

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON NATURAL RESOURCES COUNCIL
FUND; KLAMATH-SISKIYOU WILDLANDS
CENTER; NORTHWEST ENVIRONMENTAL
DEFENSE CENTER; CASCADIA WILDLANDS
PROJECT; and UMPQUA WATERSHEDS,

Civil No. 04-693-AA
OPINION AND ORDER

Plaintiffs,

vs.

ELAINE BRONG, State Director,
Bureau of Land Management; and
A. BARRON BAIL, Acting
Associate State Director,
Bureau of Land Management,

Defendants,

and

AMERICAN FOREST RESOURCE COUNCIL,
an Oregon nonprofit corporation;
SWANSON GROUP, an Oregon
corporation; and TIMBER PRODUCTS CO.
LIMITED PARTNERSHIP; an Oregon
limited partnership,

Defendant-Intervenors.

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AIKEN, Judge:

PROCEDURAL HISTORY

This case was originally filed in May 2004, in the Portland Division for the District of Oregon. After plaintiffs filed a Motion for Temporary Restraining Order (TRO), the defendants moved to transfer this case to the Southern District of Oregon. In June 2004, defendants' motion was granted and this case was reassigned to the Medford Division.

Because the salvage logging had already begun, this court scheduled the TRO hearing immediately. After a hearing on June 10, 2004, a TRO was entered that halted the logging and preserved the status quo. Pursuant to Fed. R. Civ. P. 65(a)(2), the parties then agreed to finally resolve this case via a permanent injunction/trial on the merits. On September 28, 2004, this court presided over a trial on the merits, which included argument and additional briefing and exhibits.

BACKGROUND

Plaintiffs are challenging defendants' decision to log the Flaming Rock and Smoked Gobbler timber sales in Southern Oregon in the Medford District of the Bureau of Land Management (BLM). Plaintiffs pose the following questions for this court's resolution:

1. Did the defendants violate the Federal Land Policy and Management Act (FLPMA) by permitting research logging in, and snag removal from, the Elk Creek Late-Successional Reserve?

2. Did the defendants violate FLPMA by permitting timber harvesting on "nonsuitable woodlands?"
3. Did the defendants violate FLPMA by failing to designate unstable and potentially unstable slopes as Riparian Reserves?
4. Did the defendants violate the National Environmental Policy Act (NEPA) by failing to assess the cumulative impacts of the Flaming Rock and Smoked Gobbler timber sales, fire suppression activities, salvage logging on intermingled private industrial timberlands, and salvage logging in deferred watersheds?
5. Did the defendants violate NEPA by failing to consider the direct and indirect impacts of the Flaming Rock and Smoked Gobbler timber sales on soils in the planning area?
6. Did the defendants violate NEPA by failing to ensure the scientific integrity of the Timbered Rock Final EIS when it used DecAID to determine snag retention levels?

FACTUAL BACKGROUND

On July 13, 2002, the Timbered Rock fire was ignited by lightning. The fire ultimately burned 27,000 acres, including nearly 12,000 acres of land administered by the Medford District of the BLM. The Timbered Rock fire burned primarily within the Elk Creek Late-Successional Reserve. As a result of efforts to suppress the fire, more than 63 miles of fireline were used, including more than 30 miles of existing roads. Nearly 38,800 gallons of a chemical fire retardant known as "slurry" was

dropped. After the fire, sedimentation and stream temperatures increased within the watershed.

The Northwest Forest Plan (NFP) and the Medford Resource Management Plan (Medford RMP) establish strict rules for when the BLM may conduct salvage logging operations on lands that have been affected by wildfire. The BLM designated the Elk Creek Watershed a "Late-Successional Reserve" (LSR) due to its environmental sensitivity. All of the Timbered Rock fire area falls within this LSR.

Excluding the impact of the Timbered Rock fire, the Elk Creek watershed has been adversely affected by human activity and natural events. Because of significant degradation within the Elk Creek watershed, the BLM designated four subwatersheds as "deferred watersheds" during resource management planning. Due to this designation, logging and management activities within the designated watersheds were prohibited for a period of ten years beginning in January 1993.

The remainder of the land in this watershed is privately owned, primarily by Boise Corporation (Boise), an industrial timber company. The BLM relied on Boise's Elk Creek Watershed Analysis (Boise WA) to assess the soil and aquatic conditions of the Elk Creek watershed, and to assess the potential environmental effects of the Timbered Rock project.

On August 1, 2003, the BLM announced the availability of a

Draft Environmental Impact Statement (Draft EIS) for the Timbered Rock Project. The BLM accepted public comment until October 15, 2003. On January 30, 2004, the BLM announced the availability of the Final Environmental Impact Statement (FEIS or Final EIS) for the Timbered Rock Project. On March 23, 2004, the BLM issued its Record of Decision (ROD) for the Timbered Rock Project. The BLM selected Alternative G from the alternatives discussed in the Final EIS. BLM divided the commercial timber salvage portions of the Timbered Rock project into two timber sales, naming them the Flaming Rock and Smoked Gobbler stands.

Defendants provided notice to the public of an opportunity to file an administrative protest of the two sales on April 1, 2004. Plaintiffs timely filed a protest on April 12, 2004. On May 18, 2004, BLM issued a response to plaintiffs' administrative protest, upholding both sales. Defendant Bail (Associate Director of the Bureau of Land Management) issued an internal memorandum stating that since there was a need to complete the timber sales "as early as conditions allow," "the general Policy for protests and appeals . . . will be waived for this project." Thus, the BLM exempted these sales from the usual administrative stay during its consideration of an administrative appeal. On May 17, 2004, the BLM sold the Flaming Rock and Smoked Gobbler timber stands to defendant-intervenor timber companies. Logging commenced promptly but was halted upon this court's issuance of a

TRO.

STANDARDS

Plaintiffs are entitled to a permanent injunction if they demonstrate either a (1) likelihood of success on the merits and a possibility of irreparable injury; or (2) the existence of serious questions on the merits and a balance of hardships tipping in their favor. National Wildlife Federation v. Burlington N.R.R., 23 F.3d 1508, 1510 (9th Cir. 1994). The two tests represent "two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." United States v. Nutri-Ecology, Inc., 982 F.2d 394, 397 (9th Cir. 1992) (quoting Oakland Tribune, Inc. v. Chronicle Publishing Co., 762 F.2d 1374, 1376 (9th Cir. 1985)).

