No. 14-35553

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASCADIA WILDLANDS, OREGON WILD, and UMPQUA WATERSHEDS,
Oregon non-profit corporations,
Plaintiffs-Appellants

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, an agency of the
Department of the Interior,
Defendant-Appellee

and

THE COQUILLE INDIAN TRIBE, a federally recognized Indian tribe
Intervenor-Appellee

Appeal from the Denial of Summary Judgment
in the District Court for the District of Oregon

Opening Brief of Appellants

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1, Appellants hereby state that they do not have any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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INTRODUCTION

This is an appeal of a denial of Summary Judgment before the Honorable Michael McShane of the District Court for the District of Oregon. Plaintiffs-Appellants Cascadia Wildlands, Oregon Wild, and Umpqua Watersheds (collectively, Cascadia Wildlands) raised one claim under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and another claim under the Coquille Restoration Act, 25 U.S.C. § 715c, arising from the Middle Forks Kokwel timber sale (Kokwel timber sale) Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) and Decision Notice on the Coquille Forest.

First, the Kokwel timber sale EA violates NEPA by failing to disclose or analyze the cumulative impacts of the Kokwel timber sale in combination with the Alder/Lost 40 Rasler timber sales. Second, the Kokwel timber sale violates the Coos Bay Resource Management Plan and Coquille Restoration Act by failing to comply with the Revised Recovery Plan for the northern spotted owl.

STATEMENT OF JURISDICTION

I. DISTRICT COURT

Cascadia Wildlands' claims arise from the Bureau's violations of the NEPA and the Coquille Restoration Act, pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §§ 500 *et seq.*, in planning, designing, and implementing the

Kokwel timber sale. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (injunctive relief), 28 U.S.C. § 2202 (declaratory relief), 28 U.S.C. § 1346 (United States as a Defendant), and because Cascadia Wildlands sought judicial review of a final agency action pursuant to the APA, 5 U.S.C. § 706.

II. APPELLATE COURT

The District Court's denial of Cascadia Wildlands' Motion for Summary Judgment is an appealable order. This Court has jurisdiction pursuant to 28 U.S.C. § 1292.

III. ATTORNEYS FEES

Cascadia Wildlands intends to seek attorney's fees and costs for this case, including this appeal, at an appropriate stage of the litigation, pursuant to the Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412.

QUESTIONS PRESENTED

1. Under NEPA, does the Kokwel EA fail to disclose the cumulative impacts of the Kokwel timber sale combined with the adjacent and overlapping Alder (Lost 40)/Rasler timber sales when:

   (a) the Kokwel EA fails to describe related projects and fails to describe the environmental effects from those projects?

   (b) the Kokwel EA cumulative effects analysis is perfunctory and

conclusory when it failed to disclose the cumulative effects to late-successional species, impacts to soils, and impacts from road construction?

(c) the Kokwel EA discloses impacts from the proposed action, not the incremental impacts from present and reasonably foreseeable actions?

(d) the Bureau misconstrued the Council on Environmental Quality's Memorandum on past actions for NEPA's cumulative effects analysis by allegedly incorporating reasonably foreseeable actions into the baseline?

2. Under the Coquille Restoration Act, does the Kokwel timber sale violate the Coos Bay Resource Management Plan and the Coquille Restoration Act when:

(a) the Kokwel timber sale does not comply with the northern spotted owl recovery plan?

(b) the Coos Bay Resource Management Plan for recovery plan compliance is not discretionary?

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This is a civil action for declaratory and injunctive relief arising from Defendant-Appellee Bureau of Indian Affair's (Bureau) violations of NEPA and the Coquille Restoration Act. Cascadia Wildlands challenges the Bureau's decision to approve and implement the Kokwel timber sale EA and FONSI.

II. LEGAL BACKGROUND

A. The National Environmental Policy Act (NEPA)

NEPA requires that all federal agencies assess the environmental impact of the proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). "The purpose of NEPA is to foster better decision making and informed public participation for actions that affect the environment." *Or. Natural Res. Council Action v. U.S. Forest Serv.*, 293 F. Supp. 2d 1200, 1204 (D. Or. 2003) (citing 42 U.S.C. § 4321; 40 C.F.R. § 1501.1(c)).

> [NEPA] ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9th Cir. 2000) (quoting *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989)). "Stated differently, NEPA's purpose is to ensure that 'the agency will not act on incomplete information, only to regret its decision after it is too late to correct.'" *Id.*

NEPA also requires that federal agencies take a hard look at the environmental impacts of its actions, including cumulative impacts. A hard look includes "considering all foreseeable direct and indirect impacts," *Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 973 (9th Cir. 2002), and requires that the

Bureau "undertake a thorough environmental analysis before concluding that no significant impact exists." *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1239 (9th Cir. 2005). A hard look "involve[s] a discussion of adverse impacts that does not improperly minimize negative side effects." *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1159 (9th Cir. 2006) (quoting *Native Ecosystems Council*, 428 F.3d at 1241); *National Audubon Society v. Dep't of Navy*, 422 F.3d 174, 185 (4th Cir. 2005) ("The hallmarks of a 'hard look' are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms.").

B. The Coquille Restoration Act

The Coquille Forest was established under the Coquille Restoration Act in 1989, 25 U.S.C. § 715c, under which the "Tribe was restored to federal recognition," ER- 221. Under the Coquille Restoration Act, the Coquille Forest was conveyed to the Bureau to be managed and held in trust for the Coquille Tribe. 25 U.S.C. § 715c(d)(4). The Coquille Restoration Act requires that the Bureau comply with adjacent management plans:

> Management – The Secretary of the Interior, acting through the Assistant Secretary for Indian Affairs shall manage the Coquille Forest under applicable State and Federal forestry and environmental protection laws, and subject to critical habitat designations under the Endangered Species Act [16 U.S.C. § 1531 *et seq*], and subject to the standards and guidelines of Federal forest plans on adjacent or nearby Federal lands, now and in the future.

25 U.S.C. § 715c(d)(5); ER-156 ("The tribe, in cooperation with the Bureau, manages these lands consistent with the standards and guidelines of resource management plans on adjacent federal land (Coos Bay District BLM).").

C. The Coos Bay BLM Resource Management Plan

The 1995 Coos Bay BLM Resource Management Plan (Coos Bay Management Plan) is the forest plan on adjacent federal lands, and the Bureau must comply with the direction therein. ER-224. The Coos Bay Management Plan, in turn, directs the agency to comply with relevant recovery plans: "[p]rotect, manage, and conserve federal listed and proposed species and their habitats *to achieve their recovery in compliance* with the Endangered Species Act, *approved recovery plans*, and Bureau special status species policies." ER-230 (emphasis added). To achieve this standard, the agency must

> "[c]onsult with the U.S. Fish and Wildlife Service (FWS) or National Marine Fisheries Service (NMFS) for any proposed action that may affect federal listed or proposed species or their critical or essential habitat. Based on the results of consultation/conferencing, modify, relocate, or abandon the proposed action."

Id. Further, the Coos Bay Management Plan also directs the agency to "[i]mplement the land use allocations and management actions/direction of this proposed resource management plan that are designed to enhance and maintain habitat for threatened and endangered species." ER-233.

D. Administrative Procedure Act

The Administrative Procedure Act, 5 U.S.C. § 701 *et seq.*, (APA) confers a right of judicial review on any person that is adversely affected by agency action, 5 U.S.C. §702. Upon review, the court shall "hold unlawful and set aside agency actions ... found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. §706(2). An agency action is arbitrary and capricious "if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Lands Council v. McNair,* 537 F.3d 981, 987 (9th Cir. 2008) (*en banc).*

III. FACTUAL BACKGROUND

A. The Coquille Tribe

"On June 28, 1989, the Coquille Indian Tribe was restored to federal recognition when Congress passed Public Law 101-42, the Coquille Restoration Act. Restoration reestablished the authority of the Tribe as a sovereign government" ER-221,and "provided for land to be held in trust by [the] federal government for the common benefit of the Tribe and its future generations," *id.*

> In September 1998, 5,410 acres of Coos Bay District Bureau of Land Management (BLM) lands were transferred to the BIA to be held in trust for the exclusive and beneficial uses of the Coquille Indian Tribe pursuant to the Coquille Restoration Act (P.L. 101-42). The Tribe, in cooperation with the

> BIA, manages these lands consistent with the standards and guidelines of resource management plans on adjacent federal land (Coos Bay District BLM).

ER-156.

B. The Kokwel Timber Sale

The Bureau issued a notice of intent to prepare an Environmental Assessment for the Kokwel timber sale on December 12, 2011. ER-238-40. The Bureau authorized the Kokwel timber sale on February 25, 2013. ER-4. The Kokwel timber sale is located within the Coquille Forest. ER-1. Specifically, it is "located in Sections 24, 25 and 15 in Township 30 South, Range 11 West, and Section 26 in Township 29 South, Range 11 West, in Coos County, Oregon and would take place between 2012 and 2022." ER-29.

The Kokwel timber sale includes 268 acres of regeneration[1] harvest of stands over eighty years old that will remove 268 acres of nesting, roosting, and foraging habitat for the spotted owl. ER 1; ER 184. The Kokwel timber sale will log within 561 acres of capable habitat and 296 acres of suitable habitat. ER-180. Overall, the Kokwel timber sale proposes to "harvest 13.9 million board feet." ER 1. The U.S. Fish and Wildlife Service (USFWS) anticipates that the Kokwel timber sale will result in the take of up to 4 spotted owl sites, which includes 14 spotted owls (8 adults and 6 juveniles), ER-299-300, and the take of up to 1

[1] Regeneration harvest is synonymous with clear-cut logging because it attempts to regenerate a new stand.

murrelet site in the form of harassment associated with disruption, ER-300.

