

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

SISKIYOU REGIONAL EDUCATION  
PROJECT, et al.,

Civil No. 04-3058-CO  
(lead case)

Plaintiffs,

CONSOLIDATED CASES

v.

ORDER

LINDA GOODMAN, et al.,

\_\_\_\_\_Defendants.

Plaintiffs in these consolidated cases ask the court to enjoin ground disturbing activities on six salvage timber sales on the Siskiyou National Forest. The sales are among activities authorized by the late-successional reserve component (LSR ROD) of the Biscuit Fire Recovery Project (Biscuit Project).

Background

Lightning ignited the Biscuit Fire in the Klamath Mountains on July 13, 2002. These cases arise from the response of the Forest Service (the Service) to the fire, a project the Service

describes as among the largest and most complex in its history. Millions of trees burned during a 120-day period, in an area finally encompassing 499,965 acres, primarily within the Siskiyou National Forest. Twenty-three regional and national fire management teams contributed to fire suppression efforts. Seven thousand firefighters and support people were deployed during the peak of the blaze. The affected area includes nearly all of the Kalmiopsis Wilderness Area, 164,923 acres in late-successional reserves (LSRs), 3,428 acres in Wild and Scenic River Corridors, and approximately 188,000 acres in inventoried roadless areas (IRAs). EIS 2; <<http://www.biscuitfire.com/facts.htm>>. The Kalmiopsis Wilderness Area is well-known as a repository for rare plants, and the Siskiyou National Forest as a whole is similarly renowned for its diversity of plant life. EIS III-113.

Following fire suppression activities, resource specialists analyzed impacts through aerial photography and field reconnaissance. In December, 2002, and January, 2003, the Service held ten public meetings to gather input from residents of affected communities concerning desired treatments and options. On January 30, 2003, the Service published the Biscuit Post-Fire Assessment, setting forth options for moving toward desired conditions. The Service identified needs to recover economic value from burned timber, reduce risk to nearby communities and forest resources from future high intensity fire,

and revegetate burned conifer stands and other burned plant and animal habitats. EIS I-1-6.

The Service issued a draft environmental impact statement (DEIS) on November 23, 2003, triggering a public comment period that ended on January 20, 2004, after a fifteen-day extension. The Service received more than 23,000 comments. In December, 2003, the Service held five more public meetings to explain the DEIS. Approximately 400 people attended these meetings. Thereafter, the Service issued a two-volume, Final EIS (EIS) approximately 1,000 pages in length (including appendices), in which the Service considered seven alternative responses to the fire.

On July 8, 2004, Rogue River-Siskiyou National Forest Supervisor Scott Conroy issued the LSR ROD, authorizing activities in LSRs outside of IRAs. LSR ROD at 1. That ROD and three others issued the same day implement the action described in the EIS as alternative 7. "Alternative 7 was broken down into four RODs in recognition of legal responsibilities and differing land management objectives." LSR ROD at 1. The RODs not implicated in these consolidated cases authorize activities on Forest Service matrix lands outside of IRAs, on Forest Service lands within IRAs, and on lands managed by the Bureau of Land Management. Id.

In issuing the LSR ROD, Conroy decided to "select 6,305

acres of salvage harvest on LSR lands, create 52 miles of Priority 2 fuel management zones, plant 12,700 acres of burned conifer stands and associated riparian reserves, seed 1,630 acres of meadows and savannas, reduce tree encroachment on 590 acres of meadow, maintain 200 miles of road build, and subsequent to use, decommission 1.3 miles of temporary road and road realignments." LSR ROD at 2. Only dead trees with no green needles or leaves are slated for harvest, and harvest will not take place within the Kalmoipsis Wilderness Area. EIS II-35, 52-53.

The LSR ROD authorizes roughly 113 million board feet (mmbf) of salvage timber harvest. Of this quantity, 54.4 mmbf is covered by Regional Forester Linda Goodman's June 3, 2004 emergency situation determination (ESD). The ESD exempts the challenged timber sales from the automatic stay normally triggered by the filing of an administrative appeal, based on Goodman's finding that delaying implementation of the sales would result in substantial economic loss to the federal government. Salvage logging subject to the ESD is slated to occur on one half of one percent of the recovery area, and 1.5% of LSRs within the recovery area.

Plaintiffs allege the ESD violates the Appeals Reform Act (ARA) (16 U.S.C. § 1612), the Service violated the National Environmental Policy Act (NEPA) (43 U.S.C. § 4321 et seq.) in failing to adequately evaluate environmental consequences of the

project, and the Service violated the National Forest Management Act (NFMA) (16 U.S.C. § 1600 et seq.) in designing the project and implementing the salvage sales. Plaintiffs ask the court to enjoin ground disturbing activities on timber sales subject to the ESD and authorized by the LSR ROD.