Specific to a environmental case, "where the balance of hardships tips decidedly toward the plaintiff, the district court need not require a robust showing of likelihood of success on the merits, and may grant [injunctive relief] if the plaintiff's moving papers raise 'serious questions' on the merits." Caribbean Marine Services v. Baldrige, 844 F.2d 668, 674 (9th Cir. 1988) (internal citation omitted). "Environmental injury, but its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance

of an injunction to protect the environment." Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987).

DISCUSSION

Plaintiffs contend that the defendants' decision to move forward with the timber sales is arbitrary and capricious, and should be permanently enjoined.

The Medford RMP states that, "the non-interchangeable component of the annual allowable sale quantity, attributable to key watersheds, is 1.5 million cubic feet (9.0 million board feet)[of timber]." "Allowable sale quantity" (ASQ) is defined as "the gross amount of timber volume, including salvage, that may be sold annually from a specified area over a stated period of time in accordance with the management plan." The entire Timbered Rock project lies within a Tier 1 Key Watershed. Under the NFP, Tier 1 Watersheds are river basins that are deemed to contribute directly to the survival and restoration of at-risk salmonids.

Plaintiffs allege that the Flaming Rock and Smoked Gobbler timber sales will salvage more than 25 million board feet, which is more than double the permitted volume from Key Watersheds. (Scheduled logging of more than 24 million board feet, with an additional 1,200 trees available for roadside salvage). As a result of the project, nearly one mile of road would be constructed. In conjunction with the timber sales, the BLM is

planning to conduct two research projects: (1) a study of the effects of reforestation; and (2) a study of the effects of salvage logging on birds. Plaintiffs are challenging only those portions of the ROD that permit commercial salvage logging on BLM lands, namely the two timber sales at issue. Plaintiffs do not challenge any other portions of the Timbered Rock FEIS or ROD.

The NFP requires the BLM to manage LSRs to "protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late successional and old-growth related species." As a result, the Medford RMP and the NFP impose restrictions on salvage logging within LSRs. Specifically, the Medford RMP and NFP require the BLM to retain live trees, snags, and adequate quantities of coarse woody debris (CWD). The NFP also imposes restrictions on conducting research within LSRs.

The LSR that the Flaming Rock and Smoked Gobbler timber stands lie within is also designated Northern Spotted Owl Critical Habitat Unit. Specifically, this Critical Habitat Unit (CHU) should provide north-south and east-west linkage from the Klamath/Siskiyou to the Western Cascades Provinces.

Moreover, plaintiffs allege that the Flaming Rock and Smoked Gobbler timber sales would salvage log 11 acres in Riparian Reserves as part of the research logging proposal. The Medford

RMP and the NFP prohibit the BLM from authorizing logging within a Riparian Reserve unless the Agency can demonstrate that logging will not adversely affect the nine Aquatic Conservation Strategy Objectives that are designed to protect water quality. Research activities in Riparian Reserves must be analyzed to ensure that significant risk to watershed values does not exist.

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1. Violation of Federal Land Policy and Management Act (FLPMA)

_____Congress enacted FLPMA in 1976, in part "to provide for the management, development, and enhancement of the public lands." Pub. L. 94-579; see also, 43 U.S.C. § 1701 et seq. FLPMA was also enacted to ensure that the present and future use of public lands be "protected through a land use planning process."

43 U.S.C. § 1701(a)(2). Further, Congress expressed its belief that our public land should "be managed in a manner that will protect the quality of scientific, scenic, historical, environmental, air and atmospheric, water resource, and archeological values." 43 U.S.C. § 1701(a)(8). FLPMA requires the BLM to develop land use plans that govern the use of the land it manages. 43 U.S.C. § 1712. Once a land use plan has been developed the BLM is required to manage its lands in compliance with that plan. 43 U.S.C. § 1732; 43 C.F.R. § 1610.5-3(a).

Plaintiffs allege that the two timber sales at issue violate

FLPMA in three ways. First, because research logging in the Elk Creek LSR is unlawful; second, because snag removal from the Elk Creek LSR is unlawful; and finally, because timber harvest on nonsuitable woodlands and riparian reserves is unlawful.

A. RESEARCH LOGGING

The BLM has proposed three logging "research areas:" (1) "intensive" (salvage of 4 of the entire 30-acre unit plots); (2) "moderate" (salvage of all but 30% of 4 of the 30-acre plots); and (3) "control" (no salvage). These projects are designed to explore the effects of post-fire salvage logging on wildlife and to evaluate the effects of mixed-species reforestation. One of the reasons offered by the BLM for conducting the proposed salvage research project is that most salvage research has been conducted outside of the Pacific Northwest and therefore is inapplicable to the planning area.

The Medford RMP incorporates the six basic land allocations created by the NFP, with particular focus on the following four: (1) LSR; (2) Adaptive Management Areas; (3) Riparian Reserves; and (4) Matrix. Each land allocation is governed by a different set of standards and guidelines (S&Gs).

The relevant language of the NFP relating to research on LSRs states as follows:

Research -

A variety of wildlife and other research activities may be ongoing and proposed in late-successional habitat. These

activities must be assessed to determine if they are consistent with Late-Successional Reserve objectives. Some activities (including those within experimental forests) not otherwise consistent with the objectives may be appropriate, particularly if the activities will test critical assumptions of these [NFP] standards and guidelines, will produce results important for habitat development, or if the activities represent continuation of long-term research. These activities should only be considered if there are not equivalent opportunities outside Late-Successional Reserves.

NFP S&G at C-18.

Plaintiffs first argue that the BLM may only conduct research logging in the Elk Creek LSR "if there are no equivalent opportunities outside" of LSRs. Plaintiffs assert that based on the design of the research proposals, these studies could be undertaken in any post-fire forest landscape in the Pacific Northwest; and that there are no unique aspects of the proposals that require implementation in the Elk Creek LSR. The BLM concedes that there are several recently burned areas in southern Oregon, including within the Medford District BLM, that could provide suitable research plots.

Plaintiffs argue that the court should interpret the language of the S&G quoted above to mean that in all cases, the proposed research logging may only take place if there are no equivalent opportunities outside of LSRs. In other words, regardless of whether the research activity is determined consistent with Late-Successional Reserve objectives, or conversely, determined not consistent and therefore necessitating

further justification and/or examination (test critical assumptions of these S&Gs, produce results important for habitat development, or continuation of long-term research), in both instances plaintiffs assert that the research may go forward only if there are no equivalent opportunities outside of LSRs.

