

NOTICE OF APPEAL

On April 23, 2004, Karen Shimamoto, Forest Supervisor for the Fremont-Winema National Forests issued a Final Environmental Impact Statement (FEIS), Record of Decision (ROD) and Emergency Situation Determination (ESD) for the Toolbox Fire Recovery Project, approving Alternative G Modified that authorized 10,214 acres of commercial logging inside the perimeter of the 2002 Toolbox Complex fire yielding 36 million board feet (MMBF) of timber; 206 acres of logging in Riparian Habitat Conservation Areas (RHCA's); 21.5 miles of road construction and 4 miles of road reconstruction, prescribed burning initiated on 2,362 acres, planting 20,071 acres; and a net present value (PNV) of *negative* \$8.8 million.

Notice is hereby given pursuant to 36 C.F.R. § 215 that the below listed parties are appealing the decision by the Forest Supervisor to approve and implement the Toolbox Fire Recovery Project (Toolbox FRP) ROD, FEIS, and ESD.

The ROD for the Toolbox project indicates that only part of the project will move forward without a stay pending administrative review. To that end, this administrative appeal challenges the applicable portions of the project.

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The appellants believe that the Forest Supervisor's decision of April 23, 2004 is in error and not in accordance with the legal requirements of the Administrative Procedures Act (APA), 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (1994 & Supp. IV 1998), the National Environmental Policy Act (NEPA) National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347d (1994 & Supp. III 1997), the National Forest Management Act (NFMA)

National Forest Management Act of 1976, 16 U.S.C. §§ 472a, 521b, 1600, 1611–1614 (1994 & Supp. III 1997) (amending Forest and Rangeland Renewable Resources Planning Act of 1974, Pub. L. No. 93-378, 88 Stat. 476), and these statutes' implementing regulations. The proposed project also violates the Fremont-Winema National Forest Land and Resource Management Plan (LRMP).

APPELLANTS INTEREST

The Sierra Club was founded in 1892 and is the nation's oldest grass-roots environmental organization. The Sierra Club is incorporated in California, and has its headquarters in San Francisco, California. It has more than 700,000 members nationwide, including thousands of members in Oregon. The Sierra Club is dedicated to the protection and preservation of the natural and human environment, including the Toolbox Complex fire area, which includes lands managed by the Forest Service in the Fremont-Winema National Forests. The Sierra Club's purpose is to explore, enjoy, and protect the wild places of the earth; to practice and promote the responsible use of the earth's ecosystems and resources; and to educate and enlist humanity to protect and restore the quality of the natural and human environments.

The Sierra Club has members in Oregon and across the nation whose recreational, aesthetic, business and environmental interests would be adversely affected by the actions proposed in the Toolbox FEIS and ROD. Members of the Sierra Club use and enjoy the Fremont-Winema National Forest, including the areas slated for logging, for outdoor recreation and scientific study of various kinds, including nature study, bird-watching, photography, fishing, hunting, backpacking, camping, solitude, and a variety of other activities. Members of the Oregon Chapter and the Rogue Group of the Sierra Club have a long history of recreating, doing business in and striving to keep wild the inventoried and uninventoried roadless areas as well as other lands within and around the Toolbox Complex fire area.

Oregon Natural Resources Council (ONRC) is a non-profit corporation with 6,000 members throughout the state of Oregon and the Pacific Northwest. ONRC and its members are dedicated to protecting and conserving Oregon's wildlife, lands, waters, and natural resources, including East Side forests such as the one subject to the Toolbox FRP. ONRC members use the Toolbox FRP planning area for hiking, recreation, bird watching and other recreational and professional pursuits. The interests of ONRC members will be impaired if Toolbox FRP is allowed to proceed without compliance with our federal environmental laws.

Northwest Environmental Defense Center (NEDC) is a public, non-profit corporation based in Portland, Oregon. NEDC was founded in 1969 and dedicated to the preservation and protection of the natural resources of the Pacific Northwest. NEDC's members are lawyers, scientists, students, and citizens interested in protecting our shared natural resources, including those of the Fremont-Winema National Forest. The interests of NEDC members will be impaired if Toolbox FRP is allowed to proceed without compliance with our federal environmental laws.

Klamath Forest Alliance (KFA) is a 501(c)(3) located throughout the Klamath Basin, from the headwaters (Klamath Falls) to the mouth (Klamath). Members live, work and recreate in this

rural bioregion. The interests of KFA members will be impaired if Toolbox FRP is allowed to proceed without compliance with our federal environmental laws.