C. The Northern Spotted Owl and the Revised Recovery Plan

The Northern Spotted Owl (*strix occidentalis caurina*) (spotted owl) is a threatened species that generally relies on older forests for their unique structure and characteristics that are beneficial for the owls' nesting, roosting and foraging habits. ER-255; ER-241 (old-growth Douglas fir "is ideal habitat for specialized vertebrates, such as the red tree vole, northern spotted owl and northern flying squirrel, as well as nitrogen-fixing lichens"); ER-243 (the northern spotted owl "depend[s] heavily on the old-growth canopy as sites for nesting, feeding, and protection."). Due to concerns over the spotted owl's widespread habitat loss,habitat modification, and the lack of regulatory mechanisms to protect the species, the USFWS listed the northern spotted owl as a threatened species under the Endangered Species Act on June 26, 1990. 16 U.S.C. § 1533(a); 55 Fed. Reg. 26,114 (June 26, 1990) (codified at 50 C.F.R. § 17.11(h)).

On June 28, 2011, USFWS issued the Revised Recovery Plan for the Northern Spotted Owl. 76 Fed. Reg. 38,575 (July 1, 2011); ER-434. The Revised Recovery Plan includes four (4) Recovery Criteria and thirty-three (33) Recovery Actions. ER-444-45. Recovery Criteria are measurable, achievable goals that the USFWS believes will result from implementation of the recovery actions. ER-444.

"Recovery actions are near-term recommendations to guide the activities needed to accomplish the recovery objectives and achieve the recovery criteria." ER-445.

Two Recovery Actions apply to habitat management in moist forests on the west side of the Cascade Range, Recovery Action 10 and 32. ER-489. According to the USFWS, "Recovery Actions 6, 10 and 32 are most applicable to the Kokwel timber harvest project." ER-293. Recovery Actions 10 and 32 implement the "primary spotted owl recovery goal … for moist forests …to conserve older stands that are either occupied or contain high-value spotted owl habitat." *Id.* Recovery Actions 10 and 32 apply to both reserved and non-reserved land allocations. ER-489.

Recovery Action 10 directs federal agencies to "[c]onserve spotted owl sites and high value spotted owl habitat to provide additional demographic support to the spotted owl population." ER-515. This includes currently occupied sites and historic sites. ER-514. Recovery Action 32, in turn, provides:

> Because spotted owl recovery requires well distributed, older and more structurally complex multi-layered conifer forests on federal and non-federal lands across its range, land managers should work with the Service as described below to maintain and restore such habitat while allowing for other threats, such as fire and insects, to be addressed by restoration management actions. These high-quality spotted owl habitat stands are characterized as having large diameter trees, high amounts of canopy cover, and decadence components such as broken-topped live trees, mistletoe, cavities, large snags, and fallen trees.

ER-539. The USFWS "believes that the Tribe's proposed action is … inconsistent with Recovery Actions 10 and 32." ER-293. Notably, the Bureau's Biological Assessment failed to discuss whether the Kokwel timber sale was consistent the Revised Recovery Plan. ER-150-220.

According to the USFWS, "[t]he best available information indicates that spotted owls need a certain amount of habitat within the various spatial scales comprising individual home ranges so as to provide the resources necessary to meet essential life functions." ER-292. "In general, as the amount of habitat in a spotted owl's home range decreases, so does site occupancy, reproduction and survival." *Id*. The Revised Recovery Plan found that:

> Past habitat loss and current habitat loss are also threats to the spotted owl, even though loss of habitat due to timber harvest has been greatly reduced on Federal lands over the past two decades. Many populations of spotted owls continue to decline, especially in the northern parts of the subspecies' range, even with extensive maintenance and restoration of spotted owl habitat in recent years.

ER-441. In addition, the spotted owl faces a "continual population decline and threat to its habitat, although extinction is not imminent." ER-456.

D. Endangered Species Act consultation for the Kokwel timber sale

1. The Bureau's Biological Assessment

Due to the presence of listed species under the Endangered Species Act, the Bureau prepared a Biological Assessment to assess impacts to the spotted owl and marbled murrelet. The Kokwel timber sale occurs within occupied spotted owl

habitat. ER-176; ER-289-90. According to the Kokwel EA, "[o]f the 11 known NSO [i.e., northern spotted owl] sites in the watershed, seven home ranges overlap the action area and four (2348O, 4700O, 2185O, and 2187O) would be impacted by the action, either through removal or modification of habitat or by disturbance." ER-55; ER-57 (Table 10 shows amount of habitat logged within each spotted owl activity center); ER-332 (showing the four impacted activity centers). Despite the presence of northern spotted owls, the Bureau did not conduct surveys for northern spotted owls: "In general, NSO surveys are not regularly conducted in the analysis area." ER-176.

The Biological Assessment and EA determined that regeneration harvest (or clear-cut logging) will "remove approximately 268 acres of NRF [i.e., nesting, roosting, foraging] habitat. Approximately, 258 acres (96 percent) of the NRF habitat removal would occur within four owl home ranges which are currently below the 40 percent[2] habitat thresholds." ER-184. Because regeneration harvest "will remove spotted owl habitat within NSO home ranges that are currently below management thresholds, and would result in even-aged, monotypic forest stands managed on an 80 year rotation, the regeneration harvest *may affect, is likely to adversely affect (LAA)* NSOs as a result of habitat removal." *Id*. (emphasis in

[2] "Nesting, roosting and foraging habitat removed to an extent that lowers the amount of NRF habitat cover to below 40 percent within a spotted owl home range area will likely have adverse effects to, and may cause take of, a spotted owl (USDI *et al*. 2008b)." ER 176.

original). The Kokwel Biological Assessment determined that "portions of the regeneration harvest units meet the definition of Recovery Action 32 habitat for owls,"[3] and that "outside of established NSO home ranges, these stands represent some of the better NSO habitat available in the immediate vicinity." ER-170.

For the marbled murrelet, a listed species, the Kokwel timber sale will log within 561 acres of capable habitat and 296 acres of suitable habitat. ER-180. The Kokwel EA acknowledges that "[t]here are three occupied stands within the action area (C3059, C3022, and C3036)[.]" *Id*. "[O]ne stand (C3059) will be impacted by the project actions. *Id*. Portions of the project area have not been surveyed for the marbled murrelet: "[t]he action area contains 230 acres of unsurveyed suitable habitat that could be impacted by the project." ER-181. Because of the unsurveyed suitable habitat, it is estimated that the Kokwel timber sale project area contains 0.65 pairs of marbled murrelets. *Id*. Just like the northern spotted owl, the regeneration logging for the Kokwel timber sale "*may affect, is likely to adversely affect (LAA)*" marbled murrelet habitat. ER 190 (emphasis in original).

2. The U.S. Fish and Wildlife Service's Biological Opinion

Because the Bureau determined that the project was likely to adversely affect listed species and/or habitat, the Bureau consulted with the USFWS, as

[3] As is shown below, Recovery Action 32 habitat is characterized by large diameter trees, high amounts of canopy cover, and decadence components such as broken-topped live trees, mistletoe, cavities, large snags, and fallen trees. ER-301; ER-170.

required by law, 16 U.S.C. § 1531 *et seq.*; ER-244, and the USFWS prepared a Biological Opinion, ER-244-331. The Biological Opinion found that the Bureau's decision was "inconsistent" with the spotted owl's recovery plan because it would log four owl sites below conservation management thresholds, and log areas that contained Recovery Action 32 habitat characteristics ("RA 32 areas or habitat"). ER-293.

The Biological Opinion confirmed that listed species would be adversely affected:

- The proposed action will have adverse effects to spotted owls because it will result in the removal of up to 296 acres of NRF habitat, of which 267 acres are within the home ranges of four spotted owl sites (Table 9). Compounding the proposed removal is that the sites are currently habitat deficient so that habitat fitness may already be compromised. Adverse effects are also anticipated due to disturbance/disruption of 251 acres of un-surveyed NRF habitat. ER-295.

- The proposed action will have adverse effects to murrelets because it will result in the removal of up to 268 acres of suitable habitat and impair murrelet life history functions. Adverse effects are also anticipated due to disturbance of 230 acres and disruption of 33 acres of un-surveyed suitable habitat. The resulting habitat conditions may likely lead to a reduction in the ability of murrelets to find suitable nest trees. ER-297.

The USFWS anticipated:

> the incidental take at four individual spotted owl sites, which includes up to eight adult and six juvenile spotted owls due[] to the Middle Fork Kokwel proposed action. The take is anticipated to be in the form of harm associated with 267 acres of habitat removal which will impair essential life-history functions of the species. In addition, the [USFWS] anticipates harassment

> associated with disruption during the breeding season adjacent to approximately 21 acres of un-surveyed, likely occupied NRF habitat.

ER-299-300. In addition, the USFWS:

> anticipated the incidental take of up to one murrelet site due to the Middle Fork Kokwel proposed action. The take is in the form of harassment associated with disruption likely to occur during the breeding season adjacent to approximately 33 acres of un-surveyed suitable murrelet habitat, likely to be occupied by murrelets.

ER-300.

Given the above impacts to the northern spotted owl among other listed species, the USFWS proposed that the Bureau take various precautions "to minimize or avoid adverse effects of [the] proposed action on listed species or critical habitat…." ER-301. The USFWS made the following recommendations when implementing the Kokwel timber sale:

- To reduce the impacts from habitat removal [associated with 267 acres of regeneration harvest], the [USFWS] recommends implementation of a light thinning prescript so as to retain the habitat function of the stands.

- The [USFWS] recommends avoiding harvest of these relatively more structurally complex portions of the stand [i.e., Recovery Action 32 stands].

