 (1982) .....	6
36 C.F.R. § 219.19 (1982) .....	6
36 C.F.R. § 219.19(a) (1982) .....	6

36 C.F.R. § 219.19(a)(1) (1982) .....	6
36 C.F.R. § 219.19(a)(6) (1982) .....	6
36 C.F.R. § 219.26 (1982) .....	6
36 C.F.R. § 219.35 (2000) .....	6
36 C.F.R. § 219.35(d) (2000) .....	31
40 C.F.R. § 1500.1(b).....	4, 13
40 C.F.R. § 1502.16 .....	13
40 C.F.R. § 1502.16(a) .....	4
40 C.F.R. § 1502.16(b) .....	4
40 C.F.R. § 1502.24.....	21
40 C.F.R. § 1508.7 .....	4, 13, 21
40 C.F.R. § 1508.9 .....	4
40 C.F.R. § 1508.8.....	4

FEDERAL REGISTER

64 Fed. Reg. 54,074 (Oct. 5, 1999).....	6-7
69 Fed. Reg. 58,055 (Sept. 29, 2004).....	7, 31
70 Fed. Reg. 1022 (Jan. 5, 2005).....	7

## INTRODUCTION

The Bald Angel Vegetation Management Project would log over 4,000 acres of forest, including conversion of 997 acres of multi-storied old growth forest to single story forest, both of which are below historic levels in the project area. Multi-storied old growth forest provides critical habitat for pine marten and pileated woodpecker and important cover habitat for Rocky Mountain elk, all of which are Management Indicator Species on the Wallowa-Whitman National Forest. The project will also build nearly 7 miles of new roads within an area already well above road density standards established by the Forest Plan for the protection of elk and other forest resources, opening up more acres of forest to off-road vehicles and firewood cutters. Logging and road building could have severe consequences for wildlife species the Forest Service itself has designated as representing the health of other species on the forest. Yet, the Forest Service reached its decision to log over 10 million board feet without the benefit of any monitoring data on these species that would inform them of the consequences of such logging. Moreover, although the Forest Service plans to close some roads years after logging occurs, the agency ignored its own data regarding the effectiveness of such closures and the impacts of additional road building on species like Rocky Mountain elk. The Forest Service also failed to consider the cumulative impacts of this project in conjunction with the extensive grazing that occurs throughout the area.

In short, this project runs afoul of the National Environmental Policy Act, the Wallowa-Whitman Land and Resource Management Plan and the National Forest Management Act. A preliminary injunction is necessary to ensure impacts do not occur before this Court can rule on the legality of the project.

## STANDARD OF REVIEW

The Ninth Circuit employs a two-pronged test in assessing the propriety of a preliminary injunction. Plaintiffs “must demonstrate either a combination of probable success on the merits and the possibility of irreparable injury or that serious questions are raised and the balance of hardships tips in its favor.” Idaho Sporting Congress, Inc. v Alexander, 222 F.3d 562, 565 (9<sup>th</sup> Cir. 2000) (citations and internal quotations omitted); see also Earth Island Institute v. U.S. Forest Serv., 351 F.3d 1291, 1298 (9<sup>th</sup> Cir. 2003). “These two formulations represent two points on a sliding scale in which the degree of irreparable harm increases as the probability of success decreases.” Id. The traditional test for injunctive relief has been modified in environmental cases. Environmental suits involve the public interest, and therefore, “where the balance of hardships tips decidedly toward the plaintiff, the district court need not require a robust showing of likelihood of success on the merits, and may grant preliminary injunctive relief if the plaintiff’s moving papers raise ‘serious questions’ on the merits.” Caribbean Marine Services v. Baldrige, 844 F.2d 668, 674 (9<sup>th</sup> Cir. 1988) (citing Los Angeles Memorial Col. v. Nat’l Football League, 634 F.2d 1197, 1203, n. 9 (9<sup>th</sup> Cir. 1980)); Fund for Animals Inc v. Lujan, 962 F.2d 1391, 1400 (9<sup>th</sup> Cir. 1992).

The nature of public resources involved in an environmental suit also lessens plaintiffs’ burden of showing irreparable harm. “Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment.” Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987).

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

## LEGAL AND FACTUAL BACKGROUND

### I. National Environmental Policy Act

The National Environmental Policy Act (NEPA) “declares a broad national commitment to protecting and promoting environmental quality.” Robertson v. Methow Valley Citizens, 490 U.S. 332, 348 (1989); see also 42 U.S.C. § 4331. “To insure this commitment is infused into the ongoing programs and actions of the Federal Government, the act also establishes some important ‘action-forcing’ procedures.” Robertson, 490 U.S. at 348 (citing 115 Cong. Rec. 40416 (remarks of Sen. Jackson)). NEPA directs that, to the fullest extent possible, all federal agencies must prepare an Environmental Impact Statement (EIS) whenever they propose “major federal actions significantly affecting the quality of the environment.” 42 U.S.C. § 4332(2)(C); Robertson, 490 U.S. at 348.

NEPA’s disclosure goals are twofold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) “to insure that the public has sufficient information to challenge the agency.” Robertson, 490 U.S. at 349. By focusing the agency’s attention on the environmental consequences of its proposed action, NEPA “ensures

that important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast.” Id. Thus, NEPA requires federal agencies to analyze and disclose the direct, indirect and cumulative impacts of their actions. 40 C.F.R. §§ 1502.16(a), 1502.16(b), 1508.7.

“A threshold question in a NEPA case is whether a proposed project will ‘significantly affect’ the environment, thereby triggering the requirement for an EIS.” Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1212 (9<sup>th</sup> Cir. 1998) (citing 42 U.S.C. 4332(2)(C)). “As a preliminary step, an agency may prepare an [Environmental Assessment] (EA) to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS.” Id. (citing 40 C.F.R. § 1508.9). “The purpose of an EA is to provide the agency with sufficient evidence and analysis for determining whether to prepare an EIS or to issue a [Finding of No Significant Impact].” Metcalf v. Daley, 214 F.3d 1135, 1143 (9<sup>th</sup> Cir. 2000) (citing 40 C.F.R. § 1508.9). “Because the very important decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making process.” Id.; see also 40 C.F.R. § 1500.1(b).

“Through the NEPA process, a federal agency must “take[] a ‘hard look’ at the potential environmental consequences of the proposed action.” Or. Natural Resources Council v. Bureau of Land Management, 470 F.3d 818, 820 (9<sup>th</sup> Cir. 2006) (internal quotations omitted). An agency must consider the direct and indirect impacts of the proposed project in its NEPA document. 40 C.F.R. § 1508.8. The agency must also consider the cumulative impacts of the project. Cumulative impacts result when the “incremental impact of the action [is] added to other past, present, and reasonably foreseeable future actions” undertaken by any person or agency. Id. at § 1508.7. “A proper consideration of the cumulative impacts of a project requires some

quantified or detailed information; general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.” Klamath Siskiyou Wildlands Ctr. v. Bureau of Land Management, 387 F.3d 989, 993 (9<sup>th</sup> Cir. 2004) (internal quotations omitted).

