



**BARK**

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*By certified mail*

July 26, 2012

**RE: NOTICE OF APPEAL, REQUEST FOR STAY, STATEMENT OF REASONS, and  
REQUEST FOR RELIEF**

**Airstrip Timber Sale Environmental Assessment (EA# OR080-04-09)**

**TO:**

US Department of the Interior      and  
Office of the Secretary  
Office of Hearings and Appeals  
Board of Land Appeals  
4015 Wilson Blvd.  
Arlington, Virginia 22203

Cindy Enstrom, Field Manager  
Cascades Resource Area Manager  
Bureau of Land Management  
Salem District Office  
1717 Fabry Rd. S.E.  
Salem, OR 97306

**CC:**

Regional Solicitor, PNR  
Association of O&C Counties and Freres Lumber Company

**Appellants:**

**Bark**

PO Box 12065  
Portland, OR 97212

**Reference:**

Environmental Assessment OR-S040-2009-004  
Airstrip Timber Sale

This letter serves as a notice of appeal, request for stay, statement of reasons, and request for relief from Bark of the Cascades Resource Field Manager Cindy Enstrom's June 29, 2012 decision to deny Bark's protest of the Airstrip Timber Sale.

Pursuant to 43 CFR Part 4, Bark has the right to appeal the denial of our protest of the Airstrip Timber Sale. This notice of appeal is timely because it is delivered to your office on or before July 27, 2012.

**Description of sale:**

Airstrip Timber Sale

Environmental Assessment OR-S040-2009-004

Middle Clackamas River & North Fork Clackamas River watersheds

Cascades Resource Area, Salem District BLM

Legal Description: Township 4 South, Range 5 East, Section 7, 18 Willamette Meridian

Commercial thinning on 201 acres, 1.6 miles of new road construction, renovate .7 miles of decommissioned roads

Final Decision, Decision Rationale and Finding of No Significant Impact: Airstrip Thinning Timber Sale signed 11 January, 2012

Deciding officer: Cindy Enstrom, Cascades Resource Area Field Manager

**I. Appellants' Interests**

Bark has a specific interest in this sale, and that interest will be adversely affected by this timber sale. We have previously expressed our interest in this specific sale, and have standing to appeal this decision according to 36 CFR § 215.11 (a)(2). Bark is a 501(c)(3) Oregon non-profit organization based in Portland and has worked to protect the Mt. Hood National Forest since 1999. Many of Bark's 20,000 supporters live in the communities surrounding the Cascade Resource Area and use the area extensively for recreation, viewing wildlife and wildflowers, hunting, fishing, overall aesthetic enjoyment, and other purposes. Specifically, members and/or staff of Bark visit Ladée Flats for recreational, aesthetic, and educational pursuits. The value of the activities enjoyed by Bark members and staff will be irreparably damaged by this project. We have a long-standing interest in the sound management of this area, and the right to request agency compliance with applicable environmental laws.

**II. Request for Stay**

Bark formally requests a stay of implementation of this project in Unit 7B. This includes all sale preparation, layout, road planning, road construction, site preparation and tree felling in Unit 7B. Additionally, Bark requests a stay of felling any live trees greater than 36 inches or snags greater than 15 inches for any purpose throughout the Airstrip project area, until such time when an adequate assessment of impact occurs.

This stay is essential to prevent an irretrievable commitment of agency resources, and irreversible environmental damage. Without a stay, the federal government may allow the timber company to log ecologically invaluable trees to the lasting detriment of sensitive species in the project area. Because Bark may pursue a legal challenge to this sale with or without this stay, offering this timber sale may unnecessarily exposes the government to liability and the purchaser to financial losses. Appellants petition the Board of Land Appeals (the Board) for a stay of the decision pending appeal, pursuant to 43 C.F.R. 4.21(a), (b) for the reasons described below.

**a. There is a high likelihood of immediate and irreparable harm if the stay is not granted**

A stay is necessary because award and full implementation of the sale will occur before the appeal is decided upon (an average of two years). This will cause immediate and irreparable harm to the forests and sensitive wildlife of the watersheds if the stay is not granted. The project is likely to be partially or completely implemented before the Board ruling.

