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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PENDLETON DIVISION

LEAGUE OF WILDERNESS DEFENDERS/BLUE MOUNTAINS BIODIVERSITY PROJECT, an Oregon non-profit corporation, Plaintiff, v. **SLATER R. TURNER**, District Ranger, Crooked River National Grassland and Lookout Mountain, Ochoco National Forest, in his official capacity; and **UNITED STATES FOREST SERVICE**, an agency of the United States Department of Agriculture, Defendants	Case No. 2:16-CV-01648-MO REPLY MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION OR IN THE ALTERNATIVE FOR A TEMPORARY RESTRAINING ORDER Date: October 6, 2016 Time: 11:00 am Judge: Hon. Michael W. Mosman Place: Courtroom 16; Portland, Oregon

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CE	Categorical Exclusion
DBH	Diameter at Breast Height (also: "dbh")
DM	Decision Memo
EA	Environmental Assessment
FRCP	Federal Rules of Civil Procedure
FSH	Forest Service Handbook
FSM	Forest Service Manual
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act

INTRODUCTION

In its December 15, 2015 Decision Memorandum ("DM") for the Walton Lake Restoration Project ("the Project") the Forest Service authorizes the logging of hundreds of large fir trees over 21" diameter at breast height ("dbh"). Among these large trees are old growth fir trees four and five feet in diameter. In its brief opposing Plaintiff's motion for a preliminary injunction ("Oppos. Br.") against its proposed commercial logging, the Forest Service does not deny that its proposal includes the logging of such old and very rare trees. However, the DM itself, and the Forest Service's initial scoping notice and internal reports, do not disclose that fact or the overall number of large fir trees that would be logged.

The clear and significant irreparable harm to Plaintiff and its supporters from this logging of large and old growth trees is indisputable. The Forest Service attempts to create serious issues regarding the balancing of the equities and the public interest factors by suddenly asserting that implementing the Project this fall is essential to keeping the Walton Lake area open to the public next year. Such a manufactured emergency should be given little weight by this Court. But even if the Forest Service's new assertions were credible, a campground closure for one year still does not come close to outweighing the permanent irreparable harm from cutting down old growth trees. And that is especially true in light of Plaintiff's specific request to exclude the removal of actual hazard trees from its requested injunction.

The more significant dispute regarding Plaintiff's motion is whether Plaintiff has made a sufficient showing regarding the merits of their claims, by showing a likelihood of success, or, because the balance of equities tips sharply in Plaintiff's favor, by raising serious questions going to the merits. Plaintiff explains below why they can satisfy either standard regarding their claims under the National Forest Management Act ("NFMA") and the National Environmental

Policy Act ("NEPA"). In terms of the merits, the Court should remember what is at issue. The Forest Service decided to approve the logging of hundreds of large fir trees, including old growth trees, using very narrow exceptions to the Eastside Screens' otherwise mandatory restrictions. Plaintiff believes this is both an illegal and unprecedented use of these exceptions. The Forest Service similarly decided to comply with NEPA by improperly stretching a categorical exclusion ("CE") and applying it to several different types of logging with quite different purposes. Using that CE also improperly minimized public involvement in the decision to log so many large and old growth trees. Whether the Forest Service could have approved this, or a similar project, using different, more clearly applicable rules and procedures is not before the Court. The Forest Service must defend the legality of what it actually did, and its inability to do that satisfies the final requirement for the Court to issue plaintiff's requested preliminary injunction.

ARGUMENT IN REPLY

I. The Forest Service's Arguments Against Plaintiff's Irreparable Harm Are Meritless.

Plaintiff has demonstrated that its supporters will suffer more than sufficient irreparable harm in the absence of preliminary relief. *See* Pl's Br. at 8-10. Plaintiff's supporters will be irreparably harmed from the planned logging of hundreds of large fir trees, including old growth Douglas firs up to 60" dbh and grand firs up to 57" dbh. AR5970. The Ninth Circuit has concluded that proposed logging of mature trees, "as with many instances of this type of harm," establishes irreparable harm for the purposes of the preliminary injunction analysis. *LOWD v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014); *Alliance for the Wild Rockies v. Cottrell ("AWR")*, 632 F.3d 1127, 1135 (9th Cir. 2011) (concluding that logging much smaller trees in a portion of a previously burned area establishes irreparable harm); *Lands Council v. Martin*, 479 F.3d 636, 643 (9th Cir. 2007) (Logging of old growth trees, which the Ninth Circuit defined as

trees over 21" dbh, establishes irreparable harm). The Forest Service points to no truly unusual or unique circumstances that would justify a departure from this precedent.

In their response the Forest Service does not deny that the Project involves logging old growth trees. *See* Oppos. Br. at 23-26. Instead, the Forest Service argues that Plaintiff's "long delay in bringing suit – and seeking emergency relief – significantly undermines its claim of irreparable harm." Oppos. Br. at 23. This argument is factually inaccurate and flies in the face of controlling legal precedent. Ignoring recent, leading Ninth Circuit case law on point, the Forest Service instead cites two inapposite cases, without explanation. *Id*.

Both cases the Forest Service cites for its assertion – that delay in seeking preliminary relief significantly undermines a plaintiff's claim of irreparable harm – were decided *outside* the logging context and in situations where the alleged irreparable harm had been occurring for *years* before plaintiffs sought a preliminary injunction. First, in *Oakland Tribune, Inc. v. Chronicle Publishing Company, Inc.*, plaintiff brought an antitrust claim against defendants for allegedly monopolizing regional newspaper markets through the use of exclusive contracts. 762 F.2d 1374, 1376 (9th Cir. 1985). Plaintiff alleged purely monetary harm measurable in damages as well as a loss of reputation and competitiveness. *Id.* at 1376-77. Significantly, the exclusivity provisions that plaintiff sought to enjoin had been in effect for "several years," and there was no new imminent harm. *Id.* at 1377. Unlike the plaintiff in *Oakland Tribune*, here Plaintiff has alleged clear and imminent irreparable harm – from logging hundreds of large, old growth trees – that has yet to occur and filed this motion before it could occur. Pl. Br. at 8-10.

In the second case the Forest Service cites (again, without explanation), *Lydo Enterprises, Inc. v. City of Las Vegas*, the plaintiff sought a preliminary injunction enjoining the City of Las Vegas from enforcing a zoning ordinance restricting the location of "sexually

oriented" businesses. 745 F.2d 1211, 1212 (9th Cir. 1984). Plaintiff's alleged purely monetary injuries and delayed for *five years* after the ordinance was enacted, and five months after it received notice of the city's enforcement action, before seeking a preliminary injunction. *Id.* at 1213-14. Despite the fact that plaintiff's injury "might have been greatly reduced or altogether obviated had appellees not waited five years to challenge the ordinance," the court stated "[it] would be loath to withhold relief solely on that ground." *Id.* at 1214, 1216. Again, unlike the plaintiff in *Lydo*, here Plaintiff has established clear irreparable harm that would result from logging that has yet to occur, and that it now seeks to enjoin. Pl. Br. at 8-10; Oppos. Br. at 24-5. There is simply no "delay" here involving a preliminary injunction motion filed *after* the conduct that caused the irreparable harm had begun, and, even if there were, the Ninth Circuit in *Lydo* clearly stated that it would not deny relief solely because of any such delay.

The Forest Service claims that Plaintiff "waited more than three months before filing this action." Oppos. Br. at 24. Even if that were true, it is a stretch to call three months a "long delay." *See Kettle Range Conservation Grp. v. U.S. Forest Serv.*, 971 F. Supp. 480, 484 (D. Or. 1997) (rejecting argument that plaintiff's five month delay was unreasonable and explaining that such a delay is "[o]bviously … categorically distinct from a five-year delay"). Moreover, the facts here show no real "delay" by Plaintiff. Instead they show Plaintiff promptly obtaining information to evaluate legal claims based on an environmental analysis and decision-making process that the Forest Service had conducted almost entirely out of the public eye. *See* Pl. Br. at 6-7. While Plaintiff proceeded diligently, the Forest Service itself delayed the Project for many months and publicly announced two different start dates for the Project. *See* Pl. Br. at 7. The Forest Service did not notify Plaintiff of its current plans to begin logging on October 17th until

August 26th, shortly after Plaintiff filed this lawsuit and contacted counsel for the Forest Service about a briefing schedule. Plaintiff filed this motion shortly thereafter.