## **II. National Forest Management Act**

In 1976 Congress enacted the National Forest Management Act (NFMA), 16 U.S.C. §§ 1600-1614, which governs the Forest Service’s management of the national forests. NFMA establishes a two-step process for forest planning. It first requires the Forest Service to develop, maintain and revise Land and Resource Management Plans (LRMPs) for each national forest. 16 U.S.C. § 1604(a). The LRMP guides natural resource management activities forestwide, setting standards, management area goals and objectives, and monitoring and evaluation requirements. Implementation of the LRMP occurs at the site-specific level. Once the LRMP is in place, the Forest Service assesses site-specific actions, such as the Bald Angel Project, in the second step of the forest planning process. Site-specific decisions must be consistent with the broader Forest Plan. 16 U.S.C. § 1604(i). NFMA also created substantive requirements at both steps in the forest planning process. See 16 U.S.C. § 1604 (g)(3). Among these substantive requirements is the duty to provide for the diversity of plant and animal communities. Id. at § 1604(g)(3)(B).

In 1979, the U.S. Department of Agriculture (USDA) promulgated a rule containing the first set of national forest management regulations. Citizens for Better Forestry v. U.S. Dept. of Agriculture, 341 F.3d 961, 966 (9<sup>th</sup> Cir. 2003). In 1982, USDA issued substantial revisions to the 1979 Rule. Id. at 966. The 1982 Rule “set out a comprehensive approach to forest management, implementing the statutory directive.” Id. The 1982 Rule established specific standards and

guidelines for developing, adopting, and revising forest plans, 36 C.F.R. § 219.1 (1982) and for undertaking site-specific actions. See e.g., Inland Empire Pub. Lands Council v. U.S. Forest Service, 88 F.3d 754, 760 n.6 (9<sup>th</sup> Cir. 1996). The 1982 Rule imposed many wildlife management obligations, including that “wildlife habitat shall be managed to maintain viable populations,” and defining a viable population as “one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the [relevant] area.” Citizens for Better Forestry, 341 F.3d at 966 (citing 36 C.F.R. § 219.19 (1982)).

The 1982 regulations require the Forest Service to designate Management Indicator Species (MIS) within each forest in an LRMP. 36 C.F.R. § 219.19(a)(1) (1982). Species selected as MIS are selected because their population changes are believed to indicate the effects of management activities on other species with similar habitat needs. Id. at § 219.19(a). By monitoring and analyzing impacts to MIS, the Forest Service is able to gauge the overall health and trends of other species within the forests, without incurring the time and expense of studying each species individually. 36 C.F.R. § 219.19(a)(1); 16 U.S.C. § 1604(g)(3)(B). Accordingly, the Forest Service is required to assess the impacts of all proposed projects on MIS and “estimate the effects of each [action] alternative on fish and wildlife populations.” 36 C.F.R. § 219.19(a)(1); Inland Empire, 88 F.3d at 760 n.6.

To assess impacts, the Forest Service must gather quantitative baseline population data and monitor population trends of MIS. 16 U.S.C. § 1604(g)(3)(C); 36 C.F.R. § 219.19(a)(6), 219.26. NFMA and the 1982 regulations require that “each Forest Supervisor shall obtain and keep current inventory data appropriate for planning and managing the resources under his or her administrative jurisdiction.” 36 C.F.R. § 219.12(d); see also 16 U.S.C. § 1604(g)(2)(B).

In 1999, USDA proposed a revision of the 1982 Rule. 64 Fed. Reg. 54,074 (Oct. 5,

1999). On November 9, 2000, USDA published a final rule that was “not accompanied by any environmental or endangered-species analysis,” although it noted the existence of an EA. Id. The 2000 Rule included a transition provision which provided that site-specific actions were to continue to be governed by the 1982 Rule until November 9, 2003, after which they were to conform to the 2000 Rule. 36 C.F.R. § 219.35(d); 65 Fed. Reg. at 67,563; Defenders of Wildlife v. Johanns, 2005 U.S. District LEXIS 42273, \*7 (N.D. Cal. 2005) (“the 1982 Planning Regulations were to continue to govern site-specific Forest Service decisions until November 9, 2003).

In September 2004, USDA issued a rule interpreting the transition provision contained in the 2000 Rule to mean that the 1982 Rule was no longer in effect and had not been in effect since the 2000 Rule was adopted on November 9, 2000, at least for site-specific projects. 69 Fed. Reg. 58,055, 58,057 (Sep. 29, 2004)<sup>1</sup>. According to this rule, the only requirement governing any national forest timber sale or other site-specific project from November 9, 2000 until January 5, 2005, was that the Forest Service “consider” the “best available science.” Id.

Having previously published a draft rule to replace the 2000 Rule on December 6, 2002, 67 Fed. Reg. 72,770, USDA promulgated a new rule on January 5, 2005, and made it effective immediately. 70 Fed. Reg. 1023 (2005) (codified at 36 C.F.R. pt. 219). USDA simultaneously removed the 2000 Rule in its entirety. 70 Fed. Reg. 1022 (2005). Recently, the U.S. District Court for the Northern District of California enjoined the implementation of the 2005 NFMA planning rules holding that the rules violated NEPA and the Endangered Species Act. Citizens for Better Forestry v. U.S. Dept. of Agriculture, 481 F.Supp.2d 1089 (N.D. Cal. 2007). The injunction applies nationwide. Citizens for Better Forestry v. U.S. Dept. of Agriculture, 2007

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<sup>1</sup> The 1982 regulations continue to govern LRMPs developed under those rules. Earth Island Institute v. U.S. Forest Serv., 442 F.3d 1147, 1173 (9<sup>th</sup> Cir. 2006).

U.S. Dist. LEXIS 51378, \*56 (N.D. Cal. July 3, 2007).

### **III. The Wallowa-Whitman Land and Resource Management Plan**

The Wallowa-Whitman Land and Resource Management Plan (LRMP) is the land use plan governing the management of public lands on the Wallowa-Whitman National Forest (WWNF). The LRMP sets out mandatory standards and guidelines for management of various resources within the national forest. The LRMP also includes monitoring requirements to “ensure that activities reasonably conform to the management area direction and that outputs satisfy the objectives of the plan.” LRMP (Exhibit A) at 5-2.

#### **A. Management Indicator Species**

The LRMP incorporates the 1982 NFMA regulation requirements that the Forest Service manage fish and wildlife habitat to maintain viable species populations in the planning area. LRMP at 2-9. To that end, the Forest Service chose six species or sets of species as Management Indicator Species (MIS): Rocky Mountain elk, pileated woodpecker, goshawk, pine marten, primary cavity excavators, steelhead and resident trout. Id. The assumption is that if “good habitat is provided” for MIS and “their populations [are] maintained at some desired level,” “adequate habitat is also being provided for other” species that rely on similar habitat. Id.

The LRMP sets a minimum population level for viable populations of pileated woodpeckers at 346 pairs in Decade 1 and 330 pairs in Decade 2. Id. at 4-7. Population trends for pine marten are “expected to parallel pileated woodpecker.” Id. at n. 3. In order to help maintain viable populations of old growth dependent MIS, the LRMP designated “Old Growth Preservation” areas (also known as Management Area 15 or MA-15). Id. at 4-89. MA-15 provides 36,750 acres of designated old growth in addition to old growth found in other management areas such as Wilderness. Id. Where inventories show that MA-15 areas “are not

truly in an old growth condition,” the Forest Service must “select alternative stands” for MA-15 protection. Id.

The LRMP also designated big game winter range (also known as Management Area 3 or MA-3) where “timber management is designed to provide near-optimum cover and forage conditions.” Id. at 4-60. Where logging within designated winter range “converts a site from satisfactory or marginal cover to a forage status” the Forest Service must ensure that “at least 80 percent of the treated area is within 600 feet of a satisfactory cover patch at least 40 acres in size. Id. at 4-61.

