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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

FRIENDS OF THE CLEARWATER *Plaintiff*, v. CHERYL F. PROBERT, in her official capacity as Forest Supervisor of the Nez Perce-Clearwater National Forests; and U.S. FOREST SERVICE *Defendants*.	No. 3:21-cv-189-CWD **PLAINTIFF'S OPENING BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT***

* This Opening Brief complies with the 45-page limit set by the Court's Scheduling Order, ECF No. 13.

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GLOSSARY OF ACRONYMS

APA – Administrative Procedure Act

CEQ – Council on Environmental Quality

DBH – Diameter at Breast Height

DN – Decision Notice

EA – Environmental Assessment

EIS – Environmental Impact Statement

ESA – Endangered Species Act

FONSI – Finding of No Significant Impact

FOC – Friends of the Clearwater

FPOG – Forest Plan Old Growth

MA20 – Management Area 20

NEPA – National Environmental Policy Act

NFMA – National Forest Management Act

NIOG – North Idaho Old Growth

OGAA – Old Growth Analysis Area

ROD – Record of Decision

USFWS – U.S. Fish and Wildlife Service

VDT – Variable Density Thinning

Fig. 1 – Map of the Salmon Clearwater Divide (from ECF 12, p. 2)

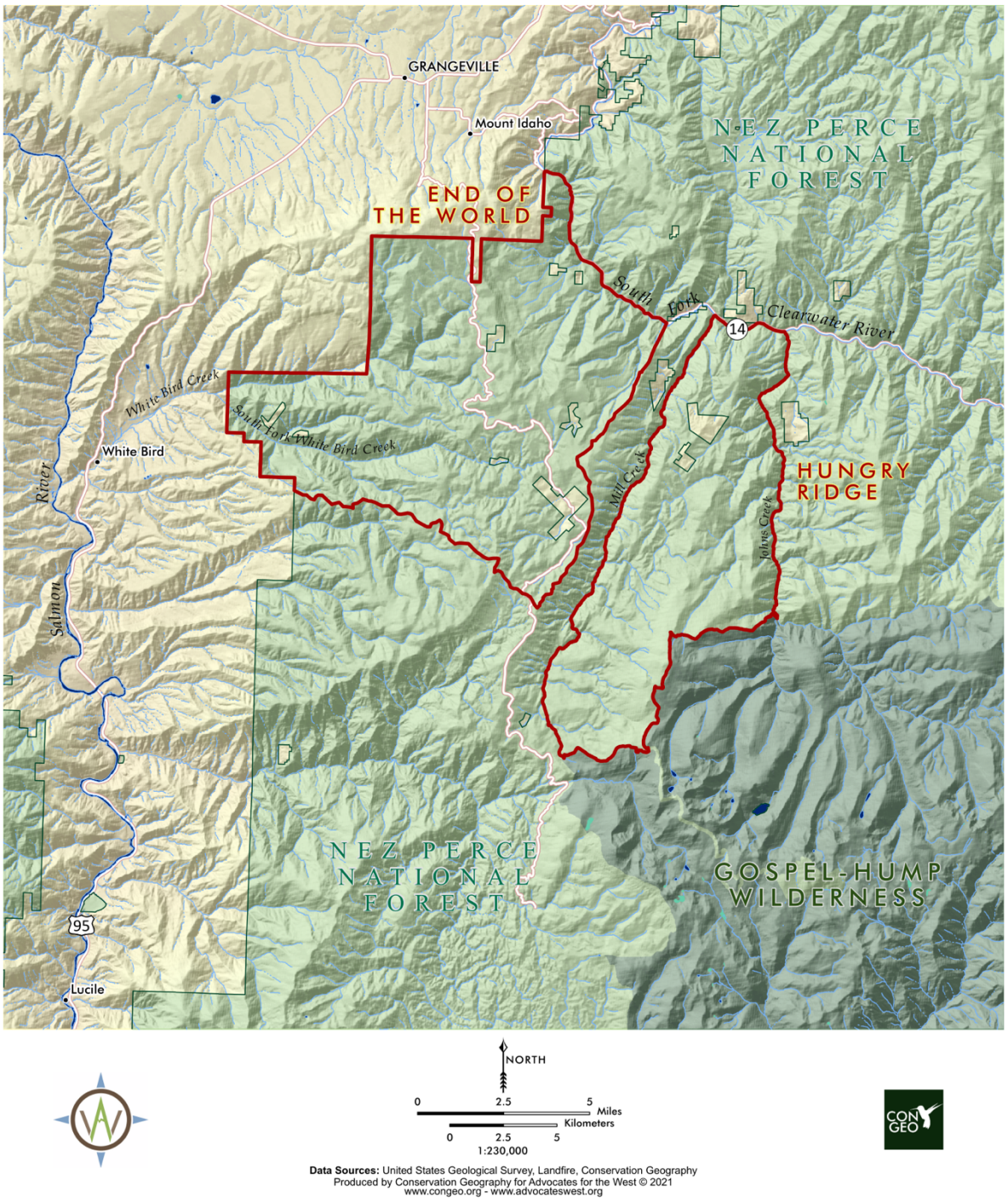
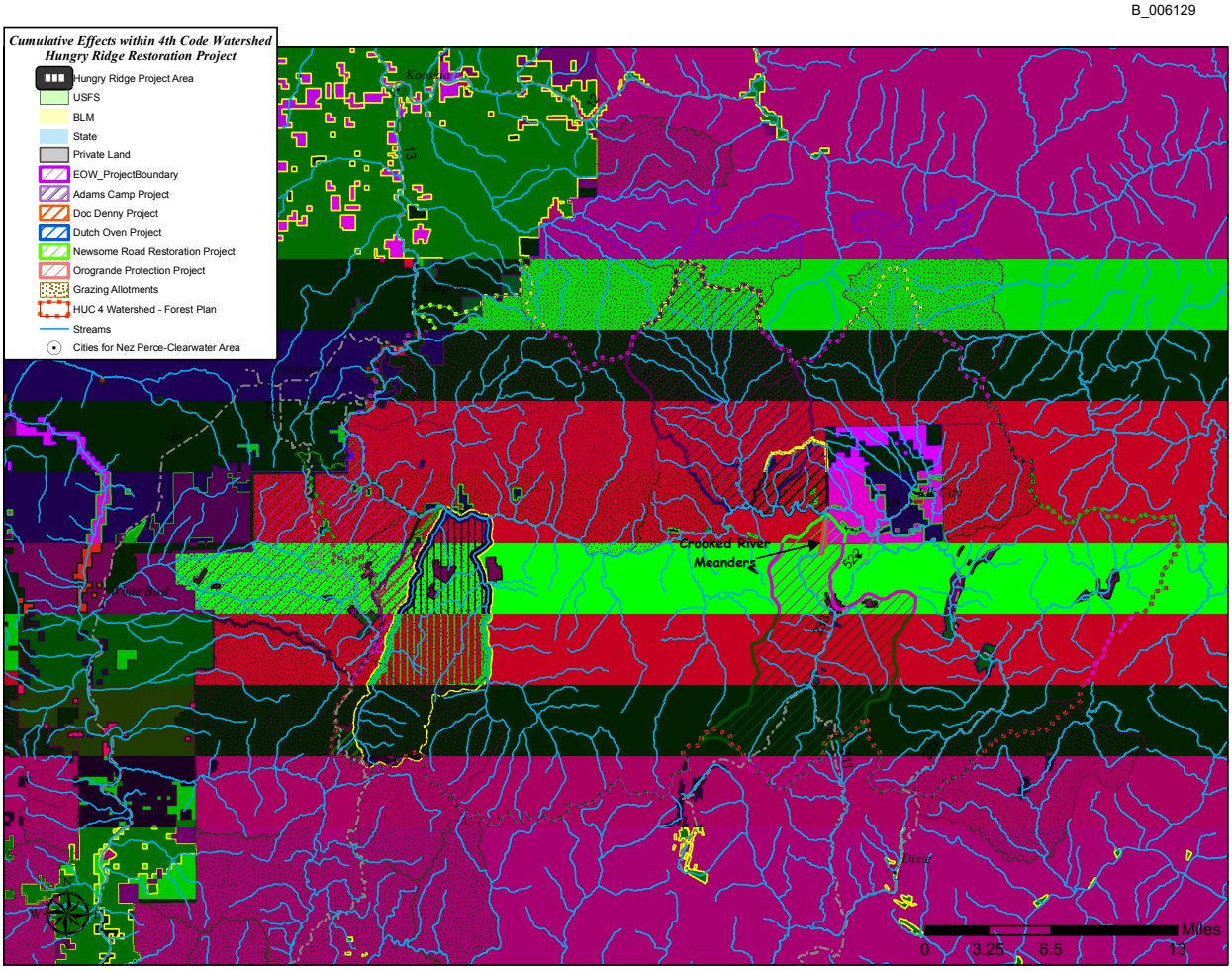