I disagree. When interpreting the plain meaning of the S&Gs, I find that in the first scenario, research activities that are initially found consistent with LSR objectives may go forward without further inquiry into their purpose, or regardless of whether there exists equivalent opportunities for research outside LSRs. Whereas in the second scenario, research activities that are found "not otherwise consistent with the objectives," may still go forward, "particularly if the activities test critical assumptions of these standards and guidelines . . ." however, "these activities should only be considered if there are no equivalent opportunities outside the Late-Successional Reserves." NWFP S&G, C-18. So, research activities that are found 'not consistent' with the LSR objectives are the activities subject to the "no equivalent opportunities" restriction.

Plaintiffs next argue that regardless of the interpretation of the S&G quoted above, the proposed research is not in fact consistent with LSR objectives and therefore impermissible. An important objective of LSRs, including the Elk Creek LSR, is the

"development of old-growth forest characteristics including snags." NFP S&Gs, B-5. Defendants assert that the LSR guideline calls for 'adequate' snag retention, not the retention of all snags, and that snags that are retained should be those that are likely to persist an estimated 80 years, until stand regeneration. Defendants argue that this standard is satisfied, although defendant admits that some of the larger trees slated for harvest in the research units would indeed persist until stand regeneration. Nevertheless, the BLM asserts that it is requiring the retention of two-thirds of the dead trees in all size classes greater than 20 inches at diameter breast height (dbh). Defendants argue that therefore all research areas will meet snag retention and CWD requirements. EIS at 5-29 to 5-30 (re: Comment 404).

Plaintiffs disagree and assert that the two timber sales at issue will remove most of the snags larger than 16 inch dbh from harvest areas. FEIS 2-6. I agree and find that BLM's research proposals are not consistent with LSR objectives. Specifically, the LSR objective of "development of old-growth forest characteristics including snags." NFP S&Gs B-5. Plaintiffs provided information to the BLM during comments on the Timbered Rock EIS referring to the scientific controversy surrounding salvage logging in late-successional reserves. The Agency failed to adequately respond to that controversy. Moreover, defendants

failed to distinguish Dr. Jerry Franklin's negative comments on the proposed Biscuit fire LSR salvage logging as being inapplicable to the salvage logging proposed for the Elk Creek LSR. See also, Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208 (9th Cir. 1998), cert. den., 527 U.S. 1003 (1999) (generally requiring agency to respond to scientific controversy in EIS). Dr. Franklin, one of the authors of the NFP, concluded that, "it appears inappropriate to carry out an active salvage program that would interfere with natural recovery processes" occurring in wildfire-affected LSRs and "such salvage does not appear justified from the standpoint of restoring the viability of the LSR network," and in fact, "would be completely antithetical to the goals of re-establishing late-successional forest habitat." See Jerry Franklin, Comments on Draft EIS for Biscuit Recovery Project (January 20, 2004), Plaintiffs' Ex. 8 at 3-5,6. I find that the BLM has failed to address the scientific controversy surrounding salvage logging in LSRs as required by law. 40 C.F.R. § 1508.27(b)(4).

Defendants argue that even if this court determines that the research projects are inconsistent with LSR objectives, the research is nonetheless appropriate because it will test critical assumptions in the NFP Standards and Guidelines and cannot be conducted in equivalent areas. Defendants point to the EIS:

Both the reforestation and wildlife-snags research test assumptions from the NFP. The wildlife-snag research will

evaluate snag levels that may be more appropriate to the drier portions of the NFP area. The reforestation research will address methods of reforestation that may be more appropriate in reserve land use allocations. Both research proposals will produce results important for habitat development. Information developed from this research could be transferable to other parts of southwest Oregon and northern California, including late-successional reserves.

EIS at 1-12.

Even assuming this court accepts defendants' contention that the research proposals will test critical assumptions, plaintiffs' argument that BLM has failed to establish the lack of equivalent research opportunities prevails. The NFP states in regards to research activities, "every effort should be made to locate non-conforming activities on land allocations where they will have the least adverse effect upon the objectives of these standards and guidelines." NFP S&Gs, C-4. Defendants respond that "because BLM has a unique opportunity the research satisfies applicable standards." I agree with plaintiffs that defendants fail to demonstrate that there are no equivalent research opportunities outside of LSRs for research logging. Defendants fail to refute plaintiffs' contentions that these studies could be undertaken in any post-fire forest landscape in the Pacific Northwest; and that there are no unique aspects of the research proposals that require implementation specifically in the Elk Creek LSR. The NFP requires the BLM to make an affirmative showing that no other suitable research locations exist outside

the Elk Creek LSR before authorizing the proposed research logging in this location. NFP S&Gs C-18. In fact the BLM concedes that there are a number of recently burned areas in southern and western Oregon, including on the Medford District BLM, that could provide suitable research plots. FEIS, 1-12. I find that the BLM has failed to provide sufficient information in support of its conclusion that no "equivalent opportunities" to conduct the proposed research projects exist outside of LSRs.

B. SNAG REMOVAL

In the areas slated for logging as part of the research proposal, the BLM would leave up to 6 snags per acre that are greater than 20 inches dbh. Outside the research logging units, the BLM proposes to retain between 8 and 12 snags per acre that are greater than 14 inches dbh, depending on the plan series.

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Plaintiffs rely on the Medford RMP's statement that the BLM's focus should be on "retaining snags that are likely to persist until late-successional forest conditions have developed and a new stand is again producing large snags." NFP S&Gs, C-14. Plaintiffs argue that despite this "clear mandate," the BLM has concluded that it needs to retain no more than 12 snags per acre. Plaintiffs assert that the Medford RMP requires more; specifically, it discourages the BLM from removing any snag unless and until it can show that the snag is not likely to

persist.

Plaintiffs assert that because the BLM has failed to show that salvage logging qualifies for an exception to the broad prohibition against logging snags in LSRs, the sales do not comply with the NFP or the Medford RMP.

As stated above, defendants agree that certain snags that will persist until stand regeneration must be retained, but dispute plaintiffs' assertion that all such snags must be retained. Defendants argue that the objective to protect and enhance long-range successional conditions is general in nature and does not establish numerical criterion against which the impacts of management decisions can be measured. Defendants assert that removing 13% of the dead trees, including some snags, and leaving two thirds of all trees greater than 20 inches at dbh will succeed in enhancing late-successional and old-growth characteristics, including snag retention. Therefore, defendants conclude, the Timbered Rock Project meets the NFP objectives relating to salvage in the LSR.

