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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

BARK,

Plaintiff

v.

BUREAU OF LAND MANAGEMENT,

Defendant

Case No.: 3:12-cv-01656-AC

**MEMORANDUM IN SUPPORT OF
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

(Violations of Federal Land Policy and
Management Act; National Environmental
Policy Act; Administrative Procedure Act)

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I. INTRODUCTION

One of the most important habitat features of the temperate rainforests in the Western Cascades is a large dead tree. Commonly known as “snags”, these standing dead trees provide essential food and shelter to over 100 vertebrate species in the Douglas-fir and western hemlock forests of the Pacific Northwest. Approximately 20 percent of all bird species in the Pacific Northwest depend on snags for nesting and feeding and the abundance of snag-dependent species is correlated with the density of suitable snags. AR¹ 548. Over the past 100 years, most of Oregon’s native old-growth forests have been logged, taking with them their potential to grow large, die naturally and become snags that provide essential wildlife habitat. To protect this habitat, the Northwest Forest Plan establishes mandatory minimum snag retention standards for timber sales on federal public lands. AR 13414. In heavily managed forests like the North Fork Clackamas River Watershed, wherein lies the Bureau of Land Management’s (BLM) proposed Airstrip Timber Sale, there are currently too few snags to meet the minimum viable habitat standards of the Northwest Forest Plan. AR 693-4.

In this context, the Airstrip Timber Sale violates both common sense and the law. The proposed sale would log 201 acres of natural second growth forest in the LaDee Flat area, east of Estacada, Oregon. This forest is heavily logged and roaded, but still contains many scattered old-growth trees and, importantly, several large old-growth snags. AR 697. To access 20 acres (10%) of the Airstrip Timber Sale, the BLM proposes to build almost a mile of new road into the area with the highest density of old-growth trees and snags. *Id.* This new road would result in the loss of at least two of the largest snags in the forest, and possibly several old-growth trees. AR 833. In addition, the logging project itself will remove snags throughout all of the timber sale units,

¹ References to the administrative record are denoted “AR.”

resulting in an additional 10% reduction of snags. AR 697. Felling these snags violates the Salem BLM Resource Management Plan and adversely impacts many snag-dependent species in the watershed.

The problems illustrated by this case are widespread. Because of past management practices, snags are deficient throughout the public lands in and around the Mt. Hood area. Despite the clear mandate to retain snags for habitat protection, Plaintiff Bark has observed federal agencies planning multiple timber sales that contribute to this snag deficit. To the best of Plaintiff's knowledge, this is the first timber sale in which the issue of snag retention in commercial thinning sales is ripe for court action in Oregon.

This issue could be resolved in a way that allowed the Airstrip Timber Sale, and others like it, to move forward legally. If the BLM committed to following its Resource Management Plan, the Airstrip Timber Sale could move forward with a plan to preserve all existing snags and legacy trees as well as to create new snags for future habitat and thus both comply with the law and improve habitat conditions for present and future snag-dependent species.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Did the Defendant violate the Federal Land Policy and Management Act (FLPMA) by planning to remove additional snags, when the forest is already below the minimum snag retention standards?
2. Did the Defendant violate the Federal Land Policy and Management Act (FLPMA) by failing to manage for sensitive species and their habitat?
3. Did the Defendant violate the National Environmental Policy Act (NEPA) by failing to take a hard look at the direct and cumulative impacts of the Airstrip Timber Sale on snag-dependent species?

4. Did Defendant violate NEPA by having insufficient information to support its Finding of No Significant Impact (FONSI)?

III. LEGAL BACKGROUND

A. The National Environmental Policy Act

Congress enacted the National Environmental Policy Act (NEPA) in 1969, directing all federal agencies to assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA's disclosure goals are two-fold: (1) to ensure that the agency has carefully and fully contemplated the environmental effects of its action, and (2) to ensure that the public has sufficient information to understand and/or challenge the agency's action. The Council on Environmental Quality (CEQ) promulgated uniform regulations implementing NEPA that are binding on all federal agencies. 42 U.S.C. § 4342, 40 C.F.R. §§ 1500 et seq.