Fig. 2 – Map Showing Hungry Ridge, End of the World, Doc Denny, Adams Camp, and other projects from the Administrative Record (B_006129)



INTRODUCTION

Plaintiff Friends of the Clearwater (FOC) respectfully seeks summary judgment reversing two massive Forest Service logging projects on the Nez Perce National Forest, known as "End of the World" and "Hungry Ridge." As illustrated on the maps above, these two projects are located nearly adjacent to each other in the area of the Salmon-Clearwater Divide, a forested ridgeline separating the Salmon River from the South Fork Clearwater River.

Together, End of the World and Hungry Ridge authorize logging 317 million board of timber on over 26,000 acres (over 40 square miles) for the next decade. Of that, 7,144 acres (over 11 square miles) would by logged by "regeneration harvest"—clearcutting and similar techniques—and result in 41 supersized clearcuts each so large they exceed the 40-acre standard limit. The two projects are separated by a narrow sliver of National Forest land that is currently being logged under another Forest Service-approved project, called "Doc Denny."

Together with Doc Denny and other recent and nearby logging, End of the World and Hungry Ridge will significantly transform the Salmon-Clearwater Divide, degrading fish habitat, and destroying mature forest wildlife habitat that the Forest Service admits will not return for at least a century. But when it authorized the projects, the Forest Service emphasized their limited "restoration" components, while ignoring or minimizing the extensive degradation that their massive amounts of logging and associated roads will cause, individually and cumulatively.

As explained below, the Court must reverse and remand the Forest Service's approval of the End of the World and Hungry Ridge projects based on multiple legal violations:

First, the Forest Service violated the National Forest Management Act (NFMA) by authorizing logging in old growth forest and in degraded watersheds without complying with binding Forest Plan standards designed to protect these sensitive areas from logging.

Second, the Forest Service violated the National Environmental Policy Act (NEPA) by relying on a Finding of No Significant Impact to avoid preparing an Environmental Impact Statement (EIS) for End of the World. For both projects, the Forest Service violated NEPA's "hard look" requirement by refusing to consider the cumulative effects of both projects together, requiring reversal under Ninth Circuit precedents, including *Bark v. U.S. Forest Service*, 958 F.3d 865 (9th Cir. 2020). The Forest Service also refused to address mounting scientific evidence undermining the agency's assertions that logging will improve forest health and reduce fire risk, again requiring reversal under *Bark*. And Forest Service erroneously asserted each project would have only short-term and negligible impacts on "threatened" Snake River steelhead, and on fisher and other wildlife that rely on old growth and other mature forest slated for logging.

Finally, even though grizzly bear have been documented in the area, the Forest Service asserted both projects would have "no effect" on grizzly, thus wrongly refusing to consult with the U.S. Fish and Wildlife Service (USFWS) in violation of the Endangered Species Act (ESA).

Each and all of these violations warrant summary judgment in FOC's favor, and requires the Court to vacate, reverse, and remand both the End of the World and Hungry Ridge decisions.

STATEMENT OF RELEVANT FACTS

Project Locations on the Salmon Clearwater Divide.

The End of the World and Hungry Ridge logging projects are located near each other on the Salmon-Clearwater Divide in the Nez Perce National Forest. *See* Figs 1 & 2 above. The project areas provide habitat to many special-status fish and wildlife, including grizzly bear, fisher, and Snake River steelhead, among others. SOF ¶¶ 19–32.[1]

[1] Plaintiff's Statement of Undisputed Facts (SOF), filed herewith, is based on the Administrative Record (AR) filed by the Forest Service, ECF No. 15. End of the World documents in the AR are cited as "A_[page #]", Hungry Ridge as "B_[page #]", and common files as "C_[page #]."

The End of the World project area encompasses 49,565 acres of National Forest lands about six miles south of Grangeville, Idaho. SOF ¶ 1. Most streams there are in the White Bird Creek drainage, which in turn flows into the Salmon River. SOF ¶ 28. Beginning just a half mile to the southeast is the Hungry Ridge project area, which encompasses 30,000 acres of National Forest lands, about 17 miles southeast of Grangeville, and next to the Gospel Hump Wilderness. SOF ¶¶ 5–6. The project area is located mostly within the Mill Creek and Johns Creek drainages, and all streams at Hungry Ridge flow to the South Fork Clearwater River. SOF ¶ 31.

Parts of both project areas have been logged in the past: 26,705 acres at End of the World since the 1940s, and 21,119 acres at Hungry Ridge since the 1960s. A_017042; B_000543. Most of this occurred long ago; little logging has occurred since the 1990s. *See* A_017043; B_000747. However, the narrow sliver of land between End of the World and Hungry Ridge is currently being logged as part of the Doc Denny project, which involves logging nearly 900 acres and constructing 3.4 miles of road. *See* B_006129 (map); B_000747. Also underway nearby, the Adams Camp project involves logging 138 acres and constructing over 7 miles of road. *Id.*

Dwarfing other past and ongoing logging in the area, End of the World involves logging around 19,000 acres of forest to harvest 144 million board feet of timber. SOF ¶ 4. Hungry Ridge involves logging 7,144 acres of forest to harvest 173 million board feet. SOF ¶ 9. The projects include some prescribed burning and watershed improvement activities. SOF ¶¶ 4 & 9. To facilitate logging, both projects include extensive road construction and reconstruction, *id.*, and could require roughly 63,400 round trips in log haul trucks, ECF 13 ¶ 59.