ER-301. The Bureau rejected these recommendations. ER-3 (Decision to implement unaltered Alternative 2); ER-140, ¶ 39. The Bureau, however, did not incorporate these recommendations to minimize or avoid adverse impacts to listed species.

E. The Alder (Lost 40)/Rasler timber sales

Prior to authorizing the Kokwel timber sale, the Bureau authorized the Alder (Lost 40)/Rasler timber sales[4] on February 7, 2011. ER-714. The Alder (Lost 40)/Rasler timber sales include 270 acres of regeneration harvest, 52 acres of density management within riparian reserves, 56 acres of commercial thinning, and 3.21 miles of road construction. ER-721. The Kokwel and Alder (Lost 40)/Rasler timber sales are immediately adjacent and interconnected, both occurring within sections 25, 24, and 15, Township 30 South, Range 11 West. ER-343 (Alder (Lost 40)/Rasler); ER-29 (Kokwel); ER-143 ¶ 59. Cascadia Wilands did not challenge the Alder (Lost 40)/Rasler sales. Logging for the Alder (Lost 40)/Rasler timber sales "would start in 2011 extending into and or beyond 2016…." ER-726.

The Biological Assessment for the Alder (Lost 40)/Rasler timber sales determined that:

> the proposed 283 acre regeneration harvest *may affect, is likely to adversely affect (LAA)* northern spotted owls because suitable nesting, roosting, foraging, and dispersal habitat would be removed and because the proposed action and some interrelated or interdependent actions may cause noise during the nesting season that is above ambient levels and exceed specified distances.

[4] The Alder (Lost 40)/Rasler timber sales are a collection of timber sales that were assessed under a single Environmental Assessment. *See* ER-727.

ER-333 (emphasis in original); *see also* ER-337 (Table 7, showing LAA for northern spotted owl habitat, disturbance, and interrelated or interdependent actions).

F. Allowable Sale Quantity for the Coquille Forest

The "allowable sale quantity" (ASQ) for the entire Coquille Forest is 2 million board feet of lumber per year. ER-226; ER 140 ¶ 41. According to the Coquille Forest Plan:

> Harvest of this approximate volume of timber is considered sustainable harvest over the short term based on the assumptions that the BLM's timber the BLM's timber inventory data covering the entire Coos Bay District is a reasonable indicator of volumes to be found in mature stands in the Coquille Forest.

ER-226. While the "ASQ represents neither a minimum level that must be met nor a maximum level that cannot be exceeded," the Coquille Forest Plan provides that the actual sustainable timber level "may deviate as much as 20 percent from the provisional ASQ." ER-227. Here, however, the Kokwel and Alder (Lost 40)/Rasler timber sales will exceed the ASQ by more than 20%. The Alder (Lost 40)/Rasler timber sales are projected to generate 22.44 million board feet of timber between 2011 and 2016, ER-725-26, the Kokwel timber sale is estimated to generate an additional 13.9 million board feet of timber between 2013 and 2022, ER-28. Assuming no additional logging is authorized until after 2022, the

Coquille Forest will have exceeded the ASQ and log more than 36 million board feet as a result of the above timber sales.

STANDARD OF REVIEW

I. STANDARD OF REVIEW FOR A DENIAL OF SUMMARY JUDGMENT UNDER THE ADMINISTRATIVE PROCEDURES ACT

In reviewing the Bureau's decision to authorize the Kokwel timber sale, this Court must determine whether the Bureau's actions were "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Idaho Sporting Congress v. Thomas,* 137 F.3d 1146, 1149 (9th Cir. 1998). An agency decision is arbitrary and capricious if the agency:

> relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43 (1983). The Court must "judge the propriety of such action solely by the grounds invoked by the agency" at the time it made its decision. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

Although the scope of review of agency action is limited, agency decisions are not by definition unimpeachable, and a probing and thorough inquiry by the reviewing court is required to determine whether there is a rational connection between the facts found and judgment to support the agency determination. *See*

Baltimore Gas and Electric v. NRDC, 462 U.S. 87 (1983) (citing *Bowman Transportation Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285-286 (1974)); *Citizens to Preserve Overton Oark, Inc. v. Volpe*, 401 U.S. 402 (1971). In record review cases under the APA, the Ninth Circuit conducts a *de novo* review. *Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). In reviewing agency actions, the Court should conduct a searching and careful inquiry. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989).

SUMMARY OF ARGUMENT

First, the Bureau violated NEPA by failing to disclose or analyze the cumulative impacts of the admittedly ongoing and reasonably foreseeable Alder (Lost 40)/Rasler timber sales in combination with the Kokwel timber sale. The Bureau's cumulative effects analysis fails to disclose related projects and the effects of related projects; and provides only a perfunctory and conclusory analysis of the cumulative effects to late-successional species, to soils, and from road construction. The Bureau's cumulative effects analysis only identifies impacts from the proposed action, not the incremental effects of other present and reasonably foreseeable actions. Finally, the Bureau misconstrued the Council on Environmental Quality's 2005 Memorandum, "Guidance on the Consideration of Past Actions in Cumulative Effects Analysis," by applying it to present and reasonably foreseeable actions.

Second, the Bureau violated the Coquille Restoration Act by authorizing the Kokwel timber sale, which is inconsistent with the northern spotted owl's recovery plan in violation of the Coos Bay Resource Management Plan. The Coquille Restoration Act renders the Bureau's management of the Coquille Forest subject to the non-discretionary standards and guidelines of the Coos Bay BLM Resource Management Plan. The Coos Bay Resource Management Plan requires that agencies comply with federally listed species recovery plans and dictates that agencies maintain and enhance habitat for these species. The Kokwel timber sale is admittedly inconsistent with the northern spotted owl's recovery plan, and, therefore, violates the Coos Bay Resource Management Plan and the Coquille Restoration Act.

ARGUMENT

I. THE FOREST SERVICE VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT

A. The Bureau violated NEPA because the EA fails to disclose the cumulative impacts of the Kokwel timber sale

1. NEPA requires that agencies take a hard look at the cumulative impacts of present and reasonably foreseeable actions

NEPA requires that agencies take a hard look at the cumulative impacts of present and reasonably foreseeable actions. 40 C.F.R. § 1508.7. A cumulative impact is:

> the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.7; *Or. Natural Res. Council v. BLM.*, 470 F.3d 818, 822 (9th Cir. 2006). In *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Mgmt*, the Ninth Circuit elaborated on the rationale for an adequate cumulative effects analysis:

> Cumulative impacts of multiple projects can be significant in different ways. The most obvious way is that the greater total magnitude of the environmental effects … may demonstrate by itself that the environmental impact will be significant. Sometimes the total impact from a set of actions may be greater than the sum of the parts.

387 F.3d 989, 994 (9th Cir. 2004). Similarly, in *Or. Natural Res. Council Fund*, the Ninth Circuit reasoned that:

> the addition of a small amount of sediment to a creek may have only a limited impact on salmon survival, or perhaps no impact at all. But the addition of a small amount here, a small amount there, and still more at another point could add up to something with a much greater impact, until there comes a point where even a marginal increase will mean that *no* salmon survive

505 F.3d at 893 (emphasis in original). To account for the total impact of adjacent and overlapping timber sales, an EA must disclose the cumulative effects of present and reasonably foreseeable actions. For EAs, the Ninth Circuit has instructed, in no unequivocal terms, that "*adequate consideration of cumulative*

effects requires that EAs address them fully." *Kern v. BLM*, 284 F.3d 1062, 1076 (9th Cir. 2002) (emphasis in original).

2. The Alder (Lost 40)/Rasler timber sales are present and reasonably foreseeable actions

The Kokwel and Alder (Lost 40)/Rasler timber sales overlap both temporally and spatially. Given this overlap, the Kokwel and Alder (Lost 40)/Rasler timber sales appear to be a single, large timber sale that was separated into smaller timber sales to mask the overall impacts. NEPA expressly prohibits such compartmentalization. *See* 40 C.F.R. 1508.27(b)(7) ("Significance cannot be avoided by terming an action temporary or by breaking into small component parts."). A cumulative effects analysis must account for adjacent and overlapping timber sales, but the Kokwel EA is silent about the Alder (Lost 40)/Rasler timber sales, except for a single disclosure.

On December 12, 2011, the Bureau prepared a notice of intent to prepare an EA for the Kokwel timber sale. ER-240. The notice of intent omitted any mention of the adjacent and overlapping Alder (Lost 40)/Rasler timber sale. ER-238-40. Two months later, with full knowledge of the intent to prepare the Kokwel EA, on February 7, 2011, the Bureau issued the Alder (Lost 40)/Rasler FONSI. ER-714. The two timber sales would occur concurrently. *See* ER-711 (Alder (Lost 40)/Rasler timber sales would occur "from 2011 through 2016."); ER-28 (Kokwel EA would take place "from 2012 through 2022.").

The Kokwel timber sale logging units are adjacent to and interspersed amongst the logging units in the Alder (Lost 40)/Rasler timber sales logging units. The Kokwel timber sale occurs on the Coquille Forest in sections 24, 25, 15, Township 30 South, and Range 11 West, amongst others. *See* ER-30 (large-scale map showing the Kokwel logging units in sections 24, 25, and 15 in the southern portion of the map); ER-29 (Table 1, Sections; "[t]he proposed actions will be located in *Sections 24, 25 and 15 in Township 30 South, Range 11 West*, … and would take place between 2012 and 2022"). The Alder (Lost 40)/Rasler timber sales will also occur within Sections 24, 25, and 15. *See* ER-343 ("the Rasler Creek timber Sale (unit 1 & 2 & 3 Section 24 & 25, Township 30 South, Range 11 West"; "and the Mead Creek Timber Sale (thinning units Section 15 township 30 South Range 11 West"). Thus, both timber sales will log within Sections 25, 24, and 15, Township 30 South, Range 11 West.