NEPA requires federal agencies to prepare, consider, and approve an adequate Environmental Impact Statement (EIS) for "any major federal action significantly affecting the quality of the human environment." 42 U.S.C. 4332 (2)(c); 40 C.F.R. § 1501.4(a)(1). To determine whether an action requires an EIS, an action agency may prepare an Environmental Assessment (EA). 40 C.F.R. § 1501.4(b). An EA is a concise public document that briefly describes the proposal, examines alternatives, considers environmental impacts, and provides a listing of individuals and agencies consulted. 40 C.F.R. § 1508.9. If the agency makes a finding of no significant impact (FONSI) after the proposed action is adequately analyzed in an EA, then an EIS is not required. *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1356 (9th Cir. 1994). If an agency makes a FONSI, it must supply a "convincing statement of reasons" to explain why a project's impacts are insignificant. *Save the Yaak Comm. v. Block*, 840 F.2d 714,

717 (9th Cir. 1988). "The statement of reasons is crucial to determining whether the agency took a 'hard look' at the potential environmental impact of a project." *Id.*

NEPA documents must consider the direct, indirect, and cumulative environmental impacts of the proposed action. 40 C.F.R. § 1508.8. Direct effects are caused by the action and occur at the same time and place as the proposed project. *Id.* § 1508.8(a). Indirect effects are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. *Id.* § 1508.8(b). Both types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." *Id.* § 1508. Cumulative impact results when the "incremental impact of the action [is] added to other past, present, and reasonably foreseeable future actions" undertaken by any person or agency. *Id.* § 1508.7.

The NEPA regulations promulgated by the CEQ also require the BLM to "ensure the professional integrity, including scientific integrity, of the discussions and analyses" in the NEPA documents that it prepares. 40 C.F.R. § 1502.24. NEPA "declares a broad national commitment to protecting and promoting environmental quality." *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 348 (1989) *see* 42 U.S.C. § 4331. By focusing 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 and the die otherwise cast." *Robertson*, 490 U.S. at 349.

B. Federal Land Policy and Management Act

Congress enacted the Federal Land Policy and Management Act (FLPMA) in 1976, in part "to provide for the management, protection, development, and enhancement of the public lands." 43 U.S.C. § 1701 et seq. Furthermore, Congress expressed its belief that our public land

should “be managed in a manner that will protect the quality of scientific, scenic, historical, environmental, air and atmospheric, water resource, and archeological values.” 43 U.S.C. § 1701(a)(8).

FLPMA establishes requirements for land use planning on public land. FLPMA requires that the BLM, under the Secretary of the Interior, "develop, maintain, and when appropriate, revise land use plans" to ensure that land management be conducted "on the basis of multiple use and sustained yield." 43 U.S.C. §§ 1701(a)(7), 1712(a); see also *Kern v. United States BLM*, 284 F.3d 1062, 1067 (9th Cir. 2002) (holding that FLPMA "requires the BLM to prepare [resource management plans] for the various districts under its control"). The process for developing, maintaining, and revising resource management plans is controlled by federal regulations. 43 C.F.R. §§ 1601.0-1610.8 (2006). Once a land use plan is developed, "[a]ll future resource management authorizations and actions . . . shall conform to the approved plan." 43 C.F.R. § 1610.5-3(a); *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007).

C. Northwest Forest Plan & Salem Resource Management Plan

In 1994, the BLM and the United States Forest Service (USFS) issued a Record of Decision for the Northwest Forest Plan (NFP). The NFP established management requirements for all BLM and USFS land within the range of the northern spotted owl. The NFP is a comprehensive response to a long and bitter legal battle over the scope of logging in the forests that provide habitat for the threatened northern spotted owl. *See Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1300-01 (W.D. Wa. 1994), *aff'd*, *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401 (9th Cir. 1996) (per curiam). Indeed, "[i]t should be borne in mind that the NFP is not an ordinary government land-management strategy; instead, the history and care in its creation

bespeak the massive effort that led to its birth." *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1068 (9th Cir. 2004).

The Salem Resource Management Plan (Salem RMP) is the land use plan governing the management of public lands in the Salem District of the BLM. AR 12274. The Salem District lies within the range of the northern spotted owl so the Salem RMP incorporates the requirements of the NFP. AR 12276.

The Salem RMP incorporates the six basic land allocations created by the NFP, with particular focus on the following three: (1) Late-Successional Reserves; (2) Riparian Reserves; and (3) Matrix. AR 12292-12307. Each land allocation is governed by a different set of Standards and Guidelines. The Airstrip Timber Sale is located primarily in the Matrix. AR 666. Matrix lands are designated to produce a sustainable supply of timber and other forest commodities; provide connectivity between Late Successional Reserves; provide habitat for a variety of organisms associated with both late-successional and younger forests; and provide for "important ecological functions such as . . . maintenance of ecologically valuable structural components such as down logs, snags and large trees." AR 12305. Because of the importance of snag habitat to many species, the Salem RMP twice directs land managers to retain snags at levels sufficient to support species of cavity nesting birds at 40% of potential population levels. AR 12306, 12310. This 40% requirement must be met throughout the Matrix with per acre requirements met on areas averaging no larger than forty acres. *Id.*