The most relevant case for the Forest Service's "unreasonable delay" argument is actually *Neighbors of Cuddy Mountain v. USFS*, which is a logging case. 137 F.3d 1372 (9th Cir. 1998).[1] In that case the plaintiffs waited more than *two years* and until *after* the intervenor had built a road and started logging. *Id.* at 1381-82. Despite that delay, the Ninth Circuit enjoined all future logging, noting that the plaintiffs there, like here, were only seeking to stop future activities, not undo past activities. *Id.* In short, Plaintiff did not delay in bringing this action, and even if they had, a delay of more than three months would not undermine its likelihood of irreparable harm.

The Forest Service argues that the "developed" nature of the Project area diminishes Plaintiff's likelihood of irreparable harm. Oppos. Br. at 25-6. Leading Ninth Circuit case law on point states that a plaintiff satisfies the likelihood of irreparable harm requirement when a project will harm a plaintiff's members' ability to "view, experience, and utilize the areas in their undisturbed state," and will "prevent [their] use and enjoyment … of the forest." *AWR*, 632 F.3d at 1135. However, the Forest Service claims *AWR*'s holding does not apply here because the Project area is not "undisturbed." Oppos. Br. at 25. In doing so, the Forest Service reads the Ninth Circuit's use of the word "undisturbed" completely out of context. In *AWR*, the court was referring to an area that was "undisturbed" after a major wildfire, and was hardly pristine. *AWR*, 632 F.3d at 1129. Thus, for the purposes of establishing irreparable harm, "undisturbed" refers to the state of the forest before the challenged future activity occurs. *See, e.g., id.*

[1] Although the specific argument made regarding the plaintiff's delay was based on laches, *see* 137 F.3d at 1381-2*,* in *Connaughton* the Ninth Circuit cited *Cuddy Mtn.* when rejecting a delay argument almost identical to that made here by the Forest Service. 752 F.3d at 765.

The Project does include a developed campground area, but the specific area at issue for this motion is a dense mixed conifer forest containing hundreds of large fir trees, including many old growth Douglas firs up to 60" dbh and grand firs up to 57" dbh. AR5970; AR6538. Thus, the Project area at issue would appear far more "undisturbed" than the post-fire acreage in *AWR*. Perhaps more importantly, the distinction the Forest Service seeks to draw makes no sense. Plaintiff's supporters recreate in the Project area because it has large and old growth trees and the proposed logging will significantly harm their future aesthetic and recreational interests in the Project area. There is no basis for concluding that their irreparable harm from the cutting of such trees is somehow less than an individual who prefers to recreate among old growth trees in an "undisturbed" wilderness area. The abundance and variety of old growth trees is a big attraction for visitors, including Plaintiff's supporters, to the Walton Lake Project area. AR6000; AR5968. In short, the Forest Service's claim that *AWR* does not apply is completely unconvincing.

In fact, the Forest Service conceded irreparable harm under analogous circumstances in *Connaughton*. 752 F.3d at 764. However, the intervenors in that case challenged irreparable harm on the grounds that: (1) the project area had been previously logged; (2) the project did not involve logging old growth forest; and (3) plaintiffs did not immediately to the logging plan. logging had already commenced in one portion of the project area before plaintiffs filed for a preliminary injunction. *See id.* at 764-65. The Ninth Circuit concluded that "none of these contentions are supported by our precedent." *Id*. (citing *AWR*, 632 F.3d at 1129, 1135 and *Neighbors of Cuddy Mountain*, 137 F.3d at 1381-82). Here, the Project *does* involve logging old growth trees, and Plaintiff did not delay in bringing this action. Even if they had delayed more than three months, as the Forest Service alleges, such a delay does not undermine irreparable harm in this context because logging under the Project has yet to occur.

II. Plaintiff Will Likely Succeed on the Merits of its NFMA and NEPA Claims.

A. *The Challenged Logging Violates NFMA and the Eastside Screens.*

As explained in Plaintiff's earlier brief, the Eastside Screens were designed to address the eastside forests' deficiency of large trees. Pl. Br. at 3, 12; *see* AR2263, 2413. The Screens do so by mandating that logging trees over 21" dbh is prohibited. Pl. Br. at 12; AR2317, 2455. Because the Eastside Screens are part of the Ochoco Forest Plan, and NFMA requires all logging to comply with the applicable forest plan, a violation of the Eastside Screens is a violation of NFMA. Pl. Br. at 12. The parties agree on this much. *See* Oppos. Br. at 10. The parties do not agree, however, on the meaning of an exception to the Eastside Screens.

The Eastside Screens contain limited exceptions to the prohibition on logging trees 21" dbh or greater, including for "sales to protect health and safety" and "sales to modify vegetation within recreation special uses areas." Pl. Br. at 13; AR2549, 2312, 2436. The Forest Service relies on both exceptions as justifying the proposed logging of trees over 21" dbh in the project area. Oppos. Br. at 9-15; AR6359. However, while the parties agree that the "recreation special uses areas" exception applies to about 39% of the project area (i.e. the campground area), the parties disagree about the application of the "health and safety" exception to the other 61% of the project area. The Forest Service argues that the "health and safety" exception applies to the disputed 61% of the project area because that exception exempts logging for "*forest* health" reasons, and the proposed logging would benefit forest health. *See* Oppos. Br. at 11-15 ("Clearly, the Eastside Screens allow the ["health and safety"] exception to be applied to address both public safety and forest health."). However, the "health and safety" exception contemplates only *public* health and safety, not *forest* health, and is explicitly limited to removal of "roadside or

campground hazard trees." Pl. Br. at 14; AR2285 (so limiting the exception). Therefore, the majority of the Forest Service's proposed logging violates the Eastside Screens and NFMA.

1. The "Recreation Special Uses Areas" Exception Only Applies to 39% of the Project Area and Includes Almost None of the Logging at Issue.

The Forest Service appears to admit that the "recreation special uses areas" exception to the Eastside Screens only allows them to log trees greater than 21" dbh *within* the campground concession area, and not trees *outside* of that area. Oppos. Br. at 11 ("The parties agree that the ["recreation special uses areas"] exception allows removal of trees greater than 21-inches dbh within the campground concession ... The campground concession is approximately 68.8 acres, or 39% of the 176-acre Project."). Plaintiff does not seek to enjoin any of the proposed logging within the 68.8-acre "recreation special uses area" (i.e. the designated campground area) *under NFMA*. Because of the parties' apparent agreement that the "recreation special uses areas" exception only applies in the campground area, Plaintiff will focus on the "health and safety" exception. Pl. Br. at 18; Oppos. Br. at 11.[2]

2. The Exception for Logging "to Protect Health and Safety" Does Not Exempt Logging for Forest Health Reasons.

The Forest Service's argument that the "health and safety" exception to the Eastside Screens applies to *forest* health, *see e.g.* Oppos. Br. at 15 ("Clearly, the Eastside Screens allow the exception to be applied to address both public safety and forest health."), is inconsistent with the text, context, and intent of the Eastside Screens.

The Forest Service argues that the Court should ignore the text of the "health and safety" exception in the original Eastside Screens document, AR2285 ("August 18, 1993 Regional Forester letter to Eastside Forest Supervisors re: Interim Approach for Sale Preparation, Eastside

[2] A small portion of Units 1, 2 , 3 and 4 is within the campground concession. Plaintiff's injunction request against the logging in those areas is supported by its NEPA claims.

Forests") (limiting the "health and safety" exception to "roadside or campground hazard trees"), because the Screens were modified in 1994 and 1995. Oppos. Br. at 11-12. However, the 1994 and 1995 amendments did not change, and did not *intend* to change, the meaning of any of the 1993 exceptions. Accordingly, the "health and safety" exception still only applies to "roadside or campground hazard trees," and does *not* apply to logging for "forest health" reasons.