A stay is necessary so that the Board will have the ability to redress our injury after considering the merits of this appeal. The Statement of Reasons below will show how this project will cause immediate and long-lasting harm to the public, as well as to forest and watershed resources. Staying the decision will preserve the status quo, allowing the BLM to make the necessary corrections to this project. Once a tree is cut, or habitat lost, it cannot be put back.

**b. The harm to appellants if the stay is denied far outweighs potential harm from granting the stay**

Denying the stay will have negative environmental impacts because the project will be implemented, whereas the government would incur no harm if a stay were granted. The government can simply implement the project at a later time. The courts have found 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.”<sup>1</sup> When environmental injury is “sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment.”<sup>2</sup> In contrast, any harm to the government would be economic and “the Government’s economic loss cannot be considered compelling if it is to be gained in contravention of federal law.”<sup>3</sup> The only injury to BLM or timber purchaser is monetary -- an injury which is not “irreparable” in the equitable sense.<sup>4</sup>

**c. This appeal has a high likelihood of success on the merits**

The likelihood of success of this appeal on the merits is demonstrated in the comments and information we have submitted to the BLM, and by the reasons outlined in our Statement of Reasons below.

Any decision to proceed with the sale would violate BLM’s duty under the Federal Land Policy & Management Act (FLPMA) to “take any action necessary to prevent unnecessary and undue degradation of the [public] lands.” 43 U.S.C. 1732(b). “Failure to comply with applicable environmental protection statutes and regulations thereunder will

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<sup>1</sup>*Amoco Production Co. v. Village of Gambell*, 480 U.S. 531, 107 S. Ct. 1396, 1404 (1987).

<sup>2</sup>*Id.*

<sup>3</sup>*Wilderness Society v. Tyrrel*, 701 F. Supp. 1473, 1491 (E.D. Cal. 1988), rev’d on other grounds, 918 F.2d 813 (9th Cir. 1990) (citing *Northern Cheyenne Tribe v. Hodel*, 851 F.2d 1152, 1157 (9th Cir. 1988)).

<sup>4</sup>*Sampson v. Murray*, 415 U.S. 61, 90, 94 S. Ct. 937 (1974).

constitute unnecessary or undue degradation.” 43 C.F.R. 3809.0-5(k)(4). The appeal merits are as follows:

- The Salem Resource Management Plan (RMP) direct managers to retain snags at levels sufficient to support species of cavity nesting birds at 40% of potential population levels. This 40% requirement must be met throughout the Matrix with per acre requirements met on areas averaging no larger than forty acres, and also requires a minimal standard of coarse woody debris. The sale area currently does not meet the snag retention and coarse woody debris standards and will result in the loss of more high quality snag habitat and coarse woody debris in the area; this violates the Salem RMP and FLPMA.
- The Salem RMP sets out specific processes to manage Sensitive Species on BLM-managed land. *RMP at 29*. First, determine whether or not special status species are, or may be present in a project area. Second, conduct field surveys according to protocol and other established procedures. Next, identify impacts of proposed actions to Bureau sensitive species and clearly describe the impacts in environmental analyses. Finally, modify, relocate or abandon a proposed action to avoid contributing to the need to list bureau sensitive species, or their habitats. *RMP at 29*. The BLM failed to follow this survey protocol, or modify the sale to protect special status species in the Airstrip project area. This violates the Salem RMP and FLPMA.
- The BLM has failed to comply with the National Environmental Policy Act (NEPA) by failing to adequately consider the direct and cumulative impacts of the Airstrip Timber Sale on sensitive species from logging important remnant snags, and removing CWD. While the EA states the action (removing snags) and impact (“[t]his would reduce high value habitat for bats, primary excavators, and cavity users in the watershed by an unknown percentage,” EA at 78), at no time does it make a reasoned analysis of the effect of this habitat removal on the sensitive species. Without understanding the effect of the action on the local populations, the BLM cannot conclude that this project will conserve species and their habitats so as not to elevate their status to any higher level of concern. *RMP at 28*.