Forest Service Approval of the Projects.

The Forest Service approved End of the World in a January 2021 Decision Notice and Finding of No Significant Impact (DN/FONSI) (A_000001), based on an October 2019

Environmental Assessment (EA) (A_000057). The Forest Service approved Hungry Ridge in a March 2021 Record of Decision (ROD) (B_000001), based on a September 2020 Environmental Impact Statement (EIS) (B_000342). *See* SOF ¶¶ 1–9. FOC submitted comments throughout the approval processes and filed administrative objections, which the Forest Service denied. *Id.*[2]

Throughout the End of the World EA and DN/FONSI, and the Hungry Ridge EIS and ROD, the Forest Service misleadingly emphasized the limited "restoration" components of both projects, while ignoring or downplaying the massive amounts of commercial logging, the adverse environmental impacts of logging and road activities, and the highly controversial and uncertain ways each project might affect forest health and fire risk. *See* SOF ¶¶ 1–32.

The stated "purpose and need" for each project focused on reducing wildfire risk, preventing insect and disease infestations, fostering more resilient forests, and restoring watersheds. SOF ¶¶ 3 & 8. In its comments and objections, FOC raised concerns and submitted scientific studies that directly refute, or raise serious questions about, many of the Forest's Service's assumptions about the effects of logging on fire and forest health. SOF ¶¶ 10–11. But the Forest Service stood by its assumptions and presented these issues as essentially settled, without acknowledging or engaging with the significant controversy and uncertainty. SOF ¶ 12.

Both projects authorize logging in forest the Forest Service identified as "old growth"—resilient forests that are crucial for biodiversity. At End of the World, 5 acres of old growth forest would be clearcut and 230 acres logged by intermediate harvest. SOF ¶ 18. At Hungry Ridge, 530 acres of old growth would be logged by clearcut or other regeneration harvest, and

[2] Plaintiff's Article III standing is demonstrated by its comments and objections in the AR and is confirmed by the declarations filed herewith of Gary Macfarlane, Jeff Juel, and Patrick Finnegan. They are FOC members/staff who attest to their personal knowledge and uses of the area harmed by each unlawful logging project, and whose harms will be redressed by a favorable decision. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997).

139 acres logged by intermediate harvest. *Id.* Clearcutting and other regeneration harvests eliminate old growth, and the Forest Service estimates it takes about 100 to 150 years for old growth wildlife habitat to reestablish after regeneration logging. SOF ¶ 17. While "intermediate harvests" sometimes leave more old large trees in place, intermediate logging removes and degrades other characteristics of old growth habitat, and some authorized methods of intermediate logging allow creating clearcut gaps on significant portions of a logging unit. *Id.*

Despite the importance of old growth, and the severe and lasting impacts logging has on it, the Forest Service never verified the locations, quantity, and quality of old growth in each project area. *See* SOF ¶¶ 13–16. Instead, the Forest Service relied on limited data and made gross generalizations to assume that vast swaths of forest are "old growth," even though significant portions of these areas are most likely younger forest stands that do not qualify as old growth. *Id.*

The Salmon-Clearwater Divide is home to fisher and other "sensitive species" that depend on old growth and other mature forest. SOF ¶¶ 19–20. The Forest Service admitted large amounts of fisher habitat will be eliminated by regeneration harvest and degraded by intermediate harvest at each project. *See* SOF ¶ 21–22. But the Forest Service falsely asserted each project would have only negligible, short-term effects on wildlife. *See* SOF ¶ 23.

Grizzly bear are an ESA-listed "threatened" species and have recently been found on the Salmon-Clearwater Divide. SOF ¶¶ 25–26. The "White Bird bear" was documented in the End of the World area in 2019 and is believed to have hibernated on the Divide. *Id.* Based on recent grizzly sightings, USFWS notified the Forest Service in 2020 that, for purposes of the ESA, grizzly bears "may be present" at both projects. SOF ¶ 27. Disagreeing, the Forest Service declared the projects will have "no effect" and refused to engage in ESA Section 7 consultation or consider grizzly in its NEPA documents. *Id.*

The Salmon-Clearwater Divide is home to streams that support threatened steelhead, salmon, and bull trout, as well as sensitive cutthroat trout. SOF ¶¶ 28 & 31. Due to past logging and other activities, fish habitat is degraded in many streams. SOF ¶¶ 30 & 32. Two watersheds at End of the World, and five at Hungry Ridge, suffer from excessive "cobble embeddedness," a measure of the degree to which streambed gravels are filled and covered with fine sediments, and which is bad for fish. *Id. See also* A_002093. The Forest Service admitted the logging and roads it authorized are likely to make these conditions worse in the "short term." SOF ¶¶ 30 & 32. But to justify more logging in these degraded watersheds, the Forest Service made rosy predictions that adverse short-term effects will be minimal and conditions will get better in the long term. *Id.*

Snake River steelhead are an ESA-listed "threatened" species with designated critical habitat in both project areas that is adversely affected by sediment and cobble embeddedness. Local populations of steelhead in the South Fork Clearwater that would be impacted by Hungry Ridge and by part of End of the World are recognized to be at "high risk." SOF ¶ 31. In recent years, steelhead returns to the Snake River basin have plummeted to all-time lows. *See* B_005565 at Table 6. Without up-to-date information on steelhead numbers in either project area, and without considering how dire the current situation is, the Forest Service dismissed each project's adverse effects to steelhead as short-term and negligible. SOF ¶¶ 28–32.

ARGUMENT

I. NFMA VIOLATIONS FOR FAILURE TO COMPLY WITH FOREST PLAN.

Plaintiff FOC first seeks summary judgment on its NFMA challenges to the End of the World and Hungry Ridge projects, as set forth in the Third and Sixth Claims for Relief in its First Amended Complaint. *See* ECF No. 12, ¶¶ 173–76, 186–89. There are two sets of NFMA violations: first, violations of Forest Plan old growth standards (addressed in sections B & C), and second, violations of Forest Plan fisheries habitat standards (addressed in sections D & E).

A. Applicable Legal Standards.

NFMA requires the Forest Service to prepare a land and resource management plan ("forest plan") for each national forest, including standards for how the forest shall be managed. 16 U.S.C. §§ 1604(a), (e) & (g)(3)(B). NFMA and its implementing regulations require that all management actions must be consistent with the governing forest plan. 16 U.S.C. § 1604(i); 36 C.F.R. § 219.10(e). "It is well-settled that the Forest Service's failure to comply with the provisions of a Forest Plan is a violation of NFMA." *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 961 (9th Cir. 2005). "If the Forest Plan's standard . . . is not being met, then the timber sales that depend upon it to comply with [NFMA] are not in accordance with law and must be set aside." *Idaho Sporting Cong. v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002).