The few maps provided for the timber sales reveal that the Alder (Lost 40)/Rasler logging units are adjacent to and interspersed amongst the Kokwel logging units in sections 25, 24, and 15. *Compare* ER-389 (map of Alder (Lost 40)/Rasler logging units in sections 24 and 25); ER-385-390 (maps of Alder (Lost 40)/Rasler logging units) *with* ER-30, 95-99; ER-431; ER-432 (maps of all Kokwel logging units); ER-143, ¶ 59 (admitting the timber sales are adjacent in places). Combined, the two timber sales will log throughout the vast majority of sections

25 and 24, and the southern half of section 15.[5] A section number is one square mile, and, therefore, the two timber sales will be concurrently logging over 2 square miles of adjacent forestland within sections 25, 24, and 15. Because the timber sales have a temporal and spatial nexus, the uncompleted Alder (Lost 40)/Rasler timber sales are both present and reasonably foreseeable actions, the effects of which must be analyzed in a cumulative effects analysis.

3. The Kokwel timber sale EA cumulative effects analysis is inadequate

An adequate cumulative effects analysis must contain several components to pass muster under Ninth Circuit case law. Here, the Kokwel timber sale EA falls short in each respect because (a) the EA fails to describe related projects and the environmental effects of related projects; (b) the EA provides only a perfunctory and conclusory analysis devoid of detail; and (c) the EA discloses effects of the proposed project, not related projects.

a. The Kokwel timber sale cumulative effects analysis fails to describe related projects and fails to describe the environmental effects of related projects

[5] It appears as though the timber sales will log all but a small portion of sections 25 and 24. An aerial photograph in the record reveals that the small portion not covered by the timber sales was recently heavily logged. *See* ER-715 (areas with scribbled lines and lack of canopy are the areas that will not be logged under the Kokwel and the Alder (Lost 40)/Rasler timber sales). The EA is silent as to this previous timber sale.

A cumulative effects analysis must not only describe related projects but it must also enumerate the environmental effects of those projects. In *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005), the Ninth Circuit concluded that an adequate cumulative effects analysis must include "adequate data of the time, type, place, and scale" of relevant timber harvest, as well as explain "in sufficient detail how different project plans and harvest methods affect[] the environment." Just like the Forest Service in *Powell*, here, the Bureau "did not do this, and NEPA requires otherwise." *Id.*

Despite the fact that the Bureau had only recently issued the EA and FONSI for the Alder (Lost 40)/Rasler timber sales, the Kokwel EA only makes a single reference to the Alder (Lost 40)/Rasler timber sales. That single reference is a table that lists four timber sale names and units, contract numbers, treatment type, and acreage. *See* ER-50 (Table 8) (listing "Alder (Lost 40) Rasler timber sales" as "[t]ribal timber sale activity in the analysis area"). This is the extent of the Bureau's disclosure about the Alder (Lost 40)/Rasler timber sales within the Kokwel timber sale EA. It is not enough to simply acknowledge the existence of an adjacent timber sale; instead, the Bureau must provide "quantified or detailed information" in the NEPA document itself about the incremental effects of the timber sales. The introductory paragraph on cumulative effects does not disclose any specific projects. *See* ER-54. Instead, the EA references unknown and

unspecified "future actions on federal and private lands" that "would result in a slight change in age and seral classification of stands on CIT [i.e., Coquille Indian Tribe] land within the watershed." *Id.*

The Kokwel EA does not provide any useful information in assisting the public and the decision-maker in understanding the cumulative effects of the timber sales.[6] For example, the Kokwel EA does not provide the location of the logging units, age of the stands, harvest amount and/or acreage, impact on threatened or endangered species, road construction, or other relevant information about environmental impacts from the Alder (Lost 40)/Rasler timber sales. Given that the agency had only recently finalized the Alder (Lost 40)/Rasler timber sales EA and FONSI, this omission is significant. The Kokwel EA has not provided enough information to gauge the cumulative effect of the adjacent and overlapping timber sales. The Bureau's failure to discuss the Alder (Lost 40)/Rasler timber sales in any substantive manner is indicative of the agency's failure to take a hard look at the cumulative effects of the timber sales. *See Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d at 1159 ("[a] hard look should involve a discussion of

[6] The EA informs the reader that "[t]he most efficient way to address cumulative effects on spotted owls and spotted owl habitat is to look at habitat within those watersheds and the effects on spotted owl habitat from this project *and those foreseeable projects*. ER-66 (emphasis added). The Kokwel EA, however, fails to provide any information about "the effects on spotted owl habitat from … those foreseeable projects." The Bureau has not followed its own advice with regard to the cumulative effect to spotted owls.

adverse impacts that does not improperly minimize negative side effects"). *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 765 (2004) (Justice Thomas noting that "[a]dmittedly, the agency bears the primary responsibility to ensure that it complies with NEPA, ….").

b. The Kokwel timber sale EA cumulative effects analysis is perfunctory and conclusory

The Kokwel EA provides that the Alder (Lost 40)/Rasler timber sales listed in Table 8 will be analyzed in "resource-specific cumulative impact discussions." *See* ER-49 ("Table 8 lists treatments proposed for the foreseeable future on CIT lands in the analysis area that will be considered in the following resource-specific cumulative impact discussions."). However, the "resource-specific cumulative impact discussions" do not provide any meaningful information about the Alder (Lost 40)/Rasler timber sales, and, therefore, the EA itself does not contain the very information it purports to satisfy its cumulative effects analysis.

Ninth Circuit case law is clear that a perfunctory and conclusory cumulative impacts analysis is insufficient. *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 994 (quoting *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) ("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 Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810, 811 (9th Cir. 1999) (cumulative effects analysis

must contain "sufficient detail" so as to be "useful to the decisionmaker in deciding whether, or how, to alter the program to lessen cumulative impacts"; cumulative impacts analysis is inadequate if it "merely provides very broad and general statements devoid of specific, reasoned conclusions"); *Neighbors of Cuddy Mountain,* 137 F.3d at 1379 ("some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing the [the agency's] decisions, can be assured that the [agency] provided the hard look that it is required to provide."); *South Fork Band Council v. U.S. Dept. of Interior*, 588 F.3d 718, 726 (9th Cir. 2009) ("a general discussion of an environmental problem across a large area did not satisfy NEPA"). The Kokwel EA's cumulative effects analysis for late-successional species, soils, and road construction falls far short of this Court's standards.

i. The Kokwel EA fails to adequately disclose cumulative effects to late-successional species

The Kokwel EA's cumulative effects analysis for the spotted owl and the marbled murrelet are the same except that the Bureau changed the words "spotted owls" and "marbled murrelets" in the applicable analysis. *Compare* ER-66-67 (two paragraphs under heading "spotted owls") *with* ER-67 (two paragraphs under heading "marbled murrelets"). The Kokwel EA does not provide any analysis unique to either listed species. Most conspicuously, the Kokwel EA omits any disclosure of the incremental impact from 268 acres of regeneration logging in the

Kokwel timber sale, ER-1; ER-184, and 270 acres of regeneration logging in the adjacent and overlapping Alder (Lost 40)/Rasler timber sales, ER-721. The Kokwel EA also fails to disclose that the Kokwel and Alder (Lost 40)/Rasler timber sales will both "likely adversely affect" the northern spotted owl. *See* ER-756 (Alder (Lost 40)/Rasler timber sales EA); ER-333 (Alder (Lost 40)/Rasler timber sale Biological Assessment); ER-190 (Kokwel timber sale Biological Assessment); ER-60 (Kokwel timber sale EA). The Kokwel EA also fails to disclose that all of the timber sales occur at the intersection of four northern spotted owl home ranges. *See* ER-332 (map showing four northern spotted owl home ranges within sections 24 and 25). The Kokwel EA's conclusory allegation that "foreseeable projects within the watershed would not appreciably diminish spotted owl suitable habitat" does not include any substantiating figures for other timber sales.[7] ER-66. *See Barnes v. U.S. Dep't of Transp.*, 655 F.3d 1124, 1131 (9th Cir. 2011) ("the agencies would like this court to take their word for it and not question their conclusory assertions"; "their word, however, is not entitled to significant deference that courts give [agency methodology]").

[7] The alleged cumulative effects analysis for the marbled murrlet is almost verbatim, except that the word "northern spotted owl" is replaced with "marbled murrelet." *See* ER-67.

The Bureau attempts to excuse itself from fully addressing cumulative effects by arguing that such an analysis would be too difficult and the impacts on private land are unknown:

- Assessing cumulative effects to wildlife is difficult due to the scale, range of the species, distribution, life history and habitat. [8]

- Much of the private lands will never reach a late seral condition given short harvest rotations. The overall effect of this type of harvest practice on spotted owls within these watersheds and the resource area is unknown at this time.

ER-66.[9] The Bureau, however, demonstrated that it is able to analyze effects to spotted owls and murrelets within the Biological Assessment, ER-182-92, and, instead, neglected to aggregate the effects to these species from the various timber sales or disclose those effects to the public, undermining NEPA's purpose. Furthermore, the alleged difficulty in analyzing environmental impacts and arguing that environmental impacts are "unknown," however, are not sufficient excuses under NEPA:

> While "foreseeing the unforeseeable" is not required, an agency must use its best efforts to find out all that it reasonably can:
>
> > It must be remembered that the basic thrust of an agency's responsibilities under NEPA is to predict the environmental effects of proposed action before the action is taken and make those effects known. Reasonable forecasting and speculation is thus implicit in

[8] The same introductory paragraph for the spotted owl and marbled murrelet is also used for the red tree vole, another late-successional species. *See* ER-67-8.

[9] Again, the same statement verbatim (except for the phrase "northern spotted owl") is set forth for the marbled murrelet. *See* ER-67.

> NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as "crystal ball inquiry."

City of Davis v. Coleman, 521 F.2d 661, 676 (9th Cir. 1975) (quoting *Scientists' Institute for Public Information v. A.E.C.*, 481 F.2d 1079, 1092 (D.C. Cir. 1973)). In other words, an agency "cannot avoid NEPA responsibilities by cloaking itself in ignorance." *Fritiofson v. Alexander*, 772 F.2d 1225, 1244 (5th Cir. 1985). The Bureau's failure to account for the cumulative impact from overlapping timber sales that will independently likely adversely affect the spotted owl habitat and marbled murrelet "fail[s] to consider an important aspect of the problem." *Ctr for Biological Diversity*, 538 F.3d at 1193.

ii. The Kokwel EA fails to adequately disclose cumulative effects to soils

The cumulative effects analysis for soils fails to provide any substantive or quantitative information, yet it purports to comply with "the CFRMP [*i.e.*, Coquille Forest Resource Management Plan]standards for detrimental soil conditions." ER-69. Despite the lack of quantitative analysis, the Bureau alleges that it is engaged in on-going monitoring: "[o]n-going monitoring to measure soil compaction and recovery will assure that impacts to soil are within the CFRMP standards and are mitigated by appropriate measures when needed." *Id*. If the agency has "measure[d] soil compaction," then the agency should have disclosed that data to assist in the environmental analysis for the Kokwel EA. Simply put, the agency is

not providing the public with the information necessary to determine whether the agency is complying with the law. "Without such information, neither the courts nor the public, in reviewing the [the agency's] decisions, can be assured that the [agency] provided the hard look that it is required to provide." *Neighbors of Cuddy Mountain*, 137 F.3d at 1379. Thus, the Kokwel EA cumulative effects analysis for soils is devoid of substantive or quantitative data.

iii. The Kokwel EA fails to disclose cumulative effects from road construction

The Kokwel EA fails to disclose that the Alder (Lost 40)/Rasler timber sales will construct 3.21 miles of new roads, information necessary to determining the cumulative effects of the timber sales. *See* ER-721 (Alder (Lost 40)/Rasler road construction); ER-70 (Kokwel EA Roads cumulative effects analysis omitting mention of Alder (Lost 40)/Rasler road construction). The combined environmental impact of the Alder (Lost 40)/Rasler timber sales would have been useful to the public and the decision-maker because the Kokwel timber sale will also construct "2.92 miles of [] road."[10] ER-69. Instead of disclosing the incremental effect of road construction from the Alder (Lost 40)/Rasler timber sales and the Kokwel timber sale, the Bureau simply provides the total number of miles of road within the entire 73,499 acre Action Area. ER-69, 70. This type of

[10] New roads often result in the introduction of noxious weeds. The Kokwel EA cumulative effects analysis fails to disclose impact from noxious weeds as a result of the combined construction of 6 miles of new, permanent roads. *See* ER-54-55.

analysis, while it may indicate a good start, has been deemed inadequate by this Court:

> Moreover, while a tally of the total road construction anticipated in the SFLBC watershed is definitely a good start to an adequate analysis, stating the total miles of roads to be constructed is similar to merely stating the sum of the acres to be harvested – it is not a description of *actual* environmental effects.

Klamath-Siskiyou, 387 F.3d at 995. The Bureau's minimal showing falls short of this Circuit's well-established precedent.

The Bureau also makes claims that are contrary to common sense and the Bureau's own disclsoures. For example, the Bureau states, without support, that "[o]ver time, the expected cumulative effect of incremental improvements from each project is to reduce road density and improve road conditions in the watershed." ER-70. If the timber sales are concurrently constructing over 6 miles of new roads, then an expected reduction in road density is simply unrealistic and unsupported by the facts. *See Motor Vehicle Mfrs. Ass'n., Inc.*, 463 U.S. at 43 (agency action arbitrary and capricious if agency "offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). Therefore, the Bureau's failure to analyze the cumulative effect of road construction from all timber sales was arbitrary and capricious.

c. The Kokwel timber sale EA discloses effects only from the proposed action, not incremental effects of present or reasonably foreseeable actions

When the Kokwel EA discloses substantive information in the cumulative effects analysis, that information pertains to the proposed action, not other present or reasonably foreseeable actions. The crux of NEPA's cumulative effects analysis, however, is that the agency must discuss interrelated and incremental effects of the proposed action *and other past, present, and reasonably foreseeable actions*. For example, in *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592, 603 (9th Cir. 2010), the Ninth Circuit determined "that the bulk of the EA's discussion … focuses on the effects of the Amendment itself, rather than the combined impacts resulting from the activities of the Amendment with other projects." The *Te-Moak* Court held that "[t]he EA's discussion of the Amendment's direct effects in lieu of a discussion of cumulative impacts is inadequate." *Id.* at 604; *see also Klamath-Siskiyou*, 387 F 3d at 996 (inadequate analysis that "only considers the effects of the very project at issue" and does not "take into account the combined effects that can be expected as a result of undertaking" multiple projects).

Here, because the Bureau failed to incorporate the Alder (Lost 40)/Rasler timber sales into any cumulative effects analysis, the Bureau simply reiterates the logging prescriptions for the Kokwel timber sale. For example, the cumulative

effects section for water quality focuses exclusively on the Kokwel timber sale without addressing other actions:

> Approximately 268 acres of late seral Douglas-fir/western hemlock forest would be regeneration harvested in Matrix lands. Approximately 221 acres within the matrix would be thinned. Approximately 69 acres of Riparian Reserves would be thinned, with timber felling resulting in a slight negative (-) effect on small woody debris, but the impact to coho and their critical habitat would be negligible, and the impact on large woody development would be positive (+) over time.

See ER-84. If the Bureau is not addressing related present or reasonably foreseeable projects, then the Bureau is not conducting a cumulative effects analysis.

4. The Bureau's litigation position for cumulative effects is not supported by the Kokwel EA or Administrative Record

Below, the Bureau's litigation position was that the Kokwel EA assumes the impacts from all past, present, and reasonably foreseeable actions without actually disclosing those impacts to the public. *See* ER-18 n. 12. First, the agency cannot rely on post hoc rationalizations of agency action. Second, the agency's litigation position is contradicted by the EA and administrative record. Finally, even if the agency did incorporate all past, present, and reasonably foreseeable actions, doing so is contrary to well-established precedent.

The "simple but fundamental rule of administrative law" that "a reviewing court, in dealing with a determination or judgment which an administrative agency

alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC*, 332 U.S. at 196; *Ctr for Biological Diversity*, 508 F.3d at 526; *Camp v. Pitts*, 411 U.S. 138, 143 (1973) ("the validity of the agency action must stand or fall on the propriety of that finding, judged, of course, by the appropriate standard of review. If that finding is not sustainable on the administrative record made, then the [ ] decision must be vacated and remanded … for further consideration."); *American Textile Mfrs. Inst., Inc., v. Donovan*, 452 U.S. 490, 539 (1981) (post hoc rationalizations "cannot serve as a sufficient predicate for agency action"); *see also Hazardous Waste Treatment Council v. EPA*, 886 F.2d 355, 374 n.1 (D.C. Cir. 1989) (concurring op. Silberman) ("only the agency's explanation of its ultimate choice, not its prior musings nor, ordinarily, its post hoc rationalizations in court ... are proper subjects for review") (citations omitted). Thus, this Court should not accept the Bureau's post hoc rationale.

Contrary to the Bureau's litigation position, the Kokwel EA openly admits that only past actions are assumed and incorporated into the EA: "The following descriptions of the No Action Alternative and the Proposed Action assume the combined relevant effects of *all past actions*. It is not necessary to individually identify or catalog these *past actions* as the description of the affected environment incorporates all those actions." ER-49 (emphasis added). On the same page, the

Kokwel EA concedes that the actions listed in Table 8 are those actions that will be specifically addressed in the appropriate cumulative effects section: "Table 8 lists treatments proposed for the foreseeable future on [Coquille Indian Tribe] lands in the analysis area that *will be considered in the following resource-specific cumulative impact discussions*." *Id.* (emphasis added). Table 8, at ER-50, lists only the Alder (Lost 40)/Rasler timber sales, and, therefore, according to the Kokwel EA, the Alder (Lost 40)/Rasler timber sales should be specifically addressed in the "resource-specific cumulative impact discussions." The District Court erred because it accepted the agency's unsupported litigation position, ER-20 ("the Kokwel EA appropriately aggregated the impacts of the Alder (Lost 40)/Rasler timber sales"), which is contrary to the assertions in the EA, as noted above.

Specifically, the Bureau's litigation position relied on the Council on Environmental Quality's (CEQ) June 24, 2005, memorandum entitled "Guidance on the Consideration of Past Actions in Cumulative Effects Analysis." *See* ER-18 (citing *Bark v. U.S. BLM,* 643 F. Supp. 2d 1214, 1223 (D. Or. 2009) and the case's reference to the CEQ memorandum). First, had the agency actually relied on this CEQ memorandum when preparing the Kokwel EA, then the Bureau would have said so in the Kokwel EA. To do otherwise is straightforward post hoc rationalization. Indeed, the Kokwel EA does not contain a single reference to the

CEQ memorandum, and, therefore, it was error to accept an argument not arising from the agency's position below. Second, even if the Bureau's reliance on the CEQ memorandum is not a post hoc rationalization, the agency's reliance on the CEQ memorandum was misplaced because it does not permit the aggregation of present and reasonably foreseeable actions, as demonstrated below.

5. The Bureau and the District Court misconstrued the CEQ Memorandum

Even assuming the Bureau had explicitly relied on the CEQ memorandum, which it did not, that memo does not authorize aggregation of ongoing or reasonably foreseeable actions. The CEQ memorandum only relates to *past actions*, as indicated by the title: "Guidance on the Consideration of *Past Actions* in Cumulative Effects Analysis." *See* ER-811-814.