Without an adequate analysis of the direct impacts of habitat loss on sensitive species, the BLM is unable to do a sufficient cumulative effects analysis. Given that the project area is surrounded by clearcuts and managed plantations, functional habitat does not exist for the species to move into. Thus, the loss of this habitat may lead to extirpation of bat species from the entire area. The lack of cumulative effects analysis violates NEPA and prohibits the BLM from making a reasoned decision as to the impacts on sensitive species.

This summary, in addition to the arguments in the Statement of Reasons below, demonstrates that this appeal has a high likelihood of success on the merits.

4. The public interest favors granting the stay.

Public interest clearly favors granting the stay. This project is on public lands. Both the public and the wildlife is dependent on the BLM protecting ecosystems by adhering to the habitat requirements in the Salem RMP, because these protections cannot happen on the adjoining industrial forest land. It is also in the interest of the public and the affected special status species for BLM to undertake conservation actions that improve the status of such species to the point where their special status recognition is no longer warranted. *BLM Manual 6840.22*

In addition, refusal of administrative agencies to comply with environmental laws invokes a public interest of the highest order: the interest in having government officials act in accordance with the law.

Many members of the public, as represented by Bark, oppose this project and deserve to have the issues reviewed by the IBLA. We have written to BLM, asking the BLM alter the timber sale to protect important legacy features and sensitive species habitat, yet the BLM refuses to do so. A stay will be in the public interest because it will protect the status quo of the environment in and near the project area, will halt the implementation of a decision that is not compliant with national and local environmental policy, and will protect the interests of appellant until the IBLA can make a decision on the merits.

### **Requested Relief**

1. Withdraw the Decision Notice and issue a new decision that: a) does not include building a new road in Unit 7B; b) excludes all of Unit 7B which was to be accessed by the new road; and c) protects all legacy trees and snags in the project area.

**Note:** Bark is not asking the BLM to withdraw the entire sale. According to the PD, “[d]ropping the road construction segment would cause approximately 20 acres of Unit 2 to be inoperable”. *PD at 15*. This is only 10% of the sale area, but would have disproportionately high environmental impact.

2. Modify the sale to meet the objections presented in Appellants' Statement of Reasons and consistent with the National Environmental Policy Act (NEPA), Federal Land Policy and Management Act (FLPMA), these statutes' implementing regulations, and the Northwest Forest Plan (NFP).

### **Statement of Reasons**

#### *1. Violation of Snag Retention Standards*

##### *A. The Airstrip Timber Sale moves the BLM farther from meeting RMP standards*

The North Fork/Lower Clackamas River Watersheds has been extensively logged and roaded over the past 100 years. A rare section of naturally regenerated second growth forest which includes legacy old growth trees and snags, the Airstrip project area is

surrounded by clearcuts on private industrial lands and managed plantations on US Forest Service lands (which are targeted for similar logging projects). With such degraded surrounding lands, the ecological importance of the habitat found in the project area is heightened.

One of the most important and rare habitat components in the Airstrip area is the remnant old growth snags. At least 47 species deemed sensitive or special-status have associations with dead wood such as downed logs and snags. (Hagar 2007). At least 20% of birds in the western Oregon Doug-fir forests depend on snags for feeding or nesting (Cline et al. 1980). 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. Species which subsequently use pileated-created cavities to nest or roost include the flammulated owl, the bufflehead, and Vaux's swifts, which are on sensitive species lists or are considered priority species in Oregon or Washington. Other vertebrate species include the northern flying squirrel, which is the primary prey of the northern spotted owl, as well as the common merganser, silver haired bat, and fisher, and American marten. (Aubrey and Raley 2002).

Evidence suggests that thinning lowers snag density relative to un-harvested stands. (Windom and Bate 2008). Since large snags are required for the habitat requirements of certain species (Cline et al. 2008) but are in short supply due to past and present management, Windom and Bates (2008) suggest no-harvest buffers around snags, particularly legacy snags, to increase retention rates.

Because of the importance of snag habitat to so many species, the Salem RMP directs managers to retain snags at levels sufficient to support species of cavity nesting birds at 40% of potential population levels. *RMP at 21*. This 40% requirement must be met throughout the Matrix with per acre requirements met on areas averaging no larger than forty acres. The Airstrip project area currently does not meet this minimum standard.

