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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KLAMATH SISKIYOU WILDLANDS)
CENTER, UMPQUA WATERSHEDS)
and CASCADIA WILDLANDS PROJECT,)

Plaintiffs,)

v.)

LYNDA L. BOODY, in her official)
capacity as Glendale Field Manager,)
DWIGHT FIELDER, in his official capacity)
as South River Field Office Manager, and)
BUREAU OF LAND MANAGEMENT,)
an agency of the United States Department)
of the Interior,)

Defendants.)
_____)

Civ. No. 03-3124-CO

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

Federal Land Policy and Management Act,
43 U.S.C. § 1732(a);

National Environmental Policy Act,
42 U.S.C. §§ 4321 et seq.

Endangered Species Act,

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INTRODUCTION

This action challenges, in part, the Defendant Bureau of Land Management (BLM) decisions to weaken, then eliminate, the protections provided to the red tree vole pursuant to the Survey and Manage provisions of the Northwest Forest Plan (NWFP). The NWFP, as amended in 2001, places red tree voles in Survey and Manage “Category C,” which requires the BLM to conduct pre-disturbance surveys for the vole and protect all known sites until high priority sites are identified. On June 14, 2002, the BLM decided to change the vole to Category D in its central range, meaning that BLM no longer needed to conduct pre-disturbance surveys, but continued to have a duty to protect known sites. On December 19, 2003, the BLM decided to eliminate the vole from the protections of the Survey and Manage mitigation provisions in the mesic portion of its range. These two decisions are not based on sufficient new information, including lack of “vital” strategic surveys, and not supported by the record before the decisionmakers. In addition, these decisions to change management requirements for the vole were made through internal memorandums without the benefit of disclosure to the public or supplemental environmental analysis, as required by the National Environmental Policy Act (NEPA). Nor were the decisions vetted through the plan amendment process required by the Federal Land Policy and Management Act (FLPMA). Plaintiffs request that this Court set aside these two decisions as not in accordance with NEPA and FLPMA and otherwise arbitrary and capricious because they are unsupported by their records.

As a result, the BLM decided to proceed with the Cow Catcher and Cottonsnake timber sales without conducting pre-disturbance surveys for the vole, and it refused to protect known sites identified by citizens as required by the NWFP, as amended in 2001. Thus, the Cow Catcher and Cottonsnake timber sale decisions violate FLPMA because they are inconsistent with the Survey and Manage requirements of the NWFP, as amended in 2001.

Moreover, due to the substantive changes to the survey and manage provisions, the Cow Catcher and Cottonsnake timber sales are substantially different than what they would have been had the red tree vole protections remained in place. The sales would have contained a number of vole sites that BLM would have had to buffer with ten acres of preserved late-successional forest. The Endangered Species Act consultations and resulting biological opinions, which date to 1999 and 2001, are based upon the explicit assumption that the sales would comply with the NWFP, as it existed at the time of consultation. As a result of the changes to survey and manage, BLM must reinitiate the ESA consultations for these sales.

BLM is in violation of its ESA duty to insure that its actions do not destroy or adversely modify critical habitat designated for the northern spotted owl. Although BLM acknowledges that timber harvesting in critical habitat will have an adverse effect, BLM unlawfully relies upon the existence of Late Successional Reserves (LSRs) to conclude that its actions will not adversely modify the critical habitat. This conclusion does not comply with the ESA and recent Ninth Circuit interpretations of the critical habitat duty vis-a-vis the NWFP.

The Cow Catcher decision further fails to comply with NEPA and FLPMA. Since this Court granted Plaintiffs' motion for a preliminary injunction of Cow Catcher, the BLM prepared a supplemental environmental assessment (hereafter "CC SEA") to disclose and analyze the effect to the vole and information to support its asserted compliance with the Resource Management Plan (RMP) standards for Connectivity/Diversity Blocks. Nonetheless, BLM continues to fail to disclose sufficient information and to act in accordance with its RMP standards for the C/D Blocks land allocations. Nor did BLM comply with NEPA in deciding to proceed with Cow Catcher because it failed to disclose and analyze the effects and cumulative effects of the sale on the red tree vole and northern spotted owl, as well as analyzing only two alternatives.

The Cottonsnake decision violates FLPMA because BLM did not use the information from the Watershed Analysis (“WA”) to inform and develop the decision, as required by the Medford RMP. Nor is the WA information, Riparian Reserve boundaries or proposed volume of harvest disclosed in the Cottonsnake EA in violation of NEPA. Finally, the EA fails to disclose and analyze the effects and cumulative effects in numerous respects, including the vole, northern spotted owl, del norte salamander and noxious weeds.

For all of these reasons, the ASR decisions and the Cow Catcher and Cottonsnake timber sale decisions should be set aside pursuant to the Administrative Procedure Act, 5 U.S.C. § 706(2), enjoined pursuant to the ESA, 16 U.S.C. § 1540(g)(1)(A), and no further timber harvest should occur until BLM can act in full accordance with all applicable law and regulation.

BACKGROUND

I. THE RED TREE VOLE AND THE NORTHWEST FOREST PLAN

The red tree vole (*Arborimus longicaudus*) is a tree-dwelling mammal that lives only in Oregon and a small portion of northwest California. The vole’s optimal habitat is old-growth Douglas-fir forest. Management Recommendations (“MR”) at 1 (attached hereto as Exhibit 1).¹ It

¹Plaintiffs challenge four final agency actions: the June 14, 2002 decision to change the vole from Survey and Manage Category C to D in its central range, known as the 2001 Annual Species Review (“ASR”); the December 19, 2003 decision to eliminate Survey and Manage protections for the vole in the mesic portion of its range, known as the 2003 ASR; the decision to proceed with the Cow Catcher timber sale; and the decision to proceed with the Cottonsnake timber sale. Each of these decisions has its own administrative record, which will be cited herein as “2001 ASR AR” followed by the Tab#/Bates Page#; “2003 ASR AR;” Cow Catcher “CC AR;” and Cottonsnake “CS AR,” respectively. Some documents are filed as their own volume and will be referred to as such. However, the Management Recommendations for the Oregon Red Tree Vole (Sept. 27, 2000) are not contained in any record and are supplied as Exhibit 1. This document can be found on BLM’s webpage at <http://www.or.blm.gov/surveyandmanage/MR/RedTreeVole/RTV.pdf> (last visited 3/11/04). Because the BLM was required to protect “known” sites at the time it issued the Cow Catcher decision, the Vole MRs should have been in the record, similar to the MR for vascular plants. CC AR at 93/1038.

is most likely to be found in forests with large trees (greater than 32 inches diameter at breast height), multiple-layered canopies and good canopy structure. MR at 1, 5, 7. The red tree vole is an important food source of the northern spotted owl, a species listed as threatened with extinction pursuant to the Endangered Species Act (“ESA”). MR at 5.

The federal agencies, including Defendant BLM, are concerned about the vole’s ability to persist (survive) in a managed forest. Red tree voles were rated as “highly vulnerable to local extirpations from habitat fragmentation or loss.” MR at 5. The red tree vole has many life history characteristics that continue to raise concerns for its long-term persistence such as very small home ranges, low dispersal capability, extremely low reproductive potential and sensitivity to stand level disturbances (timber harvesting). MR at 1; Declaration of Chris Maser ¶¶ 13-14, 18 (Dkt. #55).

The NWFP land allocations of Riparian Reserves and Late-Successional Reserves (LSRs), where timber harvesting is allowed only for limited purposes, were designed to provide for the habitat needs of the northern spotted owl. MR at 10. However, the red tree vole is not able to disperse between LSRs over the highly fragmented forest landscape with the speed or to the same distance as the owl. MR at 10 (citing FEMAT² at IV-173 (“Red tree voles have limited dispersal capabilities, and connectivity of older forests may be important to metapopulation function”)); Maser Decl. ¶¶ 31 (vole-specific); 22-30 (background on importance of connectivity). Therefore, “connectivity of LSRs is necessary to provide for reproductive populations between large reserves to facilitate gene flow from one reserve to another.” NWFP at App. J2-474³; MR at 10. “[S]table, well-distributed tree

²FEMAT is the 1993 Forest Ecosystem Management Report: and Ecological, Economic and Social Assessment, prepared to support the NWFP decision and can be found at <http://www.or.blm.gov/nwfpnepa/#1993%20FEMAT%20Report> (last visited 3/11/04).

³NWFP Appendix J2 is a separate volume of the NWFP that Defendant later filed as part of the record. It is available at <http://www.or.blm.gov/nwfpnepa/FSEIS-1994/FSEIS-1994-AppJ-2.pdf> (last visited 3/11/04).

vole populations depend on maintaining habitat for reproduction and dispersal within non-reserved land allocations.” MR at 10. Accordingly, the agencies added the red tree vole to the list of species protected by the Survey and Manage mitigation provisions of the NWFP to increase the likelihood of achieving adequate, stable, well-distributed populations across its range. NWFP, App. J2 at J2-55 (based on very limited dispersal capability, “forest fragmentation and isolation of late-successional patches may prevent gene flow and detrimentally affect metapopulation dynamics”); at J2-475; MR at 10. The NWFP required the BLM to conduct pre-disturbance surveys and manage known sites in the unreserved lands (known as “Matrix”) in order to help provide for well distributed breeding colonies of red tree voles. MR at 10; NWFP EIS Vol. 1 at p. 185.

