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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.

KATRINA SYMONS, 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,

and

D.R. JOHNSON LUMBER CO.,
An Oregon corporation,

Defendant-Intervenor.

Civ. No. 03-3124-CO

PLAINTIFFS' COMBINED
MEMORANDUM IN OPPOSITION TO
DEFENDANTS' CROSS-MOTIONS FOR
SUMMARY JUDGMENT AND REPLY
IN SUPPORT OF PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

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I. PLAINTIFFS' RED TREE VOLE CLAIMS ARE JUSTICIABLE.

A. Plaintiffs' Claims are Not Moot.

The BLM and D.R. Johnson cannot meet their heavy burden to show the 2004 Record of Decision ("2004 ROD") moots Plaintiffs' red tree vole claims (claims one, two and three). BLM Memo at 11-13; Int'r Memo at 6. The BLM did not decide to remove survey and manage protections for the red tree vole in its central/mesic range during the 2004 ROD decisionmaking process. The BLM already had made that decision during the 2003 Annual Species Review ("ASR") process. Thus, the 2004 ROD is not relevant to the claims in this case.

"The burden of demonstrating mootness is a heavy one." Northwest Environmental Defense Center v. Gordon, 849 F.2d 1241, 1244 (9th Cir. 1988) (citing County of Los Angeles v. Davis, 440 U.S. 625, 631, 99 S.Ct. 1379, 1383, 59 L.Ed.2d 642 (1979)). Moot cases are those that have lost their character as present, live controversies. Id. (citing Lindquist v. Idaho State Board of Corrections, 776 F.2d 851, 853-54 (9th Cir.1985)). The basic question in determining mootness is whether there is a present controversy as to which effective relief can be granted. Id. (citing United States v. Geophysical Corp., 732 F.2d 693, 698 (9th Cir.1984)). "[C]ourts of equity have broad discretion in shaping remedies." Id. (citing Garcia v. Lawn, 805 F.2d 1400, 1403 (9th Cir.1986)). Thus, in deciding a mootness issue, "the question is not whether the precise relief sought at the time the application for an injunction was filed is still available. The question is whether there can be *any* effective relief." Id. at 1244-45 (quoting Garcia, emphasis added by the court in NEDC).

The BLM explicitly did not consider removing the red tree vole from survey and manage protections in the 2004 decisionmaking process. In the Final Supplemental Environmental Impact Statement to support the 2004 ROD ("2003 FSEIS"), the BLM provides a summary of survey and

manage since the adoption of the NWFP in 1994. Plts' Exhibit 3 at 15-21.¹ BLM lists all the "changes," which include the 2001 ROD (which led to "removing 72 (of more than 400) species), as well as changes made through the Annual Species Reviews ("ASR") in 2001 (22 species removed), 2002 (8 species removed), and 2003 ("resulted in removing 8 more species in all of their range and one species (red tree vole) in a portion of its range"). Id. at 18. As a result, the "No-Action Alternative" (Alternative 1) is described as continuing implementation of "all current elements" of the NWFP, including Survey and Manage mitigation, which "currently applies to 296 species and 4 arthropod functional groups in all or part of their range." Id. at 29, 30. The agencies state the current Survey and Manage species are shown in Table 2-3. Id. at 30. The Oregon Red Tree Vole is included in Table 2-3 only for the xeric and northern mesic portion of its range. Id. at 43. In discussing the environmental consequences to the red tree vole, BLM explains that "[u]nder Alternative 1, the red tree vole is included in Category C in the xeric and northern mesic portions of its range," and that "[p]reviously, the red tree vole had also been included as a Category D species in the central portion of its range." Id. at 206. "The red tree vole, in most of the central portion of its range, was removed from Survey and Manage during the 2003 Annual Species Review." Id.

As demonstrated, the BLM explicitly did not include the central range of the red tree vole in its most recent decision. Accordingly, the BLM cannot rely upon the 2004 ROD in this case. BLM's duties to the red tree vole in its central range, which includes the Cow Catcher and Cotton Snake timber sale areas, must stand or fall on the validity of the 2001 and 2003 ASR decisions.

BLM also argues that there is no longer a live controversy regarding the 2001 and 2003 ASRs "since they are no longer required to be performed." BLM Memo at 12. Because there is no other

¹Plaintiffs have included only the relied upon excerpts of the 2003 FSEIS. Page numbers refer to the page numbers of the original document.

decision that controls the protective measures provided for the vole in its central/mesic range, the 2001 and 2003 ASRs continue to be decisions over which the parties have a live controversy. The fact that the BLM no longer requires ASRs pursuant to the 2004 ROD only means that a plaintiff could not bring a claim to compel the BLM to conduct an ASR this year or in the future. It does not affect the current controversy over the past ASR decisions.

Finally, a case is not moot when effective relief can be granted. American Rivers v. National Marine Fisheries Serv., 126 F.3d 1118, 1123 (9th Cir. 1997); United States v. Geophysical Corp., 732 F.2d 693, 698 (9th Cir. 1984). Courts consider whether a declaratory judgment will clarify and settle the legal relations at issue and whether it will afford relief from uncertainty and controversy giving rise to the proceedings. Natural Resources Defense Council, Inc. v. EPA, 966 F.2d 1292, 1299 (9th Cir. 1992). A court's grant of declaratory judgment "delineates important rights and responsibilities and can be a message not only to the parties but also to the public and has significant educational and lasting importance." Id.

This Court can grant effective relief to Plaintiffs. The 2001 and 2003 ASR decisions violated FLPMA, NEPA and were otherwise arbitrary and capricious, as demonstrated in Plaintiffs' memorandum in support of the pending motion and further demonstrated immediately below. As relief, the Court can remand those decisions to the BLM. The Cow Catcher and Cotton Snake timber sales, which rely upon the ASR decisions to forgo conducting surveys and protecting known sites, should be enjoined until the BLM demonstrates that: 1) it has surveyed for and protected known sites of the vole; or 2) it has issued a new and valid decision regarding the vole in its central/mesic range through the FLPMA amendment process, accompanied by appropriate NEPA analysis. Weinberger v. Romero-Barcelo, 456 U.S. 305, 313 (1982) (courts retain broad equitable powers to mold the relief to the circumstances of the case unless a statute restricts the court's jurisdiction in equity); see

also United States v. Oakland Cannabis Buyers' Cooperative, 532 U.S. 483, 496 (2001). Further, a declaration from this Court that BLM cannot circumvent the NEPA and FLPMA requirements through an adaptive management process would have “significant educational and lasting importance.”