In order to confirm the assumptions of the LRMP that management designations are providing sufficient habitat to maintain viable populations of old growth MIS, the LRMP requires monitoring of MA-15 habitat, and population monitoring for pileated woodpecker and pine marten. Id. at 5-9, 5-10, 5-44, 5-47. For example, the Forest Service must conduct field sampling of population levels of pileated woodpecker and pine marten in suitable habitat on an annual basis. Id. at 5-10.

#### B. Road Densities

The LRMP provides that road densities within Timber Production Emphasis areas (also known as Management Area 1 or MA-1) are “limited to 2.5 miles per square mile.” Id. at 4-56. The LRMP also provides that within MA-3, open road densities are limited to 1.5 miles per square mile. Id. at 4-60.

The Standards and Guidelines for the forest transportation system provide that the Forest Service must “[m]eet the specific open-road density guidelines found in the direction for individual management areas unless a specific exception is determined through the Forest Service NEPA process, to be needed to meet management objectives.” Id. at 4-35. “Decisions to

leave open road densities greater than the guidelines are expected to be the exception rather than the rule.” Id. at 4-35, n.3.

#### **IV. The Bald Angel Vegetation Management Project**

In March 2006, the Forest Service released an Environmental Assessment (“EA”) for the Bald Angel Project. Plaintiffs submitted timely comments to the Forest Service, Exhibit B, and the agency issued a decision on May 10, 2006. On June 26, 2006, Plaintiffs filed an administrative appeal of the decision. The Forest Service withdrew the decision in July 2006.

In December 2006, the Forest Service released a second EA for the Bald Angel Vegetation Management Project. Exhibit C. The EA considered three “action” alternatives in addition to the “no action” alternative. Id. at 36-46. The Bald Angel analysis area contains 36,700 acres. Id. at 1. The analysis area encompasses seven subwatersheds within the Powder River/Pondosa and Powder River/Keating watersheds. Id.

The timber sale would log 10.9 million board feet of timber on approximately 4,193 acres of land in the La Grade Ranger District of the WWNF using tractor, skyline and helicopter yarding systems. Decision Notice (Exhibit D) at 2, 4. The timber sale also includes prescribed burning on 13,248 acres over ten years. Id. at 4.

The “open road density” within many of the subwatersheds in the project area currently exceeds road density standards in the LRMP. EA (Exhibit C) at 23. The Bald Angel Project would construct 1.6 miles of new permanent roads, 5.36 miles of new temporary roads and reconstruct 2.26 miles of system roads. Id. at 58. Within three years of completion of the project, the Forest Service will implement “an area closure” for 80 miles of road in the project area. Id. Even with the closure, the open road density in five subwatersheds will remain above standards. Id. at 124.

The Bald Angel Timber Sale will convert 1,357 acres of satisfactory elk cover to marginal cover, 25 acres of satisfactory cover to forage, and 2,771 acres of marginal cover to forage. Id. at 77. The EA fails to disclose the proximity of the timber sale units that will be converted from cover to forage to satisfactory cover patches in elk winter range.

Approximately 6% of the analysis area is in a “late/old condition” (i.e. old growth forest). Id. at 12. The timber sale involves thinning 1,237 acres of multi-story old growth forest, including 997 acres of logging to convert multi-storied old growth to single story forest. Id. at 41, 59. Both multi-story and single story old growth are below their historic range of variability in most of the project area. Id. at 41.

MIS, including pine marten, pileated woodpeckers, and elk, inhabit the analysis area and could be affected by this project. Id. at 21, 74, 78. All MA-15 areas, designated to provide habitat for old growth dependent MIS, within the analysis area have a “field rating” below 70% (the percentage that represents “high quality old growth habitat”). Bald Angel: Wildlife Inventory (Exhibit E) at 2. Three known pileated woodpecker breeding territories “could be affected by this project.” EA (Exhibit C) at 128. Although pine marten inhabit the analysis area, little if any habitat in the analysis area exists to support reproductive pairs of the species, due, in part, to fragmentation from logging. Wildlife Inventory (Exhibit E) at 4-5.

Grazing occurs on six allotments within the project area. EA, Appendix D (Exhibit F) at 11. Grazing in August through October “reduces available forage for elk and deer prior to going into rut,” which “can lead to elk and deer going into breeding and winter seasons with less body fat than necessary to survive or successfully reproduce.” Id.

No less than 37 timber sales have occurred within the Bald Angel project area and immediately adjacent lands in the last 30 years. Id. at 2-3. These timber sales included

regeneration, commercial thinning, partial removals, prep cuts, salvage selection, final removal and overstory removal harvest prescriptions. Id. at 2.

Plaintiffs submitted timely comments on this EA. Exhibits H and I. On February 22, 2007, Wallowa Whitman Forest Supervisor, Steven Ellis, issued a Decision Notice and Finding of No Significant Impact for the Bald Angel Project implementing Alternative 3 from the EA, with minor modifications. Decision Notice (Exhibit D) at 1. Plaintiffs timely appealed this decision on April 11, 2007. Exhibit J. On May 29, 2007, Regional Forester Linda Goodman denied the administrative appeal. Exhibit K.

### **JURISDICTION**

Plaintiffs have challenged a final agency action as defined by the APA, 5 U.S.C. § 551(13), pursuant to the Act's judicial review provisions, 5 U.S.C. §§ 701-706. This Court has jurisdiction under 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief).

Plaintiffs have standing because their members regularly use and enjoy, and have plans to continue to use and enjoy, the forested lands and wildlife within the Bald Angel Project for recreational, aesthetic, and educational purposes, including hiking, hunting and wildlife observation. Declaration of Lawrence McLaud (McLaud Decl.) at ¶ 9; Declaration of Tim Lillebo (Lillebo Decl.) at ¶ 3. Plaintiffs interests in this area would be injured by this project. McLaud Decl. at ¶ 10; Lillebo Decl. at ¶ 5. The injury to Plaintiffs caused by the Forest Service's violations of NFMA and NEPA can be remedied by the relief sought in this action. Lillebo Decl. at ¶ 5.

Members of Plaintiff organizations recreate in the project area and have plans to

return to the area. McLaud Decl. at ¶ 9, 11; Lillebo Decl. at ¶ 3, 4. Defendant proposes to log live trees and build new roads, as well as construct skid trails and landings, in an ecosystem where Plaintiffs' members derive substantial recreational and aesthetic benefit from hiking, wildlife observation and hunting. Id. Plaintiffs have established concrete injuries and have standing under NFMA and NEPA to bring the instant case before this court.

## ARGUMENT

### I. Plaintiffs Are Likely To Succeed On The Merits And Have Raised Serious Questions.

#### A. The Bald Angel EA violates NEPA by failing to adequately analyze the direct, indirect and cumulative impacts of the project.

NEPA requires the agency to disclose all foreseeable impacts from projects, whether they are “direct,” “indirect,” or “cumulative.” 40 C.F.R. § 1502.16; Id. at § 1508.7; City of Davis v. Coleman, 521 F.2d 661, 676 (9<sup>th</sup> Cir. 1975). The agency must use high quality information and accurate scientific analysis. 40 C.F.R. § 1500.1(b). NEPA procedures are meant to “ensure that the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger [public] audience.” Robertson, 490 U.S. at 349; see also Found. on Economic Trends v. Heckler, 756 F.2d 143, 147 (D.C. Cir. 1985) (“NEPA's dual mission is thus to generate federal attention to environmental concerns and to reveal that federal consideration for public scrutiny.”). NEPA also “emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” Blue Mountains Biodiversity Project v. Blackwell, 161 F.3d at 1216. The Bald Angel EA is

flawed because the analysis it contains is not detailed enough to allow the decision maker and the public to understand the foreseeable impacts of the project.