In 1998, the Forest Service and BLM attempted to limit the scope of the Survey and Manage requirements through interpretive memoranda that exempted certain timber sales in old growth forests from the survey requirements for 77 species of wildlife, and by developing new survey protocol for the red tree vole. Oregon Natural Resources Council Action v. U.S. Forest Service, 59 F.Supp.2d 1085, 1088 (W.D. Wash. 1999). Recognizing that “for certain species, surveys are the principal means of ensuring that their viability will not be ended by logging,” the court held that the agencies illegally exempted timber sales from survey and manage requirements, and that the interpretive memoranda “would undermine the strategy on which the [Northwest Forest Plan] ROD depends. The surveys are designed to identify and locate species; if they are not done before logging starts, plants and animals listed in the ROD will face a potentially fatal loss of protection.” Id. at 1088, 1093. Further, the court found that the agencies illegally adopted new survey requirements for the red tree vole, which in effect eliminated field surveys where the species is most likely to be found. Id. at 1094-95.

In January, 2001, the Forest Service and BLM made their final decision to amend the Survey and Manage provisions, issuing a “Record of Decision for Amendments to the Survey and Manage, Protection Buffer, and other Mitigation Measures Standards and Guidelines” (“2001 ROD”). Table 1-1 in the 2001 ROD lists the species that are included with the Category to which each species belongs. 2001 ROD Standards and Guidelines (“S&G”) at 41, Table 1-1. The BLM and Forest Service decided in the 2001 ROD that the Oregon red tree vole belongs in Category C. Id. at 49. For species in Category C, the Survey and Manage Standards and Guidelines require that the agency conduct pre-disturbance surveys for the species and manage all known sites until high priority sites are identified. Id. at 10-11. The 2001 ROD defines “known site” as historic and current location of a species reported by a credible source, available to field offices, and that does not require additional species verification or survey by the Agency to locate the species. Id. at 76.

In the 2001 ROD, the agencies rejected Alternative 2, which would have removed Survey and Manage protections for the vole in the year 2006. “Given our limited knowledge of the red tree vole population dynamics and ecology, the 5-year timeframe is not likely to be sufficient for completion of the studies necessary to make an informed recommendation to the species future disposition.” 2000 FSEIS Survey and Manage at 392. “Information on the genetic variation between these small isolated populations, combined with studies of red tree vole population trend, longevity, demographics, and population densities, require collection of data over several generations of red tree voles (more than 5 years).” Id. at 392-93.

The 2001 ROD also described a “Species Review Process” to evaluate new information about individual species. 2001 ROD at 7-8. In the Standards and Guidelines, the agencies discuss an “Adaptive Management Process” whereby the agencies acquire, evaluate and apply new information to implement “changes or refinements to Survey and Manage,” including moving species between

categories and removing species completely from Survey and Manage. 2001 ROD S&G at 14-15. The analysis process requires use of a “panel of agency taxonomic experts, resource specialists, and managers similar to the process used to evaluate new information in 1999 and 2000.” Id. at 17.

Less than 18 months after adopting the 2001 ROD, on June 14, 2002, the agencies issued a memorandum to BLM and Forest Service managers deciding to make changes to the 2001 ROD, including changing red tree vole from Category C to Category D in its central range. 2001 ASR AR 2/97. The decision is based on the 2001 Annual Species Review (ASR). This change in category means the agencies no longer need to conduct pre-disturbance surveys for the vole, although the agencies continue to be required to protect “known sites” until priority sites are established. The internal memorandum was not accompanied by any NEPA analysis, although the agencies purported to prepare a “Supplemental Information Report,” not disclosed to the public. Nor does the memo provide any explanation or support for the change in category. 2001 ASR AR Tab 1 passim. Despite data errors and precautionary comments of the Step 2 panel, the agencies decided to weaken the red tree vole protections by changing it from S&M Category C to Category D in its central range.

On December 19, 2003, the agencies issued a memorandum to BLM and Forest Service managers again deciding to make changes to Table 1-1 of the 2001 S&M ROD, including completely removing red tree vole from the protections of the Survey and Manage provisions in the “Mesic Zone” of its range. 2003 ASR AR 4/53-67. The internal memorandum was not accompanied by any NEPA analysis, although the agencies purported to prepare a “Supplemental Information Report,” not disclosed to the public. Id. 3/8-12. Further, the memorandum does not provide any explanation or support for the change in category. Finally, the record for the December 19, 2003 memorandum does not support the decision to eliminate survey and manage protections for the red tree vole in its central range.

II. THE COW CATCHER TIMBER SALE DECISION

On June 16, 2003, the South River Field Office of the Roseburg District of the BLM released an Environmental Assessment for the Cow Catcher Timber Sale to attempt to comply with NEPA. CC AR 64/365. The EA proposed two alternatives – Alternative 1, the “no action” alternative and Alternative 2, the proposed action. In Alternative 2, the BLM proposed to log five units comprising about 155 acres of mature and old-growth forests of trees 110 to 220 years old. Id. 64/371, 375. About half (77) of those acres, are in the “General Forest Management Area” of the “Matrix” land allocation, the other half (78) of those acres are within “Connectivity/Diversity Block” of the Matrix land allocation, which has a longer harvest rotation of 150 years and is intended to provide for connectivity of already fragmented forest lands. The entire 155 acres that BLM proposes to log in the Cow Catcher timber sale are considered “suitable” northern spotted owl habitat (nesting, roosting and foraging) and are all within the territorial home ranges of six individual owl sites. Id. 64/389-390. In addition, about 60 of the 155 acres proposed for logging are within northern spotted owl critical habitat. Id. 64/390. On August 26, 2003, the BLM published the Decision Record, deciding to implement Alternative 2 of the Cow Catcher timber sale EA and advertised the sale. Id. 36/267.

In the Cow Catcher EA, BLM states that “Red tree voles are known to utilize stands in the project area.” 2001 ASR 64/378. The BLM did not conduct surveys to protocol for red tree voles prior to deciding to log these 155 acres. The BLM’s EA states that a “partial survey of the project area was conducted in January, 2000, but was not completed to protocol,” and that a single occupied nest tree was located as a result. Id. The BLM further states that the one identified nest was revisited on May 1, 2003, but no nest was observed. Id. BLM assumed the nest was blown out of the tree by winds because the nest site was on the edge of a clearcut on adjacent private lands. Id.

As a result, the BLM did not propose any habitat management areas for red tree vole and stated “the red tree vole will be discussed no further in this analysis.” Id.

After the BLM issued the Cow Catcher EA, in July and August, 2003, the Northwest Ecosystem Survey Team (“NEST”) surveyed the Cow Catcher timber sale area for evidence of red tree voles, finding over 20 active Red Tree Vole nests and 14 inactive nests. Declaration of Jesse Crocker ¶¶ 2-3, 5; Declaration of Kristin Stankiewicz ¶¶ 5-9 (explaining NEST survey methods). On August 8, 11 and 12, 2003, Umpqua submitted to the BLM evidence and documentation of these nests, including the timber sale unit, Global Positioning System (“GPS”) points, survey date, a description of the nest and location in the tree, as well as resin duct samples from each of the nests. Eatherington Decl. ¶ 6; CC AR 38/279 (BLM log of receipt of NEST survey information); CC AR 42/289-297 (photos of nest samples and GIS location notes). The 2001 Survey and Manage ROD S&G defines “known site” to include current locations, reported by a credible source, that does not require additional species verification or survey by the Agency to locate the species. 2001 ROD S&G at 76. A “credible source” includes amateur, private individuals. 2001 ROD S&G at 76. In denying Plaintiff’s protest on this issue, BLM acknowledged that it is required to protect “known” red tree vole sites, but states that “[t]his office has determined that there are no known sites requiring protection.” CC AR 14/138.

On May 18, 2004, this Court granted Plaintiffs’ motion to preliminarily enjoin the Cow Catcher timber sale, enjoining

further implementation of the Cow Catcher timber sale until final resolution of plaintiff’s claims in this court, or until BLM completes a sufficient supplemental NEPA analysis that analyzes the effects and cumulative effects of the project on red tree voles, and discloses the basis for BLM’s conclusion that the project complies with RMP management direction for connectivity/diversity blocks.

Order (May 18, 2004) (Dkt. #82).

On June 22, 2004, BLM published a notice of availability of the Supplemental Environmental Assessment for the Cow Catcher Timber Sale (hereafter “CC SEA”) (attached hereto as Exhibit 2). Plaintiffs timely submitted comments on the CC SEA. On August 2, 2004, BLM issued a Decision Document deciding that no modifications to the original Cow Catcher Timber Sale Decision are necessary. Plaintiffs timely protested the BLM’s new decision.

The BLM did not disclose or analyze the direct effects on the red tree vole in the SEA because: 1) it relies upon an analysis that is not applicable to the relevant 5th field watershed; 2) it relies upon a percentage of alleged existing vole habitat, but it does not consider the fragmentation of those acres; 3) it relies on the contribution of young stands to vole habitat without basis.