#### Discussion

Preliminary equitable relief is appropriate if plaintiffs demonstrate a likelihood of success on the merits and the possibility of irreparable injury, or the existence of serious questions on the merits and a balance of hardships tipping in their favor. National Wildlife Federation v. Burlington N.R.R., 23 F.3d 1508, 1510 (9<sup>th</sup> Cir. 1994). These tests are points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases. United States v. Nutri-Ecology, Inc., 982 F.2d 394, 397 (9<sup>th</sup> Cir. 1992). The court is required to balance the competing claims of injury and consider harm to each party and the public interest before granting or withholding requested relief. Amoco Production v. Village of Gambell, 480 U.S. 531, 542, 545 (1987). Owing to the nature of many environmental injuries, the balance of harms in environmental cases often favors issuance of an injunction where a plaintiff proves that serious questions are raised and harm to the environment is sufficiently likely. Amoco, supra; National Wildlife Federation, 23 F.3d at 1510.

In evaluating the likelihood that plaintiffs will ultimately prevail on their claims, the court is mindful that judicial review of plaintiffs' claims is governed by the Administrative Procedure Act (APA). Under the APA, the court must set aside agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706. Factual disputes implicating substantial agency expertise are reviewed under the arbitrary and capricious standard, while the Service's legal interpretations are reviewed for reasonableness. Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 964 (9<sup>th</sup> Cir. 2002).

I. Emergency Situation Determination

Plaintiffs first argue that the regulation that authorized Goodman to base her ESD on a finding of substantial loss of economic value to the government violates the ARA, and the ESD is otherwise arbitrary, capricious and an abuse of discretion.

A. Appeals Reform Act

The ARA requires the Service to stay implementation of a decision during a period of administrative appeal unless the Chief determines that an emergency situation exists. 16 U.S.C. § 1612, Note(e). Until 2003, the Service defined "emergency" in its implementing regulations as "an unexpected event, or a serious occurrence or a situation requiring urgent action," examples of which included but were not limited to several types

of environmental damage or unsafe conditions. See 36 C.F.R. § 215.10(d)(1) (2002). In 2003, the Service issued a new regulation defining "emergency situation" to include situations that would result in substantial loss of economic value to the federal government if implementation of the decision were delayed.<sup>1</sup> 36 C.F.R. § 215.2.

The ARA does not define the terms "emergency" or "emergency situation." Plaintiffs urge the court to interpret the term "emergency" consistent with the manner Congress used the term elsewhere in the Appropriations Act. Plaintiffs point to Title II, where Congress appropriated money for the "'Emergency Forest Service Firefighting Fund,' '[f]or necessary expenses for *emergency* rehabilitation, presuppression due to *emergencies* or *economic efficiency* . . .'" (emphasis added). PL 102-381, 1992 HR 5503. The court disagrees that this language evidences Congressional intent that economic considerations may not constitute a basis for an emergency. While it permitted the Emergency Forest Service Firefighting Fund to be expended to achieve economic efficiency, Congress simply did not address whether an imminent substantial loss of economic value to the government may constitute an emergency situation.

Plaintiffs contend that in enacting the 2003 regulations,

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<sup>1</sup>The Service also issued a regulation authorizing the Chief and Associate Chief and certain authorized delegates to make the emergency situation determination. 36 C.F.R. § 215.10(a).

the Service reversed its position as to whether a substantial loss of economic value to the government may provide the basis for an ESD. Plaintiffs cite to a transcript of proceedings in Sierra Club v. Bosworth, No. 01-2626-SC (N.D.Cal. 2001).

However, the Service's position in that case is consistent with the new regulation, although the court disapproved of the Service's interpretation of the old regulation. See Pls' Ex. 5.

Plaintiffs also cite to Kentucky Heartwood v. Worthington, 125 F.Supp.2d 839 (E.D.Ky. 2000) and a memorandum prepared by a former Chief of the Forest Service addressing that opinion.

Plaintiffs assert that the court and the former Chief "clarified that economic considerations were not normally accepted as a reason for an emergency stay exemption." Pls' Memo. at 10.

Interpreting the old regulation, the court held that in order to avoid making an arbitrary decision, the Associate Deputy Chief had to consider potential environmental harm from a stay before issuing an ESD. 125 F.Supp.2d at 844. In his memorandum

addressing the issue on remand, the Chief wrote, "[f]uel loading does not, in and of itself, satisfy the provisions of 36 C.F.R. § 215.10(d) . . . Those criteria center around demonstrating that an emergency situation exists because of imminent risks to public health and safety, private property, or the environment." Pls' Ex. 4 at 3. Neither the court nor the Chief explicitly stated that economic considerations may not suffice.

Plaintiffs finally point to a document prepared by the Service in which it explains that the proposed rule change "defines an emergency to include economic factors that would allow for immediate implementation of approved projects and exemption for stay on projects applied to non-emergency activities." Pls' Ex. 6 at 9. The court cannot fault the Service for not characterizing economic factors as an emergency in explaining the need for the rule change, where the need arises in part from judicial rejection of that characterization.