The Salem RMP also sets out specific processes to manage special status species on BLM-managed land, which apply to all land designations. AR 12314. First, the BLM determines whether or not special status species are, or may be, present in a project area. Second, the BLM conducts field surveys according to protocol and other established procedures. Next, it identifies

impacts of proposed actions to sensitive species and clearly describes the impacts in environmental analyses. If necessary, it modifies, relocates or abandons a proposed action to avoid contributing to the need to list bureau sensitive species, or their habitats. AR 12314.

D. Administrative Procedure Act

The Administrative Procedure Act (APA) confers a right of judicial review on any person that is adversely affected by agency action. 5 U.S.C. §702. Upon review, the court shall “hold unlawful and set aside agency actions...found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.” 5 U.S.C. § 706(2).

IV. FACTUAL BACKGROUND

A. Airstrip Project Area

The North Fork/Lower Clackamas River Watersheds, in which the Airstrip Timber Sale is located, have been extensively logged and roaded over the past 100 years. AR 4752. As a result of this history, the North Fork Clackamas River Watershed suffers from a lack of large diameter snags and coarse woody debris, while in the Lower Clackamas River Watershed, road densities exceed NFP standards. AR 811-12. However, the forest still contains rare sections of naturally regenerated second growth forest which include legacy old growth trees and snags. Surrounded by recently clearcut private lands and managed plantations on U.S. Forest Service lands, the Airstrip Timber Sale is located in just such an area: a spacious, healthy naturally regrowing forest with several pockets of old-growth legacy trees and snags. AR 667-669. In the midst of degraded surrounding lands, the ecological importance of the habitat found in the project area is heightened.

Some of the most important and rare habitat components in the Airstrip Timber Sale area are the remnant old-growth snags. Snags play an integral role in the ecology of forests:

Tree mortality is an important and natural process within a forest ecosystem. Diseased and damaged trees and logs are key structural components. . . Snag removal may result in long-term influences on forest stands because large snags are not produced in natural stands until trees become large and begin to die from natural mortality. Snags are used extensively by cavity-nesting birds and mammals such as woodpeckers, nuthatches, chickadees, squirrels, red tree voles, and American marten. Removal of snags . . . can reduce the carrying capacity for these species for many years.

Brong, 492 F.3d at 1128, citing NFP, B-8.

As noted in the introduction, large snags provide essential habitat for many cavity-dependent species – including multiple varieties of birds and bats. The hairy woodpecker, red-breasted sapsucker, and pileated woodpecker are present in the project area. Northern flicker and downy woodpecker are also found in and around the project area. AR 694. Of these, the pileated woodpecker is the most reliant on large snags. AR 818. Pileated woodpeckers play a crucial keystone species role in Oregon’s forests, and are directly affected by snag habitat availability. Over two dozen bird species have been shown to use cavities that have been previously excavated by Pileated woodpeckers. AR 61. Species which subsequently use pileated-created cavities to nest or roost include the flammulated owl, the bufflehead, and Vaux’s swifts, which are priority species in Oregon and Washington. Other vertebrate species that use cavities created by pileated woodpeckers include the northern flying squirrel, which is the primary prey of the northern spotted owl, as well as the common merganser, silver haired bat, fisher, and American marten. *Id.*

Five BLM special status bat species² are also presumed to occur in the Airstrip Project Area. AR 821. These bats are associated with decadent live trees and large snags with sloughing bark, which are used variously as solitary roosts, maternity roosts, and hibernacula by bat species associated with Douglas-fir forests. Because old-growth and tall snags with sloughing bark are

² These are the silver-haired bat, long-eared myotis, long-legged myotis, Yuma myotis, and the fringed bat. AR 821.

rare in the Airstrip project area, these species are likely to be present, but in low numbers. AR 821.

B. Airstrip Timber Sale Plan

In the Airstrip Timber Sale, the BLM proposes to commercially thin 201 acres of forest. Commercial thinning is a silvicultural approach that logs approximately half of the live trees in a stand with the intent to increase the growth and vigor of remaining trees. AR 647-8. The BLM estimates that 20 years after thinning, the remaining trees will average 1.2 to 1.9 inches larger in diameter than they would without the logging. AR 670. While the timber sale nominally only includes trees less than 80 years old, there “may be a loss of large diameter remnant trees in Unit 7B and 7A as a result of road construction, landing location and cable yarding corridors.” AR 825.