Defendants' argument that the harvest prescriptions for the two timber sales will result in retaining some snags in all size classes across the landscape, and that this is sufficient to meet the requirements of the NFP and RMP is misplaced. Defendants fail to provide any citation to the NFP or RMP to support their assertion that retention of "some snags" is sufficient,

particularly given the fact that both documents affirmatively require the BLM to retain the snags that will persist until the next forest develops. Further, the FEIS indicates that the only way that snag retention levels will be met is by averaging salvaged and non-salvaged areas together to arrive at a snag retention level that approximates the required number. FEIS, 3-112 (stating that the area salvage units will retain between 8 and 12 snags per acre, but that "the snags would be concentrated in portions of the units that receive no harvest"); D-46 (same). I find no scientific justification for this "averaging" approach. Finally, while defendants argue that all of the research logging units will meet snag retention standards, they overlook the fact that the BLM expressly admitted that snag retention levels will not be met in the research logging units. FEIS, 5-28, 5-29 (response to comments acknowledging that LSR, NFP and RMP requirements would not be met in the "salvage areas in the research" units).

Moreover, both the defendants and intervenors place great weight on the statement in the NFP that "commercial wood volume removal" is permitted in LSRs, and argue that is precisely what the Flaming Rock and Smoked Gobbler timber sales accomplish. NFP S&Gs, C-13. However, the first part of that sentence states, "salvage guidelines are intended to prevent negative effects on late-successional habitat, while permitting some "commercial

harvest." Id. The NFP states that "salvage will not be driven by economic or timber sale program factors." NFP Appendix F, F-21. Similarly, one of the primary objectives of LSRs is the "development of old-growth forest characteristics including snags," however, by definition, this project will specifically interfere with that development by removing the very snags that are likely to persist until the next stand develops. NFP S&Gs, B-5. The BLM has failed to demonstrate that the salvage logging of the Flaming Rock and Smoked Gobbler timber sales qualifies for an exception to the prohibition on logging snags in LSRs.

C. HARVEST ON NONSUITABLE WOODLANDS/RIPARIAN RESERVES

(1) Nonsuitable Woodlands

The Medford RMP states that "nonsuitable woodlands, which include all landslide prone areas and other unstable soils, are identified as not suitable for timber harvest. Other surface-disturbing activities will be prohibited unless adequately mitigated to maintain site productivity and protect water quality." The RMP defines "nonsuitable woodlands" as "all fragile nonsuitable forest land." "Fragile nonsuitable forest land" is defined as "a Timber Production Capability Classification indicating forest land having fragile conditions, which if harvested, would result in reduced future productivity; even if special harvest or restrictive measures are applied. These fragile conditions are related to soils, geologic

structure, topography, and ground water."

Plaintiffs assert that the Timbered Rock FEIS authorizes hundreds of acres of salvage logging on lands that are "nonsuitable woodlands." The Boise WA, which the BLM relied on in preparing its FEIS, indicates that nearly the entire Elk Creek Watershed has a "high erosion hazard." Plaintiffs allege that the Timbered Rock FEIS does not disclose this information, but instead has down-rated erosion potential without explanation. The Boise WA also discloses a drastic increase in landslides and slope instability in the burn area, information also not disclosed in the Timbered Rock FEIS. Plaintiffs conclude that not only does this omission violate NEPA, but this information makes it clear that a majority of the planning area - including the proposed salvage units - are located on "landslide prone areas and other nonsuitable woodlands" in contravention to the Medford RMP.

Defendants first argue that plaintiffs did not raise this claim during the public comment period to either the EIS or ROD, and therefore, have waived it. See Department of Transportation v. Public Citizen, ____ U.S. ____, 124 S.Ct. 2204, 2213-14 (June 7, 2004) (respondents waived objections to an EA by failing to raise particular objections during the comment period). I find that plaintiffs adequately raised this objection given plaintiffs' extensive comments on the DEIS and FEIS regarding the

effects of the proposed salvage logging on soils, steep and unstable slopes, and deferred watersheds, and whether the proposal complied with the applicable NFP and RMP standards and land allocations. The court will allow this claim to proceed.

Defendants next assert that even if this court deems plaintiffs' objections not waived, plaintiffs' claim still fails because while nonsuitable woodlands are not capable of supporting a sustained yield of forest products, salvage is not specifically prohibited. Defendants contend that plaintiffs misconstrue the parameters in nonsuitable woodlands by failing to recognize that salvage is permitted and that BLM required protective measures such as helicopter yarding in order to alleviate the risks associated with salvage in nonsuitable woodlands.

I agree with the plaintiffs that defendants and intervenors have not met their burden to produce a record that supports logging on nonsuitable woodlands. The Medford RMP clearly states that "nonsuitable woodlands, which include all landslide prone areas and other unstable soils, are identified as lands not suitable for timber harvest. Other surface disturbing activities will be prohibited unless adequately mitigated to maintain site productivity and protect water quality." RMP, 41. Although the parties disagree whether the watershed should be rated as a "moderate" or a "high" erosion risk, it seems that either category can and should be considered unstable, and salvage

logging, if not technically "timber harvest," is at least "other surface disturbing activity," thus bringing the soils and salvage activity within the nonsuitable woodlands designation.

Plaintiffs' rely on the Boise WA, which designated the vast majority of the planning area as "high erosion risk," as support for their argument. Defendants assert that the Boise WA was considered for pre-fire information only, and that the conclusions in this document have been superseded by information "updated" by the Natural Resources Conservation Service in 2002. BLM, however, defended the value of the Boise WA for pre- and post-fire data and analysis, and in fact indicates that the Flaming Rock and Smoked Gobbler timber sales were designed based on this information. FEIS, 5-14 and Broda Dec. at ¶ 7 ("the potential cumulative effects of all roads, BLM and private, in the project area were assessed . . . by projecting the effects of the 1987 Burnt Peak fire into the effects of the Timbered Rock fire."). I find nothing in the FEIS that would inform the public that the conclusions in the Boise WA are no longer accurate, nor do defendants present a comparison of the two sets of data. Furthermore, the administrative record is devoid of the allegedly "updated" information and electronic database - it does not appear in the FEIS, the ROD, or the record supplied by the defendants. Finally, I find no data that supports defendants' claim that its 'mitigation' efforts (i.e., helicopter yarding)

adequately addresses or alleviates the risks associated with salvage in nonsuitable woodlands.

(2) Riparian Reserves

The Aquatic Conservation Strategy (ACS) has four components - Riparian Reserves, Key Watersheds, Watershed Analysis (WA), and Watershed Restoration. Riparian Reserves are "portions of watersheds where riparian-dependent resources receive primary emphasis and where special standards and guidelines apply." NFP S&G at B-9. The reserves are essentially lands along streams, "primary source areas for wood and sediment and potentially unstable areas in headwater areas and along streams." Id. at B-13. The NFP standards and guidelines "prohibit and regulate activities in Riparian Reserves[.]" Id. at B-12.