Because Congress has not addressed the precise question of whether an ESD may rest entirely on loss in economic value to the government, the court must determine whether the regulation is based on a permissible construction of the statute. Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984). Consistent with 36 C.F.R. § 215.10(d)(1) (2002), Webster's defines "emergency" as "an unforeseen combination of circumstances or the resulting state that calls for immediate action," or "an urgent need for assistance or relief." Webster's Collegiate Dictionary 377 (10th Ed., 1996). The position of the Service that an imminent threat of loss of economic value may constitute an emergency is reasonable. Such a circumstance may require immediate action or assistance.

Plaintiffs have not convincingly demonstrated that the Service formerly held an opposite position, and even if it did, a

revised interpretation is entitled to deference if it is justified by experience or changed circumstances. Rust v. Sullivan, 500 U.S. 173, 186-87 (1991). The Service justified the expansion of the emergency definition. "[E]xperience has shown that situations exist which are not covered by the existing regulation. These include loss of economic value." Pls' Ex. 6 at 8. "[D]elayed implementation can affect the feasibility of cost-effective removal." "If the timber is not harvested in a timely manner, the agency may need to use its own funds to have hazardous trees removed for public safety or other trees removed to support fire rehabilitation." Pls. Ex. 6 at 9. The Service's reasonable interpretation is entitled to deference. The court finds no conflict between the new regulation and the ARA.<sup>2</sup> On this record, it appears that plaintiffs are unlikely to prevail on their claim that the new regulation violates the ARA.

#### B. ESD Determination

Plaintiffs next argue there is no rational basis for the ESD. Plaintiffs advance three arguments. First, plaintiffs

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<sup>2</sup>Plaintiffs argue that the emergency exception may swallow the rule of administrative appeal in ordinary cases. The Executive Director of Forest Service Employees for Environmental Ethics opines that 40% of the nation's annual timber harvest value may qualify for exemption from the automatic stay. Stahl Decl., ¶ 15. No evidence speaks to how frequently the Chief, Associate Chief and/or their delegates exempt salvage sales on the basis of substantial economic loss to the government. Absent such evidence, the court cannot say that the Service is defying Congressional intent that emergency situation determinations should be made only in exceptional cases.

contend that the Service improperly assumed a one-year delay in performing its loss calculation, instead of the 105-day period of the automatic stay for administrative appeals. Prorating the Service's numbers, plaintiffs estimate the loss in value to timber from deterioration to be \$1.1 million, not \$3.3 million as found by Goodman. Plaintiffs assert that Conroy's letter to Goodman requesting the ESD evidences that harvest can occur year round. Stahl Decl., ¶ 10. Conroy states in his declaration, however, that his loss analysis assumed full winter production capacity, and restrictions on winter activities due to weather and conservation requirements are significant, so that a 105-day delay cannot be made up in the winter. Thus, volume that would have been harvested during the period of the automatic stay cannot be harvested until the end of the 2005 season. Conroy Decl., ¶¶ 6-9. Conroy sufficiently justified calculating loss of value based on a delay of one year. The court does not conclude that the loss calculations are arbitrary for this reason.

Plaintiffs next argue that Conroy and Goodman based their loss calculations on inflated market values for salvage timber. Goodman reduced Conroy's estimate of market value for salvage timber to \$187.50 per thousand board feet, in order to reflect prevailing market conditions. Pls. Ex. 2. Plaintiffs argue that bid packages released by the Service on July 9, 2004 demonstrate a range of market value between \$39 and \$115 per thousand board

feet. Conroy explains that these rates are minimum bid rates the Service will accept, not estimates of market rates. Conroy Decl., ¶ 10. Conroy further states he based his loss calculations on then-current market data using standard appraisal methods; of the five sales auctioned on July 16, 2004, one sold for three times the advertised rate, two sold for the advertised rate, and two received no bids; and actual market values depend on many factors, including variable market conditions for wood products and the business needs of potential purchasers. Id. It is all too easy to second guess the Service's valuations with hindsight. Goodman adjusted Conroy's valuation to reflect current market conditions, and plaintiffs at best have shown only that those conditions did not prevail on July 16, 2004. The court is deferential to the Service's estimates. Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Svc., 273 F.3d 1229, 1236 (9<sup>th</sup> Cir. 2001). Changed conditions are not enough to demonstrate that the loss calculations were arbitrary at the time Conroy and Goodman performed the calculations.