The body of the memorandum provides guidance on aggregating cumulative effects from past actions, not ongoing or reasonably foreseeable actions:

> In this Memorandum, the Council on Environmental Quality (CEQ) provides guidance on the extent to which agencies of the Federal government are required to analyze the environmental *effects of past actions* when they describe the cumulative environmental effect of a proposed action in accordance with Section 102 of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the CEQ Regulations for Implementing the Procedural Provisions of NEPA, 40 C.F.R. parts 1500-1508. ER-811.
>
> The environmental analysis required under NEPA is forward-looking, in that it focuses on the potential impacts of the proposed action that an agency is considering. Thus, *review of past actions is required to the extent that this review informs agency decisionmaking regarding the proposed action*. *Id*.

> [T]he *effects of past actions* may warrant consideration in the analysis of the cumulative effects of a proposal for agency action. CEQ interprets NEPA and CEQ's NEPA regulations on cumulative effects as requiring analysis and a concise description of *the identifiable present effects of past actions* to the extent that they are relevant and useful in analyzing whether the reasonably foreseeable effects of the agency proposal for action and its alternatives may have a continuing, additive and significant relationship to those effects. *Id*.
>
> Based on scoping, agencies have discretion to determine whether, and to what extent, information about the specific nature, design, or *present effects of a past action* is useful for the agency's analysis of the effects of a proposal for agency action and its reasonable alternatives. Agencies are not required to list or analyze *the effects of individual past actions* unless such information is necessary to describe the cumulative effect of all past actions combined. ER-811-12.
>
> CEQ regulations do not require the consideration of *the individual effects of all past actions* to determine the present effects of past actions. ER-813.
>
> Generally, agencies can conduct an adequate cumulative effects analysis by focusing on *the current aggregate effects of past actions* without delving into the historical details of individual past actions. ER-812.

(emphasis added). The clear import of the CEQ memorandum is that aggregating effects applies to *past actions*. Plaintiffs cited specifically to this CEQ memorandum, but the Magistrate determined that the Bureau could aggregate present and reasonably foreseeable cumulative effects: "The issue here essentially reduces to whether the baseline approach to a cumulative effects analysis may be utilized when those impacts derive from other ongoing projects. Plaintiffs fail to present sufficient authority for the proposition that the Bureau may not engage in such analysis." ER-18. The Magistrate's interpretation is at odds with the CEQ

memorandum and nullifies NEPA's requirement to conduct a cumulative effects analysis for reasonably foreseeable actions. *See* 40 C.F.R. § 1508.7.

To support the notion that agencies can aggregate cumulative effects of present and reasonably foreseeable actions, the Magistrate cited to *dicta* in *Tongass Conservation Soc. v. U.S. Forest Service*, 455 Fed. Appx. 774, 777 (9th Cir. 2011): "the Ninth Circuit has stated, although in an unpublished opinion, that it has not been shown that the aggregation of cumulative impacts which has been allowed for past timber harvests, may not be applied to harvests that have already been approved under a separate environmental impact statement." ER-19-20. The statement is *dicta* because it is not necessary to the holding. *See Tool Research and Engineering Corp. v. Honcor Corp.*, 367 F.2d 449, 453 (9th Cir. 1966) ("language in the opinion appear to be to the contrary is dictum, and not necessary to the holding of the case"); *Dyer v. Calderon*, 151 F.3d 970, 991 (9th Cir. 1998) (O'Scannlain's dissenting) ("statements … were dicta not necessary to the holding"). In *Tongass Conservation Soc'y,* the plaintiffs lost their cumulative effects claim because (1) they had "not shown that the Forest Service did not take a 'hard look' at the cumulative impacts of future projects together with the Logjam project"; (2) they did not "raise[ ] concerns about the the[ ] future projects before the Forest Service" and were thus barred "from raising the matter before th[e] court"; and (3) the plaintiffs' allegation of "error was harmless" *Tongass*

Conservation Soc'y, 455 Fed. Appx. at 776-7. After addressing several of the above, the Ninth Circuit found that the plaintiffs have:

> not shown that the aggregation of cumulative impacts, *which the Ninth Circuit allows for past timber harvests*, *see Ecology Ctr. v. Castaneda*, 574 F.3d 652, 667 (9th Cir. 2009), may not be applied to harvests that have already been approved under a separate environmental impact statement. In any event, there is no suggestion that the Forest Service hid, or failed to consider, any relevant information regarding cumulative impacts.

Id. at 777. This above statement is not necessary to the holding in that case, and, as noted above, the CEQ memorandum is directed at *past actions*, not present or reasonably foreseeable actions.

In addition, *Tongass Conservation Soc'y* is an unpublished memorandum that provides that "[t]his disposition is not appropriate for publication and *is not precedent except as provided by 9th Cir. R. 36-3*," *Id.* at n. * (emphasis added). Although these memorandum opinions can be cited if published after January 1, 2007, it acts as precedent in limited circumstances: "**Not precedent**. Unpublished disposition and orders of this Court are not precedent, except when relevant under the doctrine of law of the case or rules of claim preclusion or issue preclusion." FRAP 36-3(a) (emphasis in original). The issue here is not related to law of the case, claim preclusion, or issue preclusion, and, therefore, it was error for the Magistrate to cite *Tongass Conservation Soc'y* as though it established precedent for courts within the Ninth Circuit. ER-19-20.

The Magistrate also cited to *Bark*, 643 F.Supp.2d at 1223, to support the contention that agencies can aggregate the cumulative effects of present and ongoing timber sales. This finding, however, misconstrues *Bark* because that case addressed only *past actions, not present or reasonably foreseeable actions*:

> the BLM adequately considered other past, present, or foreseeable projects that could cumulatively affect owl habitat with the proposed action. The EA describes the vegetative condition of the project area and past management activities. This baseline data serves to aggregate *past effects and does not require the agency to detail in a particular procedural fashion the impact of past actions*. *Additionally, Bark does not cite any future activities within the NSO provincial home range that would contribute to cumulative impacts*. Thus, there is no evidence to conclude that the BLM acted irrationally in its method of calculating cumulative impacts.

Bark, at 1227-1228 (emphasis added). Simply put, the holding in that case was not related to aggregating present or reasonably foreseeable timber sales, only past timber sales because the Plaintiff did not "cite to any future activities within" the spotted owl's home range.

The Magistrate also erred by finding that *Ecology Center v. Castaneda*, 574 F.3d 652 (9th Cir. 2009), and *League of Wilderness Defenders-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211 (9th Cir. 2008) (*LOWD*), were not controlling. *See* ER-19. The Magistrate found that these two cases:

> do not go so far as to foreclose such an analysis for ongoing projects. In fact, the *Ecology Center* court specifically determined that the agency's reference to 'past and *proposed* activities' and providing of data on the cumulative effects 'with other *pending* proposals' provided a sufficient aggregated discussion.

ER-19 (emphasis in original). In *Ecology Center*, only *past* projects were challenged: "WildWest complains the cumulative impact statements do not contain discussion of *prior projects* on an individual basis," *Id.* at 666; *id.* at 667 ("[w]e reiterate that an aggregated cumulative effects analysis that includes *relevant past projects* is sufficient"); *id*. at 667; *id.* ("The record includes extensive evidence that the Forest Service considered the relevant *prior and related actions* and took the requisite hard look before approving the challenged projects"). The Magistrate's reference to "past and proposed" and "other pending proposals" was not relevant to the plaintiffs' cumulative effects claim regarding past projects. The entire quote from *Ecology Center* provides:

> We reiterate that an aggregated cumulative effects analysis that includes *relevant* past projects is sufficient.
>
> The Forest Service met this standard here. Generally, the Forest Service explained in each EIS what the effects of the project would be, including the existing condition of each area along several variables. The Pipestone EIS explicitly notes there have been no previous timber harvests in this area, and there will therefore be no cumulative impacts. Although the cumulative effects section of the West Troy EIS merely refers generally to 'past and proposed activities,' without listing details about those activities, other parts of the EIS give extensive history about past actions in the area, dating all the way back to the early 1900s. Bristow's EIS provides data on the cumulative effects with other pending proposals and mitigation in areas with previous harvests.

Id. (emphasis in original). The *Ecology Center* court clearly stated that the aggregate method applies to relevant past projects, and the word "proposed" is simply quoted from a heading in the EIS. The word "proposed" has no relation to

the claims in that case. The word "pending" that the Magistrate also focused upon simply states that an EIS provided "data on the cumulative effects with other pending proposals." This cannot be read to aggregate effects because, unlike here, the agency there actually provided data about the "pending proposals."

The Magistrate also erred in his consideration of *LOWD*. *See* ER-19. There, the Ninth Circuit disagreed with the District Court's analysis of *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004), but determined that another authority, the CEQ memorandum at issue, allowed the Forest Service to aggregate past cumulative effects:

> We conclude, however, that a different source does permit the Forest Service to consider cumulative effects in the aggregate. During the summary judgment proceedings, the Forest *Service* introduced a June 24, 2005 memorandum issued by the Chairman of the Council on Environmental Quality (CEQ), entitled "Guidance on Consideration of Past Actions in Cumulative Effects Analysis." This CEQ memorandum advises that "[a]gencies are not required to list or analyze *the effects of individual past actions unless such information is necessary to describe the cumulative effects of all past actions combined*." Instead, the memorandum explains, "agencies can conduct an adequate cumulative effects analysis by *focusing on the current aggregate effects of past actions without delving into the historical details of individual past actions*."
> …
> Similarly here, CEQ's interpretation that 40 C.F.R. § 1508.7 *permits consideration of all past impacts in the aggregate* is not plainly erroneous or inconsistent with the language of the regulation, and CEQ is the agency charged with interpreting NEPA and that adopted the regulation…. The CEQ memorandum is therefore entitled to *Auer* deference and, as a result, we hold that the Forest Service may aggregate its cumulative effects analysis pursuant to 40 C.F.R. § 1508.7.