To facilitate the logging and removal of the trees, the BLM plans to build new 1.6 miles of roads, one of which is located in an area with the highest density of old growth trees and snags. AR 1711. This new road – almost one mile in length – would be used to access 20 acres (or 10%) of the timber sale. AR 87. These 20 acres are located on such steep slopes that all trees cut must be removed with a cable yarding system, which requires making 15 to 20 long, thin clearcuts on the hillslope. AR 1711. The logs pulled up by the cables would rest on 15 to 20 landings (each landing is 60 ft. x 40 ft wide, which massively expands the width of the road) before removal via log truck. AR 1695. Indeed, in this sale the impacts from building the infrastructure to remove the commercial trees from the area may have a much greater environmental impact than the logging itself.

C. Public Participation

Plaintiff Bark participated in every step of the planning process for the Airstrip Timber Sale. Bark consistently raised concerns about the impact of habitat loss on cavity-dependent species. *See* AR 548-50; AR 190-92; AR 60-62. On January 26, 2012, Bark submitted an administrative protest of the sale to the BLM. AR 189-197. Notwithstanding this protest, on February 15, 2012 the BLM held an auction for the Airstrip Timber Sale. AR 171. Before the auction, the BLM sent a Notice to Bidders explaining that the sale was under administrative protest, and advising all bidders that significant delay may occur before award of the sale or before any operations may be undertaken. AR 171. The Airstrip Timber Sale was appraised by the BLM as having a value of \$128.50 per unit, for a total value of \$387,556. AR 169. Freres Lumber Company was the highest bidder for the sale, with a bid of \$323.00 per unit, for a total bid of \$974,168. AR 169. To the best of Plaintiff's knowledge, the contract for the sale has yet to be awarded.

V. JURISDICTION & STANDING

Jurisdiction is proper in this Court under 28 U.S.C. §§ 1331 and 1346 because this action arises under the laws of the United States and involves the United States as a Defendant. An actual, justiciable controversy exists between the parties, and the requested relief is proper under 28 U.S.C. §§ 2201-2202 and 5 U.S.C. §§ 701-706. All available administrative remedies have been exhausted. The challenged agency action is final and subject to this Court's review under 5 U.S.C. § 706.

In order to establish standing under Article III of the Constitution, Plaintiff must show that: (1) it has suffered an "injury in fact" due to Defendant's allegedly illegal conduct, (2) which can fairly be traced to the challenged conduct of the Defendant, and (3) which can be redressed

by a favorable decision. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 923 (D.C. Cir. 2008); *Massachusetts v. EPA*, 549 U.S. 497, 517 (2007); *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 180-81 (2000). An organizational plaintiff can demonstrate standing by showing that it or one of its members suffers injury in fact from the challenged agency action. *See U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 719 (1990); *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 552 (1996).

Plaintiff Bark has standing to bring this action because its members regularly use and enjoy the Airstrip project area, and their use and enjoyment will be adversely affected if the proposed timber sale proceeds as planned. As Candace Larson and Matthew Mavko explain in their standing declarations, they are both longtime Bark members and active volunteers, who have visited the Airstrip project area multiple times for enjoyment and recreation, including bird watching and mushroom harvesting for personal consumption. *See* Decl. of Candace Larson and Decl. of Matthew Mavko (filed herewith). The loss of snag habitat and wildlife diversity that will occur if the Airstrip Timber Sale is logged in contravention of legal requirements would cause a direct injury to their ability to recreate in and enjoy the area. *Id.* This injury can be remedied by the relief sought in this action.

VI. STANDARD OF REVIEW

Summary judgment is appropriate if “there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.” FED. R. CIV. P. 56(c). The Supreme Court encourages District Courts to utilize summary judgment in appropriate cases. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-27 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-49 (1986). Judicial review of administrative actions under FLPMA and NEPA is governed by section 706 of the Administrative Procedure Act. 5 U.S.C. § 706. Under the APA,

“[t]he reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). An agency action is arbitrary and capricious “if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). The arbitrary and capricious standard is deferential, but it does not shield agency decisions from a “thorough, probing, in-depth review.” *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971).