Citing to Kentucky Heartwood and the Odion and Nawa declarations, plaintiffs finally argue that in rendering the ESD, Goodman failed to consider potential harm that may result from authorized logging activities, including the potential for extreme fire hazard from logging slash. The ESD merely exempts the project from the 105-day automatic stay; the LSR ROD

authorizes logging activities. Further, Kentucky Heartwood predates the effective date of 36 C.F.R. § 215.2 (2003). The new regulation expressly permits an ESD to be based on loss of economic value alone, and the court believes the regulation comports with a reasonable interpretation of the ARA. Plaintiffs are not likely to ultimately prevail on their arguments against the ESD.

## II. NFMA - Northwest Forest Plan LSR Guidelines

\_\_\_\_\_ Plaintiffs next argue that the Service violated NFMA in designing the LSR component of the Biscuit project, because the Service has not demonstrated that salvage logging within LSRs will comply with Northwest Forest Plan (NWFP) Standards and Guidelines (S&G), the project as designed does not retain a sufficient quantity of large snags and the Service does not demonstrate that conditions justify planned research activities in the LSRs.

### A. LSR Salvage Guidelines

The NWFP permits salvage of dead trees in LSRs in compliance with guidelines. NWFP S&G C-13. Eleven general guidelines are intended to prevent negative effects on late successional habitat (LSH) while permitting removal of some volume of commercially viable wood. Id. "While priority should be given to salvage in areas where it will have a positive effect on [LSH], salvage operations should not diminish habitat suitability now or in the

future." Id. Plaintiffs argue that salvage activities within LSRs will negatively impact present and future habitat suitability.

The service addressed the LSR salvage guidelines and determined that its planned activities comply with the eleven general guidelines, as well as the requirement that activities not diminish LSH suitability now or in the future. EIS App. E-51-52, 59-61, 68-69. The Regional Ecosystem Office Interagency LSR Work Group concurred with the Service's conclusion that the salvage activities are consistent with the NWFP. EIS App. E-48-49. Plaintiffs do not address compliance with the eleven general guidelines. Instead, plaintiffs provide the opinions of scientists in support of their argument that the salvage logging in LSRs will negatively impact LSH.<sup>3</sup> Where as here, the Service supports its conclusions with a thorough discussion and reasoned analysis, the court's function is not to referee a dispute between scientists. See Arizona Cattle Growers', 273 F.3d at 1236. The court is not likely to ultimately find that the Service arbitrarily concluded that salvage logging in the LSRs will not negatively impact LSH or habitat suitability.

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<sup>3</sup>Plaintiffs specifically cite to the declarations of Dr. Dominick Della Sala, Dr. Dennis C. Odion, and comments submitted to the Service by Dr. Jerry Franklin. The Service considered many of the opinions advanced by plaintiffs' experts, yet concluded that proposed salvage activities have neutral impact on LSH, and are economically beneficial. See EIS III-3 and App. L, generally, and L-48, 61.

## B. Snag Retention

Plaintiffs restate with more particularity their argument that loss of snags from salvage logging within LSRs is detrimental to LSH, or the development of LSH. Plaintiffs contend that the Service has decided to salvage the greatest percentage of acres in areas dominated by the largest snags, without limit on the maximum size of timber that can be removed, or any specific provision for identifying individual snags to be retained.<sup>4</sup> According to plaintiffs, this scheme violates a guideline command to retain snags that are likely to persist until the return of late-successional characteristics.

In its table addressing compliance with LSR salvage guidelines, the Service states that it will comply with the requirement in NWFP S&G #3 (C-14) to retain snags that are likely to persist until late-successional conditions have redeveloped and the new stand is producing large snags. EIS App. E-68. The Service will do this by retaining the largest hard-snags, as they are most persistent, and by emphasizing retention of pine and Douglas-fir, as they are persistent and have greater value for wildlife than other species. Id. The Service revised its contract language to require retention of the largest snags in

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<sup>4</sup>Salvage is proposed in 15% of the acres of LSR dominated by snags greater than 9" dbh. EIS App. E-60. Snags less than 16" dbh are not targeted for salvage because of their low economic value. EIS App. G-21.

subdivisions. Pls' Ex. 22, at 143a, ¶ 2. It thus appears that the Service intends to fulfill its promise to retain the largest snags, which are most likely to persist.

As the largest snags will be retained, the remaining dispute concerns whether snags will be retained in sufficient number. The EIS reflects that the Service used local data from "ecoplots" in natural stands to establish a dead wood prescription (including snag retention guidelines) that it concludes satisfies NWFP S&G #4 (C-14-15), which requires that after stand-replacing disturbances, adequate coarse woody debris (CWD) be retained in quantities sufficient to ensure that the new stand in the future will still contain amounts similar to naturally regenerated stands. The complicated snag retention scheme is set forth in Table 10 of Appendix G of the EIS. EIS App. G-20-21. The scheme requires average retention levels of 1.5 to 13.5 snags per acre, depending on several factors, including burn severity, aspect, plant community, and management considerations. EIS App. G-15-16. The court is not inclined to second guess the Service's conclusion that the dead wood prescription will ensure sufficient CWD so as to comply with S&G #4. Arizona Cattle Growers', 273 F.3d at 1236.