The Court reviews FOC's NFMA claims under the Administrative Procedure Act (APA) to determine whether the Forest Service decisions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This requires a "thorough, probing, in-depth review" to determine whether the agency presented a "rational connection between the facts found and the conclusions made." *Native Ecosystems,* 418 F.3d at 960. Courts "defer to an agency's decision only if it is fully informed and well-considered." *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007).

B. Forest Plan Old Growth Requirements.

The Nez Perce Forest Plan includes Fish and Wildlife Standard #7: "Provide management for minimum viable populations of old-growth and snag-dependent species by adhering to the standards stated in Appendix N." C_027300. The Appendix N standards state as follows:

> [I]n order to maintain a viable population of old-growth-dependent species, it is necessary to maintain 10 percent of the total forested acres as old growth with no less than 5 percent of the forested acres maintained as old growth within each prescription watershed or combination of watersheds totaling 5,000 to 10,000

> acres. If less than 5 percent old growth exists in a drainage, the additional required acres will be assigned to adjacent drainages where excess old growth is available . . . . An additional 5 percent of the forested acres within each prescription watershed shall be designated as replacement old growth.

C_027490 (underscore added).

Appendix N defines "old-growth habitat" as "a community of forest vegetation which has reached a late stage of plant succession characterized by a diverse stand structure and composition along with a significant showing of decadence." C_027489. It further defines an "old-growth stand" through several criteria, including "[a]t least 15 trees per acre > 21 inches diameter at breast height (DBH)," and "[o]verstory canopy closure of 10-40 percent; understory canopy closure of at least 40 percent; total canopy closure at least 70 percent." *Id.* This Appendix N definition of old growth is what the Forest Service calls "Forest Plan Old Growth" or "FPOG" in its discussion of the End of the World and Hungry Ridge projects. *See* B_023972.

To carry out these directives, the Forest Service divided up the Nez Perce Forest into Old Growth Analysis Areas (OGAAs). SOF ¶ 13. Thus, to meet the Appendix N requirements quoted above, the Forest Service must maintain at least 5% "existing old growth" in each OGAA. C_027490. The Forest Service must also "designate" at least another 5% "replacement old growth" in each OGAA. *Id.* If an OGAA has less than 5% existing old growth, the Forest Service must look to adjacent OGAAs for extra existing old growth to make up the difference and protect it. *Id.* Importantly, Appendix N also directs the Forest Service to: "Verify the quality, amount, and distribution of existing and replacement old- growth habitat as part of project planning." *Id.*

C. Failure to Maintain Minimum 5% "Existing Old Growth".

Using the Forest Service's own numbers of the forested acres it verified to qualify as FPOG, the record reveals that none of the five OGAAs at End of the World currently meet the minimum 5% existing old growth requirement; and only two of the six OGAAs at Hungry Ridge

meet it. *See* A_018750–51 at Table 43; B_000648 at Table 3-50. After approved clearcutting and other regeneration logging, old growth percentages will drop even more. *See* SOF ¶¶ 17–18. In the end, only one OGAA at Hungry Ridge would meet the minimum 5% existing old growth requirement. *See* B_000657 at Table 3-52. *See also* Jageman Decl., Figs 2 & 3.[3]

To claim it is meeting the 5% requirement, the Forest Service resorted to counting not only stands verified to be FPOG, but also stands it identified as "North Idaho Old Growth" (NIOG) and stands in areas designated as "Management Area 20" (MA20). *See* A_018750–51; B_000657. This is inconsistent with Appendix N, fails to demonstrate compliance with the minimum 5% existing old growth standard, and violates NFMA, as discussed below:

1. Arbitrary & Capricious Decision to Count "NIOG" as Existing Old Growth.

It is established in the Ninth Circuit that to demonstrate compliance with a forest plan old growth standard when authorizing logging, the Forest Service must use the definition of old growth in the governing forest plan, not some other definition. *See Alliance for the Wild Rockies v. USFS*, 907 F.3d 1105, 1116–17 (9th Cir. 2018) (Forest Service "decision to adopt a new definition of 'old forest habitat'" that deviated from definition in forest plan held arbitrary and capricious); *Idaho Sporting Cong.*, 305 F.3d at 970–71 (Forest Service violated NFMA when it relied on a "new definition for old growth that is different from the Forest Plan definition").

[3] While the End of the World old growth table displays the % FPOG in each OGAA, the Hungry Ridge old growth tables do not. The % FPOG in each Hungry Ridge OGAA can be calculated using numbers displayed in the Forest Service's table, as follows: add the acres of "FPOG" and "NIOG/FPOG" (to get the total acres of FPOG); divide that sum by the "OGAA forested acres"; and multiply by 100. Figures 2 and 3 in the Declaration of Harry Jageman, filed herewith, display the % FPOG for each project. Mr. Jageman is a wildlife expert. His declaration is properly before the Court as "necessary to determine whether the agency has considered all relevant factors and has explained its decision." *Sw. Ctr. for Biological Diversity v. USFS*, 100 F.3d 1443, 1450 (9th Cir. 1996). *See also Hausrath v. U.S. Dep't of the Air Force*, 491 F. Supp. 3d 770, 785–87 (D. Idaho 2020). Figures 2 and 3 are also permissible for illustrative purposes.

The Forest Service made the same error here when it included NIOG as existing old growth at End of the World and Hungry Ridge. Again, the Nez Perce Forest Plan sets forth specific criteria for what qualifies as old growth, *i.e.,* FPOG. C_027489. NIOG is not the same as FPOG. NIOG is based on a different set of criteria, set forth in Green, *et al.*, "Old-Growth Forest Types of the Northern Region" (1992). *See* C_020442–506. For example, for ponderosa pine stands, only 8 or more sufficiently large trees per acre are needed to meet the NIOG criteria, *see* C_020451 at Table 1; but 15 or more large trees per acre are required to qualify as FPOG, *see* C_027489. Thus, a stand of ponderosa could qualify as NIOG despite having just over half the number of large trees required to qualify as FPOG. This is just one of many differences.

Notably, the limited verification of forest stands that the Forest Service did at End of the World and Hungry Ridge confirms NIOG is not the same as FPOG. The Forest Service did not verify whether all stands at each project site do or do not qualify as FPOG and/or NIOG. *See* SOF ¶¶ 15–16. But for those stands it did verify, it found that some stands qualified as FPOG; some qualified as both FPOG and NIOG; and some qualified as NIOG only. *Id.*

The Forest Service knows FPOG is what matters for Forest Plan compliance. In the Hungry Ridge EIS, the Forest Service stated: "Potential impacts to lands meeting the North Idaho old growth (NIOG) definition (Green et al. 1992) were included as best available science. Potential impacts to lands meeting the Forest plan old growth (FPOG) definition were included to comply with Forest Plan direction." B_000646. But later when the EIS tabulated and displayed "existing old growth," it lumped NIOG and FPOG together to boost its numbers. *See* B_000657 at Table 3-52. By counting NIOG forest stands—that were never found to qualify as FPOG—as existing old growth for purposes of determining Forest Plan compliance, the Forest Service violated NFMA, like in *Alliance for the Wild Rockies* and *Idaho Sporting Congress*.