B. Plaintiffs' Claims are Not Barred by Laches.

Intervenor, D.R. Johnson Lumber, argues that Plaintiffs are barred by laches from challenging the ASR decisions. Int'r Memo at 7-9. BLM does not join in this argument. Laches is disfavored in NEPA cases. To allow BLM to proceed with timber sales that admittedly adversely impact the red tree vole without the benefit of NEPA analysis on the ASR decisions circumvents the very purposes and mandates of NEPA. Moreover, this would establish a dangerous precedent that the BLM could issue internal, unpublished decisions without NEPA compliance and thereby evade its NEPA obligations without repercussion. Second, federal forest management decisions made at the broader landscape level often cannot be challenged until site-specific impacts are felt. Finally, Plaintiffs did not sit on their rights. They challenged the internal, unpublished 2001 ASR, which did not issue until June 14, 2002, as soon as they were aware that their interests would be impacted because BLM refused to protect known red tree vole sites identified by citizens through the NEST surveys.

1. Laches is disfavored in NEPA cases and should not apply here.

Laches is extremely disfavored in environmental cases. Cady v. Morton, 527 F.2d 786, 792 (9th Cir. 1975); City of Davis v. Coleman, 521 F.2d 661, 678 (9th Cir. 1975); Coalition for Canyon Preservation v. Bowers, 632 F.2d 774, 779 (9th Cir. 1980); Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372, 1382 (9th Cir. 1998); Apache Survival Coalition v. United States, 21 F.3d 895, 905 (9th Cir. 1994). In considering laches claims, it is relevant that the plaintiff will not be the only victim of possible environmental damage. City of Rochester v. United States Postal Service,

541 F.2d 967 (2d Cir. 1976); City of Davis v. Coleman, 521 F.2d at 678. Citizens have a right to assume that federal officials will comply with the applicable law. Cady v. Morton, 527 F.2d at 792. Therefore, to the extent the Court believes that Plaintiffs delayed challenging the 2001 ASR², the case law overwhelmingly disapproves of allowing such delay to permit BLM to avoid NEPA compliance.

BLM should not be allowed to rely on decisions that violate NEPA because this would circumvent congressional intent. Courts have held that the use of laches should be restricted to avoid defeat of Congress' environmental policy. Coalition for Canyon Preservation, 632 F.2d at 779; Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1241 (9th Cir. 1989). As the Ninth Circuit stated in City of Davis v. Coleman, "[t]o make faithful execution of this duty contingent upon the vigilance and diligence of particular environmental plaintiffs would encourage attempts by agencies to evade their important responsibilities. It is up to the agency, not the public, to ensure compliance with NEPA in the first instance." 521 F.2d at 678 (9th Cir. 1975). Likewise, in the case at hand, should the Court allow the BLM to log known red tree vole habitat in the Cow Catcher and Cottonsnake timber sales prior to complying with its NEPA obligations for the ASR decisions would encourage the BLM to evade its NEPA duties, as well as circumvent the purposes and mandates of NEPA.

NEPA sets forth "action-forcing" procedures designed to fully inform agency decision-makers of the environmental impact of their decisions. Trustees for Alaska v. Hodel, 806 F.2d 1378, 1382 (9th Cir.1986). The reason for NEPA analysis is that "decisions that are based on understanding of the environmental consequences" will "protect, restore and enhance the environment." 40 C.F.R. § 1500.1(c). The purpose is to "inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1. NEPA analysis is intended to "provide decision makers with enough information

²Plaintiffs challenged the December 19, 2003 ASR decision eleven days after it issued.

to aid in the substantive decision whether to proceed with the project in light of its environmental consequences and to provide the public with information and an opportunity to participate in gathering information.” Northwest Coalition for Alternatives to Pesticides v. Lyng, 673 F.Supp. 1019, 1022 (D.Or.1987).

In order to satisfy the disclosure and informed decisionmaking purposes of NEPA, CEQ regulations place “[l]imitations on actions during NEPA process.” The CEQ regulations provide that until an agency issues a decision in compliance with NEPA “no action concerning the proposal shall be taken which would: (1) have an adverse environmental impact; or (2) limit the choice of reasonable alternatives.” 40 C.F.R. § 1506.1(a). If an agency fails to follow NEPA procedures prior to issuing a decision, yet it is allowed to proceed with later, site-specific decisions that rely upon the broader, non-compliant decision, then a primary purpose of NEPA has been defeated.

Applying laches to this case would leave the plaintiff without an adequate remedy. An injunction is an appropriate remedy when an agency has failed to comply with NEPA. In Klamath Siskiyou Wildlands Center v. BLM, 2004 U.S. Dist. LEXIS 10977 (D.Or., 2004), the plaintiffs challenged the BLM’s EA for violating NEPA. The court determined that “if the court finds NEPA violations, an injunction is the appropriate remedy.” Id. at 54-55 (quoting Forest Conservation Council v. U.S.F.S., 66 F.3d 1489, 1496 (9th Cir. 1995)). “If, having established a violation of NEPA, plaintiffs are not allowed to enjoin further activities until the agency complies with NEPA, then NEPA would be an ‘exercise in futility.’” State of California v. Bergland, 483 F.Supp. 465, 499 (E.D. Cal. 1980), aff’d, rev’d and remanded on other grounds sub nom, State of California v. Block, 690 F.2d 753 (9th Cir. 1982). Likewise, in this case, enjoining the agency from acting while the BLM conducts NEPA analysis on its ASR decisions is an appropriate remedy for BLM’s violations of NEPA.

Moreover, Intervenor is not prejudiced by any alleged delay in filing by Plaintiffs. Economic harm is not considered in a laches analysis involving violations of environmental laws. Neighbors of Cuddy Mountain, 137 F.3d at 1382. Specifically, the Ninth Circuit found that such economic losses are “not the type of harm that is properly considered in a laches analysis” and that “[p]rejudice in environmental actions is measured by ‘what Congress defines as prejudice. The primary concern is whether the harm that Congress sought to prevent . . . is now irreversible.’” Id. citing Apache Survival Coalition, 21 F.3d at 912. Plaintiffs in the instant case are merely asking that the BLM conduct the NEPA analysis that it is required to do by law, and requesting that while the analysis is being prepared logging of red tree vole habitat should be halted. Neighbors of Cuddy Mountain, 137 F.3d at 1382.

2. Forest management decisions at broader landscape levels are often challenged later, after a site-specific decision.

The federal agencies’ forest management decisionmaking processes almost guarantee that the agency will rely on certain programmatic or regional decisions that are subject to challenge later. The BLM makes decisions at the level of its Resource Management Plans (RMP), as well as ecosystem-, region- and species-wide levels. Simply because the agency makes decisions at a broader landscape level does not mean that a plaintiff must challenge it immediately or else lose the opportunity to obtain a meaningful remedy.