The appellants have a specific interest in this project. We have previously indicated our interest in this project by commenting throughout the planning process and continued involvement in management of the Fremont-Winema National Forest (FWNF). Appellants' continued interest and involvement in this project creates standing to appeal this decision according to 36 C.F.R. § 215.11(a)(2).

REQUESTED RELIEF

1. That the ROD, FEIS, and ESD for the Toolbox FRP project be withdrawn;
2. That the Toolbox FRP be modified to meet the objections presented in appellants' Statement of Reasons
3. That the Toolbox FRP be revised to ensure consistency with the Administrative Procedures Act, National Environmental Policy Act, National Forest Management Act, these statutes' implementing regulations, and the amended FWNF LRMP.

STATEMENT OF REASONS

The massive logging and associated activities authorized under Alternative G Modified would severely degrade RHCAs, Late and Old Structure (LOS) forests, mature forests, Uninventoried Roadless Areas, rivers, streams, and wildlands that provide outstanding recreational opportunities and essential habitat for fish and wildlife species and that our members explore and enjoy on a regular basis. Embedded within this logging proposal are an assortment of practical actions that the appellants might possibly support on their own, but taken together with the extent and nature of the proposed salvage logging, are unacceptable.

The appellants are especially concerned about the utter disconnect between the stated purpose and need for the project, as described in the Toolbox FEIS, and the actions authorized under the Alternative G Modified.

The appellants urges the Forest Service to reconsider and redesign its proposals to achieve the project's purpose and need without authorizing massive commercial logging that would devastate the ecological integrity of the Toolbox Complex fire area. There is now overwhelming scientific evidence concerning the devastating environmental consequences of post-fire salvage logging. Unfortunately, the FEIS largely ignores that evidence and, instead, relies heavily on the Forest Service's *opinion*. The Toolbox FEIS and ROD consist largely of broad generalizations and simplifications regarding regional fire ecology and the specific behavior of the 2002 Toolbox Complex fire. And the FEIS largely ignores the extensive scientific evidence regarding the significant environmental damage that the types of actions authorized in the Toolbox ROD would cause.

Alternative G Modified appears to be based in part upon the unsubstantiated premise that massive commercial logging of remote areas of the backcountry will somehow create sustainable forest, stream, and riparian habitats. In fact, current fuel loading is low in most of the high severity burned stands in the project area and will only begin to increase after ten years or more. Until and after that time, the snags and logs in burned stands play vital roles in natural recovery processes. The importance of dead and dying woody materials in every stage of decay cannot be overstated. (Rose et al. 2001.)

Imposing the severe disturbance of post-fire logging as proposed would put recovery processes at risk and cause damage to multiple ecosystem components. There is absolutely no valid ecological reason to log right now for the sake of fuels reduction. Unmanipulated, post-fire landscapes and ecosystems are one of the rarest in the Pacific Northwest Region and should be protected unequivocally until it can be demonstrated that these ecosystem types are adequately represented to maintain species viability and ecosystem processes.

Moreover, post-fire logging typically is a money-losing endeavor on the National Forests in Oregon and nationwide and may serve to depress economic markets for wood products, further weakening any economic rationalization.

The authorized actions will neither restore the portions of the forest burned in the Toolbox Complex fire, nor will they protect communities at risk from the threat of future fire. To the contrary, they would wreak havoc on the environment and increase, rather than decrease, the risk of future catastrophic fire.

Therefore, the appellants object to the proposed actions outlined in the Toolbox FEIS and ROD and urge the FMNF to develop a management plan for the area based on restoring natural fire processes and watershed function while reducing fire risk adjacent to communities. The FEIS failed to develop and analyze an alternative that will adequately protect the Toolbox landscape and wildlife viability, actively restore some parts of the landscape, allow passive restoration to occur on the rest of the area, reduce the risk of fire-related injury and damage to private property, and be fiscally responsible.

The Forest Service should fulfill its role as custodian, responsible for managing the nation's natural resources. 42 U.S.C. § 4331(b)(1). This duty includes managing natural resources "without degradation, risk to health or safety, or other undesirable and unintended consequences." *Id.* at § 4331(b)(3). The Forest Service is also responsible for carrying out Congress' promise of providing aesthetically pleasing surroundings for all Americans. *Id.* at § 4331(b)(2). Moreover, each person at the Forest Service is responsible for contributing to the preservation and enhancement of the environment. *Id.* at § 4331(c). Consequently, forest managers must balance these goals with the FWNF Land and Resource Management Plan objectives. Critical analysis, necessary to ensure that these Congressional policies are met, is lacking in the Toolbox Post-fire Logging Project FEIS and ROD.