#### C. Research Activities

Research activities may be conducted in LSRs if consistent with LSR objectives and if not, may be considered if there are no

equivalent opportunities outside of LSRs. NWFP S&G C-18. The Service has designed a research project to compare different techniques on developing LSH. According to plaintiffs, salvage logging as part of this research is planned for 3,181 acres in LSRs, and will yield a volume of 42 mmbf, or nearly 40% of the LSR volume for the Biscuit Project. Plaintiffs contend that the Service has not demonstrated there are no equivalent opportunities for this research outside of LSRs. The Service concluded that "all of the treatments within the Learning areas are the same as those described previously and would meet all NWFP guidance as described in other sections." EIS App. E-68. Because plaintiffs have not shown that the project does not comply with guidelines for salvage logging in the LSRs, the research is not demonstrably inconsistent with LSR objectives and the Service need not demonstrate that no equivalent opportunities exist elsewhere. NWFP S&G C-18.

Plaintiffs are unlikely to ultimately prevail on these NFMA claims.

### III. NEPA

Plaintiffs next argue that the Service violated NEPA by failing to consider direct and indirect impacts of sediment-producing activities, specifically failing to consider impacts to Tier 1 Key Watersheds, and by failing to use information of the highest quality and scientific integrity in analyzing sediment

impacts. In reviewing the adequacy of an EIS, the court employs a "rule of reason" to make a pragmatic judgment whether the form, content and preparation of the EIS fosters informed decision-making and informed public participation. Churchill County v. Norton, 276 F.3d 1060, 1071 (9<sup>th</sup> Cir. 2001) (quotations and citations omitted). The court's role is limited to ensuring that the agency took a "hard look" at the environmental consequences of its decision. Id. The court may not "'fly speck' an EIS and hold it insufficient on the basis of inconsequential, technical deficiencies." Oregon Env't'l Council v. Guzman, 817 F.2d 484, 292 (9<sup>th</sup> Cir. 1987).

#### A. Impacts from Sediment-Producing Activities

Plaintiffs argue the Service failed to consider impacts on sediment delivery from mass wasting (landslides) and road use and fire lines, and improperly segmented its analysis of impacts from coarse and fine sediment.

##### 1. Mass Wasting

The Service identified naturally occurring landslides as the largest source of sediment to streams in the Biscuit Fire area, and concluded that most landslides in the area are tied to 100-year storm events, such as occurred in 1964. The Service reached this conclusion after analyzing historical data, including sequential aerial photos. The Service noted few if any new landslides following the large storms of 1996. Citing high

variability in the timing of extreme weather triggering events, the Service did not attempt a quantitative estimate of sediment delivery from landslides.<sup>5</sup> EIS III-201, 207-08. Plaintiffs argue that without such an estimate, the Service's sedimentation analysis is meaningless.

The Service discussed potential impacts of salvage logging, fuel management zone activities, landscape burning, fuels treatments, reforestation and road work on mass wasting. EIS III-86, 88, 89, 90, 91, 92. The Service explained its conclusion that removal of snags does not affect slope stability (roots are left in place), while road construction and cable skidding can increase landslide potential. EIS III-87. The Service went on to discuss mitigation measures to combat that risk, including removing active landslide areas from skyline or tractor logging units, retaining 70% or more snags on inactive or historically active landforms to decrease impacts of logging activities, limiting construction of temporary roads to slopes with less than 30% gradient and outside of riparian areas, review of helicopter landing sites by geology personnel, and pre-logging monitoring and ongoing review by a resource specialist of salvage units proposed for tractor or skyline harvest. EIS III-83, 87, 92.

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<sup>5</sup>As an example, the Service noted that the yearly rate of sediment delivery from landslides to the Silver and Indigo Creek areas after the Silver Fire ranged from zero to four million cubic yards, the latter amount attributable to a 50-year storm event. EIS III-83.

Field data collected during the latter process will be used to develop site-specific mitigation measures. EIS III-83.

Given the difficulties in predicting landslide frequency and severity, the Service's decision not to attempt to quantify estimates of sediment delivery from this source is defensible, and does not render the entire sedimentation analysis legally deficient. The Service acknowledged the risk and contributing factors, conducted a significant inquiry using historical data and aerial photography, and demonstrated the difficulty in rendering an estimate. EIS III-207-08. The service did not pretend that mass wasting can have no impact on sediment delivery. Rather, it concluded that mass wasting is primarily tied to rare storm events, and the project as designed will not contribute to the risk that mass wasting will occur. The Service based its conclusion on historical data and explained its methodology. While plaintiffs may disagree with the Service's conclusions, the court is and should be deferential to a reasoned analysis, and is convinced that the Service took the requisite hard look at the effect of the project on mass wasting.