For example, in Kern v BLM, plaintiffs challenged the Environmental Impact Statement (EIS) for the Coos Bay RMP, for which the BLM issued a decision in May, 1995. But, plaintiffs did not challenge the EIS until after the BLM issued a site-specific Environmental Assessment (EA) and decision to allow logging, on February 11, 1997, which relied upon the RMP EIS and decision. 284 F.3d 1062, 1070-1071 (9th Cir. 2002). Although the Ninth Circuit held that the claim that the RMP

EIS violated NEPA is never riper than at the time the NEPA decision issues, it did not allow the BLM to rely upon the noncompliant RMP EIS and proceed with the timber sales authorized by the later EA and decision. To the contrary, the court held that where the effects were not evaluated in the RMP EIS, they needed to be analyzed in the site-specific EA. *Id.* at 1078. See also Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 732-34 (1998) (where the Forest Service will necessarily have to rely upon an as yet unchallenged Forest Plan, which a plaintiff may then challenge later when the Forest Service issues site-specific decisions in reliance upon the plan so that plaintiff's harm is imminent and claims have ripened). Likewise, Plaintiffs here may challenge the 2001 Annual Species Review decision on NEPA grounds after the BLM issued the Cow Catcher EA and decision.

Moreover, BLM seemed to anticipate that a challenge to the ASR decision would not be judicially reviewable until it was applied in a site-specific timber sale decision. In the "Record of Decision for Amendments to the Survey and Manage, Protection Buffer, and other Mitigation Measures Standards and Guidelines" (2001 ROD), the agencies state that the application of the species' information to the survey and manage criteria "will be documented in writing for the record." 2001 ROD S&G at 18. The agencies further explain that "[d]etails of the Species Review Process will be available as administrative record for actions applying resultant changes in the future." 2001 ROD S&G at 18. Thus, not only was the 2001 ASR decision issued through an internal memorandum, the agencies intended to provide the record for the ASR decisions in a subsequent decision applying those decisions.

3. Plaintiffs challenged the ASR decisions as soon as they knew their interests would be harmed.

Plaintiffs did not sit on their rights. Rather, they challenged the ASR decisions as soon as they knew their interests would be harmed. The timing of the events in this case is relevant to the laches inquiry:

- 6/14/02 BLM made the 2001 ASR decision to reduce red tree vole from Category C to D through non-public, internal memorandum to the agency files. 2001 ASR AR Tab 1, page 1.
- 6/16/03 BLM released the Cow Catcher EA. CC AR at Tab 64, page 365.
- 8/25/03 BLM issued the Cow Catcher timber sale decision. CC AR at Tab 36.
- 9/10/03 Plaintiffs protested the decision. CC AR at Tab 28, page 181.
- 10/3/03 BLM denied the protest. CC AR at Tab 14, page 137.
- 11/5/03 Plaintiffs appealed the decision and requested a stay. CC AR Tab 11, page 88.
- 12/18/03 Interior Board of Land Appeals denied the request for a stay. CC AR Tab 1, page 1.
- 12/19/03 BLM made the 2003 ASR decision to completely remove red tree vole from survey and manage protections through a non-public, internal memorandum to the agency files. 2003 ASR AR Tab 4, page 53.
- 12/30/03 Plaintiffs filed their initial complaint. Dkt. #1.

First, Intervenor argues that Plaintiffs should have challenged the 2001 ROD amending the Northwest Forest Plan’s survey and manage standards, which adopted an “adaptive management procedure that contemplated changes in species’ category rankings through an ASR process without further NEPA review.” Int’r Memo at 8. Plaintiffs do not challenge the “adaptive management procedure” or the “ASR process” established in the 2001 ROD in this action. While the 2001 ROD “contemplated” that further NEPA review may not be necessary, the 2001 ROD did not finally decide whether the ASR decisions would trigger NEPA. In the 2001 ROD, the BLM did not, and could not,

predetermine the decisions that the agencies would make as a result of the ASR procedure and the environmental effects that would result from those decisions. Plaintiffs could not have brought an “anticipatory” challenge that BLM would, in fact, violate its NEPA and FLPMA duties when it finally did make its ASR decisions. Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 733-34 (1998) (challenge to plan decisions not ripe until plaintiff’s harm imminent, especially where there is a second level of decisionmaking).

Second, Plaintiffs cannot be barred by laches from challenging the 2003 ASR, which completely removed any protection for the red tree vole in its central/mesic range, because Plaintiffs challenged that decision within eleven days. 2003 ASR AR Tab 4, page 53 (2003 ASR decided December 19, 2003); Complaint (Dkt. #1) (filed Dec. 30, 2003).

Finally, Plaintiffs challenged the 2001 ASR decision, the very first ASR decision issued, as soon as they knew their interests would be harmed. The BLM made the 2001 ASR decision through an internal memorandum to the agency files on June 14, 2002. 2001 ASR AR at 1. Plaintiffs would have no reason to know of this decision for the very reason that they challenge it here. The BLM completely failed to conduct any NEPA analysis or disclose the decision and its analysis to the public. Because BLM issued the decision internally, Plaintiffs were unable to challenge it when it issued. It would be fundamentally unfair to expect the public to be aware of internal agency decisions in order to challenge them.

Moreover, the 2001 ASR changed protections for the red tree vole from Category C to D. This meant that BLM did not need to conduct pre-disturbance surveys, but was required to continue to protect known sites. Plaintiffs reasonably believed that they could collect the information of known sites and that BLM would protect those known sites, as required for a Category D species, thereby continuing to protect the red tree vole and Plaintiffs’ interests. See Exhibit 4 (The Register-

Guard “Owl habitat cuts logging plans” (Jan. 29, 2002) indicating that the U.S. Forest Service reduced the Clark timber sale to one-third its original size based on data collected by environmental activists showing red tree voles nesting in the sale area); Exhibit 5 at 3 (Draft Supplemental EA for the Clark timber sale explaining the history of the sale, including the Forest Service’s provision of additional protection for citizen-identified red tree vole sites).³ It did not become apparent to Plaintiffs until BLM issued the Cow Catcher decision that BLM would not protect any of the known sites that Plaintiffs’ NEST surveys identified. Therefore, Plaintiffs were not aware that the 2001 ASR decision would harm their interests and those of the red tree vole until the Cow Catcher decision issued on August 25, 2003. Plaintiffs diligently pursued their rights thereafter by protesting and appealing the decision, then filing the instant complaint on December 30, 2003.

