

Doyle - AS

Chris Winter OSB # 98435 (LEAD COUNSEL)
(503) 525-2725
chris@crag.org
Ralph O. Bloemers OSB #98417
(503) 525-2724
ralph@crag.org
Cascade Resources Advocacy Group
917 SW Oak St., Suite 417
Portland, OR. 97204
Fax: (503) 296-5454

Susan Jane Brown WSB # 31224
Pacific Environmental Advocacy Center
10015 SW Terwilliger Blvd.
Portland, OR. 97219
Tel: (503) 678-6823
Fax: (503) 768-6642
smbrown@lclark.edu

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF OREGON

FILED 04 APR 30 13:00 JUSJC:erp

OREGON NATURAL RESOURCES
COUNCIL FUND, KLAMATH FOREST
ALLIANCE, and NORTHWEST
ENVIRONMENTAL DEFENSE CENTER

Plaintiffs,

vs.

LINDA GOODMAN, REGIONAL
FORESTER, and UNITED STATES FOREST
SERVICE,

Defendants

Civ. Case No.

CV 04 593 AS

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

(Violation of National Environmental
Policy Act, National Forest Management
Act, and Administrative Procedure Act)

#174083

INTRODUCTION

1. This action challenges Linda Goodman's and the United States Department of Agriculture Forest Service's (collectively, the "Forest Service" or the "Defendants") April 23, 2004 decision to immediately authorize the Toolbox Fire Recovery Project (the "Toolbox Project"). This salvage timber sale would allow the post-fire logging of 10,214 acres within the Fremont-Winema National Forest resulting in the removal of 36 Million Board Feet ("MMbf"). The project would also involve construction of 11 miles of new temporary roads and another 10.5 miles of reopened roads, some of which would be within riparian areas. Furthermore, the Toolbox Project threatens to decimate the post-fire landscape, leaving as few as 2.9 snags per acre that are critical to the species that depend on these unique habitats.

2. Defendants violated the National Forest Management Act by failing to ensure the continued viability of species as required by statute and regulation. The Forest Service impermissibly relied on a "proxy on proxy" approach for ensuring the viability of primary cavity excavator Management Indicator Species, including black-backed and Lewis' woodpeckers. Without conducting population surveys for these species, the Forest Service relies on an inappropriate habitat model in a poor effort to justify the retention of as few as 2.9 snags per acre. In fact, the old population model utilized in the Fremont National Forest LRMP is outdated and no longer considered valid science. In response, the Forest Service has used another "model" that, among other things, has not been field verified, does not apply in a burned landscape, is not intended as a tool to manage species populations over time, does not measure species viability, and does not address all of the species designated as MIS on the Fremont-Winema National Forest.

3. The Forest Service has also violated the National Environmental Policy Act (“NEPA”) by failing to present the public with an alternative that includes active restoration of the post-fire landscape but excludes destructive salvage logging. The Forest Service has argued that it does not need to consider such an alternative, because: 1) it does not meet one of the numerous purposes and needs of the project (providing economic benefit); and 2) it started to consider this alternative but then stopped when the agency determined that the alternative would not meet the purpose and need of economic recovery. The public cannot ensure that the agency has made a well-informed decision about how to manage the Toolbox Fire planning area without the benefit of an adequate range of alternatives. By artificially limiting the range of alternatives, the Forest Service has predetermined that it will either do nothing, or it will salvage log a minimum of 6,309 acres (21.5 MMbf).

4. The Forest Service has also violated NEPA by failing to prepare an environmental assessment or an environmental impact statement for the 2003 National Forest Management Act Notice, Comment, and Appeal Procedures on National Forest System Lands (the “2003 Notice, Comment, and Appeal Regulations”). In these regulations, the Forest Service created a rule that allows it to exempt project implementation from an automatic stay while a party administratively appealed its decisions. Now, in the case of an “economic emergency,” the Forest Service may cut first and resolve issues on the validity of the project later, often after all of the trees are logged. This regulatory implementation has a concrete effect on ground, because the entire logging project in this case may be completed before the Forest Service resolves outstanding issues in the administrative appeal. Pursuant to NEPA, the Forest Service was required to disclose and analyze these impacts in a public process, but failed to do so.

5. This complaint seeks the following: 1) a declaration that the Forest Service has violated NFMA by failing to comply with the snag retention standards in the LRMP; 2) a declaration the Forest Service violated NFMS by using a proxy-on-proxy approach to ensure viable population of MIS species in combination with a flawed habitat model; 3) a declaration that the Forest Service violated NEPA by failing to fully develop, analyze, and disclose a restoration-only alternative; 4) a declaration that the Forest Service violated the NEPA in failing to prepare an Environmental Assessment or Environmental Impact Statement for the 2003 Notice, Comment, and Appeal Regulations; 4) a permanent injunction prohibiting the Forest Service from implementing the Toolbox Fire Recovery Project until the Forest Service has demonstrated compliance with NFMA and NEPA; 5) a permanent injunction vacating, in whole or in part, the 2003 Notice, Comment and Appeal Regulations until the Forest Service has demonstrated compliance with the National Environmental Policy Act; and 6) any other relief that may be just, equitable, or appropriate.