I. The Forest Service is violating the National Forest Management Act and the Fremont LRMP by failing to provide for snags as required by the Fremont LRMP

The National Forest Management Act ("NFMA") requires the Forest Service to develop comprehensive land and resource management plans (LRMPs) for each unit of the National Forest System. 16 U.S.C. § 1604(a). Subsequent "plans, permits, contracts, and other instruments for the use and occupancy" of the national forests must be consistent with the local LRMP, in this case, the Fremont-Winema National Forest Land and Resource Management Plan, as amended. *Id.* § 1604(i); 36 C.F.R. § 219.10(e).

Snag densities and down wood were likely at unacceptable levels before the fire. The Forest Service does not disclose information on whether snag levels met LRMP standards before the fire. The Forest Service does, however, admit in the Toolbox Fire Recovery Project FEIS that past timber harvest has "decreased snag and down wood habitat." Furthermore, the salvage on both BLM land and 16,000 acres of intermingled private land in the same region have "resulted in substantial reductions in snag and down wood habitat." *FEIS at 3-205*. Snag levels are critical for the dozens of species that depend on these habitat types. The Forest Service estimates that as many as 70 different species are associated with forest snags in ponderosa pine communities present in the Toolbox area.

In areas equal or greater than 200 acres that are burned by wildfire, the Fremont LRMP specifically requires that the Forest Service to retain at least 4 snags per acre. Of those four snags, two must be greater than or equal to 20 inches dbh and 30 feet tall, and two must be greater than or equal to 12 inches dbh and 15 feet tall.

The Forest Service acknowledges that the model it used to determine these snag retention requirements is inadequate, and no longer scientifically valid. The Forest Service has decided to leave only 2.9 snags per acre on large portions of the Toolbox planning area, which will not meet even the admittedly inadequate standards of the Fremont LRMP.

The Forest Service's snag prescriptions also do not take into consideration fall rates (i.e., that snags will fall over time) and felling of snags to meet logging safety standards, both of which will reduce even further the number of snags remaining in the planning area post-project. The Forest Service has violated NFMA and the FWNF LRMP by failing to comply with the LRMP's snag retention standards in wildfire areas. This is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

II. The Forest Service has violated the National Forest Management Act by failing to ensure viable population of MIS species.

NFMA requires the Forest Service to "provide for diversity of plant and animal communities" in managing national forests. 16 U.S.C. § 1604(g)(3)(b). To ensure this diversity, NFMA requires that fish and wildlife habitat be managed to maintain viable populations of existing native and desired non-native vertebrate species in the planning area. 36 C.F.R. § 219.19.

NFMA further requires that “to estimate the effects of each alternative on fish and wildlife populations, certain vertebrate and/or invertebrate species present in the area shall be identified and selected as management indicator species.” 36 C.F.R. § 219.19(a)(1). These species (“MIS”) shall be selected because their population changes are believed to indicate the effects of management activities. *Id.* § 219.19(a)(2). “[P]opulation trends of the management indicator species shall be monitored and relationships to habitat changes determined.” 36 C.F.R. § 219.19(a)(6).

Finally, NFMA requires that “habitat must be provided to support, at least, a minimum number of reproductive individuals and that habitat must be well distributed so that those individuals can interact with others in the planning area.” *Id.* § 219.19.

The Forest Service has stated that several primary cavity excavator MIS species on the Fremont-Winema National Forest, including the Lewis’ and black-backed woodpecker, are “listed by the U.S. Fish and Wildlife Service as bird[s] of conservation concern, meaning that, without additional conservation actions, [they are] likely to become candidate[s] for listing under the Endangered Species Act of 1973 (2002).” *FEIS at 3-165*.

The Forest Service acknowledges that the scientific understanding of the habitat needs of primary cavity excavator MIS, has changed over time:

Before the Regional Forester’s Amendment #2 was adopted, the Fremont National Forest used the best available science at the time and determined that in salvage areas 100 percent population potential levels for primary excavators would be met by retaining 4 snags per acre; 3 snags greater than 15 inches dbh (greater than 20 inches dbh preferred) and 1 snag greater than 10 inches dbh (12 inches dbh preferred). Down wood requirements are to manage for 80 lineal feet of down wood in ponderosa pine communities, and 120 lineal feet of down wood in mixed conifer communities.