1. *The EA fails to analyze the direct and indirect impacts of the project.*

The Bald Angel EA contains little more than conclusory, unsupported statements regarding general impacts to wildlife species.

a. Pileated woodpecker and pine marten

The EA's "analysis" of impacts to pileated woodpecker and pine marten, old growth dependent MIS, is inadequate for two reasons. First, the EA fails to disclose the impacts of converting nearly 1,000 acres of multi-storied old growth forest to single storied forest and the scientific uncertainties inherent in such treatment. Second, the information regarding the impacts of this project on old growth habitat focuses almost exclusively on the purported and unsupported long-term benefits of logging, while downplaying or ignoring the short-term negative impacts, as well as evidence that past logging has resulted in long-term negative effects.

Pileated woodpecker and marten need "large diameter trees, large diameter snags and logs, multiple canopy layers and contiguous forested habitat with low fragmentation" to survive. EA (Exhibit C) at 70. The Bald Angel Project involves commercial thinning on 1,237 acres of old growth forest, *Id.* at 41, including "treatment" of 997 acres of multi-storied old growth forest, which will convert it to single story forest. *Id.* at 72. Both multi-storied old growth forest and single story old growth forest are below their historic range of variability in most of the project area. *Id.* at 12. Yet, the EA contains no analysis of the impacts of this conversion on species like the woodpecker and marten that need multi-storied forests with low fragmentation. The EA's analysis of the impacts of this treatment in its chosen alternative consists of two sentences.

Additionally, 997 acres of existing [multi-storied old growth forest] would receive maintenance type treatments aimed at restoring [single story old growth forest]

character and reducing fuel loading that resulted from fire exclusion. These treatments will not result in a net decrease in [old growth], but will reduce structural complexity in the short-term at the stand scale.

Id. at 74. Merely reciting the number of acres to be harvested “is not a sufficient description of the actual environmental effects that can be expected from logging those acres.” Klamath Siskiyou Wildlands Ctr., 387 F.3d at 995. The Forest Service has a duty to disclose the impacts of old growth conversion on the species that rely on multi-storied old growth forest for their survival, particularly where only a fraction of the multi-storied old growth that historically existed is present in the project area today. The failure to disclose these impacts violates NEPA. Id.

In addition, the Forest Service failed to disclose any of the scientific uncertainties associated with thinning 1,237 acres of old growth forest, including converting nearly 1,000 acres of multi-storied old growth in the project area. In two recent cases, the Ninth Circuit has held that the Forest Service’s failure to disclose the scientific uncertainty of its decisions to “treat” old growth forest violated NEPA. Ecology Ctr., Inc. v. Austin, 430 F.3d 1057, 1065 (9<sup>th</sup> Cir. 2005); Lands Council v. McNair, 2007 U.S. App. LEXIS 15749, \*13 (9<sup>th</sup> Cir. July 7, 2007). In Ecology Center, the Forest Service sought to “correct uncharacteristic forest development resulting from years of fire suppression.” Id. at 1063. This “treatment” was “designed to leave most of the desirable old-growth trees in place and to improve their health.” Id.

Although treatment may be designed to restore old-growth to ‘historic conditions,’ . . . this can be a misleading concept: for example, information regarding historic conditions is incomplete; altering particular sections of forest in order to achieve “historic” conditions may not make sense when the forest as a whole has already been fundamentally changed; many variables can affect treatment outcomes; and the treatment process is qualitatively different from the ‘natural’ or ‘historic’ processes it is intended to mimic.

Id. (citing Plaintiffs’ arguments). The Ninth Circuit concluded that the Forest Service violated

NEPA because it “treat[ed] the prediction that treatment will benefit old-growth dependent species as a fact instead of an untested and debated hypothesis” and it failed to “address in any meaningful way the various uncertainties surrounding the scientific evidence’ upon which the decision to treat the [] old-growth rests.” *Id.* at 1065.

Ecology Center is directly on point here. Like Ecology Center, the Forest Service here claims that it must treat 997 acres of multi-storied old growth because “past management practices and fire exclusion [have] promoted fir encroachment in the understory.” EA (Exhibit C) at 41; 430 F.3d at 1063. In addition, as in Ecology Center, the Forest Service here asserts it will leave old growth trees in place. *Id.* Moreover, like the Plaintiffs in Ecology Center, Plaintiffs in this case noted in their comments on the EA that attempting to approximate some historic condition may not be appropriate for this environment due to overall changes across the forest as a result of past logging and other management; other variables, such as continued fire suppression, may impact treatment outcomes; and treating old growth is fundamentally different from and may disrupt natural processes. Exhibit B at 2; Exhibit H at 2-3, 41-42; Exhibit G at 35-6; 430 F.3d at 1063.<sup>2</sup> Finally, like Ecology Center, in this case, the Forest Service failed to address these issues or any of the uncertainties surrounding its decision to “treat” multi-storied old growth and simply assumed that the treatment will benefit old growth dependent species. Thus, as in Ecology Center, the Forest Service’s decision to treat old growth forest without analyzing the potential impacts or uncertainties associated with such treatment violates NEPA. 430 F.3d at 1065.

The EA analysis is also inadequate because it repeatedly asserts, without support, that

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<sup>2</sup> Plaintiffs also cited numerous scientific reports and studies in their comments and appeal regarding the negative impacts of open canopy forests on old growth species. Exhibit F at 33-34; Exhibit G at 16-17, 23; Exhibit I at 11, 12, 15-17.

logging throughout the project area will benefit old growth dependent species over time while ignoring the short-term negative impacts, as well as its own evidence that past logging has harmed old growth dependent species. For example, the EA contends “intermediate treatments will accelerate” 2,656 acres of forest toward single story old growth forest and 717 acres of forest toward multi-story old growth forest. EA (Exhibit C) at 74. According to the EA, “these treatments would benefit the [designated old growth] network by increasing connectivity and providing more habitats for reproduction and foraging for both marten and pileated woodpeckers.” Id.

This analysis is problematic for two reasons. First, the Forest Service cites no basis for its conclusions that logging will improve old growth habitat in the long-term. “[W]hile the conclusions of agency experts are surely entitled to deference, NEPA documents are inadequate if they contain only narratives of expert opinions.” Klamath Siskiyou Wildlands Ctr., 387 F.3d at 996; see also Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9<sup>th</sup> Cir. 1998) (“NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion.”). Moreover, the assertion that logging will promote old growth in the long-term is undermined by the Forest Service’s own acknowledgment that past logging has resulted in high fragmentation such that “there are few if any examples of habitat in this analysis area that could support reproductive pairs of . . . species requiring contiguous cover with an old growth component.” Wildlife Inventory (Exhibit E) at 4-5; see also EA (Exhibit C) at 76 (the project area includes “past regeneration harvest areas that have not recovered to support [old growth] associated wildlife species.”), id. at 70 (Logging results in “created openings” that have “led to [old growth dependent] wildlife species being restricted to smaller parcels of habitat, which decreases distribution across their available habitat.”). There is no explanation why the

problems associated with past logging will not be exacerbated by the current logging proposal. Without an explanation, the Forest Service cannot support its conclusion that this timber sale, which includes regeneration and other harvest prescriptions that have been most detrimental to old growth species in the past, will actually benefit those species. Motor Vehicles Manufacturers Ass'n. of the U.S., Inc. v. State Farm Mutual Auto Ins. Co., 463 U.S. 29, 43 (1983) (“the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”) (quotations omitted).