6. Should Plaintiffs prevail, Plaintiffs will seek an award of costs and attorneys' fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412.

JURISDICTION

7. Jurisdiction is proper in this Court pursuant to 28 U.S.C. §§ 1331 (federal question), 2201 (injunctive relief), 2202 (declaratory relief), and 28 U.S.C. § 1346 (United States as a defendant). This cause of action arises under the laws of the United States, including the Administrative Procedure Act (APA), 5 U.S.C. §§ 701 et seq.; the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq.; and the National Forest Management Act (NFMA), 16 U.S.C. §§

1600 et seq. An actual, justiciable controversy exists between Plaintiffs and Defendants. The requested relief is proper under 28 U.S.C. §§ 2201 & 2202, and 5 U.S.C. §§ 705 & 706.

VENUE

8. Venue in this court is proper under 26 U.S.C § 1391. The Regional Forester, Linda Goodman, authorized the immediate implementation of this decision and is headquartered in Portland, Oregon. The lead Plaintiff, Oregon Natural Resources Council Fund, as well as co-Plaintiff Northwest Environmental Defense Center, have their headquarters in Portland, Oregon.

9. This case is properly filed in Portland, Oregon, pursuant to Local Rule 3.4. The Regional Forester, who authorized the immediate implementation of this decision, is headquartered in Portland, Oregon. The lead Plaintiff, Oregon Natural Resources Council Fund, as well as co-Plaintiff Northwest Environmental Defense Center, have their headquarters in Portland, Oregon.

PARTIES

10. Plaintiff OREGON NATURAL RESOURCES COUNCIL FUND (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 Project. ONRC members use the Toolbox Project planning area hiking, recreation, bird watching and other recreational and professional pursuits. The interests of ONRC members will be irreparably impaired if Toolbox Project is allowed to proceed without compliance with our federal environmental laws.

11. Plaintiff KLAMATH FOREST ALLIANCE (KFA) is a non-profit corporation with supporting members located in Klamath basin, as well as throughout the state of Oregon and the

Pacific Northwest. KFA and its supporting members are dedicated to protecting and conserving the forests and living communities of the Klamath basin, from the headwaters of the Klamath River to its mouth at the Pacific Ocean. KFA's staff and supporting members live and work near the Fremont-Winema National Forest and enjoy these public lands for hiking, recreation, bird watching, hunting, fishing, and other recreational and professional pursuits. The interests of KFA's supporting members will be irreparably impaired if the Toolbox Project is allowed to proceed without compliance with our federal environmental laws.

12. Plaintiff 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.

13. Plaintiffs' members use and enjoy the Fremont-Winema National Forest, including the Silver Lake Ranger District, for hiking, fishing, hunting, camping, photographing scenery and wildlife, and engaging in other vocational, scientific, and recreational activities. Plaintiffs' members derive recreational, inspirational, religious, scientific, educational, and aesthetic benefit from their activities within this national forest. Plaintiffs' members intend to continue to use and enjoy the Fremont-Winema National Forest, including the Silver Lake Ranger District, frequently and on an ongoing basis in the future.

14. The aesthetic, recreational, scientific, educational, and religious interests of Plaintiffs' members have been and will be adversely affected and irreparably injured if defendants proceed to further implement the Toolbox Fire Recovery Project. These are actual, concrete injuries

caused by defendant's failure to comply with mandatory duties under NEPA, NFMA, and the APA. The relief Plaintiffs seek would redress their injury.

15. Defendant, LINDA GOODMAN, is the Regional Forester based in Portland, Oregon who approved the Emergency Situation Determination for the Toolbox project, and prompted this legal challenge.

16. Defendant FOREST SERVICE is an agency of the United States and is a division of the Department of Agriculture. The Forest Service is responsible for implementing the National Environmental Policy Act and National Forest Management Act procedures for projects on national forests. The Forest Service promulgated the Notice, Comment, and Appeal regulations challenged here.

FACTUAL AND LEGAL BACKGROUND

The Toolbox Fire Recovery Project

17. In July and August of 2002, the Toolbox and Silver Fires burned approximately 85,000 acres of National Forest land, as well as 8,000 acres of land owned by the Bureau of Land Management, and 27,500 acres of private industrial forestland. The Toolbox Project totals approximately 47,200 acres of National Forest lands in two separate 5th Field Watersheds – the Silver Creek Watershed and the Silver Lake Watershed.