## 2. Road Use and Fire Lines

Plaintiffs argue that the Service failed to consider impacts on sediment delivery from road use and firelines. The Service first points to portions of the EIS where it analyzed impacts of project activities on erosion and sedimentation (EIS III-78, 83,

86-92), aquatic habitat and water quality (EIS III-199-292, App. F,K), and threatened fish species (EIS 289-92). The Service also points to the concurrence of NOAA Fisheries with its effects determinations during consultation pursuant to the Endangered Species and Magnuson-Stevens Fishery Conservation Acts. Govt Ex. 11 at 4. Sediment delivery is specifically discussed at EIS III-227-60. In the section on fine sediment delivery, the Service acknowledged that timber hauled across perennial streams on native surface roads increases fine sediment on the road surface that can be delivered to fish habitat, reducing the food supply. EIS III-259. The Service then discussed mitigation measures involving applications of crushed rock, and concluded that there may be small localized adverse effects to fish habitat and populations from timber haul on native surface roads, but the impact will not be detectable at the watershed or subwatershed level. EIS III-259-60. The Service estimated quantities of post-fire fine sediment delivery. It appears that the Service estimated fine sediment delivery attributable to all Biscuit Fire project activities at two and five years after the fire, and compared these amounts with pre-fire levels of sediment delivery. EIS III-259-60, Figures III-45, 46.

Plaintiffs present the declaration of hydrologist Jonothan Rhodes, who opines that the mitigation measure is inadequate. Rhodes Decl., ¶¶ 24-25. The court is deferential to the

Service's factual conclusion, and cannot say that the Service failed to take a hard look at environmental consequences of sediment delivery from road use simply because plaintiffs' experts disagree with the Service's conclusions.

As for sediment delivery from firelines, plaintiffs argue that this case is like Sierra Club v. Bosworth, where the court held that the Service violated NEPA by failing to address in an EIS cumulative effects of prior fire suppression tactics, and by failing to explain how rehabilitation could eliminate effects from construction and existence of firelines. 199 F.Supp.2d 971, 985 (N.D.Cal. 2002). In contrast to Bosworth, the Service described its rehabilitation activities for the firelines and concluded that erosion was greatest the winter after the fire, and erosion from firelines will be minimal as vegetation recovers and will not contribute to cumulative effects by the time salvage operations begin. EIS III-228-29. The Service stated elsewhere that most dozer lines near streams are recovering due to restoration efforts, and effects are small, localized and short-lived. EIS III-284. Plaintiffs again disagree, relying on Rhodes. See Rhodes Decl., ¶¶ 28, 29. As noted, the court is not inclined to police principled disputes about whether the Service's rehabilitation efforts will be successful, when the Service has reached a considered conclusion. The court's view is that the Service considered the effects on sediment delivery from

road use and fire lines, and adequately evaluated probable environmental consequences.

### 3. Segmented Analysis

Plaintiffs object to the Service's separate analysis of coarse and fine sediment, on grounds that the Service did not explain its method for dividing sediment by size, and the separate treatment caused the Service to ignore the impact on channel form from fine sediment delivery. See Rhodes Decl, ¶ 43 (citing to Beschta and Jackson, 1979; Lisle and Hilton, 1999). The Service distinguished between fine sediment suspended in water and coarser materials (sands and gravels) transported as bedload. EIS III-251. The Service acknowledged that although fine sediment is usually transported through a stream system, it can "deposit out" in very low gradient areas or when flow subsides after a storm event. Id. The separate treatment is not arbitrary or capricious, because different size particles may behave differently. At most, plaintiffs have identified a technical, inconsequential deficiency that does not invalidate the substantial analysis of project effects on sediment delivery.

Plaintiffs also argue that the Service should not have utilized the "Disturbed WEPP (Water Erosion Prediction Project)" modeling tool in its analysis of coarse sediment, because the tool predicts surface erosion, which primarily consists of fine sediment. This argument is considered in Section III.C., below.

## B. Impacts to Tier 1 Key Watersheds

In three paragraphs, plaintiffs discuss the background and importance of Tier 1 Key Watersheds. They then advance this concise argument: "despite the importance of Key Watersheds under the NWFP, the FEIS does not specifically address the project's impacts on these areas. This failure violates NEPA." The Service points out that it evaluated individual watersheds (including the Key Watersheds identified by plaintiffs) when it considered effects on channel morphology (coarse sediment) and fine sediment delivery. EIS III-233-49, 254-60, EIS III-269-79, Tables III-96-102 at EIS III-269-79. Without more than a conclusory assertion, plaintiffs are not likely to ultimately prove that the Service failed to adequately consider impacts to Key 1 Watersheds.