C. Plaintiffs’ Claims are Enforceable.

Intervenor further argues that Plaintiffs cannot enforce survey and manage provisions because “resource management plans adopted by BLM under FLPMA and its implementing regulations ‘are not a legally binding commitment.’” Int’r Memo at 6 (quoting Norton v. Southern Utah Wilderness Alliance, 124 S.Ct. 2373, 2384 (2004) (hereafter, “SUWA”). Intervenor ignores that the Supreme Court specifically stated that its holding does not affect a plaintiff’s ability to challenge a discrete, final agency action pursuant to Section 706(2) of the Administrative Procedure Act (APA) because the decision does not conform to the land use plan. 124 S.Ct. at 2379. Here, the 2004 ROD did not address removal of red tree vole from survey and manage protections in its central/mesic range because that decision was made in the 2003 ASR, as discussed above. And, the ASR decisions must be set aside because they do not comply with NEPA, FLPMA, and are otherwise arbitrary and capricious. Therefore, the BLM must act in accordance with the survey and manage provisions for

³entire document available at <http://www.fs.fed.us/r6/willamette/manage/nepa/current/supp-ea/clark-sea.pdf>

the vole in its central/mesic range until such time that it validly determines the vole can persist without survey and manage.⁴

II. BLM FAILED TO COMPLY WITH NEPA WHEN IT DECIDED TO CHANGE THEN REMOVE SURVEY AND MANAGE PROTECTIONS FOR RED TREE VOLES.

A. BLM Did Not Analyze the Effects of Removing Vole Protections in the 2000 FSEIS.

BLM does not dispute that the BLM did not consider, disclose or analyze the impacts of changing then removing protections for the vole during the ASR process. BLM Memo at 21-25. Instead, BLM argues that it “was not required to conduct supplemental NEPA because the procedures for changing the management status of red tree vole were established by the 2001 ROD.” BLM Memo at 23. The BLM’s heading to this argument implies that BLM is relying on effects analysis contained in the 2000 FSEIS. BLM Opp. at 23. However, BLM does not cite once to the 2000 FSEIS to show where the “effects of the ASR process” were disclosed or analyzed. Moreover, BLM does not show where it has disclosed and analyzed the specific effects of the results of the ASR processes – decisions to reduce and eliminate protections for a number of species with attendant increases in timber harvesting of late successional and old growth forests.

Instead of demonstrating compliance with NEPA, BLM relies heavily on the discussions of adaptive management in the NWFP and the 2001 ROD. BLM Memo at 23-24. BLM adopted an adaptive management “procedure” to annually review species information and establish criteria to change or remove protections for those species included in the survey and manage program as of the 2001 ROD. That procedure did not, and could not, predetermine the decisions that the agencies would make as a result of the ASR procedure and the environmental effects that would result from

⁴The Court can set aside only that portion of the 2001 and 2003 ASR decisions that concern the vole. 2001 ASR 1/2 (“The finding for each species is independent of the finding for any other species. This is based on the separate and independent analyses that took place during the species review. Although only one document has been issued, it is a collection of separate findings.”)

those decisions. The agencies' contemplation that further NEPA analysis may not be required cannot substitute for NEPA compliance.

Adaptive management and NEPA disclosure, analysis and documentation are not mutually exclusive. BLM absolutely must continue to gather and review information and reconsider its decisions and actions to ensure it is best meeting its management duties. However, if BLM decides to substantially change its decisions based on that new information, then it must supplement its NEPA analysis. 40 C.F.R. § 1502.9(c).

NEPA supplementation is required when the agency “makes substantial changes in the proposed action” or when “[t]here are significant new circumstances or information . . .” 40 C.F.R. § 1502.9(c). Here, BLM made substantial changes to the survey and manage program through the ASR process that will result in substantially more timber harvesting. Plts. Memo at 24-25. Plaintiffs have demonstrated that there is a likelihood that there are significant environmental effects that the agency has overlooked that will result from the increased harvesting of vole habitat. Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998) (“‘plaintiff need not show that significant effects will in fact occur,’ raising ‘substantial questions whether a project may have a significant effect’ is sufficient). BLM’s substantial change in management, the effect of which the 2000 FSEIS did not disclose, analyze or evaluate, requires further NEPA analysis.

B. BLM Failed to Supplement its NEPA Analysis at the Plan Level or Otherwise Comply with NEPA for its ASR Decisions.

BLM argues that it was not required to conduct supplemental NEPA for the ASR decisions “because the land use planning process was complete.” BLM Memo at 22-23. BLM relies upon the SUWA case, which holds that once a land use plan has been approved, there is no further major Federal action to occur at the plan level. SUWA, 124 S.Ct. at 2385. However, the Supreme Court

clearly stated that “BLM *is* required to perform additional NEPA analyses if a plan is amended or revised, see §§ 1610.5-5, 5-6.” *Id.* (emphasis in original). Here, Plaintiffs have demonstrated in their opening memorandum (Plts.’ Memo in Supp. of SJ at 25-26) and below, BLM did, in fact, amend at the plan level when it reduced then eliminated the red tree vole protections, although it failed to comply with FLPMA amendment procedures.

BLM bootstraps this NEPA argument to its argument that no plan amendment was required. BLM Memo at 22. However, either the ASR decisions that changed protections for the vole are plan level decisions requiring amendment, or the ASR decisions are decisions that implement the ASR “procedure” adopted in the 2001 ROD. Plaintiffs submit that the ASR decisions are plan level decisions, and, as such, SUWA requires supplemental NEPA analysis.

If the ASR decisions are not plan level decisions, then they implement the ASR procedure. See BLM Memo at 15 (stating “ASRs implement the adaptive management concept”); Int’r Memo at 7 (characterizing Plaintiffs’ claim as “attacking the implementation of the adaptive management process” adopted in the 2001 ROD). However, as discussed above, simply because the ASR procedure was adopted in the 2001 ROD accompanied by the 2000 FSEIS, one cannot infer that the environmental effects of the ultimate implementation decisions were considered. Just as an agency’s decision to implement a timber sale in accordance with plan level decisions and requirements must comply with NEPA, the ASR decisions, if characterized as implementation decisions, trigger NEPA in their own right because the decisions are likely to have significant environmental effects by permitting substantially more timber harvesting in red tree vole habitat.

III. BLM FAILED TO COMPLY WITH FLPMA WHEN IT DECIDED TO CHANGE THEN REMOVE PROTECTIVE STANDARDS FOR THE RED TREE VOLE.

The BLM again relies upon adaptive management and argues that the NWFP “contemplated” that adaptive management changes may not require changes to plans. BLM Memo at 15. Advance contemplation is no substitute for demonstrating that the decisions at hand, the 2001 and 2003 ASRs, complied with the FLPMA plan amendment requirements. Just as NEPA is required when the agency takes an action that triggers NEPA, FLPMA plan amendment is required when the agency takes action that triggers plan amendment pursuant to the agency’s regulations.