The Forest Service notes that, in the 1994 amendments, the "health and safety" exception is not explicitly defined (as it is in the original 1993 Eastside Screens document) as applying only to "roadside or campground hazard trees." Oppos. Br. at 11. The implicit argument is that the absence of the words "roadside or campground hazard trees" in the 1994 amendments somehow vastly expands the scope of the "health and safety" exception to include logging for any forest health-related reason. *See id.* However, the Forest Service fails to note that the environmental assessment for the 1994 amendments explicitly incorporates the intent of the 1993 Eastside Screens document by reference. AR2266 ("All of the modifications are consistent with the intent of the August 18[, 1993] Direction."). Further, six days after issuing the Decision Notice adopting the 1994 Eastside Screen amendments, Regional Forester John Lowe explained that the exceptions to the Eastside Screens (as modified by the 1994 amendments) apply to "incidental and selective timber harvest," which is inconsistent with the Forest Service's expansive interpretation of the "health and safety" exception:

> 1. Exempted Sales. The August 18, 1993, interim direction described the types of sales that would not be subjected to the screening process (personal use firewood, post and pole, and sales to protect health and safety). The [1994] interim standards add 'sales to modify vegetation within recreation special uses areas' because the scope and impact of the *incidental and selective timber harvest* in these areas was in alignment with the previously exempted types of sales.

AR2353 (Emphasis added); AR2266 ("The scope and impact of [the "recreation special uses areas" exception] is similar to the other categories of exempted sales" under the 1993 Screens.).

Finally, there is nothing in the 1994 environmental assessment that suggests any intent to change the scope of the 1993 "health and safety" exception beyond "roadside and campground hazard trees." *See* AR2266-67. The fact that the 1994 EA contains no analysis of the *impacts* of such a huge expansion of the scope of the "health and safety" exception shows that there was no intent to expand its scope to cover *forest* health. *See* AR2262-2359 (1994 EA). Under NEPA, the Forest Service would have been required to disclose and analyze the *impacts* of such a broad expansion. *See Citizens for Better Forestry v. U.S.D.A.*, 341 F.3d 961, 970-71 (9th Cir. 2003).

Because the 1994 amendments were made "consistent with the intent" of the original 1993 Eastside Screens document, because the Regional Forester described the scope and impact of the exceptions as resulting in "incidental and selective timber harvest," and because there is no evidence that the 1994 amendments were intended to expand the meaning of the 1993 "health and safety" exception beyond "roadside and campground hazard trees," the Court should reject the Forest Service's expansive interpretation.

The Forest Service then argues that the Forest Service amended the Eastside Screens again in 1995 and "[n]othing in the [1995] revision said that the Forest Service could not remove trees greater than 21-inches dbh when the objective is to treat dense understory to improve forest health and protect old-growth features." Oppos. Br. at 12. However, that argument is flatly wrong and represents an attempt to create an exception to the Eastside Screens that does not exist. In fact, the 1995 amendments changed the Eastside Screens very little, and did *nothing* to change the prohibition on logging trees over 21" dbh.

In its "Introduction" section, the EA for the 1995 Eastside Screens amendments proves that the amendments did not modify the prohibition on logging trees over 21" dbh:

> *The May 20, 1994, environmental assessment and decision notice remain in effect as to all analyses, conditions and requirements*, *except as to the narrow revision*

> *of the vegetative structural stage classification.* This environmental analysis revises only those parts of the 1994 environmental assessment pertaining to the vegetative structural stages.

AR2411 (Emphasis added). The 1995 EA further emphasizes that "[n]o other portions of the 1994 interim direction are under consideration here, that is[,] … *the requirements of the interim wildlife standard … remain intact*." *Id.* (Emphasis added). Because the prohibition on logging trees over 21" dbh is contained in the "interim wildlife standard," AR2441-43, AR2455-57, which was not modified by the 1995 amendments, the Eastside Screens still prohibit logging trees over 21" dbh. *Lands Council v. Martin*, 529 F.3d 1219 (9th Cir. 2008), explained, in 2008:

> The Eastside Screens require that the Forest Service '[m]aintain all remnant late and old seral and/or structural live trees [greater than or equal to] 21" dbh [diameter at breast height] that currently exist within stands proposed for harvest activities.' *Id.* at 641 (emphasis omitted). In short, the Forest Plan prohibits the harvest of old growth 'live trees.'

Id. at 1223. Accordingly, the Court should reject the Forest Service's suggestion that the 1995 amendments to the Eastside Screens somehow allow the Forest Service to "remove trees greater than 21-inches dbh when the objective is to treat dense understory to improve forest health and protect old-growth features." Oppos. Br. at 12. The Eastside Screens contain no such exception.

If it existed, an exception to the Eastside Screens for logging "to improve forest health and protect old-growth features" would swallow the rule. That is, the primary *purpose* of the Eastside Screens is to protect forest health and old-growth features. AR2264 (environmental assessment for Eastside Screens) ("The purpose is to preserve those components of the landscape -- old forest abundance … which new information suggests is vitally important to … the overall vegetative structure of the forest."). Therefore, creating an *exception* for the same reason (i.e. "to improve forest health and protect old-growth features") would frustrate the entire reason for the prohibition against logging trees over 21" dbh. That is not what the "health and safety "

exception to the Eastside Screens was designed to do. *See* AR2285 (exception for "Sales made to protect health and safety (roadside or campground hazard trees)."). The Eastside Screens specifically contemplates "restrictive" standards that should be interpreted narrowly. *See* AR2263 (environmental assessment for 1994 Eastside Screens) ("The standards established in the interim management direction are *intentionally restrictive*, reflecting a conservative interpretation of wildlife ecosystem needs.") (emphasis added). Given the "health and safety" exception's plain language, and the intentionally restrictive nature of the Eastside Screens, the only plausible interpretation of the "health and safety" exception is that is applies to *human* health and safety.

The Forest Service argues that its interpretation of the "health and safety" exception "is a narrow interpretation consistent with the 1995 revision that found the failure to *thin* (including *select removal* of large trees) could threaten the very old-growth features that the Eastside Screens protect." Oppos. Br. at 13 (emphasis added). As explained above, that interpretation is inconsistent with the Eastside Screens' general rule and explicit prohibition on logging trees over 21" dbh. More importantly, the specific language the Forest Service quotes, Oppos. Br. at 12, (quoting AR2415-16), says absolutely nothing about allowing the "select removal of large trees" when conducting any necessary "thinning." What the 1995 EA says is that there is a need for flexibility to "remove, or at least thin, the dense understory in the stands of large trees." *Id*. Allowing for flexibility to thin *the dense understory* within stands of large trees cannot be twisted to somehow create an exception for also removing *large trees* whenever the Forest Service conducts "thinning." And, even if such a strained reading were possible, what the Forest Service is doing in units 2, 3 and 4, where it proposes to remove almost all of the large and old growth fir, is not "thinning" or the "select removal of large trees."

3. The Health and Safety Exception Does Not Allow for the Logging of Hundreds of Large Trees in the Project Area to "Protect" Public Safety.

The Forest Service also argues that, "[e]ven if the Court were to find that the ["health and safety"] exception applies only to human health, it would still cover the entire Project area" because "it makes no sense to then limit the reduction of known threats to just campgrounds and roadsides, as Plaintiff urges, when the entire Project area is located within a developed recreation area where visitors recreate away from campground and off roads and trails." Oppos. Br. at 13-14. In making this argument the Forest Service ignores the fact that the majority of the project area (and almost all of the commercial logging Plaintiff seeks to enjoin) is *not* part of the developed site, but is in the Forest Plan's MA-13 "visual influence area." As explained in Plaintiff's earlier brief, the Forest Plan defines the MA-13 area as including two distinct subsections: a "developed site" and a "visual influence area" surrounding the developed site. Pl. Br. at 19, fn. 14; AR1507 (Ochoco Forest Plan). The "developed site" and the "visual influence area" are subject to different management standards. AR1650 (the "developed site" is to be logged "only for the purpose of maintaining safe and attractive recreational sites" whereas the "visual influence area" is to be logged "to meet the visual quality objectives and maintain healthy stands."). This distinction is consistent with the campground area (the "developed site" – which accounts for about 39% of the project area) being subject to the "public health and safety" and "recreation special uses areas" exceptions to the Eastside Screens, while the area outside the campground (the "visual influence area" – accounting for about 61% of the project area) is not. Again, to be clear (and as the Forest Service appears to concede, Oppos. Br. at 10-11), the "recreation special uses area" at Walton Lake, which is 68.8 acres in size and is subject to the "recreation special uses areas" exception to the Eastside Screens, is *not* co-extensive with the entire project area (which is approximately 176 acres in size). *See* Pl. Br. at 19.