The BLM did not disclose or analyze the indirect or cumulative effects on the northern spotted owl from removing the red tree vole habitat and consequent loss of voles or from the barred owl moving into the Cow Creek watershed. The BLM further ignores the cumulative effects on the red tree vole because it ignores the reasonably foreseeable Loose Laces timber sale and the Can-Can timber sale, as well as Mr. Wilson and Papa Cow. In addition, BLM does not consider the large private land clearcuts in the watershed on the fragmentation of red tree vole habitat.

The BLM’s CC SEA also fails to disclose sufficient information to provide the basis for BLM’s conclusion that the project complies with RMP management direction for C/D blocks. The CC SEA addresses individual C/D blocks, however, the BLM only discloses the number of acres that BLM defines as late-successional forest. CC SEA at 8. Likewise for the entire C/D block land use allocation, BLM has failed to disclose the amount harvested over the past decade. BLM only reveals the amounts cut over the last nine years. CC SEA at 9.

III. THE COTTONSNAKE TIMBER SALE DECISION

In June, 2003, the Glendale Resource Area of the Medford District of the BLM released an Environmental Assessment for the Cottonsnake Timber Sale to attempt to comply with NEPA. CS AR 33/417. On August 28, 2003, Glendale Resource Area Field Manager Lynda Boody signed a Decision Record/FONSI (DR), in which she decides to proceed with Alternative 2, to cut 322 acres of trees through regeneration harvest, commercial thinning and group selection harvest over nineteen timber harvest units, along with nearly 40 miles of road work. CS AR 12/310. The stands of trees vary in each unit, but most are late-successional or mature forests, and most of the overstory trees are more than 150 to 200 years old and ranging in diameter at breast height from 28 inches to 60 inches (five feet across). All the units are “currently considered within suitable nesting, roosting or foraging habitat for northern spotted owls.” CS AR 33/458. Ten of the timber harvest units are located within two designated spotted owl critical habitat units (“CHU”), CHU OR-62 and CHU OR-64. CS AR 33/461. Approximately 143 acres of suitable habitat will be removed or downgraded within these two CHUs. CS AR 33/461. “The impacts on late-successional habitat in matrix lands are particularly important because the Late-Successional Reserves (LSRs) in the area are not yet fully functioning and will not be for several decades.” CS AR 33/462.

In the Cottonsnake EA, BLM acknowledges that if any red tree vole nests occur within the units and remain undetected, “they would likely be destroyed.” CS AR 33/467. BLM further acknowledges that viability of sites would be substantially reduced or eliminated and dispersal would be eliminated even if nest trees were incidentally retained. Id. In the EA, BLM admits that known red tree vole sites would be protected with a 10 acre no-cut buffer of the best available habitat. Id. 33/431, 467. BLM claims there are only two known sites in the project area. Id. 33/467.

From July 10-20, 2003, the Northwest Ecosystem Survey Team (“NEST”) climbed trees within the proposed Cottonsnake timber sale to locate and make known red tree vole nests sites. Stankiewicz Decl. ¶4. NEST confirmed 30 active vole nests and 23 inactive nests. These findings are contained in Appendix A of Plaintiffs’ comments submitted to BLM on July 21, 2003. CS AR 18/338, 358-364. Appendix A delineated the exact location of the nest trees, including GPS data, the date the tree was climbed, and where in the tree the nest is located. Id. Nest trees are also marked in the field with pink flagging that is wrapped around the tree indicating the GPS location and location of the nest. Resin duct samples from the sites have been bagged and labeled and were submitted with Plaintiffs’ comments. Plaintiffs further offered to schedule a field visit with BLM to confirm nest sites with representatives from NEST.

JURISDICTION

Plaintiffs challenge final agency actions as defined by the APA, 5 U.S.C. § 551(13), pursuant to the Act’s judicial review provisions, 5 U.S.C. §§ 701-706. This Court has jurisdiction under 28 U.S.C. §§ 1331 (federal question), 2201 (declaratory relief), and 2202 (injunctive relief). Plaintiffs also challenge the agency’s action as in violation of Section 7(a)(2) of the Endangered Species Act (ESA) pursuant to that Act’s citizen suit provision, 16 U.S.C. § 1540(g)(1)(A). Plaintiffs sent a written notice of intent to sue on December 29, 2003 and again on May 7, 2004 in accordance with 16 U.S.C. § 1540(g)(2)(A)(i). Plaintiffs have standing because their members regularly use and enjoy, and have firm plans to continue to use and enjoy, the forested lands and wildlife within the Cow Catcher and Cottonsnake timber sales for recreational, aesthetic, spiritual, educational and scientific purposes, including wildlife viewing, photography, and hiking. The injury to Plaintiffs caused by the BLM’s violations of FLPMA, NEPA and the ESA can be remedied by the relief sought in this action.

See Declaration of Francis Eatherington ¶¶ 3-4 (Dkt.#52), Declaration of George Sexton ¶¶ 3-4 (Dkt.#53); Declaration of Josh Laughlin ¶¶ 3-4 (Dkt.#54).

STANDARD OF REVIEW

Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). See also Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). The substantive law governing a claim determines whether a fact is material. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); see also T.W. Elec. Serv. V. Pacific Elec. Contractors, 809 F.2d 626, 630 (9th Cir. 1987).

The APA sets forth standards governing judicial review of decisions made by federal administrative agencies. See Dickinson v. Zurko, 527 U.S. 150, 152 (1999); Mtn. Rhythm Res. v. FERC, 302 F.3d 958, 963 (9th Cir. 2002). Pursuant to the APA, this court shall hold unlawful agency actions that are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law” as well as those actions taken “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D). Review of final agency action is narrow; however, the agency must articulate a rational connection between the facts found and the conclusions made. See Envtl. Def. Ctr. v. EPA, 319 F.3d 398, 428 n.46 (9th Cir. 2003). The reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Marsh v. Ore. Natural Res. Council, 490 U.S. 360, 378; Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1097 (9th Cir. 2003). The agency is not entitled to deference where its “conclusions do not have a basis in fact.” Ariz. Cattle Growers’ Ass’n v. United States Fish & Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001). The arbitrary and capricious standard does not shield agency action from a “thorough, probing, in-depth review” of those actions. Citizens to

Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971). Courts must not “rubber stamp the agency decision as correct...Rather, the reviewing court...must engage in a ‘substantial inquiry’ into the facts, one that is ‘searching and careful.’” Northern Spotted Owl v. Hodel, 716 F.Supp. 479, 482 (W.D.Wash. 1988) (internal citations omitted). Finally, an agency’s decision can be upheld only on the basis of the reasoning in that decision. Anaheim Mem’l Hosp. v. Shalala, 130 F.3d 845, 849 (9th Cir. 1997).

ARGUMENT

I. THE DECISIONS TO CHANGE AND THEN REMOVE SURVEY AND MANAGE PROTECTIONS FOR THE RED TREE VOLE ARE NOT SUPPORTED BY THEIR ADMINISTRATIVE RECORDS AND ARE OTHERWISE ARBITRARY AND CAPRICIOUS.

The reasons the red tree vole were included in the protections of the Survey and Manage provisions of the 1994 NWFP and the 2001 ROD amendments to the NWFP have not changed. Voles continue to have low dispersal capability, extremely low reproductive potential, short life spans and sensitivity to stand level disturbances. MR at 1; Maser Decl. ¶¶ 18, 31. The vole’s habitat is still highly fragmented and lacking connectivity between LSRs. In addition, the agencies do not have new information to support changing, then removing, the survey and manage protection for the vole in a portion of its range. The agencies have not completed strategic surveys. The majority of newly found vole sites only contain one nest, which the agency admits means those voles are unlikely to persist. Finally, in the 2001 ROD, the agencies found that numerous studies were necessary before deciding whether to remove the vole from survey and manage protections. The agencies have not completed these studies. Nonetheless, on June 14, 2002 and on December 19, 2003, the BLM decided to reduce, then remove those protections for the vole in a portion of its range, despite comments and protests by agency personnel. These decisions are arbitrary and capricious and put

the vole at risk of extirpation. Maser Decl. ¶¶ 21, 31-32.

The ASR Process involves several steps. 2003 ASR AR 5/76-77. In Step 1, the agencies determine if sufficient new information is available for analysis that could lead to a change in management. 2003 ASR AR 5/68. The Step 2 panel, comprised of biologists, botanists, and ecologists, reviews the information to determine whether the species meets certain criteria. Id. at 5/67-68. These results are reviewed by the Step 3 panel comprised of four managers and four scientists. Id. at 5/68. The Step 3 panel votes on the most appropriate management category or whether the species should be removed from survey and manage protections. Id. The Step 2 panelists have 30 days to comment on the Step 3 votes. Id. The Intermediate Managers Group (IMG) reviews the Step 3 votes and the Step 2 30-day comments and recommends action to the Regional Interagency Executive Committee (RIEC). Id. The RIEC subcommittee makes a final decision determining how and whether each species will be protected under the Survey and Manage mitigation provisions of the NWFP.