As a threshold issue, I reject the intervenors' argument that this claim is not properly before the court. The intervenors argue that this claim is "properly read as a BLM 'failure to act to implement the Medford district RMP' claim," and therefore inappropriate under the Supreme Court case, Norton v. Southern Utah Wilderness Alliance, ____ U.S. ____, 124 S.Ct. 2373 (June 14, 2004). Norton held:

The statutory directive that BLM manage 'in accordance with' land use plans, and the regulatory requirement that authorizations and actions 'conform to' those plans, prevent BLM from taking actions inconsistent with the provisions of a land use plan. Unless and until the plan is amended, such actions can be set aside as contrary to law pursuant to 5 U.S.C. § 706(2).

Id. at 2381.

As allowed by the Supreme Court in Norton, the claims here challenge site-specific final agency actions under § 706(2) of the APA and allege that the BLM failed to conform the site-specific project to the provisions of the RMP. This claim is properly before the court.

Plaintiffs allege that the BLM violated FLPMA by failing to designate the land 'Riparian Reserves' as required by the NFP and the Medford RMP. Plaintiffs assert that the NFP as incorporated into the RMP requires BLM to designate "unstable and potentially unstable" slopes as Riparian Reserves. Plaintiffs further charge that the EIS contains evidence of extensive areas of unstable and potentially unstable soils that, post-fire, are at greater risk for landslides and erosion. Finally, plaintiffs assert that despite the Agency's recognition of those unstable areas, BLM failed to designate additional Riparian Reserves, choosing instead to exclude logging only from high risk areas within 300-400 feet of perennial intermittent streams. Plaintiffs allege that proposal violates FLPMA.

Defendants respond that the areas that plaintiffs believe should have been designated as Riparian Reserves comprise only a small percentage of the overall project area, approximately 92 BLM acres, whereas the Timbered Rock Fire affected approximately 27,000 acres in the watershed. Defendants also argue that the

Timbered Rock fire itself increased the risk of landslides in certain areas within the project perimeter, but that risk is not exacerbated by salvage.

Plaintiffs assert that those 92 acres of land in the project area should have been designated as Riparian Reserves - areas characterized by BLM as being at high risk for landslides because they are "quite steep." BLM determined that not all the high risk areas warranted designation as Riparian Reserves, but further determined that no logging would take place in areas that had steep slopes (greater than 65%), and areas within 300-400 feet of perennial and intermittent streams. Defendants assert that of the 92 acres classified as high risk only seven acres have realistic potential to deliver CWD to streams. BLM prohibited salvage on all high risk acres that could potentially deliver CWD to streams. Defendants also point out that the Agency concluded that salvage operations (under all action alternatives) and the absence of salvage (under the No Action Alternative) would have the same effect on the number of landslides due to reduced evapotranspiration and the loss of root strength as a result of the fire. EIS at 3-26, 5-75 ("As related to landslide hazards, the . . . effects of the removal of fire-killed trees from upland areas . . . would be quantitatively indistinguishable from the No Action Alternative."). Therefore, the defendants argue, whether or not the salvage is performed the

existing conditions are maintained and the objectives will be achieved.

First, the NFP does not limit the designation of Riparian Reserves to only those acres immediately surrounding streams. The Standards & Guidelines states that, "at a minimum, Riparian Reserves must include . . . the extent of unstable and potentially unstable area (including earthflows)[.]" NFP S&Gs, C-31. I find no reason why the unstable and potentially unstable soils at issue in the planning area, including areas other than those immediately surrounding streams, are not required to be designated as Riparian Reserves. Further, the BLM has failed to demonstrate, why, given the plain language of the NFP S&Gs, Riparian Reserves was not an appropriate designation for the 92 acres at issue. Regarding defendants' argument that the effects of the fire are greater than any effects of logging, that analysis was rejected by the Ninth Circuit in Blackwood. There, the court held:

Despite the lack of data, the Forest Service asserts through the EA that the expected level of sediment delivery will be small in comparison to that caused by the fire. Whether the increased erosion from logging and roadbuilding is smaller or larger than that produced by the fire is irrelevant. The proper evaluation should identify the impact of the increased sediment from the logging and roadbuilding on the fisheries habitat in light of the documented increases that have already resulted from the fire.

161 F.3d at 1213.

Finally, the BLM's opinion that no sediment or CWD will reach the stream from these 92 acres (and thus render it unnecessary to designate the land as Riparian Reserves) is immaterial. The Standards and Guidelines do not use "material delivery to streams" as a criterion for whether land is appropriately designated as Riparian Reserves. Instead, the S&Gs clearly state that the designation must be made on all "unstable and potentially unstable areas." NFP S&Gs, C-31.

2. Violation of National Environmental Procedures Act (NEPA)

_____Congress enacted NEPA in 1969, directing all federal agencies to assess the environmental impact of proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2). NEPA's disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action; and (2) to insure that the public has sufficient information to challenge the agency's action. The Council on Environmental Quality (CEQ) promulgated uniform regulations implementing NEPA that are binding on all federal agencies. 42 U.S.C. § 4342; 40 C.F.R. §§ 1500 et seq.

NEPA requires federal agencies to prepare, consider, and approve an adequate EIS for "any major federal action significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2); 40 C.F.R. § 1501.4(a)(1). An EIS is a thorough analysis of the potential environmental impacts that

"provide full and fair discussion of significant environmental impacts and . . . inform[s] decisionmakers 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.

An adequate EIS must consider the direct, indirect, and cumulative environmental impacts of the proposed action. 40 C.F.R. § 1508.8. Direct effects are caused by the action and occur at the same time and place as the proposed project. Id. at § 1508.8(a). Indirect effects are caused by the action but are later in time or further removed in distance, but are still reasonably foreseeable. Id. at § 1508.8(b). Both types of impacts include "effects on natural resources and on the components, structures, and functioning of affected ecosystems," as well as "aesthetic, historic, cultural, economic, social or health [effects]." Id. at § 1508. Cumulative impacts result when the "incremental impact of the action [is] added to other past, present, and reasonably foreseeable future action" undertaken by any person or agency. Id. at § 1508.7.

_____The Ninth Circuit recognizes that:

NEPA imposes a procedural requirement that an agency must contemplate the environmental impacts of its actions. Inland Empire Pub. Lands v. United States Forest Serv., 88 F.3d 754, 758 (9th Cir. 1996) (finding that NEPA is concerned with the process of disclosure, not any particular result.) NEPA "ensures that the agency . . . 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 [public] audience. Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989); Inland Empire, 88 F.3d at 758.

Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149-50 (9th Cir. 1998).

_____ Plaintiffs allege that the two timber sales at issue violate NEPA in three ways. First, due to the defendants' failure to consider the cumulative impacts of the sales; second, the defendants' failure to consider the direct and indirect impacts of the sales on soils; and finally, due to the BLM's failure to ensure the scientific integrity of the Timbered Rock Final EIS (specifically criticizing the defendants' use of DecAID).

A. CUMULATIVE IMPACTS OF THE 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.

The Ninth Circuit addressed this issue in Blackwood:

A cumulative impact on the environment "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 Cumulative impacts may result from 'individually minor but collectively significant actions taking place over a period of time.' Id. 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). If several actions have a cumulative environmental effect, 'this consequence must be considered in an EIS.'

Blackwood, 161 F.3d at 1214 (some citations omitted).

More recently, the Ninth Circuit has held, "a proper consideration of the cumulative impacts of a project requires "some quantified or detailed information; . . . [g]eneral statements about possible effects and some risks do not constitute a hard look absent a justification regarding why more definite information could not be provided.'" Klamath-Siskiyou Wildlands Center v. Bureau of Land Management, ___ F.3d ___, 2004 WL 2406557, *2 (9th Cir. Oct. 28, 2004) (quoting Neighbors of Cuddy Mountain v. United States Forest Service, 137 F.3d 1372, 1379 (9th Cir. 1998)).

Plaintiffs allege that in the Timbered Rock FEIS, the BLM failed to adequately disclose and analyze the environmental impacts from the two sales at issue and past, present, and reasonably foreseeable future federal and nonfederal actions, including the extensive post-fire salvage logging conducted on Boise's intermingled private lands; road construction on BLM lands undertaken by Boise in order to reach and salvage log its

inholdings; Timbered Rock Fire suppression efforts (specifically, chemical fire retardant use, the re-opening of closed roads, and fire line creation); and salvage logging in deferred watersheds in violation of NEPA.

While plaintiffs acknowledge that the BLM provided charts listing the proposed timber sales in the watershed, and other charts that provided general predictions about the impact on the timber sales, plaintiffs assert that defendants must do more than catalogue "relevant past [or future] projects in the area." The NEPA analysis "must also include a 'useful analysis of the cumulative impacts of past, present and future projects.'" Muckleshoot Indian Tribe v. United States Forest Service, 177 F.3d 800, 809-10 (9th Cir. 1999). Plaintiffs assert that defendants' "cumulative effects" section is inadequate because they provided only "very broad and general statements devoid of specific, reasoned conclusions." Id. See Neighbors of Cuddy Mountain, 137 F.3d at 1380 ("general statements about 'possible' effects and 'some' risk do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided."). See also, Klamath-Siskiyou Wildlands Center, 2004 WL 2406557, *4 ("this conclusory presentation does not offer any more than the kind of 'general statements about possible effects and some risk' which we have held to be insufficient to constitute a 'hard look.'").

I agree and rely on the following examples. The BLM built approximately 33 miles of new firelines and used more than 30 miles of existing open roads as a fireline to suppress the Timbered Rock fire. Fire suppression activities also included the aerial application of 38,800 gallons of chemical fire retardant. Despite these fire suppression efforts undertaken on the Timbered Rock fire, the BLM failed to assess how these activities affected the environment in the planning area. I find no discussion in the FEIS of the environmental consequences of those actions. Defendants point to several places in the record where they allegedly assessed the effects of these actions. Upon review, however, I find that these citations merely state that the BLM evaluated the effect of increases in sediment on water quality and channel morphology, and list the number of miles of fire line creation. These citations fail to assess the cumulative environmental effects on wildlife and natural resources of building approximately 33 miles of new firelines, using more than 30 miles of existing open road as a fireline, aerial application of 38,800 gallons of chemical fire retardant, or other activities that may have had greater adverse effects than the fire itself. FEIS, 3-5. The BLM has failed to take the required "hard look" at the consequences of its actions, and further failed to adequately assess the cumulative effects of these activities on the Elk Creek Watershed as required by law.

40 C.F.R. §§ 1508.7, 1508.27(b)(7).

Specifically, the effects of salvage logging 6,000 acres of private land owned by Boise is an action that should have been assessed in the Timbered Rock FEIS and was not. Plaintiffs recite the EPA's comments and concerns in the Timbered Rock draft EIS. The BLM's analysis is limited in describing the cumulative environmental effects of its proposed actions combined with the salvage logging activities on 6,000 acres of adjacent private and industrial forests in the affected wildfire zone. That analysis consists primarily of listing the number of acres of private lands that were salvaged, and acknowledging generally that this activity exacerbated the cumulative effects in the watershed. I also note that the record is bare regarding the information about the effects and locations of the unknown miles of roads that were constructed across BLM LSR lands to reach Boise inholdings that were salvaged immediately after the fire, or the previously closed roads that were reopened during the fire suppression efforts.

The BLM also failed to adequately assess the cumulative impacts associated with salvage logging in deferred watersheds. The Medford RMP states that the BLM must:

Defer the following areas (approximately 49,636 acres) identified as having high watershed cumulative effects from management activities, including timber harvest and other surface-disturbing activities for ten years, starting from January 1993. Management activities of a limited nature (e.g., riparian, fish or wildlife enhancement,

salvage, etc.) could be permitted in these areas if the effects will not increase the cumulative effects. Watershed analysis plans will be prepared if rehabilitation is deemed appropriate. The following areas will be reevaluated during the next planning cycle or by January 2003.

RMP at 42. The RMP is clear that any management activities - including timber harvest and salvage logging - cannot take place in deferred watersheds if there is an increase in cumulative effects.

Defendants respond that first, they are not asserting that the deferrals expire as a result of the fire; and second, that BLM did not fail to analyze the cumulative effects of salvage in the deferred watersheds. Salvage is permitted as are other "management activities of a limited nature" so long as those activities do not increase the cumulative effects in the deferred areas. EIS at 3-9. Those cumulative effects include "high amounts of equivalent clear-cut acres, compacted acres, openings in the transient snow zone, and road density." Id. at 3-45. Defendants argue that the BLM examined those effects, as well as the impact of post-fire salvage, and disclosed several justifications for salvage in the deferred watersheds. Defendants argue that the Timbered Rock fire "reset the successional clock to zero," meaning not that the deferred watersheds are no longer designated as such and subject to appropriate protection, but that the salvage considered in those areas should not aggravate the present conditions as the damage

has already been done by the Timbered Rock fire itself.