The Forest Service's argument that the "health and safety" exception to the Eastside Screens applies to protect human safety *throughout* the entire project area is also undermined by the Forest Service's own definition of "hazard tree." In fact, the Forest Service has made no effort to address Plaintiff's argument in that regard. As explained above, the "health and safety" exception is explicitly limited by the language of the 1993 Eastside Screens to removal of "roadside or campground hazard trees."[3] *See also* Pl. Br. at 14. A "hazard tree" is a term of art that is defined by the Forest Service as "[a]ny tree that is within striking distance of a permanent or transitory target of value as defined in the Field Guide for Hazard-Tree Identification and Mitigation on Developed Sites in Oregon and Washington Forests." Pl. Br. at 14, fn. 8; Buss Decl. Ex. 6 (FSM 2300, § 2332.5). The Field Guide, in turn, states that "[c]amp sites and buildings, where breakage from or failure of defective trees could result in damage to people or their property, are examples of valuable targets that need to be protected." Pl. Br. at 14, fn. 8; Buss Decl. Ex. 10, at 9. Accordingly, pursuant to the applicable definition of "hazard tree," trees outside of the Walton Lake campground area and away from roads and trails are not "hazard trees" for purposes of the "health and safety" exception to the Eastside Screens. *See* AR5529 (failure potential by itself does not constitute a hazard).

If, as the Forest Service argues, the "health and safety" exception to the Screens applies to "hazard tree" removal throughout the project area (even to portions of the project area where visitors rarely go), then the "health and safety" exception to the Screens could be applied *anywhere* in the Ochoco National Forest, because the entire forest is open for recreation. *See* AR1457 (Forest Plan) (calling for opportunities for the public to recreate "across *all areas* of the Ochoco National Forest[.]") (emphasis added). That, of course, would be absurd, allowing the

[3] This limitation was incorporated into the 1994 and 1995 amendments. *See* above at 9; AR2266 ("All of the modifications are consistent with the intent of the August 18[, 1993] Direction.").

Forest Service to cut down *any* tree in the Forest as a "hazard tree" on the basis that it might fall on some unwary traveler, even if the tree was miles from the nearest campground, road, or trail. *See* AR5539 (defective tree without a target is not a hazard tree).

Finally, the Forest Service cannot now rely on the argument that the "health and safety" exception to the Eastside Screens applies to protect public safety *throughout* the entire project area when, in the Decision Memo, the Forest Service only relies on the "health and safety" exception for the proposed logging in units 2, 3, and 4. AR6362-63 (Decision Memo) (noting that the "treatments in units 2, 3 and 4 are designed to remove trees that are infected with root disease or susceptible hosts of root disease that are causing and/or will cause future safety concerns in the project area[.]"). The proposed commercial thinning treatments in units 1 and 5, however, "are designed to meet stand specific conditions including density, species composition, and stand structure[.]" AR6361. In other words, outside of units 2, 3, and 4, the Decision Memo's justification for the proposed commercial logging is *forest health*, not public safety.

4. Logging for "Forest Health"-related Reasons Requires a Site-specific Forest Plan Amendment.

As explained in Plaintiff's earlier brief, instead of relying on a non-existent exception for "forest health," the Forest Service must attempt to promulgate a site-specific forest plan amendment if it wishes to avoid the 21" dbh limitation of the Eastside Screens for "forest health" reasons. The Forest Service is clearly aware of this requirement because its 2003 and 2015 guidance letters specifically encourage the use of site-specific amendments for forest health-related projects that would otherwise violate the Eastside Screens. AR2846-2847 (2003 guidance letter) (giving five examples of projects, all of which are forest health-related, that would be appropriately exempted from the Eastside Screens via site-specific forest plan amendments); Buss Decl., Exhibit 1, at 4 (2015 guidance letter) (giving six such examples). However, in this

case the Forest Service refuses to consider promulgating a site-specific forest plan amendment for the proposed project, repeatedly insisting that the "health and safety" exception applies to exempt all forest health-related logging from the Eastside Screens. Oppos. Br. at 14.

In responding to Plaintiff's argument that "forest health"-related logging requires a site-specific forest plan amendment, the Forest Service mischaracterizes Plaintiff's position by setting up a straw man and knocking it down. That is, the Forest Service says that "Plaintiff claims that guidance from 2003 and 2015 requires a forest plan amendment *if the Forest Service wants to remove trees greater than 21-inches dbh*." Oppos. Br. at 14 (Emphasis added). Of course, that is *not* Plaintiff's argument. Rather, Plaintiff's argument is that forest health-related logging projects are not exempt from the Eastside Screens under the "health and safety" exception, and therefore require site-specific forest plan amendments. Pl. Br. at 15-17. However, after setting up the straw man, the Forest Service argues that the 2003 and 2015 guidance letters only provide "examples of where [site-specific forest plan] amendments may be *appropriate*," and do not "provide a list of situations where amendments are *required*." Oppos. Br. at 14 (Emphasis added). And, the Forest Service argues, a site-specific forest plan amendment is not required in this case because the project is exempt from the Screens. *Id.* This is a tautology in its purest form. That is, the Forest Service is essentially arguing that the proposed project is exempt from the Eastside Screens because the project is exempt from the Eastside Screens. *See id.* ("No forest plan amendment is needed because the Project is consistent with the Forest Plan."). That tautological argument, by its very form, does nothing to address the 2003 and 2015 guidance letters and, in effect, simply dismisses them out of hand. The result is that the Forest Service's argument fails to explain *why* or *how* the project is "consistent with the Forest Plan" in light of

the 2003 and 2015 guidance letters. This steadfast refusal to address the substance of Plaintiff's argument suggests that the Forest Service has no convincing argument to make.

Similarly, by repeatedly reciting its belief that the Eastside Screens contain an exception for *forest* health-related logging projects, the Forest Service completely avoided any attempt to explain the proposed project's inconsistency with the Snow Basin and Wolf projects.[4] *See* Pl. Br. at 16-17. As previously explained, the Forest Service would not have bothered with site-specific amendments in those cases if they could have relied on a "forest health" exception to the Eastside Screens. Pl. Br. at 15-17. While the Forest Service does suggest that an amendment is not necessary for "the small acreage harvested by the Project," Oppos. Br. at 14, the Forest Service ignores that, in the Wolf Project, a forest plan amendment was proposed for logging large trees in a much smaller *10-acre* area.[5] A separate amendment was also required to authorize logging trees 21" dbh or greater on 384 acres within the project area. *See* Buss. Decl., Ex. 5, at 2 (Wolf ROD). Accordingly, the Forest Service cannot rely on the proposed project's 176-acre size to justify some sort of *de minimis* exception to the Eastside Screens. There is no such exception, and the proposed project's impacts would be anything but "*de minimis*."

B. *Plaintiff Should Prevail on its NEPA Claims.*

The Forest Service's use of a CE for the Project is arbitrary and capricious because the agency conducted inadequate scoping and because the express language of the applied CE does

[4] The Forest Service does not even *mention* the Snow Basin and Wolf projects in its Response.
[5] *See* "Wolf_FEIS_final_", p.15, at http://data.ecosystem-management.org/nepaweb/nepa_project_exp.php?project=41946 (last accessed 10/04/2016) (explaining that the chosen alternative would "require" an amendment to the Ochoco Forest Plan for "[c]ommercial harvest within about 10 acres of an LOS stage that is currently below historic abundance (Douglas-fir multi-strata)."). Plaintiff asks the Court to take judicial notice of the Wolf FEIS and other documents on the Forest Service's webpage at that location.

not cover the whole Project. *See Citizens for Better Forestry v. U.S. Dep't of Agric.*, 481 F. Supp. 2d 1059, 1086 (N.D. Cal. 2007) (describing requirements for the proper application of a CE).

1. The Forest Service Failed to Show that it Conducted Scoping in Accordance with its Own Regulations and the Requirements of NEPA.