The 2001 ASR is based upon faulty data that the Step 2 panel highlighted. The error rate of vole data was 11% – even higher than the agency expected. 2001 ASR 28/640. On December 13, 2001, the agency explained that “[t]here still exist data quality concerns”. The agencies recognized that their 2001 ASR was risky because of the data inaccuracies. 2001 ASR AR 35/706; 23/596. The total number of vole sites is misleading as a result of misinterpretation of the protocol by three units, including Medford BLM where the most sites are found. 2001 ASR 63/1184.

2001 ASR Step 3 panelists, in making their recommendation, rely upon abundance, riparian reserves and LSR for dispersal, and never address data errors. 2001 ASR AR 59/1101. Step 2 panel commented that the Step 3 panel recommendations were not consistent with Step 2 information. 2001 ASR AR 56/1047, 55/973, 42/865. When the IMG asked the experts whether there is a

concern for persistence in the mesic zone, where the vole was changed from Category C to D, the expert responded that there is “insufficient information to determine persistence” at a number of sites. 2001 ASR AR 21/570. The expert also revealed that surveys show that the voles do not persist in matrix under current management. Id. at 570

During the 2003 ASR process, the Step 2 panelists found that the red tree vole meets all criteria to remain protected by the Survey and Manage provisions. 2003 ASR AR 29/290-331. The primary concern for the vole continues to be limited dispersal ability which may lead to populations in reserves that are isolated unless quality habitat is provided between LSRs. Id. at 291. Additional protection of habitat in the Matrix lands is necessary to provide for dispersal, and, thus, a reasonable assurance of species persistence. Id. In addition, the Step 2 panelists were concerned that 43% of the current “known sites” contain only a single active nest tree, which suggests a low likelihood that these sites will persist over time. Id. at 302.

Based upon its review of the Step 2 information, no one on the Step 3 panel recommended removing from survey and manage protections. 2003 ASR AR 2/5. Most voted to continue Category D protections for the mesic range, or Category C if the entire range is considered together. Id. The Step 2 30-day comments express concern that the Step 3 rationale to recommend Category D in the mesic range is inconsistent with the Step 2 data for two reasons. First, the Step 2 panel habitat model suggested that many of the large LSRs in the Cascades were not likely to contain as much vole habitat as the LSR’s acreage suggest. 2003 ASR AR 7/125. Yet, the Step 3 Panel used this information as rationale to retain Category C for the non-mesic portions of the range, but ignored the information for the mesic (“Category D”) portion of the range. “Since the Mexic Zone is affected to a greater extent by the Cascade LSR habitat issue, it is not clear why the panelist seemed to come to contradicting conclusions between the Category C or Mesic Zone votes.” Id. Second, Step 2

panel had limited habitat data, and no population trend data, therefore, no support for the reliance on “more stable populations or habitat” as a rationale for listing as Category D. Id.

The IMG recommended removing based on moderate to high number of likely extant sites/records and sites relatively well distributed within the species range. 2003 ASR AR 5/114. However, “[t]he record in Step 2 doesn’t support removal of the species from the D or mesic portion of the range. If IMG chooses to remove RTV in that zone, they will be going against the recommendations of the taxa team.” 2003 ASR AR 2/6.

A. Existing Survey Information does not Support Changing the Vole’s Protection

1. The Surveys Do Not Provide New Information.

In 2001, when the agencies amended the Survey and Manage provisions of the NWFP, but retained protection for the red tree vole, they found that “[i]n general, pre-disturbance surveys since the NWFP have not indicated the species is more abundant than previously expected.” 2000 FSEIS at 387. The agencies’ rationale for changing the vole from Category C to D in its central range in the 2001 ASR is relatively greater abundance of the species in its central range. 2001 ASR AR 21/568; 23/596-97 (“more abundant in central portion of its range”); 25/603-616 (only affirmative “significant change” responses are for total number of known sites at pages 603 and 614). The 2003 ASR rationale for removing red tree voles from Survey and Manage protections in its mesic range included higher abundance and more well-distributed, relative to the rest of its range. 2003 ASR AR 5/107. The Step 2 panel did not believe the limited habitat data, and lack of population trend data could support for the reliance on “more stable populations or habitat” as a rationale. 2003 ASR AR 7/125. The fact that the vole is more widespread in the mesic portion of its range is not new information warranting removal of Survey and Manage protections. 2000 FSEIS at 377 (populations believed to be widespread in mesic range).

While the record demonstrates that the vole may be relatively more abundant in this portion of its range, nothing in the record demonstrates that the primary concern for the species has been satisfied. The vole needs quality habitat of sufficient size and orientation to allow the species to disperse between reserve areas in order to provide a reasonable assurance of species persistence. Relative abundance does not satisfy this major obstacle to the species long-term persistence.

The “abundance” that the agencies relies upon is misleading. “Inactive” nest sites are not treated as sites for management purposes. 2001 ASR AR 25/604. In other words, the inactive sites are subject to timber harvest. 2001 ASR AR 23/596. In addition, surveying based on the number of nests alone may over estimate the number of individuals. 2001 ASR AR 25/620. Surveys do not identify individuals, and voles use many nest structures; therefore, the number of red tree voles cannot be accurately determined. Id. “Polygons may not be representing actual size of populations because of the way surveys are conducted.” 2001 ASR AR 21/570.

Moreover, in the mesic portion of the range, the agencies have “released” 18% of sites with one or more active nests “for other management priorities.” 2003 ASR AR 14/205. This means that 73 of the 405 active sites in the mesic range will not be protected to provide for the persistence of the vole. Id. at 199. This is the exact number of new active sites identified since the last ASR. Id.

Finally, the agencies have not completed Random Grid Strategic Surveys at the time of either the 2001 ASR or the 2003 ASR. 2003 ASR AR 5/77, 6/114; 2001 ASR AR 25/606-07. The pre-disturbance surveys do not address “[i]ssues associated with distribution, dispersal, and persistence at local and landscape scales.” 2001 ASR AR 25/606-07. “These issues will be more appropriately addressed following completion of strategic surveys for this species.” Id. The agencies believe that strategic surveys are “vital” to understand vole ecology, distribution, habitat relationships, population trends and management options. 2000 FSEIS at 393.

2. Newly Found Vole Sites are Unlikely to Persist

The “abundance” of the sites also is ephemeral. “Large sites containing many nests will provide major support for tree vole population persistence, while sites with only one to a few nests may help maintain the species distribution and connectivity throughout its geographic range.” MR at 5. The newly identified sites have only 1-2 active nest trees, suggesting low red tree vole densities compared to other microtines. 2001 ASR AR 67/1225. These sites “may be too small to be sustainable and would have to rely on emigrants to maintain persistence at the site.” Id. These “localized populations may not be stable because of low abundance.” Id. Of the active sites located in the 2001 ASR, 42% have only 1-2 active nests trees per site. Id., and at 68/1217. Similarly, in the 2003 ASR, 42% of detections of sites contained only 1 active nest. 2003 ASR AR 14/199. “In general, numbers of active nests in survey areas appear low for long term site persistence.” 2003 ASR 12/165; 2001 ASR AR 67/1225 (many isolated small sites not expected to persist).

This is not new information. In the 2000 FSEIS accompanying the 2001 ROD that amended the NWFP Survey and Manage provisions, the agencies already knew that “[l]ow red tree vole densities, occurring at many sites, may indicate that these localized populations may not be stable because of low abundance.” 2000 FSEIS at 376, 390 (“Currently, many sites appear to have few individuals and occupy very small habitat patches, two factors that suggest these sites may not persist over time”). In 2003, the agencies repeated “[w]hat is bothersome is the small dispersal distance for this species and that current sites don’t hold for some reason (this is not new information, which is also a concern).” 2003 ASR AR 12/168.

In the 2001 ASR, the taxa team expert revealed that surveys show that the voles do not persist in matrix under current management. 2001 ASR AR 21/570. In addition, the vole’s low reproductive rate “raises concern for the species ability to colonize habitats after disturbance or

maintain existing local populations at known sites.” 2001 ASR AR 67/1217. Indeed, the agencies found a potential for isolation of the species in reserves if matrix management does not provide for connectivity. 2003 ASR 12/165.

3. The Agencies Failed to Demonstrate that Existing Sites will Provide Connectivity for Vole Dispersal

“Many of the newly found sites seem to have few individuals, as estimated from nest numbers and, therefore, are dependent upon dispersal and connectivity to provide mates.” 2000 FSEIS at 376. The agencies cannot demonstrate that the vole has adequate habitat connectivity to be able to disperse throughout the mesic range. Within the mesic zone portion of the range there are 7.9 million acres, 4.2 million of which are federally managed. 2003 ASR 14/197. The agencies have conducted 1,546 surveys over 54,479 acres within the mesic zone, finding 1,417 acres occupied by voles. *Id.* These 1,417 acres containing voles are spread over the 7.9 million acres in the mesic zone. *Id.* at 201 (map showing site locations). What is important, and not addressed in the record, is “the right juxtaposition of known sites to provide for the connectivity and persistence.” 2001 ASR AR 21/568, 25/604 (known sites at that time found “throughout the suspected range, but distribution of known sites is spotty”).