BLM’s FLPMA regulations describe when an amendment is required:

An amendment shall be initiated by the need to consider monitoring and evaluation findings, new data, 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 ASR decisions are changes in the plan that may result in both a change in the scope of resource uses and a change in the terms, conditions and decision of the plan; therefore the BLM must amend the plan. 43 C.F.R. § 1610.5-5. The Survey and Manage program consists of two integral components established through the NWFP amendments to land management plans: 1) survey and manage requirements; 2) that are applied to certain species. These are plan-level requirements with which the BLM must act in accordance when it proposes and implements a timber sale. Through the ASR process, the BLM substantially modified the plan-level standard to apply to the red tree vole. In so doing, the BLM changed the “terms, conditions and decision of the approved plan” and is required by its own regulations to conduct a plan amendment process. 43 C.F.R. § 1610.5-5. In addition, the removal of protection for species, in particular the red tree vole, results “in a change in

the scope of resource uses,” namely, greater timber harvesting than would otherwise have been allowed pursuant to an unmodified 2001 ROD. These changes require plan amendment.

BLM argues that the ASR decisions “constitute only plan maintenance, which ‘reflects minor changes in data’ and does not require a formal plan amendment.” BLM Memo at 14. First, the ASR decisions, which are purportedly based upon two or more years of survey data collected for the very purpose of learning more about a little-known species, and completely remove protection for those species, cannot be characterized as a “minor change in data.”⁵ Further, plan maintenance, which does not require plan amendment, is “limited to further refining or documenting a previously approved decision incorporated into the plan.” 43 C.F.R. § 1610.5-4. While the 2001 ROD lays out the procedures and criteria for the ASR, it does not make any of the decisions that resulted from the ASR process. Those resulting decisions are more than “administrative” and require plan amendments. Moreover, use of plan maintenance to make changes is prohibited where the change results in expansion in the scope of resource uses, as occurs here.⁶ Id.

⁵If the survey data truly reflect only “minor changes in data,” then the BLM had wholly insufficient bases to make the ASR decisions to reduce then eliminate protections for the vole in its central/mesic range following the 2001 ROD decision to maintain those protections.

⁶During rulemaking, the public raised specific concerns “that the provision on maintenance appeared to allow a minor change in the scope of resource use in a plan.” 48 Fed. Reg. 20364, 20367 (1983). In response,

the final rulemaking amends the maintenance provision and the amendment provision to make clear the distinct difference between the two concepts and their impacts on an existing plan. The final rulemaking makes it clear that maintenance cannot make a change in the scope of resource use in a plan, while an amendment can make a change in the scope of resource use.

Id. In response to public comment that the proposed rule reduced public participation, BLM stated that the final rule amended the proposed rules “to assure meaningful public participation in keeping with the strong support in the Department of the Interior and the Bureau of Land Management for public participation in the planning process.” 48 Fed. Reg. 20364.

IV. THE ASR DECISIONS ARE ARBITRARY AND CAPRICIOUS

The agency has ignored important aspects of the problem of persistence of the vole, rendering the decision arbitrary and capricious. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (agency action is arbitrary and capricious if it “entirely failed to consider an important aspect of the problem”). In particular, BLM has not evaluated the number of sites relative to the number or distribution the vole requires to persist. BLM also relies upon potential habitat in Late Successional Reserves (LSRs), but ignores the relevant fact that surveys have demonstrated that far less vole habitat exists in LSRS than the agencies anticipated in the NWFP in 1994. Finally, BLM has failed to address possibly the most important aspect of the problem for vole persistence – whether its current distribution is sufficient to assure persistence where the agency knows that the vole is a poor disperser faced with finding mates and establishing sites in a highly fragmented forest habitat that lacks connectivity.

BLM refers to criteria of “high number of likely extant sites; low-to-high number of individuals per site; moderate-to-broad ecological amplitude; and moderate-to-high likelihood of sites in reserves.” BLM Memo at 17 (citing 2001 ROD at 10). BLM has not satisfied any of these with respect to the particular needs of the red tree vole.

The red tree vole site data that the agencies collected during pre-disturbance surveys has resulted in the unremarkable conclusion that when the agency looks for vole nest trees in its optimal habitat, it has found some. BLM has not demonstrated that the vole sites are sufficiently abundant to meet the objective of persistence. In particular, statements that the agency found a “large number” of sites (582 active nests) or a higher detection rate than other species cannot be viewed in a vacuum. BLM Memo at 17. The basis for the sites determination cannot be a bald number or relative to other species, but must be related to the needs of the vole itself. A high number of sites for a species that

is able to disperse easily will be a different number of sites as compared to a species such as the vole that is a poor disperser. Moreover, BLM does not dispute that the sites that have been found are not likely to persist; therefore, contributing very little to either site or species abundance. Plts. Memo at 19; BLM Memo at 15-18 (making no reference to site persistence problems in the record that Plaintiffs discussed).

In addition, the data does not demonstrate a greater abundance of sites than the agency expected in 1994. This is not to say the survey data collected in the two years prior to the ASRs is not new (BLM Memo at 17); rather, it means the conclusion to be derived from the survey data should not have been new. The site data, at most, only confirms the abundance that was expected to be found when the agencies adopted the NWFP and 2001 ROD. Based on that assumed abundance, the agencies decided to provide and continue protections in the NWFP and 2001 ROD. But, based on that same extent of abundance, in the ASR process, the agencies decided to reduce then remove survey protections for the vole. The BLM has failed to explain its change in position regarding the vole's survey and manage protections without new information that demonstrates an abundance greater than that relied upon in the NWFP and 2001 ROD. Such a change in position is arbitrary and capricious.

BLM argues that it is not required by FLPMA or NEPA to conduct population counts for the vole. BLM Memo at 17-18. However, its own criteria seek to determine both whether there are a high number of existing sites as well as whether there are "low-to-high number of individuals per site." BLM Memo at 17 (citing 2001 ROD at 10). A failure to comply with its identified criteria demonstrates an arbitrary and capricious decisionmaking process.

Regarding the criteria of likelihood of sites in reserves, the agency experts commented that the LSRs contain less vole habitat than expected in 1994, a fact that the Step 3 panel ignored in

making its decision based on the criteria. BLM's failure to explain why it ignored its own experts is arbitrary and capricious. Seattle Audubon Society v. Moseley, 798 F. Supp. 1473, 1479-82 (W.D. Wa. 1992), aff'd Seattle Audubon Society v. Espy, 998 F.2d 699 (9th Cir. 1993). "Although the Court must defer to an agency's expertise, it must do so only to the extent that the agency utilizes, rather than ignores, the analysis of its experts." Defenders of Wildlife v. Babbitt, 958 F. Supp. 670, 685 (D. D.C. 1997) (citing Northern Spotted Owl v. Hodel, 716 F. Supp. 479, 483 (W.D. Wash. 1988)).