LOWD, 549 F.3d at 1218. Again, citing to the CEQ memorandum, the Ninth Circuit concluded that the aggregate method applies to the past actions, consistent with the deference attributable to the CEQ in their interpretation of NEPA's regulations. Because the CEQ memorandum did not interpret 40 C.F.R. § 1508.7 to allow aggregating present and foreseeable actions, the Magistrate erred in holding to the contrary.

Practically speaking, it makes sense to aggregate impacts from past actions because those impacts have already occurred and, therefore, are identifiable. Aggregating impacts from present and reasonably foreseeable impacts, on the other hand, makes little sense because those impacts have *not yet occurred*. There is simply no way for the public to verify the impacts from actions that have not yet occurred, and, therefore, the public would have to blindly accept the agency's conclusory assertions, something the Ninth Circuit expressly prohibits. *See Barnes,*, 655 F.3d at 1131 ("the agencies would like this court to take their word for it and not question their conclusory assertions"; "their word, however, is not entitled to significant deference that courts give [agency methodology]").

The Magistrate also relied on a D.C. Circuit court case. *Coalition on Sensible Transp., Inc. v. Dole*, 826 F.2d 60 (D.C. Cir. 1987). ER-18-19. The Magistrate cited to the following statement in *Dole*: "[i]t makes sense to consider the 'incremental impact' of a project for possible cumulative effects by

incorporating the effects of other projects into the background 'data base' of the project at issue, rather than by restating the results of the prior studies." *Dole*, 926 F.2d at 70-71. The Magistrate also cited from the *Dole* case (at ER-19), stating that "[f]urther analysis in the present EA or FONSI would be redundant and in no material way serve the purposes of NEPA. The EA and FONSI were sufficient to alert interested members of the public to any arguable cumulative impacts involving these other projects."

First, the Ninth Circuit has never sanctioned a cumulative effects analysis that "incorporate[es] the effects of other projects" that are present or reasonably foreseeable. Second, disclosing and analyzing the incremental and additive cumulative effects of the Kokwel and Alder (Lost 40)/Rasler timber sales would not have been redundant because the Kokwel EA contains no information related to the Alder (Lost 40)/Rasler timber sales. More importantly, from reading the Kokwel EA, the public would not know that the timber sales are immediately adjacent; that both timber sales were likely to adversely affect listed species; that both timber sales would log throughout almost two square miles in Sections 25 and 24, Township 30 South, Range 11 West, and so forth. ER-721 (Alder (Lost 40)/Rasler); ER-29 (Kokwel); ER-143 ¶ 59.

For those areas not logged pursuant to the Kokwel timber sale and Alder (Lost 40)/Rasler timber sales within Sections 24 and 25, they were previously

logged, as can be seen from the lack of canopy cover in the scribbled areas at ER-715. This is significant because the area containing the two timber sales contains four northern spotted owl home ranges, ER-332, and numerous marbled murrelet sites, ER-715(red circles indicating "mamu sites"); ER-55 ("seven home ranges overlap the action area and four (2348O, 4700O, 2185O, and 2187O) would be impacted by the action, either through removal or modification of habitat or by disturbance"). Even if the Alder (Lost 40)/Rasler timber sales were incorporated into the baseline, doing so does nothing to alert the public to the cumulative effects between the concurrent and immediately adjacent timber sales because no effects of the Alder (Lost 40)/Rasler timber sales were disclosed in the Kokwel EA.

The Magistrate also cited to *Save Strawberry Canyon v. U.S. Dept of Energy*, 830 F.Supp.2d 737 (N.D. Cal 2011), stating:

> Instead, DOE's analysis factored in recently completing, ongoing, planned, pending and/or reasonably foreseeable proposed actions in the surrounding area and in the same general time frame after the CRT project, from 2010 through 2018 …. Agencies are permitted to do this and DOE's decision to do so here was reasonable. *See Pac. Coast Fed'n of Fishermen's Ass'ns* [*v. U.S. Bureau of Reclamation*], 426 F.3d [1082], 1090 [(9th Cir. 2005)]; *Grand Canyon Trust v. Fed. Aviation Admin*., 290 F.3d 339, 342 (D.C. Cir. 2002).

ER-20. The two cases cited in support, however, do not support the cited proposition. *Pac. Coast Fed'n of Fishermen's Ass'ns* does not even include a NEPA claim, let alone a cumulative effects claim. *Pac. Coast Fed'n of Fishermen's Ass'ns*, 426 F.3d at 1090. *Pac. Coast Fed'n of Fishermen's Ass'ns*

was a challenge under the APA to a biological opinion pursuant to the Endangered Species Act.

The next case cited in *Strawberry Canyon* is *Grand Canyon Trust*, 290 F.3d 339. In *Grand Canyon Trust*, the D.C. District Court found that an EA was inadequate for failure to adequately identify cumulative effects of noise from an airport:

> The analysis in the EA does not address the accumulated, or total, incremental impacts of various man-made noises, such as the 250 daily aircraft flights near or over the Park that originate at, or have as their destination, airports other than that in St. George. Neither does the EA consider in any manner the air tours near and over the Park originating from the St. George airport. Nor does the EA address the impact, much less the cumulative impact, of noise in the Park as a result of other activities, such as the planned expansions of other regional airports that have flights near or over the Park. Without analyzing the total noise impact on the Park as a result of the construction of the replacement airport, the FAA is not in a position to determine whether the additional noise that is projected to come from the expansion of the St. George airport facility at a new location would cause a significant environmental impact on the Park and, thus, to require preparation of an EIS.

Grand Canyon Trust, 290 F.3d at 346. Simply put, the *Grand Canyon Trust* case stands for the proposition that agencies must analyze the "total, incremental impacts," not that an agency can avoid a cumulative effects analysis by aggregating present and reasonably foreseeable actions. Therefore, neither *Pac. Coast Fed'n of Fishermen's Ass'ns* nor *Grand Canyon Trust* stand for the position that they were cited in the *Strawberry Canyon* case.

Regardless of that error, the court in *Strawberry Canyon* went on to find that the agency provided analysis of the impact from the future projects, in conjunction with the existing project: "The EA then made clear that in developing a list of future projects, it included only those projects that had reached approval or where funding was otherwise anticipated. *The EA listed each such project and included information regarding the net impact the projects would have on traffic.*" *Strawberry Canyon*, 830 F.Supp.2d at 752. Thus, in *Strawberry Canyon*, the agency actually provided analysis about the combined, incremental impact from the project and the future projects. Here, that simply did not occur, as noted above.

Thus, the agency failed to disclose the cumulative effect of the Kokwel timber sale when combined with the adjacent and overlapping Alder (Lost 40)/Rasler timber sales, and, therefore, Kokwel timber sale EA violates NEPA.

II. THE BUREAU VIOLATED THE COQUILLE RESTORATION ACT

A. The Kokwel timber sale violates the Coquille Restoration Act

Pursuant to the Coquille Restoration Act, the Bureau manages the Coquille Forest subject to the "standards and guidelines of Federal forest plans on adjacent or nearby Federal lands, now and in the future." 25 U.S.C. § 715c(d)(5). "Federal lands adjacent to the Coquille Forest are managed under the BLM Coos Bay District – Final Proposed Resource Management Plan [PRMP] /Environmental Impact Statement

[EIS] dated September 1994.[11]" ER-224. The Coquille Forest Resource Management Plan, which "adopt[s] the existing BLM Coos Bay District Final PRMP/EIS [CBD-RMP] as the Resource Management Plan and Environmental Impact Statement for management of the Coquille Forest" and "standards and guidelines from the CBD-RMP…are applicable to the Coquille Forest lands." *Id*.

The undisputed definition of a "standard and guideline" is the "rules and limits governing actions, and the principles specifying the environmental conditions or levels to be achieved and maintained."[12] ER-433. The Coos Bay RMP, finalized after the Northwest Forest Plan (NWFP), defines both the "Objectives" and "Management Actions/Directs" of the RMP in exactly those same terms:

> Each land use allocation will be managed according to specific objectives and management actions/direction. During initial implementation of the plan, *the stated objectives and management actions/direction will provide the direction and limits that govern actions and also provide the principles that specify the environmental conditions or levels to be achieved and maintained*. The stated objectives and management actions/direction will be refined as BLM gains experience in implementing the plan and applying the adaptive management concepts for specific geographic areas."

[11] In May 1995, the BLM Oregon/Washington State Director issued a Record of Decision approving the PRMP/EIS as the Coos Bay District Resource Management Plan. ER-224.

[12] Below, both the Bureau and Intervenors cited this definition of "standards and guidelines," and argued Congress's use of the term was unambiguous. *See* ER 13-14 (citing definition of "standard and guideline").

ER-229 (emphasis added). Thus, by its plain language, the "standards and guidelines" of the Coos Bay RMP include both the "objectives" and corresponding "management actions/direction."

A specific objective of the Coos Bay RMP requires that land managers "[p]rotect, manage, and conserve federal listed and proposed species and their habitats to achieve their recovery in compliance with… approved recovery plans…." ER-230. The corresponding management actions/direction within the RMP provides: "Consult with the [USFWS] or National Marine Fisheries Service … for any proposed action that may affect federal listed or proposed species or their critical or essential habitat. Based on the results of consultation/conferencing, modify, relocate, or abandon the proposed action." *Id*. Accordingly, when a project will affect federally listed species, the agency must consult with the USFWS, and based upon that consultation, the RMP requires that the Bureau modify, relocate, or abandon the proposed action to achieve recovery plan compliance.