Under the APA, "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.'" *Humane Soc'y of the United States v. Locke*, 626 F.3d 1040, 1048 (9th Cir. Or. 2010). The agency is not entitled to deference where its “conclusions do not have a basis in fact.” *Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife Serv.*, 273 F.3d 1229, 1236 (9th Cir. 2001). Importantly, “an agency’s position that is contrary to the clear language of a forest plan is not entitled to deference.” *Native Ecosystems Council v. U.S. Forest Service*, 418 F.3d 953, 962 (9th Cir. 2005); *Friends of Southeast’s Future v. Morrison*, 153 F.3d 1059, 1069 (9th Cir. 2005). Under the APA, an agency’s decision can be upheld only on the basis of the reasoning found in that decision; the reviewing Court cannot substitute reasons for agency action that are not in the record. *Anaheim Mem’l Hosp. V. Shalala*, 130 F.3d 845, 849 (9th Cir. 1997).

Review for compliance with NEPA consists of “ensuring that the agency has taken a ‘hard look’ at the environmental effects of the proposed action.” *Ctr. for Biological Diversity v.*

U.S. Forest Serv., 349 F.3d 1157, 1166 (9th Cir. 2003). An EA is arbitrary and capricious if it fails to consider an important aspect of the problem, or "offer[s] an explanation that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Sierra Club v. United States Envtl. Prot. Agency*, 346 F.3d 955, 961 (9th Cir. 2003).

VII. ARGUMENT

A. BLM Violated Snag Retention Standards

The Salem RMP directs the BLM to retain snags in a timber harvest unit at levels sufficient to support species of cavity nesting birds at 40% of potential population levels. AR 12306, 12310. This 40% requirement must be met throughout the Matrix with per acre requirements met on areas averaging no larger than forty acres. *Id.* In its Environmental Assessment, the BLM acknowledged that the timber harvest units in the Airstrip Timber Sale do not meet the RMP's minimum snag-retention standard. AR 693-94.

Despite this pre-existing snag deficit, the Airstrip Timber Sale would fell at least two large diameter snags for road construction and cut or knock over approximately 10% of snags larger than 15 inches diameter in every harvest unit.³ While 10% may not seem like a significant number, given the very low number of snags present, this additional loss could have a large impact. Specifically, Unit 7A has **no** recorded snags over 15 inches per acre, Unit 7B

³ While not explicit in the EA, Bark assumes that the BLM bases the 10% overall reduction on the Occupational Health and Safety Administration (OSHA) requirement that snags be felled if they pose danger to human health and safety: "Each danger tree shall be felled, removed or avoided. If the danger tree is not felled or removed, it shall be marked and no work shall be conducted within two tree lengths of the danger tree unless the employer demonstrates that a shorter distance will not create a hazard for an employee." 29 C.F.R. §1910.266(h)(1)(vi). However, this standard also allows the BLM to retain snags if provided adequate buffers.

has 1.1 snags per acre (but few over 25 inches) and Units 18A & B each have 1.4 snags per acre.⁴ AR 693-94.

Not only would the Airstrip Timber Sale decrease the number of existing snags, it would also “remove most of the trees which would die from suppression mortality and create small snags”. AR 339. Thus, the Airstrip Timber Sale would remove both existing snags *and* the trees that would likely become snags in the near future, without any plan to create new snags.⁵ If the Airstrip Sale proceeds as proposed, there will be a time-lag of three to six decades before snag habitat meets the RMP standards. AR 825.

The questions of adequate snag retention in this case are similar to those raised in *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120 (9th Cir. 2007). In *Brong*, the court also evaluated a BLM project that would remove a significant number of snags in a post-fire salvage logging sale. In addressing the issue, the Ninth Circuit stated that the Medford BLM District’s “some-is-enough” approach to snag retention, was not sufficient to comply with the snag-retention requirements of the Medford RMP. *Id.* at 1129. The Court concluded “[t]he BLM’s decision to preserve a baseline number of snags is insufficient in a fundamental way: it neglects to explain why the snag removal it does authorize, which undisputably harms late-successional habitat in the short term, will somehow maintain overall habitat suitability now or in the future, as expressly required by the NFP. See NFP S&G at B-8, C-14. Consequently, the Timbered Rock Project violates FLPMA.” *Id.* at 1131.

⁴ These are far lower than the amount of snags needed per 100 acres to meet the RMP standards, as compared in the BLM’s Wildlife Report. AR 818.

⁵ The BLM acknowledged that “the commercial thinning project does not propose to kill trees specifically to create snags or CWD”. AR 84.

While the issue of snag retention is similar, the Salem BLM's violation of its RMP is even more stark. The Medford RMP guidelines in *Brong* did not actually state the specific amount of snags that must be retained to meet the standards, but rather limited the removal of snags in the following way: "Snags provide a variety of habitat benefits for a variety of wildlife species associated with late-successional forests. Accordingly, following stand-replacing disturbance, management should focus on retaining snags that are likely to persist until late-successional conditions have developed and the new stand is again producing large snags." *Id.* at 1128, citing NFP at C-14.