While true that "management activities of a limited nature," including salvage, may occur if "the effects will not increase the cumulative effects" in the deferred watersheds, however, the FEIS states that "the combined effects of past, present, and future activities within the fire perimeter have resulted in high cumulative watershed effects." FEIS, 3-55. The FEIS explains that "the cumulative effects from the [Flaming Rock and Smoked Gobbler timber sales] would be added to those effects from the fire and suppression efforts, as well as the past, present and reasonably foreseeable future actions described in Alternative A. Additional effects would include increased erosion and subsequent sedimentation from ground-based logging systems in the salvage and roadside salvage projects." Id. at 3-61.

Plaintiffs are correct in that the FEIS did not address the cumulative impacts of additional salvage logging in these deferred watersheds. The cumulative effects discussion considers only the effects of the very project at issue. It fails to take into account the combined effects that can be expected as a result of the additional salvage logging in these watersheds. BLM's response that the "Timbered Rock fire reset the vegetative state on most acreage within these drainages back to zero and negated the original purpose of these deferrals even though they remain in place," is non-responsive to the issue of additional

logging in watersheds that were already deferred from logging based on extreme cumulative impacts.

While true that courts grant considerable deference to the agency's determination of the proper scope of a NEPA analysis, including the scope of its cumulative effects review, I find that defendants have failed to adequately consider the cumulative impacts of several actions in the Elk Creek Watershed, specifically, fire suppression activities, salvage logging on Boise's intermingled industrial forestlands, and salvage logging in watersheds that are deferred from timber harvest due to the exact same activities that BLM is now proposing. I find that BLM's authorization of the two sales without an adequate cumulative impacts analysis is arbitrary, capricious, and not in accordance with NEPA.

B. DIRECT AND INDIRECT IMPACTS OF THE SALES ON SOILS

NEPA requires the BLM to assess and disclose the direct and indirect effects of the proposed action on the resources in the planning area. 40 C.F.R. §§ 1502.16, 1508.8. NEPA also requires the agency to consider "relevant factors" relating to its assessment of direct and indirect effects. Rybachek v. U.S. Environmental Prot. Agency, 904 F.2d 1276, 1284 (9th Cir. 1990).

In the Timbered Rock FEIS, plaintiffs allege that the BLM has failed to consider the relevant factors necessary to make an informed decision regarding how the two sales will affect the

soil in the planning area. Plaintiffs rely on a declaration from George Badura who states that the BLM inappropriately applied studies and analyses from other physiographic provinces - with completely different soils - to the Timbered Rock planning area without disclosing this information in the Timbered Rock FEIS or ROD; that the BLM failed to conduct a fine-scale analysis of the soils in the planning area; that the BLM failed to consider factors other than, and in addition to, land slope when designing logging systems and determining soil effect; the BLM failed to actually assess how the timber sales will affect soil productivity, instead discussing the loss of topsoil and use of mitigation measures, which are not direct indicators of soil productivity; and finally, the BLM failed to incorporate important information into its soil analysis that is applicable to the planning area, including site-specific information.

Plaintiffs allege that they have repeatedly raised these issues with the BLM in their comments on the draft EIS, the final EIS, and in their administrative protest of the two timber sales. Plaintiffs allege that the BLM did not respond to the public's concerns over adverse direct and indirect effects to soils from the sales as required by NEPA.

The defendants respond that the BLM did in fact carefully analyze the direct and indirect impact of salvage on soils, in full compliance with NEPA. I agree. Defendants assert that the

issues raised by plaintiffs were not ignored by the BLM, but simply that the BLM disagreed with plaintiffs' (and Mr. Badura's) assertions.

Regarding plaintiffs' assertion that the BLM relied on studies of soils outside the planning area, the BLM relied on other scientific data indicating that "[b]asic mechanisms behind how landscapes respond to fire and logging [are] similar regardless of location." (Milver 2001, 160); EIS at 3-10. In other words, the BLM asserts that fire and logging effect all soils in the same region in approximately the same way. BLM used a study of post-fire distribution of organic matter that was completed following the Silver Fire in the Siskiyou National Forest. That fire occurred in the mountains of Southern Oregon, 50 miles west of the Timbered Rock fire. Defendants argue that the soil conditions of the two areas are comparable, and that Mr. Badura's assertion to the contrary with no further evidence is insufficient to demonstrate that BLM's use of the Silver Fire study was inappropriate.

Defendants next assert that plaintiffs' contention that the soil maps used by BLM were created for low level intensity areas and therefore the maps do not accurately reflect existing "inclusions" and should not be used for project design work, is inaccurate. Plaintiffs stated that the BLM should have conducted site-specific surveys (known as "ground-truthing"). Defendants

assert that the BLM did, in fact, conduct site-specific soil surveys, in an appropriate sample within the planning area. BLM surveyed 27 transects of up to 25 data points each and compiled the data in an analysis file. Information was collected on seven topics as to each data point: soil compaction at four to twelve inch depth, presence of ruts or tire imprints, mineral soil exposure, percentage of upper soil removal, presence of detrimentally burned soils, presence of rills or gullies, and alteration resulting in permanently saturated soils or standing water. EIS at 3-10. The first six criteria are from a 1998 Forest Service manual defining detrimental soil conditions and the seventh was added by Mr. Prchal as a result of his work with Mr. Badura and his knowledge that tractor use can result in saturated soil conditions.

NEPA requires the BLM to take a hard look at the effects of an action, but cannot be read to require the Agency to scour every inch of an action area in order to draw a reasoned conclusion about the effects of salvage on area soils. I find that the BLM's thorough utilization of existing soil maps, combined with the updates that resulted from site-specific surveys, provided a detailed look at the condition of the soils in the planning area and the potential direct and indirect effects of salvage on those soils.

Defendants assert that when BLM was planning the salvage

systems for the Flaming Rock and Smoked Gobbler fire salvage sales, in addition to slope, BLM considered factors such as geomorphology, root strength, soil depth, groundwater conditions, and soil properties. BLM also considered soil inclusions, "though perhaps not at the level of excruciating detail suggested by plaintiffs." The BLM also considered road density and location in development of the logging systems. The BLM concluded that the lack of temporary or permanent road construction will increase the cost of logging (by increasing the acres of helicopter and skyline logging) but will reduce the potential detrimental impact of roads on soils and other resource values.