FEIS at 3-161.

However, the Regional Forester’s Amendment #2 determined that these standards were likely insufficient to meet the needs of cavity excavator MIS species. Subsequent to Amendment #2, the best available science indicated that:

“Several major lessons have been learned in the period 1979 to 1999 that have tested critical assumptions of earlier management advisory models (2001), including some of the assumptions used to develop the current recommendations in the LRMP Standards and Guidelines, as amended by the Regional Forester’s Amendment #2. Some assumptions include:

- calculation of numbers of snags required by woodpeckers based on assessing their “biological (population) potential” is a flawed technique (Johnson and O’Neil 2001). Empirical studies are suggesting that snag numbers in areas used and selected by some wildlife species are far higher than those calculated by this technique (Johnson and O’Neil 2001).

- numbers and sizes (dbh) of snags used and selected by secondary cavity nesters often exceed those of primary excavators (Johnson and O'Neil 2001).

This suggests the current direction of managing for 100 percent population potential levels of primary excavators may not represent the most meaningful measure of managing for cavity-nesters and that these snag levels, under certain conditions, may not be adequate for some species. In addition, the current direction provides recommendations for green stand conditions only when studies show that **cavity-nesting birds require higher densities of snags in post-fire condition versus green stand conditions for nesting and productivity**. This is likely due to the fact that in post-fire conditions, cavity-nesting birds require more snags for foraging, cover, and protection from predators”

FEIS at 3-161 (emphasis added).

The Forest Service has not amended the LRMP to update the snag retention standards despite the fact that it admits those standards are no longer scientifically valid.

Because the FWNF is currently without a sufficient snag retention standard that would ensure viable population levels as required by NFMA, the Forest Service has turned to *DecAID, the Decayed Wood Advisor for Managing Snags, Partially Dead Trees, and Down Wood for Biodiversity in Forests of Washington and Oregon* (DecAID).

The authors of DecAID note that “at present, DecAID does not specifically address effects of fire.” Mellen et al. go on to explain that:

The inventory data likely do not represent recent post-fire conditions very well because the plots sample conditions arise from a variety of disturbances, including but not limited to fire. The sample plots of older forests might represent at least some post-fire conditions; however, young stands originating after recent wildfire are not well represented because they are an extremely small proportion of the current landscape. Conditions of stand origin, especially post-fire conditions, are pertinent for interpreting conditions for wildlife species such as Black-backed Woodpecker that use and select for dense clumps of snags in recent post-fire situations.

The inventory data do not represent recent post-fire conditions very well, since recent post-fire forests are only a subset of early seral conditions sampled by the inventory plots.

Moreover, DecAID is not a population model, and does not determine population viability. The authors of DecAID state that “DecAID is NOT...a wildlife population simulator or analysis of wildlife population viability.”

The Forest Service, therefore, does not have a viable model for estimating habitat requirements for MIS species, or viable populations of those same species.

The Forest Service admits the old model is flawed and results in artificially low habitat recommendations. *FEIS at p. 3-161*. The Forest Service then decided to use a model that explicitly does not apply to a post-fire landscape, and this model recommended snag levels lower than the original model. Without a viable methodology, the Forest Service cannot ensure the continued viability of MIS species as required by law.

In addition to these problems, the Forest Service has failed to monitor population levels to determine whether it is maintaining viable populations of MIS species. Instead, the Forest Service uses a “proxy-on-proxy” approach to management.

MIS species populations are a proxy for estimating overall ecosystem health. Instead of surveying populations, however, the Forest Service uses another proxy – the habitat proxy. The Forest Service focuses on whether enough adequate habitat exists instead of surveying populations. The problem, however, is that the Forest Service’s habitat models are flawed, and neither the Forest Service nor the public has any information on actual population levels. With flawed models and no population data, the Forest Service cannot ensure the continued viability of species across the landscape.

Although the Forest Service did conduct some limited population surveys in 2003, the agency states that it has not done any statistical analysis of the data to determine population viability. The limited surveys that have been completed do not satisfy the requirement to ensure the continued viability of MIS species.