Even if logging could develop old growth more quickly in the long-term, the EA’s analysis entirely fails to consider the short-term impacts of logging on species that require closed canopy, contiguous forests. The long-term development of old growth may be irrelevant if species cannot remain viable during the near term to take advantage of it.<sup>3</sup> Thus, the Forest Service’s failure to adequately analyze the short and long-term impacts of the Bald Angel Project on old growth dependent species violates NEPA.

b. Primary cavity excavators

The EA is also deficient in its analysis of impacts to primary cavity excavators (PCEs). The EA discloses that although snags larger than 12 inches will generally be retained, “the effectiveness of snag habitat is reduced when their context is converted from a closed canopy setting to an open setting.” EA (Exhibit C) at 129. The impacts analysis for each alternative, however, simply recites the number of acres to be logged and states that Alternative 2 “would have the most deleterious effect to wildlife species associated with higher canopy closure, snags and down logs” and Alternative 3 “result[s] in a smaller reduction in snag and log habitat than

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<sup>3</sup> The Forest Service admits that logging will reduce habitat quality in connectivity corridors between old growth patches by reducing canopy closure, structural complexity and log and snag numbers. EA (Exhibit B) at 71.

Alternative 2, but slightly more of a reduction than Alternative 4.” Id. at 130. The EA fails to disclose what the “deleterious effect[s]” associated with any of the alternatives are. The EA also contains a table that estimates the impacts of logging on “tolerance levels” for PCEs based on snag densities 40 years in the future, but contains no analysis of impacts in the short-term. Id. Reciting the number of acres to be logged and noting that “deleterious effects” will occur, without analyzing what those effects are on PCEs is insufficient to meet the requirements of NEPA. Klamath Siskiyou Wildlands Ctr., 387 F.3d at 995.

c. Elk

The EA’s analysis of impacts to elk is inadequate because it fails to disclose the effectiveness of the intended road closures and does not account for temporal lags between road building during project implementation and road closures, which will occur up to five years post-logging. The project area provides winter, summer and transitional habitat for elk. EA (Exhibit C) at 13. Big game security habitat that is impacted by roads is a “key issue” for the Bald Angel Project. Id. High road densities “tak[e] habitat out of production, reduc[e] the effectiveness of cover and increas[e] disturbance to elk.” Id. at 14.

Road densities within many subwatersheds of the project area are well above the road density standards set by the LRMP. Id. at 124. The Bald Angel Project will exacerbate this problem by building 1.6 miles of permanent roads and 5.36 miles of temporary roads. Decision Notice (Exhibit D) at 4. Within approximately two years after logging is completed, .76 miles of road will be decommissioned within the project area. Id.; EA (Exhibit C) at 32. Approximately 15.48 miles of project roads will be closed by signs or barriers after logging is completed.

Decision Notice (Exhibit D) at 4.<sup>4</sup> In addition, an “area closure” for 80 miles of roads within the project area “is expected to be completely implemented within three years of the project completion.” EA (Exhibit C) at 124.

The Forest Service estimates that closure effectiveness on Maintenance Level 1 roads is 50%. “Wallowa-Whitman National Forest La Grande Ranger District, Proposed Bald Angel Project: Area Transportation System & Project Plan, By: Charles LeBold, 3/2004” (LeBold Report, Exhibit L) at 1.<sup>5</sup> This figure is not disclosed in the EA.<sup>6</sup> The impacts analysis for elk assumes the “area closure” of 80 miles of roads will result in 17.25% of the analysis area further than .90 km from an open motorized route, creating “a notable improvement from the current condition,” and “positively influencing the distribution of elk.” EA (Exhibit C) at 78. However, this analysis avoids two important considerations.

First, the baseline analysis of elk habitat effectiveness is based on a Habitat Effectiveness Index (HEI) that considers road densities and distance from open motorized routes. *Id.* at 77. The baseline road densities are likely much higher and the percent of the area greater than .90 km from an open route much lower than that used to calculate the HEI because approximately 50% of closed roads are operating as open roads on the ground. LeBold Report (Exhibit L) at 1. The EA admits that “the impacts of off highway vehicle use on closed roads and cross country travel are not considered in the HEI analysis” and this analysis likely “underestimates the effects of

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<sup>4</sup> Neither the EA, nor the DN discloses how soon after logging completion the necessary signs and barriers could be put in place.

<sup>5</sup> Maintenance Level 1 roads are “designated closed to traffic and are maintained to provide basic custodial care.” LeBold Report (Ex. K) at 2.

<sup>6</sup> The EA does acknowledge potential enforcement difficulties and “increased potential for violations of the area closure” by off-highway vehicles. EA (Ex. B) at 125. The EA also notes that “motorized access occurs on closed roads and cross country” and many roads closed with earthen barricades are actually functioning as open roads. EA (Ex. B) at 14.

motorized access to elk habitat effectiveness.” EA (Exhibit C) at 14. Yet, the EA contains no alternative analysis of impacts to elk and relies on these figures to estimate both the baseline and the impacts that will result from this project.

Second, the analysis of impacts from the road closures is skewed because it is based on 100% effectiveness of the area closure, rather than the Forest Service’s own estimate of 50%. The effects analysis is meaningless if it does not represent the actual on-the-ground impacts based on an understanding of the current and future management situation. 40 C.F.R. § 1502.24 (the agency must “insure the professional integrity, including the scientific integrity of the discussions and analysis in” NEPA documents.); see also Ocean Advocates v. U.S. Army Corps of Engineers, 402 F.3d 846, 866 (9<sup>th</sup> Cir. 2005) (“A patently inaccurate factual contention can never support an agency’s determination that a project will have no significant impact on the environment.”). The failure to account for the effectiveness (or lack thereof) of the road closures in the impacts analysis violates NEPA. Sierra Club v. U.S. Dept. of Agriculture, 1995 US Dist LEXIS 21507 (S.D. Ill. Sept. 25, 1995), aff’d, 1997 US App. LEXIS 14635 (7<sup>th</sup> Cir. 1997) (where environmental analysis is based on the assumption that off-highway vehicle (OHV) users will abide by use regulations, but fails to include an analysis of problems associated with OHV use or the agency’s plans and ability to enforce use limitations, the analysis violates NEPA) .

Further, the impacts analysis fails to account for temporal lags in road closures and the short-term impacts of road building within subwatersheds that already exceed road density standards. As previously noted, this project includes building 1.6 miles of permanent road and 5.36 miles of temporary roads. Decision Notice (Exhibit D) at 4. Although some roads will be closed “at the completion of harvest and project activities,” others will remain open for up to three years post-harvest. Id.; EA (Exhibit C) at 124. The EA should account for the impacts to

elk during project activities (when road densities will increase even further above standards) and until closures are implemented. The failure to consider the short-term impacts of road building and excessive road densities on elk populations violates NEPA. Klamath Siskiyou Wildlands Ctr. v. U.S. Forest Service, 373 F.Supp. 2d 1069, 1085-86 (E.D. Cal. 2004) (Where road closures would not occur until three years after logging commenced, the court held the failure to “disclose or analyze the increased [impact] over the short term” before road closures were implemented violated NEPA.)