It is important to remember that the intent of the snag retention standard is to provide a minimum habitat standard for snag dependent species – specifically cavity nesting birds. Because commercial thinning timber sales usually occur in younger stands that have already been logged, the project area is often lacking in sufficient snags. When this pre-existing snag deficiency is coupled with thinning that removes most of the trees that would likely become snags, the result is a much prolonged habitat deficiency. Thus, in order to ensure sufficient snag habitat, it is clearly important to retain every possible snag in a commercial thinning sale.

In this context, the fact that within road right-of-way all snags would be felled (including two large diameter snags in Unit 7B), and within the harvest units, approximately 10% of snags larger than 15 inches diameter could be cut or knocked over during logging operation, and within road right-of-way all snags would be felled (including two large diameter snags in Unit 7B), means that Airstrip is moving further away from its ability to meet the RMP minimum habitat standards.

The BLM primarily talks in percentages, rather than absolute numbers, which obscures the fact that there are far too few snags in the project area (*see, eg, DN at 34*). As Bark noted in our comments, the EA states, “[a]pproximately 90% of large diameter trees, snags larger than 15 inches and CWD would be retained in the project area . . .” *EA at 77*. However, Table 11 indicates that Unit 7A has **no** snags over 15 inches per acre, Unit 7 B has 1.1 snags per acre (but none over 25 inches) and Units 18A & B each have 1.4 snags per acre. *EA at 69*. 90% of 0 to 1.4 snags per acre, which is already below the minimum standards, is not enough! That, coupled with the reality that this project area is an forested oasis in a desert of clear-cuts and managed plantations, means that *every single large snag* has environmental significance and should be retained. This could be achieved by a) buffering all snags larger than 15 inches and b) re-routing, or dropping, the proposed road in Unit 7B.

Finally, the PD argues that the Airstrip Project “helps put these stands on a trajectory to implement RMP standards”. *PD at 2*. This is belied both by logic and the BLM’s own admissions. First, as noted above, this is an already snag-deficient landscape. There is rare patch of remnant old-growth in Unit 7B, where the only large snags Bark has found anywhere on Ladee Flats are located. Removing these snags necessarily retards achieving RMP standards, as it will be hundreds of years before such large snags exist in the watershed again. Second, in its DN, the BLM acknowledged that “thinning removes most of the trees which would die from suppression mortality and create small snags. . . BLM also recognizes that large healthy trees growing after thinning are not snag habitat”. *DN at 34*. Thus, the BLM is removing both the existing snags *and* the trees that would likely become snags in the near future, without any plan to create new snags.<sup>5</sup> This necessarily means there will be a significant time-lag before there is **any** functioning snag habitat in the project area – and the BLM may never be able to meet the habitat standards required by the RMP.

Similarly to snags, coarse woody debris (CWD) is lacking in the Airstrip project area and falls below the RMP’s requirements. Hard CWD is lacking in all of the units and soft CWD is lacking in 7B. *EA at 70*. The hard CWD is almost exclusively small diameter that does not meet RMP management direction.<sup>6</sup> *Id.*

Up to 10% of existing CWD would be directly impacted by logging operations. Although trees larger than 36 inches diameter would be left as CWD and provide habitat for dead wood species, again, the EA does not account for the time lag needed for the trees to decay to the point where they provide adequate habitat. *EA at 74*. Bark volunteers observed that of the little CWD in unit 7B, much of it is found in the path of the proposed road and skyline yarding corridors. In a forest that already has too little CWD, activities that adversely impact 10% of the little remaining CWD do not comply with the RMP. The Airstrip Project should be altered to protect all remaining CWD.

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<sup>5</sup> The Protest Denial clearly states “the commercial thinning project does not propose to kill trees specifically to create snags or CWD”. *PD at 12*.

<sup>6</sup> Minimum of 240 linear feet of logs per acre, reflecting the species mix of the original stand. All logs must be at least 20 inches in diameter and 20 feet in length. *RMP at 21*.