The Forest Service has not successfully rebutted Plaintiff's argument that the scoping notice was misleading by implying that the project would essentially leave the area unchanged in terms of its appearance, and it does not address at all Plaintiff's argument that specific information about the supposedly applicable Eastside Screens exceptions should have been included in the scoping notice. During scoping, the public should receive "sufficient environmental information, considered in the totality of circumstances, to permit [them] to weigh in with their views and thus inform the agency decision-making process." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps*, 524 F.3d 938, 953 (9th Cir. 2008); *see also* 36 C.F.R. § 220.4(e) (requiring scoping for CEs). That did not happen for the Walton Lake Project.

The Forest Service accuses Plaintiff of "cherry-picking" phrases from the scoping notice and presents a larger block quotation from one of the sections that Plaintiff cited in its earlier brief, as if the larger quotation demonstrates the notice's adequacy. Oppos. Br. 16. However, the larger quotation still inadequately conveys the scope and impacts of the Project. It explains that the proposal for Block 1 is to "use commercial harvest *to remove the host species*" and activities would include "harvest of Douglas-fir and grand fir *of all sizes*." AR5863 (emphasis added). However, that description is followed by words of limitation. The bullet points in that section only describe harvest alongside roads, around large pine and larch, and to create openings in the stand. *Id*.; Pl. Br. at 24. Those words of limitation suggest that the harvest of fir will be selective, which is misleading because the project now proposes to log virtually *all* fir trees in Block 1.

More importantly, however, the Forest Service is the party providing quotations out of context, as it fails to address the other phrases from the scoping notice which Plaintiff highlighted. Specifically, it ignores that the scoping notice insists that "[r]etention of the natural feel and visual quality of the area around Walton Lake is a key objective of this project;" that "[r]etention of groups of Douglas-fir and grand fir [would] maintain a natural appearance" in Block 1; and that the project complies with the Forest Plan "so long as the natural appearance of the area is maintained[.]" AR5863, 63, 62. Given the overall tone of the scoping notice, therefore, few members of the public could have anticipated that "fir of all sizes" actually meant "*clearcutting all* fir of all sizes*, including old growth trees*" in a substantial part of the project area. Instead, far from hinting at a pending clearcut, this language incorrectly suggests that the appearance of the area will be essentially unchanged. *See* AR6342 (Recreation Report describing the abrupt change to an "open, parklike dry pine forest environment"). This resulted in confusion about the scope of the project. *See* AR6084 (Aug. 11, 2015 field trip notes indicating that clarification had to be provided, after scoping, about the removal of trees exceeding 21" dbh); AR6394 (Oregon Wild post-scoping email cautioning Forest Service that "[t]his project [would] totally change the feel of a place that people know and love[,]" that people "don't know about this [project,]" and that the agency should head off "the potential public relations issue"). The fact that the Forest Service only received twelve comments about the logging of a much-loved area also strongly suggests that the public was misled. The record therefore fully supports Plaintiff's argument that the scoping notice was misleading.

The Forest Service also points to the handful of media and social media descriptions of the project, but again, their contents simply call the project activities "thinning" as Plaintiff has shown. The Forest Service first calls this "quibbl[ing,]" Oppos. Br. at 17, then excuses the

language by noting the brevity of media and that these issuances did contain links – which lead to a Forest Service page that contains similar language. *See, e.g.,* AR5878, 5896 (citing http://go.usa.gov/3NfBV, which again refers to "thinning"). The Forest Service is in fact doing what can properly be called thinning in some areas of the project (*see* AR6350, referencing precommercial thinning in units 1, 5, 6, 7, and 8), but the Forest Service's notices, both during and after scoping, contain project area maps that specifically describe their conduct in the areas where they intend to clearcut as "thinning." *See, e.g.,* AR6670. "Brevity" is no excuse for one-word labels that are clearly wrong and that appear to be intentionally misleading.

Finally, the Forest Service does not actually address Plaintiff's point that the scoping notice should have contained the fact that it intended to use specific Eastside Screen exceptions to log large and old growth trees. *Compare* Pl. Br. at 25 (calling this "[t]he second critical omission" of the scoping notice) *with* Oppos. Br. at 16 (addressing the logging of trees over 21" without discussing the omitted exceptions to the Eastside Screens). Rather than address the issue of the scoping notice's silence regarding Screens exceptions, the Forest Service apparently argues that, because the scoping notice used the language "firs of all sizes" to describe Block 1, and did not specify diameter elsewhere, the public should have inferred that trees over 21" would be cut in more than one block. *See* Oppos. Br. at 16-17. This evasive language describing Block 1 logging, coupled with total silence about logging large trees in other blocks, flatly contradicts case law which holds that the public should not have to "parse" NEPA documents to determine what they actually mean. *Connaughton*, 752 F.3d at 761. Under the Forest Service's argument, members of the public should have simply assumed that all of the Project's logging would somehow not be restricted by the Eastside Screens, even though the scoping notice does not specifically mention the Screens restrictions or any potentially applicable exceptions.

Plaintiff therefore reiterates that information about Eastside Screens and *relevant exceptions* should have been included in the scoping notice. *See* Pl. Br. at 22, 25-26. This is especially true in light of the Forest Service's explanation that it was using the project scoping notice to help "focus the analysis on issues that are truly significant." AR5832. The importance of the Eastside Screens in protecting large trees in eastern forests cannot be understated. There really can be no dispute that the Forest Service's intent to exceed the Screens' well-known, protective limitations on logging large trees, and to even log old growth trees over four feet in diameter, is the "significant issue" for this project. Consequently, this omission plainly circumvents the public involvement requirements of NEPA. It also defies the intentions of the Eastside Screens, which state that NEPA must be followed when using Screens exceptions. AR2312, 2436, 2447. The public knew nothing of the alleged exceptions until the release of the Decision Memo. *See* AR6359.[6] The Forest Service's decision to ignore this aspect of Plaintiff's argument is an implicit acknowledgement of its conclusive nature.

The Forest Service then states that Plaintiff "cannot show that it was prejudiced by the information contained [sic] scoping notice." Oppos. Br. at 17. This also is incorrect. While Plaintiff correctly guessed that big trees would be cut, Plaintiff did not know the extent of the logging planned. More critically, however, and as Plaintiff has shown, because of the scoping notice's omission of the Eastside Screens exceptions, Plaintiff "had no opportunity to explain why the particular exceptions the Forest Service is relying upon do not apply." Pl. Br. at 26. The Forest Service cannot ignore one of Plaintiff's main criticisms of the scoping notice, indeed the one that prejudiced it the most, and then claim that Plaintiff was not prejudiced.

[6] The three non-Forest Service attendees at the August 11th Field Trip, well after the close of scoping, received clarification that trees exceeding 21" dbh would be cut but still no information about the specific exceptions was provided. AR6084; *see also* Pl. Br. at 5, 24-25.

The Forest Service cites to *Kootenai Tribe* for its description of the purpose of scoping, quoting, ironically, the fact that a notice requirement "ensures that interested parties are aware of and therefore *are able to participate meaningfully* in the entire [NEPA] process, from start to finish." Oppos. Br. at 15 (citing *Kootenai Tribe of Idaho v. Veneman,* 313 F.3d 1094, 1116 (9th Cir. 2002), *abrogated on other grounds by Wilderness Soc'y v. U.S. Forest Serv*., 630 F.3d 1173 (9th Cir. 2011) (emphasis added). Examining the scoping document and other information available to the public during scoping clearly shows that here the public was *not* able to participate meaningfully.

2. The Forest Service Failed to Show that the Walton Lake Project Falls within the Constraints of a Limiting Categorical Exclusion.