2. *The EA fails to analyze the cumulative impacts of the project.*

In order to comply with NEPA, a cumulative impacts analysis must “sufficiently identify or discuss the incremental impact that can be expected from each successive timber sale, or how those individual impacts might combine or synergistically interact with each other to affect the environment.” Klamath Siskiyou Wildlands Ctr., 387 F.3d at 997; Or. Natural Resources Council, 470 F.3d at 823. The Forest Service must not only catalogue past, present and reasonably foreseeable future projects in the area of the proposed sale, but it must also include a “useful analysis of the cumulative impacts” of those projects. Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 809-10 (9<sup>th</sup> Cir. 1999). The requirement to analyze cumulative impacts means the agency must look at the impacts on the environment from the particular action when that action is added to other past, present, and reasonably foreseeable future actions. 40 C.F.R. § 1508.7. The Bald Angel EA fails to include a cumulative impacts analysis that satisfies the requirements of NEPA.

Appendix D to the EA contains a list of past, present and foreseeable future projects in the project area. It discloses that 37 timber sales have occurred in the project area in the last 30 years. See Appendix D (Exhibit F) at 2-3. It also discloses the number of acres and the general

logging prescriptions for each sale. Id. It then includes a “Cumulative Effects Determination Table” that lumps these 37 timber sales into the category of “Past Harvest,” notes “Potential Effects,” whether there will be a “measurable cumulative effect” and the “extent [those effects are] detectable.” Id. at 9-34. The problem with this approach is that the table lacks the detailed analysis necessary to meet the requirements of NEPA. For example, for “Old Growth,” the table indicates the “potential effects” of “past harvest” are “reduc[tion of] canopy closure and structural complexity.” Id. at 9. It notes there will be a “measurable cumulative effect,” but under “extent detectable,” it states merely that “[p]revious harvest reduced the amount of [old growth] within the area. Past harvest has positive and negative effects on species into the foreseeable future.” Id. This type of “vague discussion of the general impact of prior timber harvesting” and the Forest Service’s failure to “discuss[] the environmental impact from past projects on an individual basis” violates NEPA. Lands Council v. Forester of Region One of the U.S. Forest Serv., 395 F.3d 1019, 1027 (9<sup>th</sup> Cir. 2005); see also Or. Natural Resources Council v. Brong, 492 F.3d 1120 (9<sup>th</sup> Cir. 2007) (cumulative impacts analysis “must be more than perfunctory; it must provide a *useful analysis* of the cumulative impacts of past, present, and future projects.”) (emphasis in original); Great Basin Mine Watch v. Hankins, 456 F.3d 955, 971 (9<sup>th</sup> Cir. 2006) (“A proper consideration of the cumulative impacts of a project requires some quantified or detailed information; *general statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided.*”) (citations omitted) (emphasis in original). The cumulative impacts analysis for old growth in the EA itself is no better. Rather than actually addressing cumulative impacts, the EA merely rehashes the impacts of the proposed project itself, which is insufficient to satisfy NEPA. EA (Exhibit C) at 75-76.

The EA also entirely fails to consider the combined impacts of this project with extensive grazing that occurs throughout the planning area. Although the EA considers the impact of logging *on* livestock grazing in the project area, it is silent regarding the cumulative impacts of grazing *in conjunction with* the planned timber sales. *Id.* at 138-140. There are six grazing allotments within the analysis area. Appendix D (Exhibit F) at 6. Appendix D acknowledges impacts to elk and deer caused by livestock grazing, stating that “[g]razing . . . reduces available forage for elk and deer prior to going into the rut. This can lead to elk and deer going into the breeding and winter seasons with less body fat than necessary to survive or successfully reproduce.” *Id.* at 11. The EA concludes that “[t]hese effects will persist and will not change as a result of any of the action alternatives.” EA (Exhibit C) at 79. However, forage availability is merely one component of the health and survival of elk. *See id.* at 77. The EA entirely fails to consider the synergistic impacts of forage reduction, when combined with road building and loss of cover associated with the Bald Angel Project. The failure to take a hard look at the cumulative impacts of logging and grazing violates NEPA. League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv., 2004 U.S. Dist. LEXIS 24413, \*34 (D. Or. Nov. 19, 2004).

B. The Bald Angel Project violates NFMA because it fails to comply with the Wallowa-Whitman LRMP and NFMA regulations.

1. The Bald Angel Project does not comply with LRMP standards.

Under NFMA, a site-specific project must comply with the substantive standards in the LRMP. 16 U.S.C. § 1604(i). The Bald Angel Project is not in compliance with LRMP standards for MIS, old growth protection, road density or elk cover. Thus, the project violates NFMA.

a. *Management Indicator Species*

The LRMP requires the Forest Service to provide for viable populations of MIS. E.g., LRMP (Exhibit A) at 2-9. To accomplish this, the Forest Service designated 36,750 acres of “Old Growth Preservation” areas (MA-15) throughout the national forest, *id.* at 4-16, and developed a monitoring plan to ensure that forest management “satisfies the objectives of the plan.” *Id.* at 5-2. The monitoring plan requires the Forest Service to monitor *populations and habitat* of pileated woodpeckers and pine marten annually, and the LRMP sets a minimum number of pairs that constitute a viable population. *Id.* at 4-7 (minimum number of pairs), 5-10 (population monitoring), 5-44 (pileated woodpecker monitoring), 5-47 (pine marten monitoring). Despite the fact that the Forest Service has conducted little or no monitoring for pine marten and pileated woodpecker to demonstrate that it is providing for viable populations of these species, the agency has authorized logging of multi-storied old growth forest, the necessary habitat for these species, in this timber sale. The decision to log within old growth stands without the benefit of any information demonstrating that such logging can occur without impacting the viability of these species is arbitrary and capricious and not in accordance with the LRMP or NFMA. Earth Island Inst., 442 F.3d at 1176 (Where the LRMP requires population monitoring, the Forest Service’s approval of timber sales “without appropriate or sufficient population . . . data is contrary to the NFMA and governing provisions of the forest plan.”)

The LRMP specifically requires the Forest Service to conduct field sampling of population levels within suitable pileated woodpecker and pine marten habitat on an annual basis. LRMP (Exhibit A) at 5-10. According to the Forest Service’s annual monitoring reports, the agency has failed to conduct the necessary monitoring to confirm the assumptions made in the LRMP. In 1998, monitoring information for these species was “deferred or not reported.”

1998 Report (available at <http://www.fs.fed.us/r6/uma/projects/monitor/98W-WF.html#notreported>). In 1999-2001, the Forest Service conducted no surveys for pileated woodpecker or pine marten. 1999 Monitoring Report (Exhibit M) at W-29, 30; 2000 Monitoring Report (Exhibit N) at W-8; 2001 Monitoring Report (Exhibit O) at W-4, W-8. The agency noted that if these species were “going to continue to be used as management indicators, then both habitat and population monitoring needs to be completed. Without this information, the Forest cannot confirm assumptions made about th[ese] species within the Forest plan.” *Id.* According to a summary of monitoring between 1991 and 2001, the Forest Service has never conducted population monitoring for these species as required by the Forest Plan. 2002 Monitoring Report (Exhibit P) at 8. This report also discloses that many MA-15 areas fail to meet the standards of the LRMP for old growth. *Id.* at 7. The 2003 Monitoring Report indicates that current LRMPs “may not be sustaining minimum viable populations of MIS.” “Blue Mountains Forest Plan Revision, DRAFT Current Management Situation Report” (Exhibit Q) at 56.<sup>7</sup>

The Forest Service’s own documentation establishes that the agency has failed to conduct the population monitoring required by the LRMP and may not be maintaining viable populations of MIS.<sup>8</sup> Yet, the Forest Service has authorized logging in old growth stands in the Bald Angel Project, including thinning 1,237 acres of old growth forest of which 997 acres will be converted from multi-storied old growth forest to single story forest. EA (Exhibit C) at 41, 74. The Ninth Circuit has held that the Forest Service may not continue to “treat” old growth forest through

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<sup>7</sup> The WWNF website (<http://www.fs.fed.us/r6/uma/projects/monitor/>) notes that this report “is the Monitoring & Evaluation Report for 2003.”