## C. Quality of Information

Plaintiffs next argue that in conducting its sediment analysis, the Service violated its obligation to ensure professional, scientific integrity of analysis within the EIS by utilizing the Disturbed WEPP tool, and by utilizing a baseline that underestimates the magnitude of sediment impacts from the project. See 40 C.F.R. § 1502.24.

### 1. Disturbed WEPP

Citing to the declaration of forest hydrologist and FEMAT team member Dr. Robert Ziemer, plaintiffs argue that Disturbed

WEPP is not an appropriate tool to model sediment effects from the Biscuit Project because it was not intended for use on such a large and varied landscape, the modeling tool estimates overland flow, which is not a significant source of sediment delivery in the project area, the modeling tool does not account for the major contributors of sediment, including mass wasting, bank slides and inner gorge failures, and the Service improperly assumed for its analysis that "flows will not exceed a 1.5 year return interval the winter following salvage." Ziemer Decl., ¶¶ 8-11.

In applying Disturbed WEPP, the Service input information from the project area on soils, slope, climate, vegetation type and soil cover, including information collected during the Burned Area Emergency Restoration (BAER). It also used data collected from soil erosion plots to "calibrate sediment numbers generated by the model for wildfire and post-fire conditions." EIS III-207, 227, App. F. "Erosion from rills and gully incisions factored into Disturbed WEPP." EIS III-207. The Service acknowledged limitations of the Disturbed WEPP tool, and made adjustments. EIS App. F-4. The Service further explained that reported sediment numbers should not be considered absolute, accuracy of predicted runoff or erosion is subject to error of 50% plus or minus, and the data should therefore be used only to compare alternatives. EIS III-229, App. F-1-4. The discussion

regarding mass wasting demonstrates that the Service also employed other methodologies to evaluate the risk of sediment delivery from that source. While plaintiffs advance legitimate critiques of the Disturbed WEPP modeling tool, these critiques do not render the sediment effects analysis incapable of fostering informed decision-making and informed public participation.

## 2. Baseline

Plaintiffs argue that in admittedly overstating sediment delivery using Disturbed WEPP, the Service in fact underestimated sediment delivery from planned activities, because overestimating the baseline diminishes the visibility of impacts from project activities. The Service responds that it overestimated both baseline erosion levels and sediment delivery attributable to project activities. When it made its downward adjustments to predicted sediment delivery in response to monitoring, it adjusted only the baseline erosion prediction. See EIS App. F-4, Conroy Decl., ¶ 12. This would cause the Service to overestimate sediment delivery from project activities. In any event, the Service stressed that the quantitative estimates were primarily useful for comparative analysis. While estimates of sediment volume may not be as accurate as plaintiffs would like, the court does not find the sedimentation analysis legally inadequate. Plaintiffs are not likely to ultimately prevail on their NEPA arguments.

#### IV. NFMA - Marking of Trees and Boundaries

NFMA requires that designation and necessary marking of trees be conducted by persons employed by the Secretary of Agriculture, and that such persons have no personal interest in the sale or harvest. 16 U.S.C. § 472a(g).<sup>6</sup> Plaintiffs finally argue that the Service violated Section 472a(g) in preparing the Berry and Fiddler Sale contracts. The Service responds that this claim is moot, because any designation and necessary marking will be conducted by Service employees. In support of this argument, the Service presents new proposed contract language for the Fiddler contract. The contract states,

Reserve trees are designated as follows:

1 - All trees within 174 feet slope distance from the edge of the active channel on both sides of designated streamcourse per B6.5, as shown on the Sale Area Map, or to be identified on the ground by the Forest Service prior to harvest in a Subdivision, are reserved from cutting.

2 - Purchaser shall leave the largest trees as reserve trees in the Subdivisions listed in the table below. If additional trees are still needed to meet the quantities as shown in the table, trees selected by the Purchaser will meet the criteria listed in the table below.

3 - Purchaser shall identify, and Forest Service shall designate, prior to cutting the Subdivision, standing

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<sup>6</sup>Designation, marking when necessary, and supervision of harvesting of trees, portions of trees, or forest products shall be conducted by persons employed by the Secretary of Agriculture. Such persons shall have no personal interest in the purchase or harvest of such products and shall not be directly or indirectly in the employment of the purchaser thereof.

16 U.S.C. § 472a(g).

dead trees to be left for resource management needs, according to the following Dead Standing Tree Retention Table. Up to 70% of the required standing dead trees may be clumped within the Subdivision, and the remaining standing dead trees required to be left are to be dispersed throughout the remainder of the subdivision. Reserve trees necessary to be marked will be marked by the Forest Service with orange paint above and below stump height.

Pls' Ex. 22. For each listed subdivision, the table states average number of dead trees to be left per acre, minimum desired dbh, species preference, and desired dbh range. Id.