Regarding plaintiffs' allegation that the BLM failed to take a hard look at soil productivity, not just at loss of topsoil, defendants contend that the BLM did in fact examine long-term soil productivity, not just potential topsoil loss. Specifically, BLM addressed whether plants would grow again by, among other things, examining the litany of post-fire and post-salvage impacts to soil productivity, including "[r]educed amounts of organic matter and mineral nutrients lost by fire consumption and erosion;" "[r]educed water storage by removal of large woody material;" "[l]oss of productive soil by surface erosion and mass wasting;" "[r]educed duff, litter, large organic matter and associated nutrients;" "[c]oncentration of runoff

water by roads, landings, and yarding corridors;" "[r]emoval of soil anchoring vegetation;" "[c]hanges in water quality and stream sedimentation due to mass wasting and surface erosion;" and "[i]ncreased subsurface water availability resulting from reduced evapotranspiration." EIS 3-23.

Finally, defendants contend that the BLM properly accounted for current soil conditions when it conducted site-specific surveys. Also, the Boise WA was not ignored, as contended by plaintiffs, but rather was used, in concert with updated information to reflect erosion conditions.

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I find that the Timbered Rock FEIS adequately considered the relevant factors necessary to make an informed decision regarding how the Flaming Rock and Smoked Gobbler timber sales would affect the soils in the planning area.

C. SCIENTIFIC INTEGRITY OF THE FINAL EIS

Plaintiffs object to the BLM's use of the tool "DecAID" which is a habitat model used as an advisory tool by managers to evaluate effects of forest conditions and existing or proposed management activities on organisms that use snags and down wood. (The model is based on a paper titled, "Decayed Wood Advisor for Managing Snags, Partially Dead Trees, and Down Wood for Biodiversity in Forests of Washington and Oregon"). The authors of the paper also prepared a document titled, "DecAID: The

Decayed Wood Advisor - Work in Progress on a Decayed Wood Advisor for Washington and Oregon Forests - Caveats and Cautions." Among other limitations, the authors expressly warn users that the tool is not appropriate for use in post-fire landscapes.

Plaintiffs allege that throughout the Final EIS, the BLM relied upon DecAID to determine appropriate levels of snags and coarse woody debris. Plaintiffs argue that use of DecAID was inappropriate and failed to meet NEPA's scientific integrity standard.

Besides using DecAID when its authors specifically warn that it may not be appropriate in post-fire landscapes, plaintiffs assert that the BLM misapplied DecAID's scale of analysis. The authors state that "DecAID is not intended to predict occurrence of wildlife species at the scale of individual forest stands or specific locations," but rather "is intended to be a broader planning aid than a species or stand-specific prediction tool." Plaintiffs also criticize the BLM for failing to demonstrate that the studies reviewed in DecAID are applicable to the proposed project. Even though the DecAID authors have cautioned against extrapolating the small amount of post-fire data in DecAID, plaintiffs allege that the BLM disregarded this important fact.

Finally, plaintiffs allege that DecAID has not been "field verified." Plaintiffs state that the BLM has failed to provide the public in the Timbered Rock FEIS with any information

relating to the veracity or efficacy of DecAID, as even DecAID's authors recommend.

Plaintiffs conclude that "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." Plaintiffs assert that the agency has failed to demonstrate that DecAID insures scientific integrity, as required by NEPA and therefore, the BLM's conclusions based on DecAID are arbitrary, capricious, and not in accordance with NEPA.

Alternatively, or in addition, plaintiffs assert that the DecAID generated snag retention levels are insufficient. So that even if this court should find that the use of DecAID is, in fact, an appropriate tool, the snag retention levels projected by DecAID are far below the standard for snag retention in the Medford RMP. Based on information generated by using the DecAID model, the BLM has concluded that it needs to retain no more than 12 snags per acre. Plaintiffs argue that the Medford RMP requires more - specifically the BLM is prohibited from removing any snag unless and until it can show that the snag is not likely to persist. Here, plaintiffs argue, the BLM has failed to make such a showing in the Timbered Rock FEIS or ROD.

Defendants respond that BLM did, in fact, disclose the limitations of the DecAID tool to post-burn landscapes and it was reasonable for BLM to use the new scientific information

contained in DecAID, along with the other local and regional information, some of which is specific to post-burn landscapes, in designing the salvage sales.

However, the limitations of DecAID are found only in the appendix to the EIS, which the Ninth Circuit has held is an impermissible location for such an important disclosure. In Blackwood, the Ninth Circuit held that the environmental impact statement "is where the Forest Service's defense of its position must be found," and not in an appendix to this document. 161 F.3d at 1214.

Moreover, the defendants' declaration of Linda Hale offered to prove that DecAID was appropriately applied to the project, and even if not appropriate, that BLM considered other studies that were appropriate, is insufficient. The studies listed by Ms. Hale in her declaration are studies that were conducted in eastern Washington, the Sierra Nevadas, and in unburned forests in southern Oregon. Ms. Hale fails to indicate why these studies - which are from ecosystems different from that found in the Timbered Rock planning area - are applicable to the proposed project. Further, I find no evidence that DecAID contains any information or data from burned forests in southern Oregon, instead there is evidence that DecAID is a useful tool for generating snag retention data for unburned, mixed conifer-hardwood forests in any location.

Both defendants and intervenors argue that the decisions by the Regional Ecosystem Office (REO) to equate the use of DecAID with adequate snag retention for purposes of consistency with the NFP, and to permit research logging in the Elk Creek LSR and Riparian Reserves, are due Chevron deference and should be followed by this court. See Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). I disagree. First, the REO is not a government agency or department. I find no evidence that the REO has special expertise to interpret the legal requirements of the NFP and/or the Medford RMP. Further, the NFP is not a statute, regulation, or rule. Instead the NFP consists of an environmental impact statement and record of decision that collectively establish standards and guidelines for the management of federal land. I find that it is this court's duty to independently review the agency's decision and determine whether it is arbitrary, capricious, and in accordance with law. 5 U.S.C. § 706(2)(A). Accordingly, I find that defendants' reliance on DecAID to design the Flaming Rock and Smoked Gobbler timber sales was not reasonable and not in compliance with the law.

CONCLUSION

Plaintiffs' motion for a permanent injunction and judgment on the merits (doc. 9) is granted. The Agency's action is "arbitrary, capricious and not otherwise in accordance with law.

5 U.S.C. § 706(A) (2). A permanent injunction is entered enjoining defendants and intervenors from proceeding with the Flaming Rock and Smoked Gobbler timbers sales on the Medford Bureau of Land Management District.

IT IS SO ORDERED.

Dated this 8 day of November 2004.

/s/ Ann Aiken
Ann Aiken
United States District Judge