2. Arbitrary & Capricious Decision to Count "MA20" as Existing Old Growth.

The Forest Service also violated NFMA by arbitrarily and capriciously assuming all forest lands labeled MA20 qualify as "existing old growth" and adding huge acreages of MA20 to its old growth numbers, without verifying whether any qualify as FPOG—when many likely do not. Under the Forest Plan, the Forest Service assigns management area designations to different parts of the Nez Perce National Forest, where each management area has different Forest Plan goals and limitations. MA20 is one such management area, and its stated goal is to: "Provide 'suitable' habitat (existing and replacement) for old-growth-dependent wildlife species." C_027364 (emphasis added). The Forest Service designated numerous blocks of land as MA20 across the entire forest, including multiple MA20 complexes at the End of the World and Hungry Ridge sites. *See* A_004445 & B_023792 (maps showing MA20).

But areas designated as MA20 include both old and young forest stands, where the old stands might meet the FPOG criteria, and where the young stands do not. As the Forest Plan states for MA20: "Approximately half of the area has a timber condition class of overmature sawtimber (150 years or older). The remainder of the area is comprised of immature stands (40-80 years) that will provide for replacement old growth habitat." C_27364. This is true for the project areas here. *See* A_018717 & B_000398 (both acknowledging that MA20 areas include "immature stands (40-80 years) that will provide for replacement old-growth habitat").

The limited verification of forest stands that the Forest Service did confirms that MA20 is not made up entirely of existing old growth. Of the forest stands the Forest Service verified, some are located in areas of MA20. SOF ¶ 16. Of these verified stands within MA20, the Forest Service found some qualify as FPOG, but others qualify as NIOG only, and others are immature stands of replacement old growth (neither FPOG nor NIOG). *Id. See*, *e.g.*, B_000648 (map).

But many areas of MA20 at Hungry Ridge and End of the World were never verified to be FPOG, NIOG, replacement old growth, or anything else, because the Forest Service lacked "stand exam data" needed to make such a determination. *See* SOF ¶ 15; B_000646–47. *See also* A_004445 (map); B_023792 (map). Yet the Forest Service simply counted all of the unverified acres of MA20 lands as existing old growth, vastly inflating the purported amounts of existing old growth in every OGAA. *See* A_018750–51; B_000657. This is arbitrary and capricious, as the very definition of MA20 includes immature replacement old growth stands.

Furthermore, Appendix N sets forth explicit requirements for how to determine whether a block of MA20 counts as existing or replacement old growth—requirements the Forest Service did not follow when it counted all unverified MA20 as existing old growth. Appendix N directs: "Verify the quality, amount, and distribution of existing and replacement old- growth habitat as part of project planning." C_027490. "If the old-growth component is less than 50 percent of the complex, the complex should be considered replacement old growth." *Id.* "Within the old-growth complex, only the stands that meet old-growth criteria will be counted toward meeting the allocation for existing old growth. The replacement stands will be counted toward meeting the allocation for replacement old growth." *Id.*

The Forest Service never "verified the quality, amount, and distribution" of huge swaths of MA20 lands at Hungry Ridge and End of the World. The Forest Service never determined whether any of these MA20 complexes are made up of less than 50% old growth and, therefore, must be counted as replacement old growth—not existing old growth. And for any MA20 complexes that are made up of at least 50% old growth, the Forest Service never separated out the stands that meet the old growth criteria from those that do not, except for limited areas where it had stand exam data. Instead, it simply counted them all as "existing old growth."

The Ninth Circuit has held that the Forest Service violates NFMA when a court is "unable to determine from the record that the agency is complying with the forest plan standard" because it failed follow the specific methods set out in the forest plan for evaluating compliance with the given standard. *See Native Ecosystems*, 418 F.3d at 961–64 (NFMA violation where Forest Service used method to calculate elk hiding cover that was different from forest plan method). *See also Hapner v. Tidwell*, 621 F.3d 1239, 1250–51 (9th Cir. 2010) (same); *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1377–78 (9th Cir. 1998) (NFMA violation where Forest Service used wrong baseline area to calculate old growth percentages). Likewise here, by failing to follow the Forest Plan Appendix N instructions for calculating existing old growth, the Forest Service failed to demonstrate compliance with the 5% existing old growth standard, in violation of NFMA, requiring reversal of both projects.

D. Forest Plan Prohibitions on Logging in Degraded Watersheds.

For each watershed in the Nez Perce Forest, Forest Plan Appendix A establishes (1) a "Fishery Water Quality Objective" (hereafter "Fishery Objective"), and (2) a "Sediment Yield Guideline." *See* C_027453. To satisfy the Fishery Objective, a watershed must meet or exceed its minimum percentage "fishery habitat potential," which is based on the amount of "cobble embeddedness." *See id.*; A_003287; B_015707. Cobble embeddedness is a measure of how rocks in a stream are surrounded, or embedded, by fine sediments such as silt or sand. B_015707. A higher level of cobble embeddedness is bad for fish (B_015708) and equates to lower fishery habitat potential. If cobble embeddedness levels are too high, then a watershed will fail to meet its Fishery Objective. *See*, *e.g.*, B_015724 at Table 8.

To satisfy the Sediment Yield Guideline, a watershed must be below the maximum "% over baseline" sediment yield. *See* C_027453; A_017866; B_019090. Sediment yield is the

quantity of sediment (cobbles, sands, silts) entering the watershed streams. B_019090. When sediment enters a stream, it might flow in the water column as "suspended sediment" or it might settle on the bottom as "deposited sediment" and, potentially, contribute to cobble embeddedness. *See* A_002092–94, A_002119.

The Forest Plan includes binding standards that require the Forest Service to meet the Appendix A Fishery Objective and the Sediment Yield Guideline. Fish and Wildlife Standard #19 requires: "Restore presently degraded fish habitat to meet the fish/water quality objectives established in this Forest Plan (see Appendix A of the Forest Plan)." C_027300. Fish and Wildlife Standard #21 requires: "Meet established fishery/water quality objectives for all prescription watersheds as shown in Appendix A." C_027301. To comply with these binding standards, logging is prohibited in any watershed that currently fails to meet its Fishery Objective or its Sediment Yield Guideline, unless the Forest Service demonstrates a "positive, upward trend," as explained in the Forest Service's *The Implementation Guide to Appendix A of the Nez Perce National Forest Plan* ("Appendix A Guide"). C_017811.

The Appendix A Guide defines upward trend as meaning that "stream conditions determined through analysis to be below the Forest Plan objective will move toward the objective over time." C_017821. Such trend analysis "should be done through a convergence of evidence using stream surveys, monitoring results, watershed condition inventories, literature reviews, predictive modeling, and professional judgment." *Id.* Moreover:

> With all habitat components except sediment, the improving trend should be continuously upward, with no temporary downturns or reduction in the rate of improvement. . . . With sediment, the key is that new sediment inputs remain below the flushing rates considering stream power and the fish/water quality objective of the stream. . . .