B. The Kokwel timber sale is not in compliance with the spotted owl's recovery plan

The "primary spotted owl recovery goal … for moist forests is to conserve older stands that are either occupied or contain high-value spotted owl habitat." ER-489. Recovery plans contain recovery actions that "guide the activities needed to accomplish the recovery objectives" for the species. ER-445. The two primary recovery actions applicable to the Kokwel timber sale are Recovery Actions 10 and

32. *See* ER-489 ("primary spotted owl recovery goal … for moist forests is to conserve older stands that are either occupied or contain high-value spotted owl habitat," discussed in Recovery Actions 10 and 32).

Recovery Action 10 directs federal agencies to "[c]onserve spotted owl sites and high value spotted owl habitat to provide additional demographic support to the spotted owl population." ER-515. This includes currently occupied sites and historic sites. ER-514. Recovery Action 32, in turn, provides:

> Because spotted owl recovery requires well distributed, older and more structurally complex multi-layered conifer forests on federal and non-federal lands across its range, land managers should work with the Service as described below to maintain and restore such habitat while allowing for other threats, such as fire and insects, to be addressed by restoration management actions. These high-quality spotted owl habitat stands are characterized as having large diameter trees, high amounts of canopy cover, and decadence components such as broken-topped live trees, mistletoe, cavities, large snags, and fallen trees.

ER-539. Recovery Actions 10 and 32 apply to both reserved and non-reserved land allocations. ER-293; ER-489 ("On Federal lands [Recovery Action 10 and Recovery Action 32] apply to reserved and non-reserved land allocations).

The Bureau consulted with the USFWS. The USFWS found the project to be inconsistent with the spotted owl's recovery plan, specifically Recovery Actions 10 and 32, and the USFWS suggested modifications. ER-293 (the "proposed action is … inconsistent with Recovery Actions 10 and 32"); ER-301. Instead of heeding the USFWS' recommendations, the Bureau ignored the modifications that would have

otherwise made the timber sale consistent with the recovery plan and the Coos Bay RMP. ER-140, ¶¶ 38, 39; *see Bennett v. Spear*, 520 U.S. 154, 170 (1997) ("The action agency is technically free to disregard the Biological Opinion and proceed with its proposed action, but it does so at its own peril…."). Below, the Kokwel timber sale's inconsistency with the spotted owl's recovery plan was not contested by the Bureau or Intervenor.

C. The Bureau's compliance with the Coos Bay RMP is not discretionary

Courts have repeatedly held that compliance with a Forest Plan's standards is *not* discretionary. *See* 25 U.S.C. § 715c(d)(5) (the Bureau "shall manage the Coquille Forest …subject to the standards and guidelines of Federal forest plans on adjacent or nearby federal lands."); *see also McNair*, 537 F.3d at 989 ("After a forest plan is developed, all subsequent agency action, including site-specific plans [] must … be consistent with the governing forest plan."); *see Rittenhouse*, 305 F.3d at 962 (citing *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 757 (9th Cir.1996) ("[A]ll management activities undertaken by the Forest Service must comply with the forest plan, which in turn must comply with the Forest Act.").

Here, the Coos Bay RMP unambiguously requires compliance with the recovery plan, and, the case law demonstrates that such compliance is non-discretionary. Accordingly, the Bureau's decision to proceed with a timber sale that is admittedly inconsistent with the spotted owl's recovery plan is unlawful. If a forest

plan is unambiguous, then the agency is not given deference in the application of the forest plan. *See Powell,* 395 F.3d at 1034. ("[t]here is no call for deference to the agency's legal interpretation" where a plan standard is unambiguous).

The District Court accepted the Bureau's argument that compliance with Recovery Plans is discretionary, ER-13, citing numerous statements by the USFWS to this effect. However, these citations (at ER-13, n. 8) are references to the fact that Recovery Plan compliance is discretionary *under the ESA,* and all of the cases that have held such have been ESA cases. *See Fund for Animals, Inc. v. Rice,* 85 F.3d 535, 547-48 (11th Cir. 1996). This case does not arise under the ESA, and standards applicable to the ESA do not apply here. The Court applied the wrong standard, and, therefore, the Court's grant of discretionary compliance with the governing forest plan is clear error.

The District Court next found that the "standards and guidelines" of the Coos Bay RMP only include the management actions/direction portion of the plan. ER-14. Neither the District Court nor the Bureau provided any rationale or citation for excluding "objectives" from the definition of standards and guidelines, which includes both the objectives and corresponding management actions. Instead, the District Court determined that it was reasonable for the Bureau to do so.[13] *Id.* This

[13] As explained above, the Coos Bay Resource Management Plan defines its "objectives and management actions/direction" as the standards and guidelines of the plan, the "rules and limits governing actions, and the principles specifying the

determination was in error because it conflicts with the unambiguous definition in the Coos Bay RMP. *See Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 962 (9th Cir. 2005).

The District Court also interpreted the Coquille Restoration Act's reference to "standards and guidelines of Federal forest plans on adjacent or nearby lands, now and in the future" to refer only to the standards and guidelines of the Northwest Forest Plan (NWFP) because "[t]he NWP is the only document where the term standards and guidelines appears." ER-15. This finding is belied by the by Coquille Forest RMP and the NWFP. Furthermore, the finding is contrary to the language Congress used, and is, therefore, functionally unworkable for the following reasons.

First, the Court's interpretation conflicts with the "now and in the future" language of the Coquille Restoration Act, that the management regime will change over time.[14] If Congress had intended this "standard and guideline" to refer only to the static 1994 NWFP, it would render this "now and in the future" language meaningless and superfluous. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.'" *TRW, Inc. v. Andrus*, 534 U.S. 19, 31 (2001), (quoting *Duncan v. Walker*, 533 U.S. 167, 174

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environmental conditions or levels to be achieved and maintained." ER-433; 229).

[14] The Coquille Forest must comply with "the standards and guidelines of Federal forest plans on adjacent or nearby lands, *now and in the future*." 25 U.S.C. § 715c(d)(5) (emphasis added).

(2001)); *see also United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute."). Therefore, Congress intended for the Coquille Forest to be subject to the existing forest plan and any future amendments adopted by the Coos Bay BLM.

Second, the Coquille Forest RMP, according to its own terms, "adopt[s] the existing BLM Coos Bay District Final PRMP/EIS [CBD-RMP] as the Resource Management Plan and Environmental Impact Statement for management of the Coquille Forest" and "standards and guidelines from the CBD-RMP…are applicable to the Coquille Forest lands." ER-224. The Coquille Forest Plan does not limit its application to the NWFP. The Bureau interpreted the Coquille Restoration Act to include the standards and guidelines of the Coos Bay RMP, not just NWFP.

Third, the District Court concluded that the Coquille Forest is subject to "other management actions/direction" within the Coos Bay RMP besides the NWFP standards and guidelines. If Congress intended "standards and guidelines" to refer only to the NWFP, then the Bureau's management of the Coquille Forest would not be subject to the "other management actions/direction" in the Coos Bay RMP," which the District Court acknowledged at ER-12 ("Thus, the CBRMP is only applicable to the extent it incorporates the N[W]FP's Standards and Guidelines and *other management actions/directions*."). The District Court's order thus contradicts itself and conflicts

with the Bureau's position below that it must comply with the neighboring federal forest land RMP.

Finally, if Congress wanted the Coquille Forest's management to be subject to the standards and guidelines of the NWP, it could have said so. It did not. Congress said it was subject to the standards and guidelines of the forest plan on the adjacent federal land, which is admittedly the Coos Bay RMP. *See* ER-224 ("the most efficient and effective manner to comply with this management mandate is to adopt the existing BLM Coos Bay District Final PRMP/EIS [CBD-RMP] as the Resource Management Plan and Environmental Impact Statement for management of the Coquille Forest."). "The most persuasive evidence of ... [Congressional] intent is the words selected by Congress. *Turner v. McMahona*, 830 F.2d 1003, 1007 (9th Cir. 1987), *cert denied*, 488 U.S. 818 (1988) (cited in *Washington PIRG v. Pendelton Woolen Mills*, 11 F.3d 883, 886 (9th Cir. 1993)).

In short, the statute is unambiguous and requires that the Bureau and Intervenor comply with the Coos Bay RMP. 25 U.S.C. § 715c(d)(5); ER-224. The Coos Bay RMP, in turn, unambiguously requires compliance with the spotted owl recovery plan, and requires modification, relocation, or abandonment of a project after consulting with USFWS to ensure consistency with the recovery plan. ER-230. Because the language of the RMP is unambiguous, the agency is afforded no deference in its interpretation. *See Powell*, 395 F.3d at 1034. Finally, the District Court's findings are

inconsistent with the plain language of the Coquille Restoration Act, render portions of that statute superfluous. Therefore, the District Court erred in granting Summary Judgment in favor of the Bureau and Intervenor.

III. CONCLUSION

For the foregoing reasons, Cascadia Wildlands respectfully requests that this Court reverse the District Court and vacate the EA, FONSI, and Decision Notice for the Kokwel timber sale.

Respectfully submitted this 12th day of September, 2014.

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STATEMENT OF RELATED CASES

No other cases currently before the Ninth Circuit Court of Appeals are related to this case.

Ninth Circuit Case No. 14-35553
Certificate of Compliance Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and (C) and Ninth Circuit Rule 32-1

I, Sean Malone, certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 13,990 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2007, font size 14, and Times New Roman type style.

/s/ Nicholas S. Cady
Attorney for Appellants
Date: September 12, 2014

Ninth Circuit Case No. 14-35553

Certificate of Service

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 12, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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