The Forest Service is using a flawed model in an inappropriate way, and it has failed to conduct any reliable population surveys. The Forest Service has failed to comply with the requirements in NFMA that it ensure viable population of MIS species.

Instead of actually monitoring the population levels as required by the plain language of the regulations, the Forest Service has decided to use another model – DecAID. However, the creators of DecAID specifically acknowledge that DecAID has not been field verified, should not be used in post-fire landscapes, should not be used to manage for population over time, and does not assess population viability. It also does not assess the effects on all of the cavity excavators that are MIS on the Fremont National Forest.

By using a proxy-on-proxy approach that relies on an inappropriate habitat model, the Forest Service has violated NFMA’s requirements to ensure viable populations of MIS species. This is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

III. The Forest Service Violated the National Environmental Policy Act by Failing to Consider a Restoration-Only Alternative

An adequate EIS must consider a reasonable range of alternatives. 40 C.F.R. § 1502.41. CEQ and the courts have described the alternatives requirement as the “heart” of NEPA and the “linchpin” requirement. The Forest Service must “rigorously explore and objectively evaluate all reasonable alternatives” and must also explain why any alternatives were eliminated. 40 C.F.R. § 1502.41(a).

The courts have previously admonished federal land managers for excluding restoration-only alternative in a post-fire landscape. League of Wilderness Defenders v. Marquis-Brong, 259 F.Supp.2d 1115 (D. Or. 2003).

The public in this case repeatedly requested that the Forest Service consider an alternative that would affirmatively rehabilitate the planning area without imposing the detrimental effects of salvage logging, the “restoration-only alternative.”

The Forest Service claims that it analyzed such an alternative, but it admits that it did not “analyze in detail” these options. The Forest Service did not present to the public the relative environmental benefits and drawbacks from deferring logging in the project area. For instance, the Forest Service did not disclose information on benefits to the retention of long-term snag levels resulting from planting without salvage logging.

The Forest Service did not fully develop a restoration-only alternative for the Toolbox project. The Forest Service claims it started to look at Alternative F, which would have addressed a restoration-only option for the Toolbox planning area. Instead of fully developing Alternative F and disclosing its impacts to the public, the Forest Service terminated its review and did not provide the information regarding the effects of this alternative to the public.

Alternative F may have been a reasonable alternative, but the Forest Service did not fully develop and disclose to the public this information. The Forest Service claims it is not reasonable, because it does not meet one of the several purposes for the project – recovery of economic value of the burned timber. Alternative F, however, may very well meet all the other stated purposes, all of which involve recovery and rehabilitation of the ecosystem.

The Forest Service violated NEPA’s requirements when it failed to fully develop, analyze, and disclose to the public a restoration-only alternative. This is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

IV. The Forest Service’s Failure to Conduct the Appropriate Environmental Analysis on the National Forest Management Act 2003 Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities Regulations Violates NEPA and is Arbitrary and Capricious

NEPA requires federal agencies to prepare a detailed “environmental impact statement” for every recommendation or report on proposals for legislation and other major federal actions which may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). “Action,” for purposes of NEPA, includes new or revised agency rules, regulations, plans, policies, and procedures. 40 C.F.R. § 1508.18(a). “Federal action” includes the adoption of official policy, such as rules and regulations. 40 C.F.R. § 1508.18(b)(1). “Significantly,” for purposes of NEPA, requires the consideration of both context and intensity. 40 C.F.R. § 1508.27.

In evaluating intensity, the agency must consider impacts that may be both beneficial and adverse, unique characteristics of the geographic area, the degree to which effects are likely to be highly controversial, the degree to which effects are highly uncertain, the degree to which the action may establish a precedent for future actions with significant effects, whether the action is related to other actions with cumulatively significant impacts, the degree to which the action may adversely affect threatened or endangered species or its habitat, and whether the action threatens a violation of federal, state, or local environmental laws.

In 2002, the Forest Service initiated an effort to amend its National Forest Management Act regulations governing notice, comment, and appeal procedures for National Forest System projects and activities. The agency proposed the 2003 Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities" regulations (Notice, Comment, and Appeal Regulations) in the Federal Register on December 18th 2002, took public comment on its proposal, and then issued final regulations on June 4th 2003. 68 Fed Reg 33582 (June 4, 2003). No environmental analysis was undertaken on the regulations to assess their effect on the quality of the human environment.