Id. (emphasis added). The Appendix A Guide directs the Forest Service to first assess "the current trend" following specific methods. C_017822–23. Next, the Forest Service is directed to

assess the "effects of project activities to trend," and identifies different methods depending on the current trend found in the first step. C_017823–24.

E. Arbitrary & Capricious "Upward Trend" Findings.

Two watersheds at End of the World—Jungle and Cold Springs—fail to meet their Appendix A Fishery Objective due to excessive levels of cobble embeddedness. SOF ¶ 30. The Forest Service conducted a trend analysis for both watersheds in the aquatics report. A_003294–98. The Forest Service concluded both watersheds have an existing upward trend and—despite authorizing logging and roads in these watersheds—found End of the World "would maintain and contribute to those upward trends" in the future. A_003298; SOF ¶ 30.

Five watersheds at Hungry Ridge currently fail to meet their Appendix A Fishery Objective due to excessive cobble embeddedness: Merton, Trout, American, Deer, and Upper Mill. SOF ¶ 32. The Forest Service's trend analysis for each watershed is in Appendix E of the EIS. B_000763–790. The Forest Service never disclosed the existing trend in each degraded watershed, but concluded—even with the extensive logging and road work it authorized—there will be an upward trend in the future. *Id.*; SOF ¶ 32.

Instead of using a "convergence of evidence" as called for in the Appendix A Guide, the Forest Service arbitrary relied on speculation about future improvements, failed to consider the "key" factors of stream power and flushing rates, and ignored the import of the limited data and modeling it did have which suggest a downward trend, as discussed below:

1. <u>Failure to Evaluate Existing Trend & Ignoring Existing Trend Data.</u>

Again, the Appendix A Guide directs the Forest Service first to assess the existing trend and second to assess the future trend, depending on whether the existing trend at step one was found to be downward, static, or improving. *See* C_017822–24. Moreover, the Appendix A Guide specifically states: "In all cases, discussions of upward trend in project NEPA documents

will include" eleven listed items, including a "determination of existing trend, based on the process described above." C_017825.

At Hungry Ridge, the Forest Service skipped step one, and went straight to step two without making a determination of existing trend for any of the five degraded watersheds. *See* B_000763–790. Without assessing the existing trend at step one, the Forest Service could not appropriately assess the future trend at step two, as instructed by the Appendix A Guide. For this reason alone, the Hungry Ridge trend analyses are arbitrary and capricious.

Furthermore, the limited information the Forest Service had shows that, compared to 1987 (when the Forest Plan was adopted), cobble embeddedness has gotten worse. Table 8 in the fisheries report displays the fishery habitat potential in 1987 and at present, and reveals that fishery habitat potential percentage declined in Upper Mill Creek from 90% down to 40%, declined in Deer Creek from 50% to 40%, declined in American Creek from 70% to 50%, and declined in Trout Creek from 100% to 60%. B_015724. For Merton Creek, there was no 1987 value; only the current value of 60%. *Id.* But the Forest Service never disclosed or considered this information in its upward trend analyses at Hungry Ridge. *See* B_000763–790.

At End of the World, the Forest Service evaluated the existing trend, but simply assumed based on a lack of recent logging and other disturbances that there is an upward trend in Cold Springs and Jungle. A_003295; A_003297. Again, the agency ignored the limited data it had on cobble embeddedness: while habitat potential improved in Jungle Creek, in Cold Springs Creek it declined from 70% in 1987 down to 61% (or 62%) by 2017. A_003293; A_003297.

By failing to even consider existing trend for the Hungry Ridge watersheds, and ignoring cobble embeddedness data it had for both projects—which show trends are downward in most

watersheds—the Forest Service failed to consider an important factor and reached a conclusion not supported by the facts, rendering its upward trend analyses arbitrary and capricious.

2. Ignoring Modeling Predicting Downward Future Trends & Failing to Factor in Stream Power and Flushing Rates.

At step 2, the Forest Service concluded each degraded watershed will, in the long-term, experience an upward future trend. But as discussed below, the Forest Service ignored its data and modeling showing cobble embeddedness will get worse in the short-term after logging, and did not do any long-term cobble embeddedness modeling. Instead, the Forest Service focused on sediment yield to detract from the real problem: excessive cobble embeddedness.

For both projects, the Forest Service modeled future sediment delivery and cobble embeddedness in each watershed to compare the water quality and fish habitat effects of different alternatives. *See* A_017872–73 at Table 4; A_003305 at Table 3; B_019120 at Table 14; B_015718 at Table 4. As the Forest Service admitted, its modeling is very limited. First, the modeling can evaluate only short-term changes in cobble embeddedness, and "cannot be used to predict changes in cobble embeddedness that may occur as the result of long-term declines in sediment yield." B_000765. Second, its modeling is not reliable for predicting actual results (actual amounts of cobble embeddedness and sediment delivery); but the Forest Service claims it is at least useful for comparing alternatives. A_003287; B_015707.

The modeling predicted authorized logging and road activities will cause sediment and cobble embeddedness to get worse in each of the degraded watersheds at End of the World and Hungry Ridge in the short-term. *See* A_003305–06, A_003310–11; B_015721–23 at Tables 5–7. For End of the World, the Forest Service failed to even acknowledge these modeling results in its trend analyses for Jungle and Cold Springs creeks. *See* A_003394–98. The Forest Service did acknowledge these increases in sediment yield and cobble embeddedness later in the aquatics

report (*see* A_003305–06, A_003310–11), but not in the trend analyses. The Forest Service simply asserted that because the project includes some restoration activities in each watershed, there will be an upward trend, without even mentioning—let alone factoring into its trend analyses—the logging and non-restoration road work authorized in each watershed, or the modeling results. Failing to consider these important factors in its trend analyses is again arbitrary and capricious.

Compounding these errors for End of the World, the Forest Service ignored the "key" facts that Jungle and Cold Springs creeks are both low gradient with poor flushing capabilities—meaning even short-term increases in sediment yield could cause long-lasting increases in cobble embeddedness, while long-term reductions in sediment yield might have little or no effect on cobble embeddedness. Again, as the Forest Service's Appendix A Guide explains: "the key is that new sediment inputs remain below the flushing rates considering stream power and the fish/water quality objective." C_017821 (underscore added).

For Jungle Creek, the Forest Service found existing cobble embeddedness is "higher than desired . . . mostly as a result of natural processes." A_003295. "Because of the low gradient and relatively small stream flows, the material cannot be easily flushed out of the system." *Id.* Similarly, for Cold Springs Creek, the Forest Service attributed existing high levels of cobble embeddedness primarily to this being a "low gradient stream" that "does not have the power to easily move sediment out of the system due to the low gradient." A_003297. Yet, despite blaming high levels of existing cobble embeddedness on low gradient and stream power, the Forest Service ignored these "key" factors when it evaluated future trend, factors which undermine the Forest Service's assertion that trends will improve in the future.