In contrast, the Salem RMP does provide a quantifiable standard for snag retention that the Airstrip Timber Sale does not meet. AR 12306. Decreasing snags by 10% overall and logging some of the only old growth snags in the entire project area would delay achievement of these crucial habitat requirements by decades. This violates the explicit minimum habitat standards set by the Salem RMP.

A serious focus on meeting the snag retention standards would, at a minimum, require that any project undertaken by the Salem BLM necessarily improve, not degrade, snag habitat. In the Airstrip Timber Sale, this could be achieved by a) buffering all snags larger than 15 inches to avoid cutting as per OSHA requirements; b) removing the proposed road in Unit 7B; and c) taking action to create new snags in the project area. These actions should be the minimum for any project planned in an area that does not currently meet the RMP snag retention standards.

B. BLM Failed to Follow Sensitive Species Guidelines

The Salem RMP sets out specific processes to manage special status species on BLM-managed land. *See supra* at 6, AR 12314. These guidelines are in place to ensure that any agency

action does not contribute to the need to elevate a special species to a higher level of concern. AR 12313.

Under the heading “Bureau Sensitive – Bats”, the Airstrip EA states that four bat species of concern are suspected to occur in the Airstrip Timber Sale area.⁶ AR 695. Bat populations in the area are correlated with snag density. AR 821. In its protest of the decision, Plaintiff raised concerns with the BLM's lack of surveys for bats in the project area to establish baseline populations. In its Protest Denial, the BLM admitted that it did not survey for bats, and that “in the absence of surveys, the BLM assumes that species *are* present and analyzes the impacts accordingly.” AR 84 (emphasis in original). Assuming, then, that there *are* sensitive bat species present in the project area, the BLM’s obligation under the RMP is to “identify impacts of proposed actions to Bureau sensitive species and clearly describe the impacts in environmental analyses”. AR 12314.

The BLM’s Wildlife Specialist’s Report discloses that high value habitat for bats will be lost because of the timber sale:

“In Unit 7B, and 7A some large diameter remnant trees may need to be felled for road construction, landing location and/or to establish cable logging corridors. **Falling two old-growth snags** to facilitate road construction in unit 7B **would reduce high value habitat for bats**, primary excavators and cavity users in the watershed. The minimum number of snags necessary to support species of cavity nesting birds at 40 percent of potential population levels is currently insufficient. Cutting these large snags will further reduce the snag deficit.” AR 833 (emphasis added).

While generally describing the detrimental impact, neither the Wildlife Report nor the EA explain how this loss of high value habitat – especially in the context of a pre-existing snag deficit – impacts the persistence of sensitive species. Without baseline numbers, or an analysis

⁶ The Wildlife Report states that four bat species of concern are suspected to occur and one Bureau Sensitive bat could occur. AR 821. It is unclear why the EA only says that four bat species are in the area.

of the short and long-term impact to population numbers from this habitat loss, the Airstrip Decision Notice concludes that “[t]he project will not contribute to the need to list any BLM Special Status species because . . . no suitable habitat for BLM Special Status species known or likely to be present would be lost, though some habitat will be modified.” AR 322. This conclusion is directly contradicted by the record. The Airstrip Timber Sale, as described in the record at AR 833, AR 702, and elsewhere, is explicitly designed in such a way that it will lose some or all of the best available habitat for special status bats. In order to adequately manage for sensitive bats and follow the direction of the RMP, the BLM must “clearly identify” the impacts to special status species, and “modify, relocate or abandon the proposed action” to protect all remaining high-quality habitat in the project area.

C. BLM Failed to Take a “Hard Look” at the Direct and Cumulative Impacts of Habitat Loss on Snag-dependent Birds and Bats

1. BLM failed to analyze direct impacts

As NEPA was enacted to ensure informed decision making in regards to environmental impacts, federal agencies must “undertake a thorough environmental analysis before concluding that no significant environmental impact exists.” *Native Ecosystems Council*, 428 F.3d at 1239. When reviewing the adequacy of an Environmental Assessment (EA), courts determine whether the agency took a “hard look” at the likely effects of the proposed action. *Id.* The Ninth Circuit has repeatedly explained that generalized, conclusory assertions from agency experts do not constitute a sufficient “hard look”; the agency must provide the underlying data supporting the assertion in language intelligible to the public. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 864 (9th Cir. 2005); *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 996 (9th Cir. 2004) (“*KS Wild*”) (“[W]hile the conclusions of agency experts are surely entitled to deference, NEPA documents are inadequate if they contain only

narratives of expert opinions.”) In the instant case, the Airstrip EA fails to provide enough information about the effect of habitat loss to snag dependent species, including woodpeckers and bats, to provide the required “hard look” at the impacts of this timber sale.