18. In the years prior to the fire, the Forest Service had heavily managed the area within the Toolbox Fire Recovery Project. Much of the vegetation has been logged and commercially thinned. Road densities in the planning area far exceed LRMP standards. The area has been, and continues to be, heavily grazed. Soil and water resources have been particularly impacted from these previous management activities. Indeed, both Silver Creek and the West Fork of

Silver Creek have been included on the list of impaired waters by the Oregon Department of Environmental Quality because of elevated temperature. The sedimentation and destruction of riparian vegetation caused by the fire has further exacerbated these conditions.

19. The Forest Service used typical industrial fire fighting techniques in an effort to control the Toolbox Complex Fire. The Forest Service spread a total of 102,025 gallons of chemical retardant across the landscape, some of which went directly into fish bearing streams. The Forest Service also constructed more than 204 miles of fire lines with bulldozers.

20. The Forest Services' response to the Toolbox fire is the Toolbox Project. The Forest Service proposes in its chosen alternative – Alternative G – to log more than 10,000 acres of land, totaling approximately 36 MMbf of timber. The Forest Service also proposes to construct 11 miles of new temporary road and reconstruct 10 miles of old closed roads. Of this volume, a great majority will be logged by ground-based systems – the Forest Service only plans 220 acres of helicopter logging.

21. On April 23rd 2004, the Forest Service released the Record of Decision (ROD) for the Toolbox project. The vast majority of the project is subject to an “emergency situation determination,” which allows the Forest Service to implement a project immediately if delay in implementation would result in “substantial loss of economic value to the Federal Government.” 36 C.F.R. § 215.2. Approximately 7,287 acres of commercial salvage and 4,500 acres of fuels treatments are subject to the emergency situation determination. ROD at 44. The ROD is unclear regarding which areas of the Toolbox Fire are part of this acreage and which areas are still subject to administrative appeal.

22. 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 Final Environmental Impact Statement (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.

The National Forest Management Act and Snag Retention Standards

23. 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).

24. NFMA also 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.

25. 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.

26. NFMA regulations require inventory and monitoring on National Forests under 36 C.F.R. §219.12(d), (k); 36 C.F.R. §§219.19(a)(6), 219.26, and 219.19(a)(2). These regulations require that “each Forest Supervisor shall obtain and keep current inventory data appropriate for planning and managing the resources under his or her administrative jurisdiction.” Id. §219.12(k). To ensure biological diversity, these regulations require that “[i]nventories shall include quantitative data making possible the evaluation of diversity in terms of its prior and present condition.” Id. §219.26

27. To satisfy NFMA’s requirement of maintaining viable populations of MIS, the Fremont-Winema National Forest Land and Resource Management Plan (LRMP) designates at least 9 MIS species representing different habitat types. The MIS that are of particular concern in the Toolbox planning area are primary cavity excavator and woodpecker species, including black-backed and Lewis’ woodpeckers, because these species depend on standing and down dead and dying trees for survival.

28. The Forest Service has stated that the white-headed, and Lewis' woodpeckers, primary cavity excavator MIS species on the Fremont-Winema National Forest, 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, 3-228, 3-168. Other species listed as primary cavity excavator MIS include the black-backed, three-toed, pileated, hairy, and white-headed woodpeckers; and red-naped and Williamson's sapsuckers.

29. The Forest Service acknowledges that the scientific understanding of the habitat needs of primary cavity excavator MIS, including black-backed and Lewis' woodpeckers, 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.

30. 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).

31. 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.

32. Because the Fremont-Winema National Forest 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).

33. 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.

34. 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.” It also does not address all primary cavity excavator species.

35. The Forest Service, therefore, does not have an appropriate model for estimating habitat requirements for MIS species, or viable populations of those same species, especially in post-fire environments.

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

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

38. 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.

39. 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.

40. 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.

National Environmental Policy Act and the Flawed Alternatives Analysis

41. 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 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's action.

42. The Council on Environmental Quality ("CEQ") promulgated uniform regulations to implement NEPA that are binding on all federal agencies. 42 U.S.C. § 4342, 40 C.F.R. §§ 1500 et seq.

43. The Forest Service is required under NEPA to prepare an environmental impact statement (EIS) for all major federal actions significantly affecting the quality of the human environment.

42 U.S.C § 4332(2)(C). By regulatory definition, significance should be examined both in terms of context and intensity. 40 C.F.R. § 1508.27.

44. 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).

45. An adequate EIS must consider both direct and indirect 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.

46. Cumulative effects are defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7.

47. NEPA requires that environmental information be made available to public officials and citizens before decisions are made and before actions are taken. 40 C.F.R. §1500.1 (b). The information must be of high quality. Id.

48. Scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. 40 C.F.R. § 1500.1(b).

49. 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.”