For Hungry Ridge, the Forest Service did acknowledge that the five degraded watersheds

will experience increases in sediment and cobble embeddedness in the short-term due to the authorized logging and road work. *See* B_000763–790. But despite these downward trends in the short term, the Forest Service claimed that there would still be an upward trend in the future based on anticipated post-project, long-term reductions in sediment yield and other miscellaneous factors. *Id.* However, these are all distractions from the real problem: cobble embeddedness. As the Appendix A Guide explains: "Upward trend means that stream conditions determined through analysis to be below the Forest Plan objective will move toward the objective over time." C_017821. These streams already meet the Forest Plan Sediment Yield Guideline, but they fail to meet the Fishery Objective, which is based on cobble embeddedness. To demonstrate that these streams will move toward the Fishery Objective over time, the Forest Service must show cobble embeddedness will improve—which it did not do.

Further undermining the Hungry Ridge trend analyses, the Forest Service failed to provide any information on flushing rates and stream power for the five watersheds. *See* B_000763–790. Again, the Forest Service itself considers flushing rates and stream power to be the "key" to how sediment will affect stream conditions like cobble embeddedness. C_017821. But the Forest Service ignored these factors and just assumed long-term improvements in sediment yield will lead to an upward trend in cobble embeddedness.

For example, the trend analysis for Upper Mill Creek at Hungry Ridge (B_000786–89) admitted sediment and cobble embeddedness will get worse in the short-term, found sediment yield will improve in the long-term, and then stated—without any supporting data, modeling, or explanation directly related to cobble embeddedness, and without any information whatsoever about stream power and flushing rates—"an upward trend is expected in the long term, in decreased cobble embeddedness." B_000788. This is pure speculation that fails consider

sediment yield in relation to stream power and flushing rates. Without considering flushing rates and stream power, there is no way to know whether or how short-term worsening of cobble embeddedness and sediment followed by long-term reductions in sediment will affect cobble embeddedness in the long run.

In summary, as the Appendix A Guide instructs: "At the conclusion of the [trend] analysis, it must be demonstrable that an improving trend is either in place and will continue, or that an improving trend will be initiated as a result of past, present and future management activities." C_017821 (emphasis added). Instead of demonstrating an improving trend as called for in the Appendix A Guide, the Forest Service had little useful evidence, ignored the evidence it had (which predicts downward trends in the short term), and relied on speculation that far off in the future conditions will improve. This is inadequate to demonstrate an upward trend, as required by the Forest Plan, and violates NFMA and the APA, again requiring reversal.

II. NEPA "HARD LOOK" VIOLATIONS: BOTH PROJECTS.

Summary judgment is also warranted on FOC's NEPA challenges to the End of the World and Hungry Ridge projects, as set forth in the Second and Fifth Claims for Relief in its First Amended Complaint. *See* ECF No. 12, ¶¶ 169–72, 182–85. These claims focus on the Forest Service's failure to take the required "hard look" at direct, indirect and cumulative impacts of both projects, individually and together. *Id.* The Court reviews FOC's NEPA claims under the same APA "arbitrary and capricious" standards, discussed above (*supra* I.A).

A. Applicable NEPA Standards.

NEPA requires that federal agencies prepare an EIS for major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(2)(C). An EIS must provide a "full and fair discussion of significant environmental impacts," and inform "decisionmakers and the public of the reasonable alternatives which would avoid or minimize

adverse impacts or enhance the quality of the human environment." 40 C.F.R. § 1502.1.[4] This obligates agencies to "carefully consider" a project's potential environment impacts and ensure "relevant information will be made available," so that the public can "play a role in both the decisionmaking process and the implementation of that decision." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

To determine whether an action poses "significant" effects, an agency may prepare an EA, which is a "concise public document that briefly provide[s] sufficient evidence and analysis for determining whether to prepare an EIS or a [FONSI]". 40 C.F.R. § 1508.9. An EIS is required "if substantial questions are raised as to whether a project may cause significant degradation of some human environmental factor." *Klamath-Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). Any NEPA analysis must take "hard look" at direct and indirect effects of a proposed action and alternatives, plus cumulative impacts from other past, present, and foreseeable future actions. 40 C.F.R. § 1508.7 & 1508.8. This requires a "reasonably thorough discussion of the significant aspects of probable environmental consequences." *Neighbors of Cuddy Mt.*, 137 F.3d at 1376. "[G]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification for why an agency could not supply more definitive information." *ONDA v. Rose*, 921 F.3d 1185, 1191 (9th Cir. 2019).

B. Failure to Take a Hard Look at Direct and Indirect Impacts.

1. Logging, Forest Health, and Wildfire Risk

The Forest Service violated NEPA by ignoring public comments and scientific studies questioning many of the assumptions the Forest Service made to justify the logging it authorized

[4] The Council on Environmental (CEQ) adopted NEPA regulations that guide every federal agency's implementation of NEPA. *See* 40 C.F.R. Part 1500. This Brief references the 1978 CEQ regulations in effect for End of the World and Hungry Ridge. *See* Answer (ECF 14, ¶ 26).

for each project. An agency's failure to "discuss and consider" evidence contrary to its position in an EA or an EIS indicates that it "did not take the requisite 'hard look' at the environmental consequences." *Blue Mountains Biodiversity Project v. Blackwood,* 161 F.3d 1208, 1208, 1213 (9th Cir. 1998) (EA failed to disclose report findings that there "is no ecological need for immediate intervention in post-fire landscapes"); *Sierra Club v. Bosworth,* 199 F. Supp. 2d 971, 979–80 (N.D. Cal. 2002) (failing to disclose lack of scientific support for assertion that logging would reduce the intensity of future wildfires, and failed to address contradictory science).

In *Bark v. U.S. Forest Service*, 958 F.3d 865 (9th Cir. 2020), the Ninth Circuit confirmed that Forest Service assumptions about logging, forest health, and fire are the types of highly controversial issues that must be candidly addressed, not issues the Forest Service can simply brush aside during the NEPA process. The challenged project on 11,742 acres involved using variable density thinning to provide timber products and "improve stand conditions, reduce the risk of high-intensity wildfires, and promote safe fires suppression activities." *Id.* at 868. The court found: "Substantial expert opinion presented by the Appellants during the administrative process disputes the USFS's conclusion that thinning is helpful for fire suppression and safety." *Id.* at 870. This violated NEPA, because the EA did not "engage with the considerable contrary scientific expert opinion and expert opinion; it instead drew general conclusions." *Id.* at 871.

Like in *Bark*, FOC's comments and administrative objections for Hungry Ridge and End of the World identified and discussed dozens of studies that call into question these same assumptions about forest health and fire that the Forest Service relied on to justify the extensive logging it authorized. *See* A_000297–315; B_030994–1013; SOF ¶¶ 10–12. And like in *Bark*, the Forest Service's NEPA documents "reiterated its conclusions about vegetation management but did not engage with the substantial body of research cited by Appellants." 958 F.3d at 871.