*B. Snag Retention Requirements apply throughout the Matrix*

In its denial of Bark's protest, the Salem BLM offers a novel read of the requirements contained in the Resource Management Plan. It argues that "timber harvest" refers to "regeneration harvest" and that any requirements for snag retention or amounts of coarse woody debris only apply to regeneration harvests. *Protest Denial (PD) at 3*. The PD concludes that commercial thinning is not "timber harvest" and thus thinning projects do not have to abide by the snag and CWD standards in the RMP. *Id.*

The BLM's argument that the snag retention and CWD standards only apply to regeneration harvest is incongruent with a plain read of the Salem RMP.

The PD suggests that "timber harvest" *only* refers to "regeneration harvest" and that "commercial thinning" is solely categorized as "other silvicultural activity". *PD at 3*. However, Appendix D of the RMP, which details silvicultural systems and harvest methods, does not support this claim. The word "Harvest" is used broadly to refer to much more than simply regeneration harvest. For example, the general heading "Selection of Harvest Areas" covers both "Regeneration Harvest" and "Commercial Thinning". *App. D-2*. Similarly, the heading "Landscape Design" says "Harvest units, including regeneration harvest and commercial thinnings, would be placed where needed to meet landscape objectives . . .". *Id.* This, in turn, is followed by the two headings "Regeneration Harvest Design" and "Partial-cut Harvest Design". *App. D-2, 3*. Clearly, while the term "Harvest" includes regeneration harvest, and is sometimes used as shorthand for regeneration harvest, it applies much more broadly and specifically includes commercial thinning as a type of "harvest". Thus, the RMP direction to "Retain snags within a timber harvest unit . . ." applies to all types of timber harvest, including commercial thins.

In its PD, the BLM also argues that the three bullets under "Retain green trees and snags throughout the GFMA" on p.21 use the terms "regeneration harvest" and "timber harvest" interchangeably. This can't make sense. It is true that the green tree retention standard specifically applies to regeneration harvests because commercial thins would automatically retain far more than the minimum green tree retention. In contrast, the snag retention standard applies to all types of timber harvest, because it is designed to be applied throughout the Matrix, regardless of silvicultural prescription. This is explicitly stated many times in the RMP: "Retain snags . . .at levels sufficient to support species of cavity nesting birds at 40 percent of potential population levels. Meet the 40 percent minimum **throughout the Matrix** with per acre requirements met on average areas no larger than 40 acres" *RMP at 21, 46*.<sup>7</sup>

The plain read of the RMP: that the snag habitat standard applies to timber harvests throughout the matrix, and that timber harvest includes commercial thinning, clearly shows that this standard applies in the Airstrip Timber sale.

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<sup>7</sup> This is further emphasized by the Northwest Forest Plan (upon which the Salem RMP is based): "Specific measure for green tree and snag retention . . .are intended to be applied throughout the matrix forests". *NFP at C-41*.



Finally, the BLM's argument that snag and CWD standards do not apply to commercial thinning is a post-facto justification that appears for the first time *after* the timber sale decision was made. Prior to the protest denial, the BLM had acknowledged that: "[o]verall snag habitat in the project area does not currently meet the Resource Management Plan's requirement of 40% population densities for the five woodpecker species." *EA at 69*.<sup>8</sup> As noted above, the EA acknowledged that hard CWD is almost exclusively small diameter that does not meet RMP management direction. *EA at 70*.

Decisions made by federal agencies are governed by the Administrative Procedure Act (APA). 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). An agency may only rely on the information it has before it at the time of a final decision to explain the reasons for its action. This argument comes late in the process, and was never before the BLM when it made its Decision.

In some cases, a Decision Notice may constitute final agency action. For example, if the IBLA denies, or fails to act on, a petition for a stay, the Decision Notice becomes effective and final in accordance with 43 C.F.R. § 4.21(a)(3). *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1065 (9th Cir. 2010). Thus, the BLM should not be allowed to rely on post-facto rationale that was never included in its Decision Notice, and is clearly contrary to its admissions in the EA.