"Marking" in the context of forestry means selection and indication by painting or stamping of trees to be felled or retained; "designate" is a much broader term, and simply means to indicate. West Virginia Div. of the Izaak Walton League of America, Inc. v. Butz, 522 F.2d 945, 949 (4<sup>th</sup> Cir. 1975) (interpreting predecessor statute). Congress included marking and designation provisions in the Act of 1897 to ensure that it is unmistakable "before the cutting what trees are to be cut and afterwards to ascertain that these trees, and these only, have been taken." Butz, 522 F.2d at 949 (quoting Gifford Pinchot, first Chief of the Forest Service). Congress enacted Section 472a(g) in response to holdings in Butz and other cases that the Act of 1897 required Department of Agriculture employees to mark each individual tree to be removed. S. REP. 94-893, \*8, 1976 U.S.C.C.A.N. 6662, \*\*6669. Although Section 472a(g) does not invariably require every tree to be marked, the legislative

history does not evidence that Congress intended to relieve the Department of Agriculture of its responsibility to designate trees for cutting and ensure that only those trees are cut.

Subsection [(g)] requires persons employed by the Secretary of Agriculture to designate the trees or other forest products to be harvested, to mark the trees or forest products when the marking of individual trees or forest products is considered necessary, and to supervise the harvesting operations. (The existing provision of the 1897 Act, as interpreted by the courts, requires the marking of the individual trees to be cut and removed, as well as designating the sale area.) Subsection [(g)] will provide the Secretary with sufficient flexibility to indicate the timber to be harvested by designating an area in which all timber will be cut, where trees to be cut will be marked, or where trees to be left will be marked. The subsection incorporates the provisions of the 1897 Act that persons who supervise timber harvesting shall have no personal interest in the purchase or harvest of such products and shall not be directly or indirectly in the purchaser's employment.

S. REP. 94-893, \*21-22, 1976 U.S.C.C.A.N. 6662, \*\*6681.

The description in paragraph one of the contract is sufficient to inform the purchaser which trees not to cut and to permit the Service to verify that those trees are not cut in the area described therein. The provision in paragraph three that necessary marking will be performed by the Forest Service unquestionably comports with Section 472a(g). Plaintiffs have raised a serious question, however, as to whether the scheme described in paragraphs two and three for identification, selection and designation of snags for retention violates Section 472a(g).

The scheme appears to require the purchaser to identify leave trees in areas where not all trees will be cut, albeit according to guidelines and apparently subject to subsequent designation by the Service, although the contract language is somewhat unclear on this point. If the Service designates trees identified as leave trees by the purchaser (as opposed to designating trees identified by Service employees) the Service cannot ensure compliance with the snag retention scheme, and it might be said that the purchaser had a hand in designating leave trees.

The court is sympathetic to the difficult task facing the Service in designating and marking timber where necessary, and this ruling does not prevent the Service from attempting additional written designations, although the legislative history casts doubt on whether such a description can be sufficiently specific to permit the Service to verify that the purchaser does not cut the wrong trees. Of course the statute would unquestionably be satisfied if Department of Agriculture employees, lacking interest in the sale or harvest and not in the employ of the purchaser, and without assistance of any such persons, were to conduct all designation and necessary marking required to administer the snag retention scheme.

V. Harm/Application of Sliding Scale

\_\_\_\_\_ Plaintiffs advance general allegations of imminent,

irreparable environmental injury. It is true that any snags intentionally or mistakenly harvested as a result of a violation of NFMA's designation and marking requirements cannot be replaced. On the other side of the scale, the Service determined that delay will result in loss of \$3.3 million to the government, which the Service argues could be applied toward restoration and fire risk reduction activities. The Service also concluded that delay could impact 155 jobs in the local economy. See Pls' Exs. 2, 3.

With respect to salvage activities in the LSRs and the Biscuit Project as a whole, the public interest appears fractured. Opposition to the project is vocal. Yet the court has so far found that the project for the most part appears to comply with duly enacted environmental laws which also reflect the public interest. Of course the public interest is not served if the project goes forward in violation of 16 U.S.C. § 472a(g).

Considering the likelihood that plaintiffs will prevail on their claims, the allegations of evidence and harm, and the public interest, preliminary injunctive relief is appropriate, owing to the possibility that the designation and marking scheme for snag retention violates NFMA. Therefore, plaintiffs' motion for preliminary injunction is granted to the extent that felling of trees on the Berry, Fiddler, Steed, Chetco, Hobson and Lazy timber sales is enjoined until the Service demonstrates that

implementation of the sales will comply with 16 U.S.C. § 472a(g).  
No bond is required.

Conclusion

For the foregoing reasons, plaintiffs' motion for temporary restraining order and/or preliminary injunction [#7], treated as a motion for preliminary injunction, is granted to the extent provided herein.

IT IS SO ORDERED.

DATED this 3<sup>rd</sup> day of August, 2004.

/s/ MICHAEL R. HOGAN  
United States District Judge