The Forest Service's responsive brief also does not show that its application of the CE at 36 C.F.R. § 220.6(e)(14) to the Walton Lake project is consistent with the express language of that CE. While the CE allows the logging of up to 250 acres to control insects or disease, its express language also only allows the Forest Service to log infected trees and "adjacent" uninfected trees and contains examples that reflect those limitations. *See id.* At Walton Lake, however, the Forest Service insists that in units 2, 3 and 4, this CE allows it to clearcut trees infected with laminated root rot *and* all potential host trees for laminated root rot (including large and old growth trees) regardless of whether those healthy trees are actually "adjacent" to any infected trees. Going even further, the Forest Service argues that this CE also allows it to conduct commercial logging in other units of the Project (units 1 and 5) that currently lack insect infestations or disease altogether. *See* Oppos. Br. at 20-21. These interpretations make the CE's limiting language and listed examples superfluous. When all of the CE's express language is taken into account, and considered in light of relevant case law and applicable interpretive canons, it is clear that the cited CE does not cover the extensive commercial logging of currently

healthy, large trees that the DM authorizes. The Forest Service's argument relies primarily on "deference" to its interpretation of the CE, but such deference does not allow it to stretch a CE's language like taffy, setting aside limiting language and illustrative examples. The Ninth Circuit defers to an agency's determination that its own CE applies to an action, unless it is inconsistent with the CE's language. *Alaska Ctr. For Env't v. U.S. Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999), which it clearly is here. Plaintiff should therefore prevail on this NEPA claim as well.

First, the Forest Service cannot pick and choose what parts of the CE's language apply to its actions. In its opposing brief, for example, the agency takes umbrage at the idea that it is limited by the critical clause which covers activities "including removal of infested/infected trees and adjacent live uninfested/uninfected trees," which it states is simply an "illustration" of what it may do. Oppos. Br. at 20; 36 C.F.R. § 220.6(e)(14). However, this clause is not among the "examples" described by the CE (i.e., "Examples include, but are not limited to"), but rather modifies the CE in a way that describes which trees the Forest Service may in fact remove-infected/infested trees "and *adjacent uninfected/infested trees . . . as determined necessary*." *Id.* (emphasis added). Considering the substantial number of uninfected and uninfested trees which the Forest Service intends to log, it is hardly surprising that it wishes to ignore this limiting language. However, the Forest Service's failure to recognize this and give meaning to this limiting language is "inconsistent with the terms used in the regulation[,]" and the Court should not give its interpretation weight. *Alaska Ctr.*, 189 F.3d at 857.

Courts interpret regulatory language to give meaning to all parts of the statute or regulation. *Bennett v. Spear*, 520 U.S. 154, 173 (1997) (it is the "cardinal principle of statutory construction . . . to give effect, if possible, to every clause and word of a statute . . . rather than to emasculate an entire section") (internal quotes omitted). Here, if the Forest Service had intended

to adopt a regulation permitting *any* control method – e.g., the clearcutting of all susceptible trees in an area with a slow-moving, scattered root disease (units 2, 3, and 4) – it could have ended the CE at its second comma ("Commercial and non-commercial sanitation harvest of trees to control insects or disease not to exceed 250 acres, requiring no more than ½ mile of temporary road construction[.]" *See* 36 C.F.R. § 220.6(e)(14). Instead, it included specific explanatory language to constrain removal of healthy trees.[7] Moreover, as the Forest Service acknowledges, the clause was changed in 2003 to cover "adjacent" uninfected/uninfested trees rather than trees within a specific distance. Oppos. Br. at 21; 68 Fed. Reg. 44598-01. This "provides the local manager with latitude when responding to rapidly expanding insect or disease situations" (which, again, is not the case here). *Id.* at 44606. If the disputed clause does not limit the Forest Service's discretion when removing any uninfected or uninfested trees, as the Forest Service argues, then the 2003 change was unnecessary and both the old and new limiting language have no meaning. The language applies and in fact limits the Forest Service's discretion.

The Forest Service changes tactics and states that even if it is so limited, the Walton Lake project does control disease as required because the laminated root rot is present "throughout" units 2, 3, and 4. Oppos. Br. at 20. That is not so. The disease has varying severity in the area and some areas have little or no evidence of current infection. *See* AR6391 (map showing root disease severity in different parts of the units, including ratings that represent only "[m]inor evidence of root disease[,]" "evidence of root disease within 50 feet of the plot[,]" and "[n]o apparent root disease within 50 feet of the plot"). The record thus shows that root rot is minimally or not present in some areas. The Forest Service thus cannot conduct clearcutting when the relied-upon CE expressly limits the removal of healthy trees to "*adjacent* live

[7] Similarly, the CE's language permitting the "incidental removal of live or dead trees for landings" and so on would likewise be superfluous under the Forest Service's reading. *Id.*

uninfected/uninfested trees . . . as determined necessary." 36 C.F.R. § 220.6(e)(14). The Forest Service argues that Plaintiff's understanding of adjacency makes no sense in a forest setting and "[a]ll of the units in the small Project area are adjacent to one another." Oppos. Br. at 21. But it is the language of the CE itself that focuses on individual "trees." Thus, whatever "adjacent" means in a forest setting, it certainly does not encompass clearcutting all potential host trees.[8]

The Forest Service also attempts to dismiss Plaintiff's challenge to the commercial logging of large trees in units 1 and 5. In these units, the Forest Service attempts to justify logging under the CE because it would reduce stress on trees which *could* become infested with bark beetle, though there is no current infestation. Oppos. Br. at 20; AR6350, 6358.[9] The Forest Service "explains" this by arguing, tersely, that "the beetles are present throughout Oregon." Oppos. Br. at 21. This sentence captures Plaintiff's argument. The beetles may be present in many parts of Oregon, and yet the Forest Service intends to log in an area without them to preemptively "control" them. This violates the plain language of the CE which only allows the logging of uninfested trees when they are adjacent to infested trees.

The Forest Service also cannot downplay the importance of the examples in the CE, which starkly illustrate that the Forest Service's discretion is limited to treating *present* infection, unlike "clearcutting" and unlike the wholly unwarranted commercial logging in units 1 and 5. These examples do not describe any clearcutting nor preventative actions – only the "[f]elling and harvest of trees infested with southern pine beetles and immediately adjacent uninfested

[8] The DM describes the disputed area as "not just adjacent to the camping area, but encompass[ing] approximately 200 acres around Walton Lake." AR6380. It defies both parties' shared understanding of the word to argue that all trees in that area are "adjacent" to one another.
[9] Although there is a touch of laminated root rot in both units, the Forest Service DM is clear that it is not logging in those units to address that disease. Instead it proposes to log in units 1 and 5 to preemptively address an insect pest that is not currently present in those stands. *See* AR6358; *see also* AR6084 (indicating that Aug. 11 Field Trip attendees were told that "most of the project is about thinned overstocked stands" and the root rot occupies only "a portion" of the project).

trees[,]" and "[r]emoval and/or destruction of infested trees affected by a new exotic insect or disease[.]" 36 CFR § 220.6(e)(14)(i) and (ii). Courts have previously looked to such examples to evaluate agency NEPA compliance. *See* Pl. Br. at 20 (citing *West v. Sec'y of Dep't of Transp.,* 206 F.3d 920, 927 (9th Cir. 2000));[10] *Florida Keys Citizens Coal., Inc. v. U.S. Army Corps*, 374 F. Supp. 2d 1116, 1139, 1141 (S. D. Fla. 2005) (describing "a non-exclusive list of the *types of actions* that may qualify" under the CE, and that the disputed project fell within "the *types of actions* specifically enumerated") (emphasis added). Here, no examples approach the breadth of the Forest Service's current use of the CE to cover logging uninfected/uninfested stands or non-adjacent healthy trees. Similarly, a canon of interpretation (*ejusdem generis*) demands that Forest Service actions align with the examples of present infection. 2A Norman J. Singer, *Sutherland Statutes & Statutory Construction* § 47:17 (7th ed. 2015) (the doctrine applies "[w]here specific words follow[] general ones, to restrict application . . . to things that are similar to those enumerated"); *Hamilton v. Madigan*, 961 F.2d 838, 840 (9th Cir. 1992) (applying this reasoning to a "statutory definition . . . and [an] accompanying list of examples"). Logging in an area "at risk" of bark beetle attack is flatly inconsistent with that doctrine.