## 2. *Impacts to Sensitive Species*

### A. *Failure to follow RMP Sensitive Species Guidelines*

In the Airstrip Decision Notice, the BLM states 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." *DN at 16*. Bark does not know how the BLM can come to this conclusion regarding the special status bats in the project area, when it failed to follow its protocol for surveying, and managing sensitive species, and is explicitly losing some (or all) of the best available habitat.

In the its governing Manual, the BLM is directed that it is in the interest of the public and the affected special status species for BLM to undertake conservation actions for such species **before** listing is warranted or the designation of critical habitat becomes necessary. It is also in the interest of the public and the affected special status species for BLM to undertake conservation actions that improve the status of such species to the

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<sup>8</sup> The Resource Management Plan for the Salem BLM directs managers to retain snags at levels sufficient to support species of cavity nesting birds at 40% of potential population levels. This 40% requirement must be met throughout the Matrix with per acre requirements met on areas averaging no larger than 40 acres. *RMP at 21*.

point where their special status recognition is no longer warranted. *BLM Manual 6840.22 (emphasis added)*.

Implementing the direction of the Manual, the Salem RMP sets out specific processes to manage Sensitive Species on BLM-managed land. *RMP at 29*. First, the BLM is supposed to determine whether or not special status species are, or may be present, in a project area. Second, the BLM is supposed to conduct field surveys according to protocol and other established procedures. Next, it should identify impacts of proposed actions to Bureau sensitive species and **clearly describe the impacts** in environmental analyses. Finally, the BLM is directed to modify, relocate or abandon a proposed action to avoid contributing to the need to list . . . bureau sensitive species, or their habitats. *RMP at 29 (emphasis added)*.

The EA states that four bat species of concern are suspected to occur in the Airstrip Timber Sale area, but fails to provide any further information. *EA at 71*. In its Protest Denial, the BLM states that “in the absence of surveys, the BLM assumes that species *are* present and analyzes the impacts accordingly.” *PD at 12 (emphasis in original)*.

Assuming, then, that there are four bat species of concern in the project area, the BLM’s next obligation under the RMP is to “identify impacts of proposed actions to Bureau sensitive species and clearly describe the impacts in environmental analyses”. *RMP at 29*. This is a process which necessarily combines the directions of the RMP and NEPA. Thus, the next section will detail how the Airstrip EA and Decision Notice failed to take a “hard look” at, and “clearly describe” impacts to, cavity-dependent species, as required by NEPA and the RMP.

*B. Failure to provide a “hard look” at direct and cumulative impacts on cavity-nesting birds and bats*

**i. Direct Impacts**

To determine whether an action requires an Environmental Impact Statement as required by NEPA, 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.*

In reviewing the adequacy of an EA, courts analyze whether the agency took a "hard look" at the likely effects of the proposed action. *Native Ecosystems Council*, 428 F.3d at 1239. Agencies must "undertake a thorough environmental analysis before concluding that no significant environmental impact exists." *Id.* In addition, the Ninth Circuit has repeatedly

explained that generalized, conclusory assertions from agency experts are not sufficient; 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). "[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. The Airstrip EA does not sufficiently provide enough information about the impact to cavity nesting species, including sensitive bats, to allow either the BLM or the public to take a "hard look" at the impacts of the action.

In Bark's EA comments, and again in our Protest, we raised serious concern about the BLM felling the two largest snags in the project area and likely several more.<sup>9</sup> The two 60-inch diameter old growth snags in the ROW for the road in 7B presumably provide the majority of the habitat for cavity nesters in the project area. Removal of these two snags would have an incredibly significant impact on cavity nesters – including the five known woodpecker species<sup>10</sup> and Bureau Sensitive bats. Despite this significant impact, the EA simply stated that: "[f]elling 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.**" *EA at 78* (emphasis added).

The Airstrip EA also recognizes that "[b]at species which use snags or large trees could be directly affected by loss of up to 10% of large diameter trees in Unit 7A and large snags throughout the project area." *EA at 76*. However, as discussed above, the loss of the two large snags – and possibly more – in Unit 7B would reduce high value habitat for cavity users in the watershed by an unknown percentage. *EA at 78*. The best the EA tells us is that project will adversely impact an unknown number of bats in unknown locations by an unknown percentage, which does not meet the "hard look" standard required by NEPA.