<sup>8</sup> The Forest Service admits that “there are few if any examples of habitat in this analysis area that could support reproductive pairs of American marten or other species requiring contiguous cover with an old growth component.” Wildlife Inventory at 4-5.

logging, without verifying that such treatment is not harmful to dependent species. Ecology Ctr., 430 F.3d at 1064.

Just as it would be arbitrary and capricious for a pharmaceutical company to market a drug to the general population without first conducting a clinical trial to verify that the drug is safe and effective, it is arbitrary and capricious for the Forest Service to irreversibly "treat" more and more old-growth forest without first determining that such treatment is safe and effective for dependent species.

Id. The Forest Service provides no evidence that converting 997 acres of multi-storied old growth forest to single story forest, will not harm or jeopardize the viability of species, like pileated woodpecker and pine marten, that rely on multi-layered, contiguous old growth forests.

The Ninth Circuit has also held that the Forest Service may not rely on monitoring habitat as a proxy for monitoring MIS if the habitat trend data is flawed. Lands Council, 395 F.3d at 1036; Idaho Sporting Cong., Inc. v. Rittenhouse, 305 F.3d 957, 970 n.5 (9<sup>th</sup> Cir. 2002). Here, the Forest Service's method of maintaining the necessary habitat for old growth MIS is flawed because its own documentation demonstrates that MA-15 areas are not actually providing sufficient old growth for MIS viability. 2002 Monitoring Report (Exhibit P) at 7; 1999 Monitoring Report (Exhibit M) at W-7; Wildlife Inventory (Exhibit E) at 2. Thus, the Forest Service has violated the LRMP and NFMA by failing to demonstrate it is providing for the diversity of animal species on the forest and ensuring the viability of old growth dependent MIS. Ecology Ctr., 430 F.3d at 1064; Lands Council, 395 F.3d at 1036.

b. *Old Growth*

The LRMP designated MA-15 areas to "maintain habitat diversity, preserve aesthetic values, and to provide old-growth habitat for wildlife." LRMP (Exhibit A) at 4-89. Twenty wildlife species on the forest have a "definite preference for mature and old growth forest." Id. MA-15 areas are intended to "provide the quality habitat needed by those wildlife species

dependent upon mature and old growth [forest].” Id. Thus, where “monitoring or project inventories indicate that stands allocated to old growth . . . are not truly in an old growth condition,” the Forest Service must “select alternative stands” for protection as MA-15. Id.

The Bald Angel Project area contains eleven MA-15 areas totaling 1,171 acres. Wildlife Inventory (Exhibit E) at 2. Each of these areas is below the 70% field rating “representing high quality old growth habitat.” Id. Field ratings, based on 1993 surveys, range from 44.4% to 69.1%. Id. In 1999, the Forest Service monitoring report disclosed that of the 33,750 acres of MA-15 surveyed since 1990 across the forest, only 32% met old growth standards and that management requirements for old growth were not being met. 1999 Monitoring Report (Exhibit M) at W-27. The 2001 Monitoring Report discloses that only 20% of surveyed MA-15 areas met LRMP standards across the forest. 2001 Monitoring Report (Exhibit O) at W-7. Despite the fact that none of the MA-15 areas in the project area are providing “high quality” old growth habitat, and few MA-15 areas across the forest are meeting old growth standards, the Forest Service intends to log old growth stands within the Bald Angel Project without “select[ing] alternative stands” for protection as required by the LRMP. LRMP (Exhibit A) at 4-89.

Logging may preclude protection of the project area old growth stands as MA-15 because human activities must be a subordinate factor and not alter old growth characteristics for an area to qualify for protection under the LRMP. Id. Converting 997 acres of multi-storied old growth forest to single story forest alters many of the characteristics of old growth forest, including multi-layered canopies, trees of many age classes and the snag and log component. Id. Therefore, the decision to log in old growth stands that may qualify as alternate stands for protection as MA-15 is arbitrary and capricious.

c. *Road Density*

The LRMP contains a road density standard that requires the Forest Service to 1) meet the specific road density standards found in the direction for each management area; 2) unless a specific exception is determined, through the Forest Service NEPA process, to be needed to meet management objectives. *Id.* at 4-35. The LRMP sets a road density standard of 2.5 miles/square mile for MA-1 and 1.5 miles/square mile for MA-3. *Id.* at 4-56, 4-62. The Bald Angel Project fails to comply with these standards and, therefore, the Forest Service issued a decision that is inconsistent with the LRMP, in violation of NFMA.

i. The project does not meet road density standards.

The Bald Angel Project does not comply with the numerical standards for MA-1 or MA-3. In order to prove consistency with the LRMP, the Forest Service must demonstrate that open road densities will comply with applicable standards at the sub-watershed level after project implementation. *See Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1377 (9<sup>th</sup> Cir. 1998). The EA does not show that implementation of the project will bring the sub-watersheds into compliance with road density standards. In fact, the Forest Service admits that standards will be exceeded in at least four subwatersheds after implementation of the project. EA (Exhibit C) at 124. Moreover, the Forest Service's calculations are suspect because they fail to consider the "closed" roads that are actually functioning as open roads. *See* Section I.A.1.c *supra*. Therefore, the open road network is likely much higher than that acknowledged by the agency. Because the project does not comply with the LRMP's numerical standards after project implementation, the Forest Service decision violates the LRMP and NFMA.

- ii. The Forest Service failed to determine that an exception is needed.

NFMA requires consistency with procedural as well as substantive components of forest plans. See Friends of Southeast's Future v. Morrison, 153 F.3d 1059, 1068–69 (9<sup>th</sup> Cir. 1998).

The LRMP places a procedural duty on the Forest Service to determine that a project warrants a specific exception from road density standards in order to achieve management objectives.

LRMP (Exhibit A) at 4-35. In other words, a project may deviate from the LRMP standards only if the Forest Service finds that a specific exception is necessary through the NEPA process. Hells Canyon Preservation Council v. Haines, 2006 U.S. Dist. LEXIS 54884, \*30-31 (D. Or. August 4, 2006). The Forest Plan requires this determination because “[d]ecisions to leave open road densities greater than the guidelines are expected [*sic*] be the exception rather than the rule.”

LRMP (Exhibit A) at 4-35, n.3.

This court recently interpreted this same provision of the LRMP in Hells Canyon Preservation Council v. Haines, 2006 U.S. Dist. LEXIS 54884. In that case, the Forest Service argued that its finding that road densities would exceed standards "due to mining and private property access needs, administrative use and needs of other forest users" was sufficient to satisfy the procedural requirements of the LRMP. Id. at \*31. This court held such an explanation was insufficient because “without more analysis, a reviewing court will not have a basis for rational review.” Id. (citing Motor Vehicles Manufacturers Ass’n., 463 U.S. at 43). Thus, this court held that the Forest Service’s failure “to clearly identify and discuss management objectives that require exceptions to the open-road density guidelines” violated the LRMP. Id.