The agencies have not demonstrated how the red tree vole, a small mammal that cannot disperse very far or very quickly, will be able to disperse between these far-reaching locations of known sites in the mesic zone. 2003 ASR AR 12/168 (“[w]hat is bothersome is the small dispersal distance for this species and that current sites don’t hold for some reason”). The agencies know “it would be unrealistic to expect a red tree vole to successfully cross miles of non-habitat to re-colonize habitat patches” because long distance movements “expose an individual to increased vulnerability of predation and increased risk of not finding a mate.” 2001 ASR AR 67/1224.

In the 2003 ASR the agencies rely upon riparian reserves to provide for connectivity, even though the contribution to the vole's ability to disperse is unknown. 2003 ASR AR 5/107. "No studies have been conducted, to date, that provides information on how well Riparian Reserves contribute to connectivity or dispersal routes between LSRs for red tree voles." MR at 10; 2000 FSEIS at 383 (riparian reserves help provide a bridge, however for vole, "a 3-mile movement is at a multi-generational scale"); Maser Decl. ¶ 32. Thus, while the agencies have found voles to be relatively more abundant in the mesic zone, the record does not demonstrate satisfaction of the primary concern of connectivity across the fragmented landscape will allow the vole to disperse between isolated populations in order to persist over time.

4. LSRs Provide Less Habitat for Voles than the Agencies Expected

The surveys that the agencies have conducted in LSRs are limited, but they do provide one bit of new information. The agencies have found that the LSRs in the Cascades do not provide vole habitat at higher elevations, therefore, the LSRs contain less vole habitat than the agencies anticipated in the NWFP. 2001 ASR 68/1235; 2001 ASR AR 67/1214 (higher elevations protected land allocations less likely to provide habitat for large populations of voles); Id. 42/865 (sites in reserves inherently low); Id. 42/866 (species rarely occurs above 3000 feet).; Id. 25/605 (declining likelihood of detecting sites with increasing elevation in Oregon Cascades); 2003 ASR AR 12/167 (concerns revolve around reserve habitat; more surveys in reserves needed); NWFP at App. J2 (agencies "assumed" LSRs would provide good vole habitat).

However, the agencies ignored this information when deciding to remove Survey and Manage protections for the vole in its mesic range in the 2003 ASR. The Step 2 panel habitat model suggested that many of the large LSRs in the Cascades were not likely to contain as much vole habitat as the LSR's acreage suggest. 2003 ASR AR 7/125. Yet, the Step 3 Panel used this information as

rationale to retain Category C for the non-mesic portions of the range, but ignored the information for the mesic (“Category D”) portion of the range. “Since the Mexic Zone is affected to a greater extent by the Cascade LSR habitat issue, it is not clear why the panelist seemed to come to contradicting conclusions between the Category C or Mesic Zone votes.” *Id.* This decision, which has no rational connection between the facts found and the decision made, is arbitrary and capricious.

B. *The Agencies did not Complete Studies They Believed Necessary*

In the 2000 FSEIS, the agencies found that “[d]etermining the most important habitat for the species will require an understanding of genetic variations within and among isolated populations or metapopulations and population demographic information.” 2000 FSEIS at 390. None of these studies have been completed, including strategic surveys. The agencies identified a long list of research needs in the 2001 ASR process, explaining that “[s]urvey efforts have identified new red tree vole sites and helped delineate range boundaries. However, our overall understanding of red tree vole habitat relationships and ecology has not evolved significantly since implementation of the NFP or the 2000 Step 2 analysis.” 2001 ASR AR 67/1219-20, 25/614 (“Red tree vole populations have not been studied in sufficient detail to assess population stability or trends”). Nothing in the 2003 ASR record demonstrates that the studies the agencies believe to be necessary have been completed.

II. THE DECISIONS TO CHANGE AND THEN REMOVE SURVEY AND MANAGE PROTECTIONS FOR THE RED TREE VOLE VIOLATE NEPA

NEPA directs that, to the fullest extent possible, all federal agencies must prepare an Environmental Impact Statement (EIS) whenever they propose “major federal actions significantly affecting the quality of the environment.” 42 U.S.C. § 4332(C). NEPA’s EIS process plays the dual role: “It ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that

the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.” Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989).

Federal agencies have a continuing duty to gather and evaluate new information relevant to the environmental impact of its actions even after release of an EIS. Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557-58 (9th Cir. 2000). Pursuant to Council on Environmental Quality (CEQ) regulations⁴, the BLM must supplement an EIS if it “makes substantial changes in the proposed action that are relevant to environmental concerns.” 40 C.F.R. § 1502.9(c)(1).

What is referred to throughout this brief and by the general public as the “Northwest Forest Plan” is actually a region-wide comprehensive amendment to all BLM and Forest Service resource management plans within the range of the northern spotted owl. The Survey and Manage mitigation measures of the NWFP put limits on timber harvest by requiring pre-disturbance surveys and protection of known sites. The NWFP was accompanied by an EIS. In 2001, the agencies amended the NWFP Survey and Manage provisions, thereby again amending all management plans within the range of the northern spotted owl. These changes to Survey and Manage, including removing species and changing categories, were accompanied by a Final Supplemental EIS (FSEIS). In the 2001 ROD, the agencies decided to maintain protections for the vole. Then in 2002 and 2003 the agencies changed the Survey and Manage provisions again by removing species and changing categories, including reducing, then eliminating protections for vole, as well as a number of other species. 2002 SIR at 2 (“[t]hrough the ASR process, species can be removed from or added to the S&M program,

⁴CEQ’s regulations are entitled to substantial deference as an interpretation of NEPA. Robertson, 490 U.S. at 355-56.

be changed from one management category to another, or have a new biological range validated”). These are substantial changes that require a supplemental EIS.

“All 346 [survey and manage] species were reviewed” in the 2001 ASR. 2001 ASR AR 1/1. This memo describes the ASR as “an annual adaptive management process that evaluates the latest information and ensures appropriate levels of management.” *Id.* By virtue of changing the level of species protection, BLM substantially changed the NWFP in a manner that necessitates supplemental NEPA documentation.

In the NWFP, the agencies provided for Survey and Manage mitigation for over 400 species, accompanied by an EIS. In the 2001 S&M ROD, accompanied a FSEIS, the agencies decided to remove 72 species from the Survey and Manage protections. Without any supplemental NEPA analysis, in the 2001 ASR, the agencies changed the management protection for at least 63 species through all or part of their range -- completely removing 37 species and changing the category of 30 species. 2001 ASR 1/3-4, Table 2. In the 2002 ASR, not at issue here, the agencies changed the management protection for 20 species through all or part of their range -- completely removing 13 species and changing the category of 7 species.⁵ In the 2003 ASR, the agencies changed the management protection for 13 species through all or part of their range -- completely removing 9 species and changing the category of 4 species. 2003 ASR AR 3/10-11. The agencies, through its practice of preparing EIS on Survey and Manage decisions of this magnitude, acknowledges that such NEPA analysis is required.

In terms of the vole alone, the change in management direction is substantial. In the Cow Catcher and Cottonsnake timber sales, BLM did not conduct pre-disturbance surveys and refused to

⁵This is the decision resulting from the 2002 ASR, not at issue in this matter. The decision is available on BLM’s webpage at http://www.or.blm.gov/surveyandmanage/Annual_Species_Review/2003/IM-OR-2003-050.htm (last visited 3/11/04).

protect the approximately 50 active nest sites identified by NEST citizen surveyors. Under 2001 ROD Survey and Manage requirements, BLM is required to protect those known sites with 10-acre buffers. As a result, depending on how the sites would overlap, a significant acreage of the timber sales could not have been logged. This situation will occur across the 4.2 million acres of federally-managed land in the mesic a range of the vole. 2001 ASR AR 38/722 (the effect of removing voles from survey and manage is “significant release of known sites for meeting other management objectives); 42/866 (changing to category D would reduce impact the management of vole has on vegetation management projects – no surveys means less vole sites found and protected; therefore, more timber harvesting). This is a substantial change that will have environmental effects not only on the vole, but on other old growth dependent species, soils, and water flow and quality. Such a change in management is a substantial change in the project requiring supplemental NEPA analysis.⁶

III. THE DECISIONS TO CHANGE AND THEN REMOVE SURVEY AND MANAGE PROTECTIONS FOR THE RED TREE VOLE VIOLATE FLPMA

The FLPMA and its regulations require that a resource management plan, including the Survey and Manage provisions at issue here, may be changed only through amendment. 43 U.S.C. § 1610.5-5. Amendments must include public involvement and preparation of an EA or EIS. 43 U.S.C. §§ 1610.2, 1610.5-5. BLM has amended its resource management plans through the ASR process without complying with the FLPMA amendment process.