Throughout the administrative process, Bark raised serious concern about the impacts of habitat loss to snag-dependent species from felling old-growth trees and snags and up to 10% of other snags throughout the project area. AR 548-50; AR 190-92; AR 60-62. This concern is heightened because of the pre-existing snag deficit in the impacts watershed. Removal of these snags could have a detrimental impact on cavity nesters – including woodpeckers and bats.

Despite acknowledging that there will be a loss of high value snag habitat, the BLM fails to analyze the extent of habitat reduction impacts to the populations of cavity-dependent species. Rather, it simply states “[f]alling two old-growth snags for road construction in Unit 7B would reduce the number of large snags in the project vicinity. This would reduce high value habitat for bats, primary excavators, and cavity users in the watershed by an **unknown percentage**.” AR 702 (emphasis added).

One could hardly imagine a more telling example of inadequate data. Quantifying loss of high value habitat with an “unknown” percentage, in the context of a forest already denuded of snags, does not provide the “hard look” at environmental impacts that NEPA requires. Rather, the limited underlying data leaves both the agency and the public with a generalized conclusory statement of adverse impact that does not provide sufficient information to determine the significance of the action.

To support its FONSI, the BLM must supply a “convincing statement of reasons” to explain why a project’s impacts are insignificant. *Save the Yaak Comm. v. Block*, 840 F.2d 714, 717 (9th Cir. 1988). “The statement of reasons is crucial to determining whether the agency took

a 'hard look' at the potential environmental impact of a project." *Id.* Despite the known habitat losses, and general lack of information, the BLM's Decision Notice/FONSI somehow concludes that, for sensitive species, "no suitable habitat would be lost, though some may be modified." AR 322. While the information in the EA is scant, at the very least it directly contradicts the conclusion in the DN. Without actual, quantifiable information as to the extent of impact on snag dependent species, the BLM can support its finding of no significant impact.

2. *BLM failed to analyze cumulative impacts*

In addition to analyzing the direct impacts from an action, NEPA explicitly requires that agencies undertake a cumulative impact analysis to evaluate the impacts of the proposed project within the context of past, present and reasonably foreseeable future actions. *Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 891-893 (9th Cir. Or. 2007) ("*Goodman*"). This "cumulative impacts analysis" provides both the agency and the public a big picture view on how each individual project contributes to the overall degradation or restoration of the environment. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7. An EA's analysis of cumulative impacts must "be of high quality." *See* 40 C.F.R. § 1500.1; *Kern*, 284 F.3d at 1076 ("Given that so many more EAs are prepared than EISs, *adequate consideration of cumulative effects requires that EAs address them fully.*") (emphasis in original). Cumulative effects analysis must contain "sufficient detail" so as to be "useful to the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts." *Muckleshoot Indian Tribe v. United States Forest Serv.*, 177 F.3d 800, 810 (9th Cir. Wash. 1999). An analysis falls short if it considers only the impacts of the proposed action in isolation or only the beneficial impacts of cumulative actions.

See Te-Moak Tribe of W. Shoshone v. U.S. Dep't of the Interior, 608 F.3d 592, 603-04 (9th Cir. 2010).

Regarding its cumulative impact analysis, the Airstrip EA well describes the condition of the land directly adjacent to the project area: lands adjacent to Section 7 on the east, north and west, and western half of south side are all recent clearcuts and young plantations. AR 666. In U.S. Forest Service managed lands immediately east of Section 18, approximately 2,500 acres of second growth forest has recently been logged. AR 666. The remainder of Section 18 that is not BLM-managed is private land managed for timber, recreation and a storage area for maintenance supplies. AR 663-64. Most private industrial forest land in this watershed is intensively managed with clearcuts scheduled on commercial economic rotations every 50-60 years. AR 659.