In the 2003 ASR, the agencies also determined that the vole is "more well-distributed" in the mesic portion of its range. This does not answer the question of whether it is sufficiently well-distributed to meet the objective of persistence. It is here where the agency utterly failed to address the major problem facing this species – dispersal through a highly fragmented landscape that lacks connectivity. That problem has not changed since it was identified in the NWFP. See NWFP FSEIS App. J2 at J2-55 (forest fragmentation and isolation may prevent gene flow and detrimentally affect gene flow); J2-474 (connectivity of populations in reserves is of concern because of limited dispersal capabilities); NWFP FSEIS at 186 (connectivity of populations is a particularly important issue for the species given its limited dispersal capabilities and distribution of federal and nonfederal lands within its range); NWFP FSEIS at 376 (dependent on dispersal and connectivity to provide mates); Declaration of Chris Maser ¶¶ 14, 18, 22.⁷ The survey information does not resolve the problem. The

⁷The Declaration of Chris Maser is admissible because it is necessary to explain the importance of connectivity to the vole; a relevant factor that the agency failed to consider and explain how the problem is addressed in the grounds for its decision. See Plts' Opp. to Defs' Motion to Strike (filed herewith); see also Oregon Natural Resources Council Fund v. BLM, Civ. No. 03-478-HO (D. Or.) (Feb. 17, 2004 Order explaining that a declaration is admissible in a NEPA case where it is necessary to determine whether the agency considered all relevant factors or explained the grounds for its decision). In particular, in a case such as this, where the agency completely failed to comply with any FLPMA or NEPA process, including published notice of the decisionmaking process and opportunity to comment on the proposal, the argument that Maser's opinion is not included in the administrative record is disingenuous. The agency did not solicit information from Mr. Maser. 2001 ASR Tab 70; 2003 ASR Tab 32A. Moreover, the agencies did not solicit comment on its proposed decision, rather, they limited their request for information

decision to remove protection for the vole certainly does not solve that problem, rather exacerbates it. To the extent that buffered nest sites could provide for some connectivity through matrix lands, by removing vole, no future vole sites would be sought out or buffered and protected. By failing to address connectivity for the vole, the BLM has utterly failed to examine an important aspect of the problem, rendering its decision arbitrary and capricious. Motor Vehicle Mfrs., 463 U.S. at 43.

V. BLM FAILED TO PROTECT KNOWN RED TREE VOLE SITES.

Based on the BLM's failure to lawfully reduce then remove the survey and manage protections for the red tree vole, the agencies should have conducted surveys to protocol to identify known sites, and, failing that, protected known sites identified by NEST citizen surveyors. BLM argues that "it deemed the [nest sample] materials did not support evidence of known sites" because it didn't know the names of the surveyors. BLM Memo at 26. First, the nest site materials speak for themselves and do support evidence of known sites. Only the Oregon red tree vole uses the resin duct of the Douglas Fir tree to make its nest. FSEIS (Nov. 2000) at 374. If the BLM had looked at the nest samples it would have determine they were indeed vole nests. In addition, the nest samples were accompanied by GIS location information of each tree and notes on the location in the tree where the nest was found in the Cow Catcher and Cottonsnake timber sales. CC AR 42/289-297 (photos of nest samples and GIS location notes); CS AR 18/358-364. Moreover, each nest tree was identified with pink flagging.⁸ Eatherington Second Decl. at p. 8 (photo of tree with pink flagging). All of this information supports evidence of known sites in the Cow Catcher area in need of protection.

to new locations and "new scientific information." 2001 ASR Tab 70 at 1240; 2003 ASR Tab 32A at 369A.

⁸The pink flagging in particular makes it easy for the BLM to "incidentally" identify the nest trees when it is in the sale area for timber marking, cruising, or other purposes.

Despite Ms. Eatherington's requests as to what the BLM intended to do with the material, there is no record that BLM did anything with it. CC AR 38/279. Instead, BLM argues that the surveyors are not a credible source because they do not know their names. BLM Opp. at 26. The need to determine "demonstrated expertise in identification of the taxon" is necessarily met in this instance where the nest tree samples collected by these individuals could only have been made by red tree voles.

VI. THE BLM IS IN VIOLATION OF THE ENDANGERED SPECIES ACT.⁹

BLM is in violation of its affirmative Section 7(a)(2) 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). BLM has failed to do so here because it allows logging of significant acreage within critical habitat units (CHUs) by relying on the existence of adjacent LSRs, rather than an analysis of whether the logging will destroy or adversely modify the habitat.

The regulatory definition of destruction or adverse modification of critical habitat includes alteration that "appreciably diminishes the value of critical habitat," including alteration that adversely modifies "any of those physical or biological features" for which the habitat was designated as critical. 50 C.F.R. § 402.02. In designating critical habitat for the northern spotted owl, Fish & Wildlife Service explained that the "physical or biological features," which FWS calls "primary constituent elements," are "essential to a species' conservation" and include nesting, roosting, foraging and dispersal habitat with space for individual and population growth; nutritional requirements, cover or shelter; sites for breeding and rearing; and habitats protected from disturbance. 57 Fed. Reg. 1796, 1797 (Jan. 15, 1992).

⁹Plaintiffs will not pursue further their Tenth Claim regarding BLM's duty to reinstate consultation. Plaintiffs do not challenge the 2004 ROD removing survey and manage provisions or the programmatic consultation on the 2004 ROD in this action.

First, BLM cannot rely “solely on a FWS biological opinion to establish conclusively its compliance with its substantive obligations under section 7(a)(2).” Pyramid Lake Paiute Tribe of Indians v. U.S. Dept. of Navy, 898 F.2d 1410, 1415 (9th Cir. 1990) (citing Stop H-3 Ass'n v. Dole, 740 F.2d 1442, 1459-60 (9th Cir.1984), cert. denied, 471 U.S. 1108 (1985)). BLM cannot abrogate its responsibility to ensure that its actions will not destroy or adversely modify designated critical habitat. Id.