The PD sets forth the argument that the "BLM did not calculate the percentage reduction because: 1) that level of detail is not relevant to determining 'reasonably foreseeable significant impacts'; 2) that level of detail is not 'essential to a reasoned choice among alternatives'; and 3) it is economically prohibitive to fully inventory snags in the vicinity of the project. . ." *PD at 11*.

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<sup>9</sup> Bark volunteers identified more large snags that are likely to be felled or damaged as a result of this project (specifically the road building in Unit 7B), including:

– 30 foot tall, 4 ft dbh snag 10 feet from ROW in Unit 7B, P2 17 + 45 that we assume will be felled as a safety precaution.

– 5 ft dbh snag right on the side of the ROW at P2 16 + 25.

There is also the very real possibility that other snags in the project area will be felled to comply with OSHA safety standards, decreasing the amount of snags in the project area still further than the EA analyzes.

<sup>10</sup> The hairy woodpecker, red-breasted sapsucker, and pileated woodpecker are present in the project area. Northern flicker and downy woodpecker are found in and around the project area. *EA at 70*

These are not compelling arguments. First, without understanding the percentage reduction in population, the BLM cannot conclude that this project will conserve species and their habitats so as not to elevate their status to any higher level of concern as required by the RMP. *RMP at 28*. Indeed, there is a vast difference between a 5% reduction in population and a 95% reduction in population! Which is it? Does anyone know? Without actual numbers, the BLM is unable to make a supportable determination as to the significance of the action on the sensitive bat species and other cavity nesters in the project area.

The Airstrip Wildlife Specialist's Report did not provide any more detailed analysis of the short or long-term impacts of the loss of habitat, aside from acknowledging that both remnant old growth trees and large snags would be felled and this will contribute to the snag deficit.<sup>11</sup>

The BLM's second point – that understanding the impact on sensitive bats would not help the BLM chose between alternatives – has no bearing on the fact that this information is still essential for compliance with both the RMP Special Species protocol and NEPA's hard look standard.

Finally, the BLM posits that it is "economically prohibitive to fully inventory snags in the vicinity of the project". First off, the BLM already acknowledges that the minimum number of snags necessary to support species of cavity nesting birds at 40 percent of potential population levels is currently insufficient in the project area. The BLM further acknowledges that lands adjacent to section 7 on the east, north and west, and western half of south side are all recent clearcuts and young plantations. *EA at 42, 39-40, 35*. The U.S. Forest Service managed-land east of section 18 is also all managed plantations, that are currently being logged. There need be no extensive, or expensive, survey to show that the patches of remnant old-growth in Unit 7A & 7B are rare and provide unique habitat in the Ladee Flats area, and that its loss may have a significant impact on cavity-nesting species in the area.

In sum, the BLM failed to take a "hard-look" the direct impacts of habitat loss to the populations of cavity-dependent birds and sensitive bats in the project area. Without this information, the BLM cannot meet its obligations to ensure protection of sensitive species under FLPMA, or make a supportable finding of significance under NEPA.

## **ii. Cumulative Impacts**

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<sup>11</sup> "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. The road building activities may damage roots and or cambium layer which may lead to disease or wind throw." *Airstrip Wildlife Specialist Report at 25*.

One of the most important part of a NEPA analysis is looking at the impacts of the proposed project within the context of past, present and reasonably foreseeable future actions. 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. NEPA specifically requires the agency to analyze the impacts which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. Cumulative impacts can result by collectively significant actions taking place over a period of time. 40 C.F.R. § 1508.7.

Regarding cumulative impacts, what the EA does do is summarily describe the lands directly adjacent to the project area: Lands adjacent to section 7 on east north and west, and western half of south line are all recent clearcuts and young plantations. USFS manages section 17 immediately east of 18 and has USFS has 2,557 acres of logging projects planned on these second growth plantations, including No Whisky, No Gin and ReThin. *EA at 42*. The remainder of 18 is private land managed for timber, recreation and a storage area for maintenance supplies. *EA at 39-40*. Most private industrial forest land in this watershed will be intensively managed with regeneration harvests scheduled on commercial economic rotations very 50-60 years. *EA at 35*. The Airstrip Project area, with its naturally regenerated second-growth and remnant patches of old growth, is a rare oasis of wildlife habitat.