Vastly different from the regulations in place prior to June 2003, the new Notice, Comment, and Appeal regulations allow the Forest Service to declare an "emergency situation" when "immediate implementation of all or part of a decision is necessary for relief from hazards threatening human health and safety or natural resources on those NFS or adjacent lands; or that would result in substantial loss of economic value to the Federal Government if implementation of the decision were delayed." 36 C.F.R. § 215.10 (2003).

Under the old regulations, the Forest Service granted an automatic stay when projects were appealed. Under those regulations, an automatic stay on project implementation lasted for the entire administrative appeal period, up to 105 days. The stay allowed the Forest Service to resolve disputed issues *before* logging commenced, and thereby afford the Forest Service with an opportunity to avoid or mitigate significant impacts on the environment through informal resolution.

Under the 2003 regulations, the Forest Service can simply log first and resolve issues later. When the Forest Service declares an "economic emergency" it can simply bypass the stay and implement the project while an administrative appeal is pending. Citizens, under this scenario, have no recourse other than to proceed immediately to the District Court. The new rules threaten to burden the Court system with issues that could be resolved administratively, with an end result of the potential for serious environmental harm.

The Notice, Comment, and Appeal Regulations constitute a major federal action that may significantly affect the quality of the human environment. 42 U.S.C. § 4332(2)(C). The Forest Service failed to prepare an EIS or even an environmental assessment for these regulations as required by law. Therefore, the Forest Service's decision to develop, promulgate, and implement the Notice, Comment, and Appeal Regulations without preparing an EA or EIS is arbitrary, capricious, an abuse of discretion, and not in compliance with NEPA. 5 U.S.C. § 706(2)(A).

V. The Emergency Situation Determination is Unwarranted.

In approving the Toolbox FRP, the Forest Service claims that immediate implementation is required in order to avoid "substantial loss of economic value to the Federal Government if implementation of the decision were delayed." 36 C.F.R. § 215.2. The Regional Forester, Linda Goodman, granted the Emergency Situation Determination for two components of the Toolbox FRP: 7,287 acres of commercial salvage and connected actions (road construction, reconstruction, and maintenance) as well as 4,500 acres of fuels treatments and site preparation for reforestation outside of commercial salvage units.

To Appellants' knowledge, this is one of the first projects in the nation to utilize the 2003 Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities. Although we cautioned the Regional Office regarding the utilization of this authority, it appears as though the Forest Service has disregarded our advice and is proceeding on an unwise course of action.

The emergency situation determination is unwarranted for five reasons. First, the Forest Service has failed to support its determination by information from qualified experts. NEPA requires the Forest Service to use a qualified, interdisciplinary team to prepare environmental analysis documents. 40 C.F.R. § 1502.6 ("shall be prepared using an inter-disciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of the Act). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.7)"). The Forest Service Manual, while not legally binding on the agency, also states that "the team must have the expertise to identify and to evaluate the potential direct, indirect, and cumulative social, economic, physical, and biological effects of the proposed action and its alternatives. FSH 1909.15.12.01, 12.1.

The Ninth Circuit in Idaho Sporting Congress v. Thomas stated that "allowing the Forest Service to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a Forest Service expert derived her opinion." 137 F.3d 1146, 1150 (9th Cir. 1998). In a similar situation, the district court in Washington stated that

The Defendants do assert that the results of the Interdisciplinary Team's study were, in part, based on the experiences of Forest Service personnel. However, the Defendants have not cited, nor has the court found, any direct statements from the Interdisciplinary Team that illustrate the personal experiences of Forest Service employees. If this court were only to consider the experiences of the Forest Service personnel, the court would have a difficult time upholding the Defendants' decision...

Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture, 18 F.3d 1468, 1475 (W.D. Wash. 1994).

Economic issues affecting the timber industry as well as businesses that benefit from the many non-timber uses of the FWNF are highly significant issues in the FEIS; in fact, they drive the

purpose and need of the project to some degree. The issues are complex, and require a considerable amount of expertise to be adequately addressed. For example, the FEIS characterizes the no action alternative as having no economic value whatsoever. However such benefits and costs are not difficult to quantify for a trained economist and should be addressed by the USFS.

Despite the complexity of economic issues raised in the FEIS and the significance of those issues, the Forest Service has failed to employ even one economist or sociologist on the interdisciplinary team. Instead, the Forest Service has relied upon Jerry Haugen, who has a civil engineering degree, to address the economic issues surrounding the Toolbox project. The Forest Service has not indicated how this individual is qualified to assess the economic issues associated with the proposed project.