Yet, the BLM failed to provide any meaningful analysis of the impacts of logging and road building in the Airstrip Timber Sale in the context of the heavily managed surrounding landscape. The cumulative effects section on old growth and snags only briefly assesses the impact of the project in the context of the BLM-managed land in Sections 7 & 18, and reiterated that high value habitat for bats, primary excavators, and cavity users in the watershed would be reduced by an unknown percentage. AR 701-702. Similarly vague, the EA's cumulative effects analysis regarding impacts to special status species failed to describe specific impacts to bats, and merely provided the general conclusion that "[t]hinning in the project areas either individually or collectively would not be expected to contribute to the need to list any Bureau Sensitive species under the Endangered Species Act because habitat for the species that is known to occur in the project areas would be not be eliminated, habitat connectivity would not be changed, any habitat alteration would have only short-term negative effects, and long-term effects would be beneficial." AR 703. Not only does this conclusion fail to analyze the

cumulative impacts to sensitive species in context of past, present and future projects surrounding the Airstrip Sale, it is simply not supported by the record.

In Plaintiff's comments on the EA, they challenged the inadequacy of the analysis and noted, "[to] have an adequate cumulative impacts analysis as required by NEPA, the BLM must address the hard questions, like 'to what extent would the loss of large snags in the project area impact snag-dependent species, in light of the poor habitat conditions surrounding the project area?'" AR 558-9. The BLM failed to ask, or answer, this question. Because the Airstrip project area includes some of the best snag habitat in the area, which will be lost for up to 60 years, the incremental impact of losing this habitat may be greater than it appears when only looking at direct impacts.

The Ninth Circuit recently evaluated a similar fact scenario on National Forest lands, also managed under the NFP. *Goodman*, 505 F.3d 884. In *Goodman*, the Ninth Circuit reviewed the Forest Service's failure to consider the cumulative impacts on the sensitive Pacific fisher from the Mt. Ashland Ski Resort expansion, in the context of two other projects in the fisher's range. 505 F.3d at 889. Similar to the BLM's present conclusion that minimal direct impacts lead to no cumulative impacts, in *Goodman*, the Forest Service argued that it did not have to detail the other projects' impact on the fisher because the impacts of the action were modest. The Court opined:

“[d]etail is essential to making a determination of the extent of impact, especially when a particular action may seem unimportant in isolation, but that small action may have dire consequences when combined with other actions. As we observed in *Klamath-Siskiyou Wildlands Center*, '[s]ometimes the total impact from a set of actions may be greater than the sum of the parts. For example, the addition of a small amount of sediment to a creek may have only a limited impact on salmon survival, or perhaps no impact at all. But the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where even a marginal increase will mean that no salmon survive.’”

Goodman, 505 F.3d at 891, citing *KS Wild*, 387 F.3d at 994.

This may well be the situation in the instant case: we know that available snag habitat is already below the minimum standard of 40%, though we don't know by how much. Perhaps the large legacy snags represent the crucial percentage keeping the populations of cavity nesting birds and bats viable. Perhaps there is no other similar habitat in LaDee Flat for these species. Perhaps removing these snags will cause populations to crash, and even when suitable habitat is again present (in six decades) there will be few species left to recolonize.

Neither the public nor the court should have to conjecture about what might happen – this is the very purpose of a NEPA analysis: to provide information sufficient to assess the extent of the direct and cumulative impacts of an action. The BLM has failed to do so, and the limited information in the record points to adverse and potentially significant cumulative impacts to cavity-dependent birds and sensitive bats.

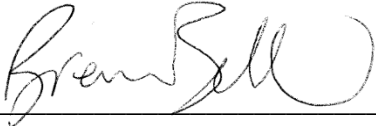
VIII. CONCLUSION

As noted above, under the APA, "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.'" *Humane Soc'y* 626 F.3d at 1040. As regards the Airstrip Timber Sale, the BLM is simply unable to connect the dots from the facts found to the decision made. In sum, the project area currently does not have enough snags to meet minimum habitat requirements and the timber sale would remove both existing snags *and* prevent the creation of new snags for many decades. This will result in loss of suitable habitat for sensitive bat species and snag-dependent birds in the watershed, in contravention of the Salem RMP.

Given these facts, the BLM's conclusion that the sale complies with the RMP and does not result in habitat loss is simply unsupported and demonstrates that it failed to take a hard look

at the environmental impacts of the sale. Plaintiff requests that the court order the BLM to set aside the Airstrip Timber Sale decision until such time it complies with all applicable laws.

Respectfully submitted this 14th day of March, 2013.

A handwritten signature in cursive script that reads "Brenna Bell". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF COMPLIANCE

This brief complies with the applicable word-count limitation under LR 7-2(b), 26-3(b), 54-1(c), or 54-3(e) because it contains 7,179 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of authorities, signature block, and a certificates of counsel.