Finally, the Forest Service attempts to recast this as an area where it deserves deference for making a scientific or technical determination. See Oppos. Br. at 21. Not so. As Plaintiff has worked to illustrate above, this is not a technical, scientific question, but rather a legal question asking whether the Forest Service complied with specific provisions and limits laid out in its

[10] The Forest Service contests the applicability of *West*. Oppos. Br. at 22 ("Plaintiff's citation . . . is inapposite"). However, the "documented categorical exclusion" which the Forest Service describes was "a type of CE," which also provided, as here, "*a non-exclusive list of examples* for which a DCE may be appropriate." 206 F.3d at 927-28. (emphasis added). Central to the court's reasoning was that "[n]one of *the examples listed in the DCE regulations* approache[d] the magnitude of [the] project" at issue. *Id.* at 928 (emphasis added); see also *Citizens for Better Forestry v. U.S.D.A.*, 481 F. Supp. 2d 1059, 1087 (N.D. Cal. 2007) (summarizing *West*).

own regulations. Here, the regulation at issue governs the control of present insects or disease, yet, as the Forest Service itself acknowledges, "disease is only about 25 percent of the [Walton Lake] project[.]" AR6409. This marks a clear failure to comply with the CE.

III. The Balancing of the Equities and the Public Interest Strongly Favor a Preliminary Injunction Against the Logging of Large and Old Growth Fir Trees.

The Forest Service's submissions in opposition to Plaintiff's motion do not establish that either the equities or the public interest favor denial of Plaintiff's request for a preliminary injunction against the logging of hundreds of large trees, including numerous old growth trees. Although the Forest Service does its best to *create* new equities in its favor and new public interest concerns, its arguments and assertions are not supported by the record. That record shows that, although parts of the Project address a continuing public safety problem caused by hazard trees near roads and campgrounds, the Project is not addressing any imminent crisis that requires the wholesale removal of hundreds of large fir trees over the next few months. Additionally, Plaintiff does not seek to enjoin the removal of "real hazard trees immediately adjacent to roads and campgrounds." Pl. Br. at 1. Thus both the balancing of the equities and the public interest strongly favor a preliminary injunction against the proposed commercial logging.

A. *The Turner Declaration Cannot Create New Public Interest Concerns or Equities in Favor of the Forest Service by Directly Contradicting the Record.*

Because the Forest Service's balancing of the equities and public interest arguments rely heavily on assertions from the Declaration of Slater Turner, Plaintiff will briefly address some of those assertions before discussing in more detail how and why the Forest Service's submissions do not support the denial of Plaintiff's motion. Mr. Turner is a named defendant, in his official capacity as the district ranger who signed the DM at issue. His declaration is a mix of statements that closely adhere to the record and others that flatly contradict it. The declaration also contains

conclusory and self-serving assertions that Turner will not allow the campground to open next year if the proposed commercial logging is not completed before the camping season begins in May 2017. Turner Decl. ¶¶ 14, 19. The Forest Service, using the Turner Declaration, should not be allowed to suddenly argue that the sky is falling by manufacturing a public safety crisis when the record itself does not suggest an imminent public safety crisis.[11]

Plaintiff acknowledges that there is a continuing hazard tree issue regarding trees along the roads and within the campgrounds in the Project area, and Plaintiff's requested injunction specifically exempts the removal of such true hazard trees. But the record, at best, indicates that this is a chronic problem rather than an imminent crisis. The initial proposal regarding this project did not even mention public safety. AR5835. The Forest Service has in fact been addressing public safety issues along the Project area's roads and within its campgrounds annually by identifying and removing individual hazard trees. AR6315, 6340; Benzar Decl. Ex. 1, p.17 (permittee required to annually inspect for and remove hazard trees within special use area). Funding availability therefore appears to have dictated this particular project's timing. *See, e.g.,* AR5878 (press release explaining project timing), 5869 (bulletin answering the question "Why now?" without discussing campground closure). The wholesale removal of all laminated root rot host trees also would allow the Forest Service to "restore" the impacted areas, which the Forest Service could not do if it simply continued to remove hazard trees. AR6110; *see also* AR6321. But nothing in the record treats such restoration as an emergency.

[11] When evaluating a "no action" alternative, which means the project would never be implemented, the Rec. Report, AR6341, does indicate that the risks from hazard trees and wildfire would increase and "could cause temporary or permanent closure of the most visited recreation site on the forest." But Plaintiff is not requesting an injunction that would prevent the Project from ever occurring and nothing in the Rec Report indicates that such a closure is imminent or even likely in the immediate future.

The Turner Declaration appears to acknowledge, at least indirectly, all of these facts. *See* ¶¶ 7, 10, 20. Yet it nevertheless suggests that the public safety issues produced by this slow-moving disease and the risk of wildfire have somehow suddenly created a public safety crisis, requiring immediate treatment via clearcut. ¶ 14. There are a number of problems with this. First, Turner himself delayed this project several times from its initial proposed implementation of fall 2015. *See* Pl. Br. at 7; AR5833. Second, the field survey he claims to have been awaiting (¶ 12) shows that, in some areas where the Forest Service is proposing to log big trees, there is currently little or no evidence of root rot infection (in contrast to the Declaration, which incorrectly says that all host trees in the Project area are infected with laminated root rot, *see* ¶ 9) and some of the least infected areas are along the south access road for the campground. AR6330-31. The silvicultural discussion of fire risk similarly lacks urgency, simply observing that fuel loading will increase as mortality continues. AR6317-18. Finally, while admitting that the Forest Service was able to address public safety issues during his delays by continuing to identify and remove hazard trees, ¶ 14, Turner asserts that the public safety situation has abruptly become unacceptable and any additional delays in implementation will cause him to close the campground in 2017.[12] Plaintiff respectfully suggests that this contradictory treatment of internal delays, in contrast which this delay to insure adequate judicial review of Mr. Turner's decision, deserves little weight when balancing the equities or considering the public interest.

Plaintiff also questions Turner's conclusory assertion that a partial closure of the project area would not be possible so that the campground could remain open even if the Project is not completed this winter. *See id.*, ¶ 19. The fir trees the Forest Service insists it must log to protect

[12] The only explanation offered by Turner is that during his authorized delays, "dead and down trees have accumulated in the area, and laminated root rot has persisted throughout the stand." ¶14. Turner offers no specific facts to explain why these conditions, which are not new, are only now an imminent crisis that requires immediate clearcutting of old growth fir trees.

public safety in units 2, 3 and 4 are almost entirely located outside of the actual campground. Although Unit 2 abuts the south access road for the campground, the Forest Service's own surveys indicate there are only scattered fir trees and limited root rot in the stands near that road. AR6122, 6330. Any public safety risks here could be controlled by removing hazard trees. The portion of road that encircles the lake, passing through Units 2, 3 and 4, is not needed for campground access and could easily be closed to all public access, as could the forested areas within those units. The conclusory assertion that the Forest Service could not control public access to these undeveloped, forested areas because they are near a popular campground is not credible and is belied by the fact that the Forest Service often issues and enforces closure orders.

Finally, it is important to point out an omission in Mr. Turner's Declaration. Although Mr. Turner notes that the Project is subject to an Integrated Resource Service Contract that will cost the Forest Service $78,262 and suggests that it would cost the Forest Service much more if it had to complete the Project on its own, ¶ 20, he very clearly does *not* say that a delay in starting the Project because of Plaintiff's requested preliminary injunction would cause the Integrated Resource Services Contract to be canceled or prevent the Project from eventually occurring.

B. *No Evidence Shows That a Short Term Delay Would Actually Jeopardize the Project, and the Balance of Harms Otherwise Tips Sharply in Plaintiff's Favor.*

The balancing of the equities factor focuses on the impacts of the requested preliminary injunction on the parties. In terms of impacts on defendants, the Ninth Circuit has repeatedly emphasized that it is only the harm caused by a temporary delay that is relevant, and the Forest Service cannot create greater harms by simply speculating that a delay might cause a project to never happen. *See, e.g., AWR,* 632 F3d. at 1136-1138. In its response, the Forest Service points to two harms that it argues it will suffer even if the Project is only temporarily delayed: harm caused by the closure of the campground and harm caused because the project could not

"proceed in its current form." Oppos. Br. at 32. Both harms are almost entirely speculative and cannot outweigh Plaintiff's permanent and significant irreparable harm if the Forest Service logs hundreds of large fir trees, including numerous old growth firs.

As discussed above, Turner's threat to close the Walton Lake Campground next summer deserves little or no weight. But even if the threat were credible, the actual harm to the Forest Service from a one-year closure would be quite small ($7,129.65; *see* ¶ 6) and cannot outweigh the permanent harm to Plaintiff. See *AWR,* 632 F.3d at 1136. Plaintiff will address the harm to the public from such a closure when it addresses the public interest factor below.