BLM will protest that changes to species’ Survey and Manage assignments “do not constitute ‘plan’ changes in the context of . . . [FLPMA].” 2001 ROD at 8. Nonetheless, the agency describes its decision as the result of the 2001 ASR as an amendment to the 2001 ROD. 2002 ASR at 1 (“This

⁶At a minimum, changing species’ survey and manage protections is implementation of the 2001 ROD and requires site-specific NEPA analysis.

memorandum changes the category placement for species displayed in Table 1-1 of the 2001 S&M ROD, as amended June 14, 2002.”) (emphasis added).⁷

The BLM is required to amend its resource management plans “by the need to consider . . . new or revised policy, a change in circumstances or a proposed action that may result in a change in the scope of resource uses or a change in the terms, conditions and decisions of the approved plan.” 43 C.F.R. 1610.5-5. The species assignments were included as terms, conditions or decisions of the original NWFP. NWFP ROD at 41-54 and C-49 to C-61. Changing species assignments also constitutes “a change in the scope of resource uses” because reassignment of a species has the potential to increase or decrease the acres of forest that may be harvested. See Nat’l Parks Conservation Assn. v. FAA, 998 F.2d 1523 (10th Cir. 1993) (where agency required to amend management plan to allow for disposal of public land for an airport site). The plain language of the regulations indicate that the BLM is amending its plan by changing terms and conditions and changing the scope of resource uses. BLM has changed the substance of the NWFP, as amended by the 2001 ROD, and, thus, has further amended it, requiring compliance with FLPMA amendment procedures.

IV. THE COW CATCHER AND COTTONSNAKE TIMBER SALES ARE NOT CONSISTENT WITH THE 2001 ROD IN VIOLATION OF FLPMA.

Because the 2001 and 2003 ASR decisions to change and eliminate protections for the vole were not lawfully adopted, the BLM’s timber sale decisions conform to the 2001 ROD provisions for red tree voles, which requires pre-disturbance survey and protection of known sites. 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a).

⁷The decision is available on BLM’s webpage at http://www.or.blm.gov/surveyandmanage/Annual_Species_Review/2003/IM-OR-2003-050.htm

a. Failure to conduct pre-disturbance surveys.

The BLM decided in the 2001 ROD and Standards and Guidelines (Table 1-1) that red tree vole belongs in Category C throughout its range. The 2001 ROD requires that the BLM conduct pre-disturbance surveys for red tree vole. The BLM admits it did not conduct pre-disturbance surveys to protocol for red tree vole in the Cow Catcher and Cottonsnake timber sale areas. CC AR 64/378; CS AR 33/463. Therefore, the BLM's decisions to proceed with the Cow Catcher and Cottonsnake timber sales violate the FLPMA because the sales do not conform to with the 2001 ROD and accompanying Standards and Guidelines for Survey and Manage species.

b. Failure to protect "known" sites, including NEST survey sites.

Because the BLM failed to conduct pre-disturbance surveys, the BLM did not identify vole sites to protect. BLM acknowledged that it is required to protect "known" red tree vole sites, but states that "[t]his office has determined that there are no known sites requiring protection." CC AR 14/138. The 2001 Survey and Manage ROD S&G defines "known site" to include current locations, reported by a credible source, that do not require additional species verification or survey by the Agency to locate the species. 2001 ROD S&G at 76. A "credible source" includes amateur, private individuals. 2001 ROD S&G at 76. The numerous red tree vole nest sites identified by the NEST surveys qualify as "known sites," which the 2001 ROD requires the BLM to protect with buffers.

NEST members surveyed the Cow Catcher and Cottonsnake timber sale area for evidence of red tree voles, finding over 50 sites. Plaintiffs submitted to the BLM evidence and documentation of these nests, including the timber sale unit, Global Positioning System ("GPS") points, survey date, a description of the nest and location in the tree, as well as resin duct samples from each of the nests. CC AR 38/279 (Umpqua Watersheds dropped off the first batch of red tree vole nest samples and information); CC AR 42/291-297 (detailed descriptions including GPS points location of the tree and

description of location of the nest within each tree, and noting hot pink flagging of trees); Crocker Decl. ¶¶ 2-3, 5 (Dkt.#57); CS AR 18/35 (vole site information submitted with KS Wild's comments on the Cottonsnake EA).

The NEST surveys were conducted by amateur, private individuals. Crocker Decl. NEST surveyors provided more than adequate information so that BLM was not required to conduct "additional species verification" by providing nest samples, and, in some instances, feces. Nor did BLM need to conduct additional survey to locate the species because the nest sites were identified by GPS points as well as with pink flagging tied around the nest trees. Eatherington Decl. Photo at p. 8. Therefore, the information acquired and provided by NEST surveyors meets the 2001 ROD definition of "known sites." BLM's failure to protect these known sites does not conform to the 2001 ROD in violation of FLPMA.

V. THE BLM IS IN VIOLATION OF THE ENDANGERED SPECIES ACT.

a. BLM Failed to Reinitiate Consultation after Changing and Removing Survey and Manage Species Protections.

BLM has an affirmative duty to prevent jeopardy to the northern spotted owl pursuant to Section 7 of the Endangered Species Act (ESA). 16 U.S.C. § 1536(a)(2). BLM can satisfy that duty through Section 7 consultation. FWS regulations implementing the ESA consultation provisions require re-initiation of consultation "[i]f the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion." 50 C.F.R. § 402.16(c). Here, BLM's decisions to proceed with the Cottonsnake and Cow Catcher timber sales violate the ESA because the BLM failed to reinitiate consultation after it modified the actions by making changes to the NWFP Survey and Manage Provisions. in Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1245 (9th Cir. 2001).

BLM prepared Biological Assessments (“BAs”) on the proposals to log timber in the Cow Catcher and Cotton Snake areas in 1999 and 2001, respectively. CC AR Tab 89, CS AR “Biological Opinion for FY 2001-2003.”⁸ BLM concluded in the BA’s the timber sales were likely to adversely affect the northern spotted owl and its critical habitat due to loss of habitat. CC AR 89/1021; CS AR BA at 56. Through consultation, FWS issued Biological Opinions (“BiOps”) finding that the proposals were not likely to cause jeopardy to the northern spotted owl. CC AR Tab 83; CS AR BiOp (following BA). However, the BA’s and BiOps are explicitly founded upon the timber sales being in compliance with the NWFP, including the survey and manage buffer provisions, which were still in effect on the dates the BAs and BiOps were issued.

The consultation documents anticipated full compliance with the Northwest Forest Plan. The biological opinion for the Cow Catcher timber sale explicitly states that BLM represented in the BA that the proposed actions, including Cow Catcher, are in compliance with the NWFP. CC AR 83/897. The Cow Catcher BiOp further relied upon “buffers around survey and manage species” to provide forest conditions supporting dispersal in the matrix. CC AR 83/909. The Cottonsnake BA lists five conditions applicable to all proposed timber sale projects. Condition #2 states that “All timber sale projects proposed by the action agencies...must be consistent with all Standards and Guidelines established by the Northwest Forest Plan.” CS AR BA at 4. If a project “does not meet one or more of the five conditions, **then the project will be dealt with through reinitiation of consultation.**” *Id.* (emphasis added). The Cottonsnake BiOp also explicitly states that the project must be consistent with the Standards and Guidelines established by the NWFP. CS AR BiOp at 5;

⁸BLM submitted to the Court as part of the CS AR the BA and BiOp for the Cottonsnake together in a separate volume. Although labeled “Biological Opinion,” this volume contains the BLM’s BA, followed by the BiOp.

CS AR BiOp at 40 (relying on “survey and manage set-aside guidelines” to mitigate for loss of owl critical habitat).

Plaintiffs furnished BLM with information revealing effects the Cottonsnake and Cow Catcher timber sales may have on listed species in a manner or to an extent not previously considered in the consultation. The NEST citizen surveys reveal that red tree vole sites exist in the timber sale areas. These sites would have been protected by ten-acre buffers under NWFP direction in place at the time of the ESA consultations. As a result, more than twenty known red tree vole nest sites from each timber sale area, along with their old growth habitat, will not be buffered or protected. The lack of buffered vole sites will have effects on northern spotted owl, which uses the vole as a primary food source. Thus, the timber sales are substantially different than anticipated when they were consulted upon with FWS.

These consultations were based on the assumption that survey and manage protections for the red tree vole and other species would remain in place. Since the consultation, these protections and management guidelines have been largely eliminated, as discussed above. The results of these modifications in protection for the red tree vole, and all other old-growth dependent species in matrix lands where the timber sales will take place, will cause impacts on the northern spotted owl in a manner never previously considered through consultation. For these reasons 50 C.F.R. § 402.16 requires the BLM to reinstate ESA consultation prior to proceeding with the sales.

b. BLM Failed to Insure Cottonsnake and Cow Catcher Will Not Destroy or Adversely Modify Critical Habitat.

BLM is in violation of its ESA duty to insure that its actions do not destroy or adversely modify critical habitat designated for the northern spotted owl. 16 U.S.C. § 1536(a)(2). Although BLM acknowledges that the timber harvesting in critical habitat will have an adverse effect, BLM

unlawfully relies upon the existence of LSRs to conclude that its actions will not adversely modify the critical habitat. This conclusion does not comply with the ESA and a recent Ninth Circuit interpretation of the critical habitat duty vis-a-vis the NWFP. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service, 2004 WL 1753387, *8-14 (9th Cir. Aug. 6, 2004).