50. The Forest Service claims that it analyzed such an alternative, but it admits that it did not “analyze in detail” this option. 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 the benefits of the retention of long-term snag levels resulting from planting without salvage logging. The Forest Service also did not disclose information about benefits of reduced sedimentation levels resulting from road decommissioning without new road construction and use.

51. The Forest Service cannot make an informed decision without analyzing and disclosing this information to the public. The public must be given the opportunity to review this information and challenge the agency’s analysis and decision-making procedures. In this case, the agency simply says it looked at this option but did not develop the analysis for the public. This approach violates the letter and intent of NEPA.

52. A federal district court in the 9th Circuit has 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 2003 Notice, Comment, and Appeal Procedures for National Forest System Projects and Activities

53. 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).

54. No environmental analysis was undertaken on the regulations to assess their effect on the quality of the human environment.

55. Vastly different from the previous regulations, the 2003 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. § 215.2 (2003).

56. 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 a maximum of 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.

57. Under the 2003 Notice, Comment and Appeal Regulations, the Forest Service can simply log first and resolve issues later, often after the logging is complete. 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.

58. Linda Goodman, in her capacity as the Regional Director of the Forest Service, used the 2003 Notice, Comment, and Appeal Regulations to make an Emergency Situation Determination for the Toolbox Project based on the alleged loss of substantial economic value to the government from delayed implementation of the proposed project.

FIRST CLAIM FOR RELIEF

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

59. Plaintiffs incorporate by reference all preceding paragraphs.

60. 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).

61. 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.

62. The Forest Service acknowledges that the model it used to determine these snag retention requirements is inadequate, and no longer scientifically valid.

63. 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.

64. The Forest Service's snag prescriptions also do not take into consideration fall rates (i.e., that snags will fall to the ground over time, making them unavailable for use by most cavity excavators) 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.

65. The Forest Service has violated NFMA and the Fremont 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).

SECOND CLAIM FOR RELIEF

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

66. The Plaintiffs incorporate by reference all preceding paragraphs.

67. 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.

68. 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.

69. 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, among other things, DecAID has not been field verified, does not apply in a burned landscape, is not intended as a tool to manage species populations over time, does not measure species viability, and does not address all of the species designated as MIS on the Fremont-Winema National Forest.

70. By using a proxy-on-proxy approach that relies on an inappropriate and untested 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).

THIRD CLAIM FOR RELIEF

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

71. Plaintiffs incorporate by reference all preceding paragraphs.

72. 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).

73. A Federal District Court has 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).

74. The Forest Service did not fully develop a restoration-only alternative for the Toolbox project.

75. The Forest Service claims it started to look at Alternative F, which would have addressed a restoration-only option for the Toolbox planning area.

76. Instead of fully developing Alternative F and disclosing its impacts to the public, the Forest Service terminated its review and did not provide information regarding the effects of this alternative to the public.

77. The Forest Service stated that it terminated consideration of Alternative F because this alternative did 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.

78. 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).

FOURTH CLAIM FOR RELIEF

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

79. 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).

80. "Action," for purposes of NEPA, includes new or revised agency rules, regulations, plans, policies, and procedures. 40 C.F.R. § 1508.18(a).

81. "Federal action" includes the adoption of official policy, such as rules and regulations. 40 C.F.R. § 1508.18(b)(1).

82. "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.

83. 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).

PLAINTIFFS' PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

1. Declare that Defendant violated the National Forest Management Act by failing to comply with the snag retention standards in the Fremont LRMP;
2. Declare the Defendant violated the National Forest Management Act by using a proxy-on-proxy approach in combination with a flawed habitat model to ensure the viability of primary cavity excavator Management Indicator Species;
3. Declare that Defendant violated the National Environmental Policy Act by failing to fully develop, consider and disclose a restoration-only alternative;
4. Declare that the Defendant violated the National Environmental Policy Act in failing to prepare an Environmental Assessment or Environmental Impact Statement for the 2003 National Forest Management Act Notice, Comment, and Appeal Procedures for Projects and Activities on National Forest System Lands;
5. Permanently enjoin the Forest Service from implementing the Toolbox Fire Recovery Project until the Forest Service has demonstrated compliance with the National Forest Management Act and the National Environmental Policy Act;
6. Permanently enjoin and vacate, in whole or in part, the 2003 National Forest Management Act Notice, Comment and Appeal Procedures for Projects and Activities on

National Forest System Lands, and remand the regulations to the Forest Service until the agency has demonstrated compliance with the National Environmental Policy Act;

7. Award Plaintiffs their costs of suit and attorneys fees; and

8. Grant Plaintiffs such other and further relief as is necessary, just and equitable.

///

///

///

Respectfully submitted and dated this 30th day of April, 2004.



Ralph O. Bloemers, OSB # 98417
Cascade Resources Advocacy Group
917 SW Oak St., Suite 417
Portland, OR 97205
(503) 525-2724
ralph@crag.org