What the EA fails to do is to provide any meaningful analysis of the incremental impact of the Airstrip project on this already denuded landscape. Most cumulative effects sections in the EA conclude that there are no cumulative effects from the project because there are no direct effects. However, as noted above, there are several quantifiable direct impacts from the project, including loss of important habitat for bats, woodpeckers, salamanders and other species. Because of its unique habitat composition, the incremental impact of losing this habitat may be greater than it appears if only looking at direct impacts.

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.' " *Ocean Advocates*, 361 F.3d at 1128 (quoting *Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1379-80 (9th Cir. 1998)).

This level of detail 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 the Court has observed: "[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." *Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 891-893 (9th Cir. Or. 2007), citing *KS Wild v. BLM*, 387 F.3d at 994.

This may well be the situation in the instant case: perhaps the large legacy snags in the Airstrip Project area are the *only* high quality habitat supporting viable populations of cavity nesting birds and bats. Perhaps there is no other such habitat in Ladee flats for these species to re-inhabit. Perhaps the populations will crash, and even when suitable habitat is again present (in how many years?) they will not be able to re-colonize. Perhaps.

We should not have to conjecture about what may happen – this is the very purpose of a NEPA analysis: to provide a detailed and quantifiable assessment of the direct and cumulative impacts of an action. The BLM has failed to do so, and all the information provided points to adverse and potentially significant impacts to cavity-nesting birds and sensitive bats.

*C. BLM must modify sale to protect sensitive species habitat*

The RMP directs the BLM to “protect and manage assessment species and their habitats where possible so as not to elevate their status to any higher level of concern.” *RMP at 28*. The BLM is further directed to modify, relocate or abandon a proposed action to avoid contributing to the need to list . . . bureau sensitive species, or their habitats. *RMP at 29*.

In its PD, the BLM argues that it is managing the sensitive bat species “at the appropriate spatial level” but does not actually indicate what that spatial level is. *PD at 14*. One could extrapolate from the following sentence in the PD that the BLM is using the contiguous block of BLM land (791 acres) as the appropriate spatial scale at which to manage for the sensitive species. *Id.* There are several arguments about this proposition 1) being the appropriate scale, and 2) providing enough habitat to manage the sensitive bats in compliance with the RMP.

First, as noted above, the snag provisions in the RMP direct the BLM to ensure that there are adequate snags throughout the matrix on an area no larger than 40 acres. *RMP at 21*. This implies that assessing sufficient habitat in 40-acre increments may provide one appropriate scale. The BLM has already admitted that there is NOT sufficient habitat in these increments in the Project area.

Second, even if the BLM-managed land was the appropriate scale, the BLM has never argued (or demonstrated) that its land outside of the timber harvest units have the necessary features to provide adequate snag habitat. The PD seems to argue that simply by virtue of not being included in the Airstrip sale, the remaining 584 acres will provide adequate bat habitat. But are there legacy snags in these acres? Are there other habitat features that will offset the loss of habitat in the project area? This is not disclosed.

Finally, the PD cites the NFP Record of Decision (ROD), that “[the Standards and Guidelines] will successfully provide habitat conditions for these [bat] species” *PD at 14*. In fact, the extrapolated quote specifically refers to the “matrix management provisions”

as one of the Standards and Guidelines that will protect the species. *ROD at 31*. To bring this argument full circle, these are the very snag retention standards that Bark has been continually arguing that the BLM must meet in order to protect the sensitive species throughout the matrix. In order to adequately manage for sensitive bats, the BLM must “modify, relocate or abandon a proposed action” to protect all remaining high-quality habitat in the project area.

Thank you for your consideration of this Appeal. I am happy to answer any clarifying questions and/or discuss this Appeal, as necessary.

Sincerely,

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## **References**

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