Similarly, in this case, the Forest Service’s explanation regarding exceedances of road density standards is that the project area “includes several major arterial and collector roads that provide access to large portions of the National Forest, private in-holdings and

recreation/irrigation areas as well.” EA (Exhibit C) at 124. There is no analysis regarding whether these are the management objectives that require an exception to road density standards. Further, it appears the Forest Service intends to leave open more than just “major arterial and collector roads.” See “Bald Angel Restoration Proposed Action Area Closure Map” (Exhibit R). As in Haines, the failure to “identify and discuss management objectives that require exceptions to the open-road density guidelines” violates the LRMP and NFMA.

d. *Elk Cover*

The LRMP sets cover proximity requirements for timber sales that convert elk thermal cover to forage. Specifically, within designated winter range, the Forest Service must ensure that “at least 80 percent of the treated area is within 600 feet of a satisfactory cover patch at least 40 acres in size. LRMP (Exhibit A) at 4-61. The Bald Angel Project contains 9,000 acres of designated winter range (MA-3), EA (Exhibit C) at 13, and will convert 2,796 acres of cover to forage. Id. at 77. Yet, the Forest Service failed to demonstrate that it is meeting the cover proximity requirements of the LRMP. The EA contains no analysis to establish that any of the areas converted from cover to forage within MA-3 are within 600 feet of a 40-acre satisfactory cover patch. This failure renders the Bald Angel Project in violation of NFMA.

2. The Forest Service violated the 2000 NFMA regulations by failing to consider the best available science for the Bald Angel Project.

The 2000 regulations require the Forest Service to consider the best available science for all site-specific projects. 36 C.F.R. § 219.35(d) (2000); 69 Fed. Reg. at 58,057; Bark v. U.S. Forest Serv., 2007 U.S. Dist. LEXIS 21272 (D. Or. 2007). The Forest Service has violated NFMA by failing to consider the best available science in developing and authorizing the Bald

Angel Project.<sup>9</sup> This Court, as well as the Second Circuit and the Tenth Circuit have held Forest Service decisions to be arbitrary and capricious where there was nothing in the record that explained what “best available science” entails or how it was considered in developing the challenged timber sales. Bark, 2007 U.S. Dist. LEXIS 21272 at \*19-20; Forest Watch v. U.S. Forest Serv., 410 F.3d 115, 117 (2nd Cir. 2005); Ecology Ctr., Inc. v. U.S. Forest Serv., 451 F.3d 1153, 1191, 1195 (10th Cir. 2006). In this case, the EA is silent as to the “best available science” standard because it was not considered with regards to pileated woodpecker, pine marten, or elk in the planning or approval of this project.

Plaintiffs cited numerous studies regarding pileated woodpecker and pine marten and their habitat needs in their comments and administrative appeal. Exhibit G at 33-34; Exhibit H at 16-17, 23; Exhibit J at 11, 12. However, the Forest Service never considered the findings of any of the cited studies, nor did it explain why these studies do not represent the “best available science.” Instead, the Forest Service relies on a single study (Wisdom 2000) in its analysis of impacts to “Late/Old Structure” without disclosing whether this study is the “best available science.” EA (Exhibit C) at 70-71.

In their comments, Oregon Wild also noted multiple studies regarding the impacts of roads on wildlife species, including elk. Exhibit G at 73-4. Further, the Forest Service’s own documentation (the LeBold Report) notes a recent report (the “Roads Scholar Report”) which shows that field surveys “typically yield[] an increase of open route miles from that indicated by [the] Forest Service [database]” and that “closure effectiveness on [Maintenance Level] 1 roads can be as low as 50%.” LeBold Report (Exhibit L) at 1. However, the Forest Service fails to cite

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<sup>9</sup> In their Complaint, Plaintiffs raised an alternative claim regarding the application and violation of the 1982 NFMA regulations’ requirements for MIS. Complaint at ¶ 56-61. Although Plaintiffs are not addressing that claim at this preliminary stage in the litigation, Plaintiffs reserve their right to pursue that claim at the summary judgment stage.

to any of this information or any other scientific information in its analysis of impacts to elk. See EA (Exhibit C) at 76-80.

As this court recently held,

Although the USFS was obligated to implement the [ ] Timber Sale according to the "best available science" under the 2000 transitional rule, the [ ] EA, DN, and FONSI show that the USFS failed to consider or even mention that standard during the administrative process. Simply put, the 2000 transitional rule provided the USFS with the appropriate standard, and it failed to apply that standard or anything like it. The administrative record lacks any explanation or definition of the "best available science" as well as what, if anything, satisfies this burden.

Bark, 2007 U.S. Dist. LEXIS 21272, at \*19. As in Bark, the Forest Service's failure to consider the "best available science" regarding pileated woodpecker, pine marten and elk in the Bald Angel EA, DN and FONSI is arbitrary, capricious and not in accordance with NFMA. Id. at \*20.

## **II. Plaintiffs Will Suffer Immediate and Irreparable Injury In The Absence Of A Preliminary Injunction.**

Irreparable injury to plaintiffs is imminent, as logging may commence at any time. Courts "have recognized that timber cutting causes irreparable damage and have enjoined cutting when it occurs without proper observance of NEPA procedures and other environmental laws." Portland Audubon Soc'y v. Lujan, 795 F. Supp. 1489, 1509 (D. Or. 1992), aff'd Portland Audubon Soc'y v. Babbitt, 998 F.2d 705 (9<sup>th</sup> Cir. 1993); see also Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1057 (9<sup>th</sup> Cir. 1994) ("timber sales constitute per se irreversible and irretrievable commitments of resources" under ESA); Amoco Production Co., 480 U.S. at 545 (holding that "environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable"); Thomas v. Peterson, 753 F. 2d 754, 764 (9<sup>th</sup> Cir 1985) ("[i]rreparable damage is presumed to flow from a failure properly to evaluate the environmental impacts of a major federal action.").

The Bald Angel Project and its associated road building will result in immediate and irreparable injury to pileated woodpecker, pine marten and elk, among other species already suffering from past mismanagement of the forest. Plaintiffs will also be harmed as their ability to enjoy the old growth forests in the project area and the species that depend on them will be irreparably injured by this project. McLaud Decl. at ¶ 10; Lillebo Decl. at ¶ 5. The “mightiest economy on earth” can certainly afford a temporary stay from proceeding with one timber sale, on public lands, while the Forest Service ensures that it has properly analyzed and disclosed the environmental impacts. See Seattle Audubon Soc’y v. Evans, 771 F.Supp. 1081, 1096 (W.D. Wash. 1991), *aff’d* 952 F.2d 297 (9<sup>th</sup> Cir. 1991).

#### **IV. No Bond Should Be Required In This Case.**

It is well established that in public interest environmental cases the plaintiffs need not post bonds because of the potential chilling effect on litigation to protect the environment and the public interest. Federal courts have consistently waived the bond requirement in public interest environmental litigation, or required only a nominal bond. People ex rel. Van de Kamp v. Tahoe Regional Plan, 766 F.2d 1319 (9<sup>th</sup> Cir. 1985) (no bond); Wilderness Society v. Tyrrel, 701 F. Supp. 1473 (E.D. Cal. 1988), *rev’d* on other grounds, 918 F.2d 813 (9<sup>th</sup> Cir. 1990) (\$100).

#### **CONCLUSION**

For the foregoing reasons, Plaintiffs respectfully request that this Court issue a preliminary injunction enjoining Defendants from proceeding with the Bald Angel Project and ordering Defendant and its agents, assigns, and contractors to immediately cease any ongoing or planned operations, until the Court can address the merits of Plaintiffs’ claims in this lawsuit.

Respectfully submitted this 21<sup>st</sup> day of September, 2007.

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