Second, BLM’s analysis of the effects of the proposed logging clearly relies on the existence of LSRs as a substitute for critical habitat in violation of its duty, not just “additional” protection. Gifford Pinchot Task Force v. U.S. Fish & Wildlife Service, 378 F.3d 1059, 1075-76 (9th Cir. Aug. 6, 2004). In the Decision Documentation for the Cow Catcher timber sale, BLM acknowledges the sale will log 60 acres of CHU-OR-63 and candidly states: “The action was determined ‘not an adverse effect’ on critical habitat because adjacent Late-Successional Reserves and Riparian Reserves are anticipated to continue to fulfill the designated biological function of this CHU.” CC AR 36/269; CC AR 64/39 (proposed harvest would reduce the available nesting, roosting, foraging habitat, known as “suitable” habitat in the CHU by 1.2 percent ¹⁰). The biological opinion on regeneration harvest, including the Cow Catcher timber sale, concludes that the logging is not likely to adversely modify spotted owl critical habitat for three reasons:

- I. The NFP provides a well distributed set of reserves which protect suitable habitat across the range of the affected species.
- II. These reserves provide for regeneration of additional acres of suitable habitat which is expected to provide for more effective populations within the reserves.
- III. The proposed projects will not preclude the recovery contributions afforded the affected species by the NFP.

¹⁰It is important to note however, that BLM also states in the EA that only 47 percent of the CHU contained suitable habitat based on 1998 data. CC AR 64/377.

CC AR 83/928.¹¹ All three of these reasons rely upon the existence of reserves established by the NWFP to conclude there will not be an adverse modification of critical habitat. The Ninth Circuit plainly held that this analysis is impermissible. GP Task Force 378 F.3d at 1076.

The BLM's Biological Assessment of the effects of the Cottonsnake and other timber sales plainly states that "[p]rojects located in critical habitat would adversely affect the primary constituent elements of critical habitat through the modification of forested areas" Biological Assessment at 35 (included in the first half of the separate volume of the CC AR labeled " Biological Opinion for Fiscal Years 2001-2003). This finding meets the regulatory definition of adverse modification of critical habitat. Yet, BLM states that "[e]ssentially, LSRs and other allocations with no programmed timber harvest function as CHU." Id. The Biological Opinion that includes the effects of the Cottonsnake timber sale concludes that the impacts to CHUs will not "preclude" spotted owl connectivity. Biological Opinion at 48. However, the appropriate legal standards is whether the logging will adversely alter the primary constituent elements (50 C.F.R. § 402.02), which the BLM admits it will. BA at 35. Moreover, this biological opinion relies upon the "redundancy built-in [sic] to the NFP . . . to adequately support the intended functions of critical habitat" Biological Opinion at 48 (emphasis added) and at 40 (relying on the condition of other Federal and non-Federal land in the area to allow dispersal). Again, the Ninth Circuit plainly held that this analysis does not satisfy the agency's ESA duty. GP Task Force, 378 F.3d at 1076.

¹¹BLM has "supplemented" the Cow Catcher administrative record by supplying a February 21, 2003 biological opinion that it asserts supercedes the 1999 biological opinion found in the Cow Catcher AR at Tab 83. However, in the Cow Catcher Decision Documentation, issued August 25, 2003, six months after the 2003 biological opinion, BLM clearly states in its rationale for the decision that it relies upon the biological opinion (Ref. # 1-15-99-F-206), dated June 28, 1999. CC AR 36/269. BLM's attempts to bolster the record now are litigation positions to which the agency is entitled no deference. Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 212-13 (1988).

Finally, Plaintiffs do not pursue a separate “recovery” claim in this action because it was not clearly included in their notice of intent to sue (Exhibit 6), although BLM recognizes that “[c]ritical habitat Units were designated to preserve options for the eventual recovery of the species in the absence of a recovery plan.” CC AR Biological Assessment at 35. However, Plaintiffs’ letter clearly put BLM on notice of Plaintiffs’ claim that the BLM has violated its ESA duty to not destroy or adversely modify critical habitat by relying on LSR land use allocations. Exhibit 6 at 2. Therefore, this Court has jurisdiction over Plaintiffs’ Ninth Claim for relief that BLM violated the ESA when it improperly relied upon LSRs in making its critical habitat determination.

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

BLM has failed to disclose the necessary information in the EA to determine whether it is meeting the Roseburg Resource Management Plan duties with respect to Connectivity/Diversity Blocks. Blue Mountain, 161 F.3d at 1214. The RMP requires the BLM to: “[m]anage available forest land within each block on a 150 year area control rotation.” Roseburg RMP at 34, 152-53. BLM has not disclosed sufficient information under NEPA to demonstrate compliance with its substantive duties under FLPMA to act in accordance with its resource management plan.

BLM refuses to disclose the forest age classes or harvest history of Unit 17; information the BLM does or should have. The best evidence in the record is a one-page map displaying the age classes for the entire watershed. CC AR 519. Based on this map, it is possible that more than half of Section 17 may be less than 50 years old, meaning that BLM cannot be in compliance with its 150 year rotation requirement. BLM must have the underlying age class information that it used to develop this map, yet it refuses to include this information in the Supplemental Cow Catcher EA.

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). Instead, BLM asks this Court to "defer to its expertise in deciding such questions." BLM Memo at 30. However, BLM is only entitled to deference to the extent that there is data to support the exercise of its expertise. Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife, 273 F.3d 1229, 1236 (9th Cir. 2001) (agency is not entitled to deference where its "conclusions do not have a basis in fact").

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

BLM argues that an alternative to harvesting that would use a thinning prescription, instead of regeneration harvest, is not feasible. BLM Memo at 33-34. The BLM's argument is pieced together in its brief because it never evaluated a thinning alternative, or a combination thinning/regeneration alternative in the Cow Catcher EA, or any alternative that was differently placed on the landscape as compared to the proposed action. BLM's explanation in this litigation of the infeasibility of any alternative other than the proposed action is not entitled to any deference. Bowen, 488 U.S. at 212-13.

The BLM only evaluated in detail the no action alternative and the proposed action to regeneration harvest 146 acres in the Cow Catcher timber sale. NEPA is a tool with the dual purpose of disclosure of information to the public and informed decisionmaking. Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 985 (9th Cir.1985) (purpose of NEPA is to ensure that federal agencies are fully aware of the impact of their decisions on the environment); Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1056 (9th Cir.1985) (NEPA provides the public with information on the environmental impact of a proposed action and encourages public participation

in the development of that information). BLM's post hoc rationalization of why it did not evaluate a thinning alternative does not meet these two purposes.

The value to the detailed comparison of alternatives is to disclose the environmental, as well as socioeconomic effects from a reasonable range of proposals. The public should have available for comment the BLM's disclosure and analysis demonstrating the environmental effects of the proposed action of 146 acres of regeneration harvest as compared to a thinning proposal. Nothing requires the BLM to select the thinning proposal, however, it must be evaluated.