Congress enacted the ESA “not merely to forestall the extinction of a species (i.e., promote a species survival), but to allow a species to recover to the point where it may be delisted. *See* 16 U.S.C. § 1532(3).” Id. at *8. In addition, “the purpose of establishing ‘critical habitat’ is for the government to carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery.” Id. The statutory language of the ESA provides no qualification to the general prohibition on destruction or adverse modification of critical habitat. The Supreme Court held that ESA Section 7(a)(2) contains a blanket prohibition against destroying or adversely modifying designated critical habitat. TVA v. Hill, 437 U.S. 153, 171 (1978)(concluding that the operation of Tellico Dam would either “eradicate the known population of snail darters or destroy their critical habitat” and refusing to sanction either result).

The Cottonsnake and Cow Catcher timber sales will destroy or adversely modify over two hundred acres of spotted owl habitat in Critical Habitat Units (CHUs) OR-62, OR-63 and OR-64. The objectives of CHU OR-62 are to provide nesting, roosting, and foraging habitat and to provide a link from the Klamath Mountains province to the Coast Range provinces through the I-5 area of concern. CS AR 33/461. OR-63 was established “because of its unique geographical location in the Rogue/Umpqua Area of Concern, where Federal lands provide a link between the Klamath and Coastal Provinces.” CC AR 64/377. CHU OR-64’s objectives are to maintain essential nesting, roosting, foraging and dispersal habitat and maintain clusters of spotted owl nest sites, in addition to providing a “stepping stone to help maintain and improve what little spotted owl habitat exists.” CS

AR 33/461. BLM has failed to adequately analyze the effects of this destruction and degradation.

The BLM relies on the NWFP LSRs and other land allocations and provisions to allow it to conclude that the proposed timber harvesting in critical habitat will not result in adverse modification of that habitat. CS AR BA at 35 (“[p]rojects located in critical habitat would adversely affect ... critical habitat,” but stating that “[e]ssentially, LSRs and other allocations with no programmed timber harvest function as CHU”); CS AR BiOp at 40 (relying on the condition of other Federal and non-Federal land in the area to allow dispersal); CC AR 89/1021 (providing no basis for determination); CC AR 83/910-911 (discussing role of LSR habitat and stating that the LSRs are “expected to address the objectives of designated spotted owl critical habitat”). The Ninth Circuit recently concluded that this device does not satisfy the agency’s ESA duties, and that it would “impair Congress’ unmistakable aim that critical habitat analysis focus on the actual critical habitat.” Gifford Pinchot Task Force, 2004 WL 1753387, *13. Holding otherwise would “be approving a transition away from ESA protections to mere compliance with the broader but perhaps less rigorous NFP”. Id.

LSRs and other land allocations cannot substitute for the destruction/adverse modification analysis because they do not provide equal or stronger protections than the ESA. “Compliance with the NFP, as important as it is, does not in itself generate the same protection for habitat as Section 7 compliance. Congressional intent is clear, and existing or potential conservation measures outside of the critical habitat **cannot properly be a substitute** for the maintenance of critical habitat that is required by Section 7.” Id. (emphasis added); TVA v. Hill, 437 U.S. at 171-172. The existence of LSRs “has, strictly speaking, no bearing on whether there is adverse modification of critical habitat.” Gifford Pinchot, *14.

Therefore, the decisions to proceed with the Cottonsnake and Cow Catcher timber sales violate the BLM's ESA duty to insure that a project will not result in the destruction or adverse modification of designated critical habitat because they rely upon the existence of LSRs, rather than analyzing the effect of the removal and degradation of critical habitat on the critical habitat itself.

VI. BLM VIOLATED NEPA AND FLPMA BECAUSE THE COW CATCHER TIMBER SALE FAILS TO DISCLOSE AND CONFORM TO THE RMP REQUIREMENTS FOR CONNECTIVITY/DIVERSITY BLOCKS.

In the EA, BLM planned 78 acres of tree harvest within Connectivity/Diversity blocks ("C/D blocks") of the Matrix land allocation in Unit E (60 acres) and Unit F (18 acres) of the Cow Catcher timber sale. CC AR 64/373. In its decision, BLM decides to cut 65 acres of GFMA and 81 acres of C/D Block. CC AR 36/267. Within C/D Blocks, the Roseburg RMP requires the BLM to: 1) maintain of 25-30 percent of each Block as late-successional forest; 2) "[m]anage available forest land within each block on a 150 year area control rotation;" 3) limit harvest to 1/15 of the available acres in the entire C/D Block land use allocation per decade; and 4) regeneration harvest only in late-successional stands, emphasizing "density management," i.e., thinning of trees, in stands under 120 years of age. Roseburg RMP at 34, 152-53. While BLM disclosed and likely meets the first requirement for old growth retention, BLM has not disclosed compliance with the remaining RMP requirements for C/D Blocks.

Although BLM prepared a supplemental EA, it continues to fail to disclose sufficient information to assess whether it has met its RMP duties. The CC SEA addresses individual C/D blocks, however, the BLM only discloses the number of acres that BLM defines as late-successional forest. CC SEA at 8. BLM defines late-successional forest as forest containing trees greater than 80 years old. BLM has not disclosed the harvest history or the decadal age classes of the forest within each individual C/D block. All that the CC SEA discloses is that 30.5 percent of Section 17 will be

more than 80 years old, therefore, 69.5 percent of Section 17 is less than 80 years old. All of the 30.5 percent could be 81 years old, and all of the 69.5 percent could be less than 10 years old. There is simply no way to determine, based on the information in the SEA, that BLM is meeting its RMP requirement to manage individual C/D blocks on a 150 year control rotation or to meet the desired future condition of fifteen to sixteen different ten-year age classes represented within each individual C/D block.

Likewise for the entire C/D block land use allocation, BLM has failed to disclose the amount harvested over the past decade. BLM only reveals the amounts cut over the last nine years. Therefore, BLM has not disclosed sufficient information to demonstrate it is meeting its RMP requirement to regenerate harvest only 1/15 of the entire C/D land allocation per decade.

This type of information must be in the EA, so that the public may comment upon it. BLM's failure to include the necessary information in the supplemental EA is in violation of NEPA. Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1214 (9th Cir. 1998).

VII. BLM VIOLATED NEPA BECAUSE THE COW CATCHER TIMBER SALE FAILS TO ANALYZE A REASONABLE RANGE OF ALTERNATIVES

NEPA requires the BLM to “study, develop, and describe appropriate alternatives to recommended courses of action.” 42 U.S.C. § 4332(2)(E). The BLM is also required to “[r]igorously explore and objectively evaluate all reasonable alternatives” and briefly describe alternative that were eliminated from “detailed study” in its NEPA documents. 40 C.F.R. §§ 1502.14. The discussion of alternatives is the “heart” of NEPA documents and is intended to “provid[e] a clear basis for choice among options by the decisionmaker and the public.” 40 C.F.R. § 1502.14. The range of alternatives that the BLM must consider is “dictated by the ‘nature and scope of the proposed action.’” Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992) (quoting California v. Block,

690 F.2d 753, 761 (9th Cir. 1982)). Additionally, the BLM “must consider every reasonable alternative” in its NEPA analysis. Methow Valley Citizens Council v. Regional Forester, 833 F.2d 810, 815 (9th Cir.1987), rev'd on other grounds sub nom. Robertson v. Methow Valley Citizens Council, 490 U.S. 332 (1989). The “existence of a viable but unexamined alternative renders an environmental impact statement inadequate.” Id.

In Methow Valley Citizens Council, the Ninth Circuit held that the discussion of alternatives in an EIS prepared by Forest Service was “inadequate as a matter of law” because it failed to consider a sufficiently broad range of alternatives. 833 F.2d at 816. In its EIS, the Forest Service proposed granting a special use permit to allow a “four-season destination ski resort” to be built on Sandy Butte in north-central Washington. Id. at 812. The Forest Service considered three alternatives to the proposed action. Id. at 815 n.7. However, every alternative in the EIS required development of Sandy Butte. Due to the broad purpose of project—“to provide a ‘winter sports opportunity’”—the court held that the Forest Service had failed to analyze reasonable alternatives, such as expanding existing ski areas or developing a ski area elsewhere.

Similarly, the Ninth Circuit held that the Forest Service failed to consider an adequate range of alternatives in an EIS prepared for a land exchange with a private timber company in Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800, 814. In its EIS, the Forest Service considered two action alternatives which were, in large part, identical. Id. at 813. Because the Forest Service had failed to consider two viable alternatives—purchasing the land outright and imposing deed restrictions on the land it exchanged—the court held that the alternatives analysis in the EIS was inadequate. Id. at 814.

In the Cow Catcher EA, the BLM considered only one action alternative despite its broad statement of the purpose and need for the project. CC AR 64/369-373. Because the stated purpose

of the project is to manage matrix lands to “[p]roduce a sustainable supply of timber and other forest commodities” any number of alternatives would fulfill the project’s purpose. *Id.* at 1. Like the Forest Service’s proposal in Methow Valley, this purpose “is not, *by its own terms*, tied to a specific parcel of land.” 833 F.2d at 815. The BLM can provide a sustainable supply of timber without necessarily harvesting the units proposed in the Cow Catcher EA. Timber is fungible; the BLM could log in any number of physical locations using any number of silvicultural prescriptions and still meet its “sustainable supply” objective. For example, the BLM could employ a silvicultural prescription that would leave more trees but increase the acreage of the harvest area. Or, the BLM could locate the five proposed harvest units elsewhere in the watershed. Or, the BLM could reduce the harvest volume of this project and harvest more intensively in another watershed. Or, the BLM could increase the volume of this project and reduce logging in another watershed. BLM’s evaluation of only two alternatives unlawfully considers an unreasonably narrow range of alternatives .