There is no evidence that the Project would not occur or would be jeopardized or canceled if it is briefly delayed for a short time. Although the Forest Service presses that point, and cites to the Turner Declaration, Oppos. Br. at 32-33, the Turner Declaration in fact says no such thing. The Turner Declaration actually states that:

> [t]he Project is awarded as an Integrated Resource Service Contract at a cost of $78,262 to the Forest Service. If the Forest Service could complete the Project on its own, it would cost two to three times this amount because the Forest Service would have to rent equipment, purchase supplies it does not own, and hire laborers. The Forest Service does not have the funds, personnel or equipment available to implement this Project itself now or in the foreseeable future.

¶¶ 20-21. What is missing from this testimony is any assertion that the Integrated Resource Service Contract would be canceled or not funded if the Project is briefly delayed. Indeed, the Forest Service obtained funding for this Project in 2015, and apparently the Forest Service's own delays have not endangered that funding. Speculative assertions that the Project might never occur if it is delayed cannot outweigh the harm to Plaintiff. *AWR*, 632 F.3d at 1137.

The cases the Forest Service cites to support its balancing of the equities arguments are readily distinguishable. *See W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012) (plaintiff sought injunction after construction project had begun and over $700 million had been

expended); *Native Ecosystems Council v. Weldon,* 2016 WL 4591897, at *2-3 (D. Mont. Sept. 2, 2016) (post-fire salvage sale where plaintiffs only met "serious questions" test, and serious economic concerns such as forty threatened jobs weighed against the injunction); *Friends of the Wild Swan v. Christiansen,* 955 F.Supp 2d 1197, 1203 (D. Mont 2013) (plaintiff failed to establish any of the four injunction factors and evidence showed that even a temporary delay would lead to layoff of 120 employees), *aff'd* 767 F.3d 936 (9th Cir. 2014); *Earth Island Inst. v. Quinn,* 2014 WL 3842912, at *8 (E.D. Cal. July 31, 2014) (salvage logging project where delay truly jeopardized entire project); *Headwaters, Inc. v. BLM, Medford Dist.,* 665 F.Supp. 873, 875-76 (D. Or. 1987) (injunction sought after contractor had already spent $47,000 on road building and injunction would cause other losses that could not be recovered).

The Forest Service does not cite a more relevant Ninth Circuit case which, when issuing an injunction even though the plaintiffs had waited over two years to seek such relief, explained:

> Moreover, "this is not a case where a dam or nuclear power plant has already been built," *Portland Audubon,* 884 F.2d at 1241, or in which delays in the project would result in a breakdown of an international coalition or loss of a project to a foreign site, *Apache Survival Coalition,* 21 F.3d at 913. Rather, it is one involving the protection of old growth forests. As we noted in *Portland Audubon,* "The old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce. The forests will be enjoyed not principally by plaintiffs and their members but by many generations of the public...." 884 F.2d at 1241.

Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1382 (9th Cir. 1998). A similar balance should be struck by the Court here.

C. *The Public Interest Favors Plaintiff's Requested Injunction Even if the Campground Had to be Closed Next Year.*

The Forest Service's public interest arguments fail because they are based primarily on speculation and ignore the fact that Plaintiff's requested injunction would allow the Forest Service to remove any actual hazard trees in the campground or along roads. The Forest

Service's opposition brief correctly notes that the Ninth Circuit in *Connaughton* recognized that mitigating fire and insect risks is in the public interest, even if they are somewhat speculative. 752 F.3d at 766. However, that same opinion went on to explain that such risks were only entitled to "great weight" when they were both imminent and unable to be mitigated while a preliminary injunction was in place. *Id.*[13] Here, nothing in the record indicates that the asserted fire and bark beetle risks are imminent. Moreover, as Plaintiff has already acknowledged, hazard trees pose an actual public safety risk in certain parts of the Project area, but that is an ongoing chronic risk which the Forest Service already successfully manages by annually removing hazard trees, which, again, Plaintiff's requested injunction would allow them to continue to do.

As it does in its balancing of harms argument, the Forest Service points to the closure of the campground as indicating that the public interest does not support Plaintiff's injunction. As Plaintiff has already explained, the Forest Service's new and self-serving assertion that it will close the campground next year in the event of project delay should be given little weight. However, even if the Forest Service were correct, and a delay would make the closure of the campground necessary for the 2017 camping season, the public interest still favors Plaintiff's requested injunction that protects its supporters' and the public's recreational and aesthetic interests in hundreds of large and old growth firs. The short-term harm caused by a temporary closure does not outweigh the essentially permanent harm from logging such trees. *See, e.g. Cuddy Mtn,* 137 F.3d at 1382; *Lands Council v. Martin,* 479 F.3d 636, 643 (9th Cir. 2007).

The Forest Service cannot credibly downplay the public interest in maintaining the dense mixed conifer forest in units 2, 3 and 4 by suggesting that an injunction would benefit only a

[13] *Connaughton* cited to *Alpine Lakes Prot. Soc'y v. Schlapfer,* 518 F.2d 1089, 1090 (9th Cir. 1975) as an example, where many of the trees were already infested and that infestation would inevitably spread to other areas absent logging. Here, though laminated root rot is present in Units 2, 3 and 4, there is essentially no risk of it spreading further into the project area. AR6315.

handful of Plaintiff's supporters. Although the Forest Service only received about a dozen comments in response to its scoping notice, most were opposed (and Plaintiff believes there would have been many more but for the scoping notice's language; *see* part II, *supra*). Both the Forest Service's own studies and comments from members of its collaborative group reflect that the public would likely be very unpleasantly surprised by the results of the logging in units 2-4.[14]

The Forest Service's speculative arguments regarding short term harms to the public interest in an open campground next year do not outweigh the public interest in preserving the existing large fir trees in the Project area while this case is fully litigated. Further, the Forest Service's public interest arguments regarding fire and insect infestation prevention lack a credible threat of imminence, and Plaintiff's request that the injunction allow the Forest Service to continue to remove actual hazard trees mitigates any remaining public safety concerns.

IV. The Bond Requirement Should Be Waived.

Plaintiff respectfully requests that the Court waive the bond requirement under FRCP 65(c). Courts routinely waive the bond requirement in public interest environmental cases. Pl. Br. at 34 (citing multiple cases which the Forest Service does not address). Ignoring this longstanding Ninth Circuit precedent, the Forest Service contends that "the posting of a bond is a precondition to the issuance of an injunction, regardless of the identity of the plaintiff." Oppos. Br. at 34. The Forest Service instead relies on one case, *Save Our Sonoran, Inc. v. Flowers*, which is easily distinguishable. 408 F.3d 1113, 1126 (9th Cir. 2005). There, the Ninth Circuit upheld a $50,000 bond because plaintiffs failed to provide any evidence that the bond would impose undue hardship. *Id*. Here, Plaintiff has provided ample evidence. Coulter Decl. ¶¶ 7-10. The Forest Service also argues that Plaintiff should be required to post a bond equivalent to costs

[14] The Forest Service's internal report speculated, implausibly, that the public would eventually appreciate the "open sight lines" and the shrubs planted to replace the old growth firs. AR6342.

and damages. Oppos. Br. at 34. However, Ninth Circuit precedent also contradicts this assertion, including *Save Our Sonoran*, which the Forest Service cites in its previous sentence. 408 F.3d at 1126 ("[requiring] bonds that approximate actual damages … would contradict our long-standing precedent that requiring nominal damages in perfectly proper in public interest litigation"). Thus, if the Court decides not to waive the bond requirement, Plaintiff requests that the Court require only a nominal bond.

CONCLUSION

For the reasons set forth above and in Plaintiff's initial motion, Plaintiff respectfully reiterates its request that the Court issue an order preliminarily enjoining the Forest Service from allowing or implementing any of the commercial sanitation logging authorized in units 2, 3 and 4 or commercial thinning authorized in units 1-5 by the December 15, 2015 Decision Memo, with an exception for the removal of actual hazard trees near campsites or along roads.

Dated this 4th day of October 2016.

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