Appellants question how the agency can make a reasoned decision regarding the socio-economic impact of the proposed project, much less a determination that the absence of immediate implementation will result in substantial loss of economic value to the government. This glaring omission makes a mockery of the NEPA process and casts a dubious shadow over any economic basis for the proposed project. The project should be withdrawn until this omission is corrected. The failure to do so violates NEPA and the APA. 5 U.S.C. § 706(2)(A).)

Second, the Forest Service fails to indicate how expeditious implementation of the Toolbox Fire Recovery project will avoid substantial economic loss to the government. As the economic analysis for the project indicates, all of the action alternatives will result in negative income: only the no action alternative will cost the federal government – and taxpayers – nothing. *ROD at 24*. Moreover, the Forest Service has failed to consider the economic loss it will experience due to litigation that is sure to involve the Toolbox FRP. If the Forest Service is trying to avoid an economic loss, it should refrain from implementing the proposed project. Alleging that an emergency exists because of an unsubstantiated claim that the government will lose money on a timber sale, and that that sale consequently must be implemented immediately,¹ is arbitrary and capricious. 5 U.S.C. § 706(2)(A).

Third, the Forest Service has failed to demonstrate that there is, in fact, an “emergency” related to the implementation of the Toolbox FRP. It is clear that the Forest Service is proposing this project only so that third party private individuals may benefit economically from processing and selling the burned timber in the planning area: the U.S. Treasury will not realize any income from the implementation of this project. The Forest Service itself will suffer a loss by selling this timber, as the cost of preparation and sale administration outweigh the income generated by the sale. If the agency forewent the sale of the timber, the natural resources in the planning area would be protected to a greater degree than if commercial harvest were permitted. Based on this situation, it appears that the Forest Service is rushing to lose money on the Toolbox Fire

¹ The conclusion that a timber sale must be implemented immediately in order to avoid losing money is belied by the fact that the Forest Service’s timber sale program has never made a profit, PAUL HIRT, CONSPIRACY OF OPTIMISM (1994), and that the Forest Service is unable to account for the actual costs of the program. GENERAL ACCOUNTING OFFICE, FINANCIAL MANAGEMENT: ANNUAL COSTS OF FOREST SERVICE’S TIMBER SALES PROGRAM ARE NOT DETERMINABLE, GAO-01-1101R Forest Service Timber Costs (2001).

Restoration Project, rather than implementing restoration-only activities. There is no emergency present in this case.

Fourth, the Forest Service has failed to disclose, as NEPA requires, why the agency believes that immediate implementation of this project is necessary to avoid an economic loss to the government. 42 U.S.C. §§ 4331, 4332. NEPA's disclosure goals are two-fold: (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 v. Methow Valley Citizens, 490 U.S. 332, 349 (1989); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1151 (9th Cir. 1998). By focusing the agency's action 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.

In this case, the FEIS for the Toolbox project does not contain any information regarding why an economic emergency situation is appropriate in this case. Although the FEIS does contain an economic analysis section, that section does not disclose or analyze the agency's rationale for declaring an emergency, and thus circumventing the normal administrative review process accorded to decisions implementing LRMPs. NEPA requires the Forest Service to disclose and assess this information in the body of the EIS. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998); Sierra Club et al. v. Bosworth, 199 F. Supp. 2d 971 (N.D. Cal. 2002).

Finally, the Forest Service has failed to demonstrate that it has the regulatory authority to make an emergency situation determination based on economics. The 2003 Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities gain their authority from the Appeals Reform Act (ARA), which amended the National Forest Management Act. 16 U.S.C. § 1612 note. However, there is nothing in the ARA that references economics as a reason to declare an emergency. Consequently, implementing a project based on a regulation that is in excess of statutory authority violates the APA. 5 U.S.C. §§ 706(2)(C); 706(2)(A).

CONCLUSION

For all the foregoing reasons, the Toolbox FRP FEIS fails to comply with the requirements of NEPA. The appellants urge the Forest Service to issue a new FEIS that provides accurate and complete information regarding the impacts of the logging alternatives, that examines a reasonable range of alternatives including management options that allow natural recovery and avoid reliance on commercial salvage logging while providing true protection for communities at risk from future wildfires, and that includes comprehensive mitigation measures capable of reducing or eliminating the significant environmental impacts of the actions proposed.

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² Verification of Identity Available upon request.