VIII. BLM VIOLATED FLPMA BECAUSE THE COTTONSNAKE EA DOES NOT USE INFORMATION DEVELOPED IN THE WATERSHED ANALYSIS.

Pursuant to the Federal Land Policy and Management Act (“FLPMA”), 43 U.S.C. § 1732(a) and its implementing regulations, 43 C.F.R. § 1610.5-3(a), BLM must ensure that a site- specific project conforms to the RMP. BLM has failed to conform the Cottonsnake timber sale decision to the RMP requirement to use the Watershed Analysis as the basis for site-specific project development. This failure is a violation of FLPMA.

The Medford RMP states that watershed analysis “will focus on collecting and compiling information within the watershed that is essential for making sound management decisions.” Medford RMP Rod at 96. It further states:

The information from the watershed analyses will contribute to decision making at all levels. Project-specific NEPA planning will use information developed from watershed

analysis. For example, if watershed analysis shows restoring certain resources within a watershed could contribute to achieving landscape or ecosystem management objectives, then subsequent decisions will need to address that information.

Id. The Medford RMP also says that “results of the watershed analysis will influence final decisions both on timing of land-disturbing activities such as timber sales and on application of design features and mitigation measures” Id. at 97.

The Middle Cow Creek WA clearly did not serve as the basis for developing the late-successional logging that is proposed in the Cottonsnake EA. The information and recommendations contained in the WA did not contribute to decision. In fact, BLM appears to have simply ignored the WA recommendations.

The WA identifies “[p]re-commercial thinning and brushing units since 1993” and “timber harvest units since 1993” as the first two categories of “highest priority for fuels management.” WA at 57. Yet this finding is notably absent from the EA. In fact, the EA focuses management on intact ancient forest stands rather than correcting the negative impacts of the BLM’s past logging efforts on fire hazard. The WA further informs BLM that:

Fire hazard is believed to be on an upward trend due to fire suppression, allowing for more build up of fuels. Recent clearcutting has resulted in young, even-aged stands, making the forest more vulnerable to stand replacement fires.

WA at 63. The WA also informs the agency and the public that “regeneration harvest within the GFMA connectivity bands on the north and south ridges should be avoided in the next decade or two to allow more contiguous forest stands to develop.” WA at 67. It appears that the BLM not only ignored this finding of the WA, but is in fact targeting some of the most contiguous and intact connectivity bands on ridges within sections 23 and 13 with regeneration harvest.

The WA found that “[a] higher level of connectivity should be maintained along the north and south ridges to promote east-west movement of species.” WA page 69. Nevertheless, BLM calls for

logging ancient forests and building roads along north and south ridges without explaining analyzing or disclosing the impact of logging connectivity blocks and critical habitat along these ridges. No attempt is made to harmonize the proposal to log these forests with the recommendations of the Watershed Analysis.

The WA contends that CHU OR-64 is particularly vulnerable to logging. Most of the CHU's are centered on large LSRs; but OR-64 is an exception in that it is placed over General Forest Management Area lands. The primary function of most of the CHU's is to maintain the range-wide distribution of the northern spotted owl since this area provides an integral portion of the link from the Klamath Mountains province to the southern end of the Oregon Coast Ranges province. Management activities within the CHU need to ensure that its function is not impaired. WA at 43.

Yet, BLM intends to harvest within CHU OR-64.

The Watershed Analysis states that "An aggressive effort should be made to reduce open road densities in the watershed through decommissioning, barricading and gating." WA at 67. Alternative 1 of the EA would increase rather than decrease, the open road density in the watershed. No alternative (including the no action alternative) would actually implement the WA recommendation to make "an aggressive effort" to reduce road densities in the watershed. The EA illustrates that recently completed and planned timber sales in the watershed have (or likely will) result in the construction of 6.0 miles of new and "temporary" logging roads. CS AR 33/469 (Table 4-4). Even "temporary" logging roads often have long term ecological consequences due to soil compaction, noxious weed spread, edge effect to adjacent forest lands, chronic sediment production, channelization and the interruption of sub-surface water flows.

BLM has not used the information, findings and recommendations of the WA. This failure to conform decision to Medford RMP direction to use this “essential” information to develop site-specific projects such as Cottonsnake violates FLPMA.

IX. BLM VIOLATED NEPA BECAUSE THE COTTONSNAKE EA DOES NOT DISCLOSE THE AMOUNT OF PROPOSED HARVEST, RIPARIAN RESERVE BOUNDARIES OR INFORMATION DEVELOPED IN THE WATERSHED ANALYSIS

Environmental information must be made available to public officials and citizens before decisions are made and actions taken. 40 C.F.R. § 1500.1 (b); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998). The information must be of high quality. 40 C.F.R. § 1500.1 (b). Scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA. Id. Additionally, NEPA requires agencies to insure the professional and scientific integrity of the discussions and analyses in environmental impact statements. 40 C.F.R. § 1502.24.

Here, in the Cottonsnake EA, the BLM fails to identify the Riparian Reserve boundaries and the specific amount of timber to be harvested, as well as much of the information from the Watershed Analysis. CS AR 33/431 (estimated harvest is 5-9 million board feet). As the Ninth Circuit made clear in ISC v. Thomas, the BLM must disclose to the public any information used to develop its proposed action. Thomas, 137 F.3d at 1150. BLM’s failure to do so violates NEPA.

X. BLM VIOLATED NEPA BECAUSE IT FAILED TO CONSIDER THE EFFECTS AND CUMULATIVE EFFECTS OF THE COW CATCHER AND COTTONSNAKE TIMBER SALES

In determining whether a project will have a significant impact on the environment, an agency must consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts.” 40 C.F.R. § 1508.27(b)(7). “Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment.” Id. The CEQ regulations define

“cumulative impact” 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.” 40 C.F.R. § 1508.7. “If several actions have a cumulative environmental effect, ‘this consequence must be considered in an EIS.’” Blue Mountains, 161 F.3d at 1214 (quoting Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1378 (9th Cir. 1998)). BLM has failed to disclose and analyze cumulative effects of the Cow Catcher and Cotton Snake timber sales on the red tree vole, the northern spotted owl, other late-successional dependent species, including the del norte salamander, and the spread of noxious weeds.

In the Cow Catcher EA and SEA, the BLM did not disclose or analyze the direct or cumulative effects on the red tree vole because: 1) it relies upon an analysis that is not applicable to the relevant 5th field watershed; 2) it relies upon a percentage of alleged existing vole habitat, but it does not consider the fragmentation of those acres; 3) it relies on the contribution of young stands to vole habitat without basis. Nor did the BLM did not disclose or analyze the indirect or cumulative effects on the northern spotted owl from removing the red tree vole habitat and consequent loss of voles or from the barred owl moving into the Cow Creek watershed. The BLM further ignores the cumulative effects on the red tree vole because it ignores the reasonably foreseeable Loose Laces timber sale and the Can-Can timber sale, as well as Mr. Wilson and Papa Cow. CC SEA at 6. In addition, BLM does not consider the large private land clearcuts in the watershed on the fragmentation of red tree vole habitat.

The Cottonsnake EA contains no substantive analysis or disclosure of the cumulative hydrological impacts of the private and federal logging and roading programs in the planning area. The cumulative effects “analysis” simply lists past federal timber sales and then discounts the actual

impacts of these activities without disclosing their magnitude, location, duration, or any monitoring data. CS AR 33/467-470.

Specifically, the Cottonsnake EA fails to provide substantive analysis or information about the problem of noxious weeds in the planning area. The EA limits its discussion of noxious weeds to a paragraph that addresses none of the “unmet needs” identified in the WA. CS AR 33/451. The EA only acknowledges that “there are many invasive species within the planning area” and identifies Scotch broom, meadow knapweed and blackberries as species of concern. No site-specific information whatsoever is provided to the reader, nor are the cumulative effects of the impacts of logging and road work on the spread of noxious weeds disclosed or discussed.

The WA indicates that the Middle Fork Cow Creek may be particularly important habitat for the Del Norte Salamander because it may be near the northern and eastern limits of the species range. WA at 45. This is significant information that should be disclosed and analyzed in the EA, but is not. Nor are the cumulative effects to the salamander discussed other than to say that it may be “vulnerable to cumulative effects of timber harvest within a watershed.” CS AR 33/470.

BLM’s decisions to adopt and implement the Cow Catcher and Cotton Snake timber sales are not in accordance with the National Environmental Policy Act, 42 U.S.C. § 4332(C), and its implementing regulations, and they are arbitrary, capricious, and not in accordance with law in violation of 5 U.S.C. § 706(2)(A).

CONCLUSION

Plaintiffs respectfully request that this Court set aside the 2001 and 2003 ASR decisions, the Cow Catcher and Cottonsnake timber sale decisions and permanently enjoin BLM and D.R. Johnson Lumber Company from conducting any activities pursuant to these decisions until Defendants fully comply with all applicable law and regulation.

Respectfully submitted this 13th day of August, 2004

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