Moreover, BLM relies upon Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 576 (9th Cir. 1998) to state that Plaintiffs have not met their burden to provide a detailed counterproposal for the agency to consider. In Morongo, the court makes clear that the agency "has the responsibility to 'study, develop, and describe appropriate alternatives.'" Id. (citing 42 U.S.C. § 4332(2)(E)). The court held that the agency had fulfilled that requirement by developing and discussing a number of alternatives, including three alternatives that would avoid the tribe's land. Id. Here, the BLM has not met its duty of evaluating a number of alternatives before shifting the burden to Plaintiffs.

IX. 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 ("WA") as the basis for site-specific project development. This failure is a violation of FLPMA.

The BLM describes the information in the WA as “essential for making sound management decisions.” Medford RMP Rod at 96. The Medford RMP states 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. Here, BLM argues only that the Cottonsnake EA makes references to the WA with respect to soil and roads, but cannot demonstrate that the WA influenced the final decision to proceed with the Cottonsnake timber sale. Nor can the BLM demonstrate that it used WA information and direction to avoid the very areas where the BLM has decided to log late-successional forests due to problems with mature forest connectivity. WA at 67 (avoid regeneration harvest within the GFMA connectivity bands in the next decade or two); WA at 69 (“[a] higher level of connectivity should be maintained along the north and south ridges to promote east-west movement of species”); WA at 43 (discussing the importance of CHU-OR-64 as a link for northern spotted owl and direction to ensure function not impaired).

The BLM’s decision to log in these areas where the WA contains information demonstrating that logging should be avoided, renders the decision in violation of FLPMA for failing to act in accordance with the RMP direction.

X. BLM VIOLATED NEPA BECAUSE THE COTTONSNAKE EA DOES NOT DISCLOSE THE AMOUNT OF PROPOSED HARVEST, RIPARIAN RESERVE BOUNDARIES.

BLM argues that it has complied with NEPA’s disclosure requirements by stating that somewhere between five and nine million board feet will be logged and that “[n]o timber harvest would occur within riparian reserves.” BLM Memo at 36. The former is too large of a range to adequately disclose and inform the public of the proposed action and the latter is not a disclosure at all. *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998). The combination of the failures is particularly disturbing because the implementation monitoring for the NFP has shown

that the agencies have trouble complying with riparian reserve boundaries. Exhibit 7 (“Four years of consistent findings have become a call for action to resolve these noncompliance issues, including green tree retention and riparian reserve boundaries). A failure to properly lay out riparian reserve boundaries on the ground, where they have not been disclosed in the EA, allows the BLM room to harvest somewhere in the range of five to nine million board feet without any ability for the public to ground-truth the proposed action.

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

The BLM is in violation of NEPA because it fails to analyze effects and cumulative effects salamanders and weeds in the Cottonsnake timber sale and on red tree voles in the Cow Catcher sale.

First, the BLM does not even bother to respond to Plaintiffs’ claim that the BLM has violated NEPA by merely listing past federal timber sales without actually analyzing the cumulative effects of those and private sales. CC AR 64/396; CS AR 33/467-470; Plts’ Memo at 40-41. Today, the Ninth Circuit Court of Appeals ruled that the BLM’s purported cumulative effects analysis is only a list of timber sale acres, holding that “[a] calculation of the total number of acres to be harvested in the watershed is a necessary component of a cumulative effects analysis, but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres.” Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, No. 03-35461, slip op. at 15271 (9th Cir. Oct. 28, 2004) (available at <http://www.ce9.uscourts.gov/>). For these same reasons, the BLM’s Cottonsnake and Cow Catcher EAs are legally flawed and must be set aside.

Next, the BLM engages in the same faulty reasoning to excuse itself from NEPA analysis for the Del Norte salamander in the Cottonsnake timber sale as it did for the red tree vole in the Cow

Catcher EA. BLM argues in its brief that because the salamander was removed from the list of Survey and Manage species, “it was reasonable for BLM not to disclose information from the WA related to that species.” BLM Memo at 39. Simply because the BLM does not have substantive duty to provide for the salamander pursuant to the survey and manage provisions, does not excuse a complete failure to evaluate the effects of the Cottonsnake timber sale on the salamander and its habitat. Order Granting Motion for Preliminary Inj. at 17 (Dkt. # 82) (May 18, 2004) (while BLM had no duty to conduct additional surveys, “it likely should have considered impacts to RTVs”). Blue Mtn Biodiversity Project, 161 F.3d at 1214 (the EA “is where the Forest Service's defense of its position must be found” citing 40 C.F.R. § 1508.9(a)); see also Sierra Club v. Marsh, 976 F.2d 763, 771 (1st Cir. 1992)(“a reviewing court may not rely on information and analysis in an administrative record to cure an inadequate EIS . . .).

Nor did the BLM disclose and analyze effects of the logging on weeds in the Cottonsnake EA. BLM acknowledges that some weeds are present in the area (although Plaintiffs have commented that more species of weeds are also present). CS AR 451. However, BLM argues that it does not have to disclose the effects of the logging because it states that logging equipment will be washed before moving into the planning area. BLM Memo at 39. The weeds are already located in the project area. The very act of logging the trees and disturbing the soil with logging equipment will provide the environment for the spread of weeds. The fact that the logging equipment will be washed before entering the planning area will only prevent the introduction of more weed sources, but it will not prevent the spread of existing weeds due to the disturbance of the proposed action. Thus, BLM has failed to disclose the very real environmental effects of noxious weed spread as a result of the proposed action in violation of NEPA.

In the Cow Catcher SEA, while the BLM certainly discusses the vole, it fails to disclose and analyze perhaps the most important factor to the vole's continued persistence – fragmentation of the landscape in the area. See Plts' Memo in Supp of Summ. J. Exh. 1 (Management Recommendations) at 5 and at 10; NWFP, App. J2 at J2-55 and at J2-475. As a result, the BLM continues to violate NEPA by failing to disclose the impact of the logging on the vole.

CONCLUSION

Plaintiffs respectfully request that this Court set aside the 2001 and 2003 ASR decisions and 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 28th day of October, 2004

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EXHIBIT LIST

- Exhibit 3 Final Supplemental Environmental Impact Statement to support the 2004 ROD (“2003 FSEIS”) (excerpts)

- Exhibit 4 The Register-Guard “Owl habitat cuts logging plans” (Jan. 29, 2002)

- Exhibit 5 Draft Supplemental EA for the Clark timber sale.

- Exhibit 6 Notice of Intent to Sue (May 7, 2004).

- Exhibit 7 Results of the FY 199 Northwest Forest Plan Implementation Monitoring Program (Final Report July 2001) (excerpts)