Specifically, FOC presented evidence of the growing scientific consensus that logging in mature forests can actually *increase* severe fire risk by removing large, fire-resistant trees and by reducing the forest canopy, which makes stands hotter, drier, windier, and stimulates the growth of the understory. SOF ¶ 10. FOC's comments and objections also pointed to studies showing that insects, disease, and fire—even stand-replacing fires—act to thin forests naturally, and do so in ways that provide for greater diversity of habitat than logging. SOF ¶ 11. These are the kinds of issues that must be addressed under NEPA and cannot be swept under the rug.

But in the End of the World DN/FONSI and EA, and in the Hungry Ridge ROD and EIS, the Forest Service made general statements about the benefits of logging to reduce fuels and reduce the effects of fire, insect, and disease without engaging with these comments and studies.

For End of the World, the DN/FONSI dismissed the "No Action" alternative, saying it would "result in the continued deterioration of some of the existing stands as well as the potential for wider impacts from spread of insects and disease . . . [and] continue to elevate the risk of an uncharacteristic wildfire and would not address fuel accumulations in the wildland urban interface." A_000005. In choosing Alternative B, it similarly asserted "this project would result in a more fire resistant, resilient forest in which fire behavior would be moderated," A_000016, "achieves the balance of managing forest resources in a responsible way for long term resilience and sustainability," and "capitalizes on opportunities in the project area to increase the resilience of the forest to insects, disease, and fire." A_000017. The End of the World EA makes these same points without addressing contrary science. *See*, *e.g.*, A_000078.

Likewise, in the Hungry Ridge ROD, the Forest Supervisor stated: "My decision will create more characteristic landscape level vegetation patterns which would maintain forest health and promote resilient ecosystems." B_000028. And she claimed: "The selected alternative will

increase the margin of safety for firefighters and the public during suppression actions due to reduced fire intensity, lower fuel loading, and lower Fire Regime Condition Class." *Id.* The Hungry Ridge EIS makes the same points, also without addressing contrary science. *See* B_000386–87 (Purpose and Need Section), B_000482–502 (Forest Vegetation Section), B_000502–16 (Fuels and Fire Section).

The Forest Service did make a limited concession near the end of the lengthy Hungry Ridge EIS that even it realizes the project is not likely to help prevent wildfire:

> Under any alternative, wildfire ignition and occurrence is unavoidable. Research suggest that ignition is most common when fuel moisture contents is low and has been shown to influence human-caused wildfires as well as lightning fires in several studies. . . . Therefore, it is expected that the project area will continue to experience the unavoidable event of wild fire and the adverse effects that are associated with this event.

B_000670. Similarly, in the End of the World fire report (but not in the DN/FONSI or the EA), sandwiched in the middle of a paragraph that otherwise touts the supposed benefits of the project, the Forest Service conceded the project could actually increase fire risk:

> These treatments would reduce the amount of shading on surface fuels, increase the wind speeds to the forest floor, reduce the relative humidity at the forest floor, increase the fuel temperature, and reduce fuel moisture. These factors may increase the probability of ignition over current conditions; depending on weather conditions . . . .

A_003249. These limited and hidden statements—which contradict the agency's positions stated elsewhere throughout the project NEPA documents—are not the kind of up-front, full and fair discussions NEPA requires in the face of serious questions about logging and fire.

As the Ninth Circuit explained in *Bark*: "Although it is not our role to assess the merits of whether variable density thinning is indeed effective in the project area to prevent fires, or to take sides in a battle of the experts, [] NEPA requires agencies to consider all important aspects of a problem." 958 F.3d at 871. Thus, while this Court does not need to resolve the controversy,

it must ensure—as the Ninth Circuit did in *Bark*—that the Forest Service confronts these issues in the NEPA documents, and must vacate and remand each project for violating NEPA.

2. Fisher and Other Wildlife that Utilize Old Growth and Other Mature Forest

The Forest Service arbitrarily and capriciously claimed each project would have only negligible and short-term adverse effects to fisher and other "sensitive species" and "management indicator species" of wildlife that depend on connected old growth and other mature forests with few open areas. SOF ¶¶ 19–23. These other species include American marten, northern goshawk, pileated woodpecker, and others known to inhabit the project areas. *See* A_018714–16 at Table 9. As discussed below, focusing on fisher, the Forest Service ignored severe and long-lasting adverse effects of logging that directly contradict its conclusions:

a. Ignoring Severe, Long-term Effects of Regeneration Logging on Fisher

The End of the World wildlife report disclosed that fisher inhabit the project area but are already in a precarious situation, and the project will cause severe long-term adverse effects. *See* A_018730–32, A_018782–85. Already below the 50% amount of "mature forest" habitat that fisher prefer, End of the World regeneration logging would completely eliminate 588 more acres of mature forest fisher habitat, bringing mature habitat down to 38%. SOF ¶ 21. Once logged, the Forest Service does not expect mature forest fisher habitat to reestablish for 100 to 150 years. SOF ¶ 23. Already exceeding the 5% or less "forest openings" that fisher prefer, regeneration logging will cause another 1,244 acres of open forest in areas of "probable" fisher habitat, increasing openings from 12 to 15%. SOF ¶ 21. Once converted to an opening, the Forest Service does not expect openings to close to a point where fisher might be able to use them again (as less important habitat) for about 30 years. SOF ¶ 23.

Yet fisher are not even discussed in the End of the World DN/FONSI. *See* A_000001–37. The DN/FONSI acknowledged there "would be effects" from some activities, including

"potential but minor short-term losses of habitat for wildlife." A_000019. While an EA table provided some limited information on fisher, including by disclosing that logging will reduce fisher habitat and increase forest openings, it claimed the project will be good for fisher in the long term. *See* A_000094–97. The EA, however, failed to explain how these adverse effects are "potential" or "minor" or "short-term"—which they are not. Directly eliminating 588 acres of important mature forest habitat for 100 to 150 years, and creating 1,244 acres of damaging open areas for 30 years or so, for a sensitive species that appears to be barely hanging on in the area, is neither "potential," "minor," nor "short-term."

Similarly, the Hungry Ridge wildlife report acknowledged that regeneration logging will occur on 5,381 acres in suitable fisher habitat, including about 4,000 acres of regeneration in mature forest habitat, and will eliminate and fragment that habitat. B_023929–30. Mature forest would decrease from 76% to about 60%, and forest openings in probable habitat would increase from 5% to 26% after logging. *Id.* Yet, the ROD wildlife section discussed only the ways logging to create more open habitat can benefit a few other wildlife species, without mentioning fisher. B_000031–33. Likewise, the EIS wildlife section minimized adverse effects to wildlife as "potential" and "short-term." B_000643. Directly eliminating around 4,000 acres of important fisher mature forest habitat that will not return for 100 to 150 years, and riddling the project area with 5,381 acres of forest openings that will not likely close for 30 or more years, is neither "potential" nor "short-term," as the Forest Service misleadingly stated in the EIS.

b. Ignoring Effects of Intermediate Harvest by Variable Density Thinning

Adverse effects to fisher are likely even worse than what the Forest Service disclosed in the wildlife reports, because extensive acres of fisher habitat will see "intermediate harvest," including areas logged by "variable density thinning" (VDT) and converted to open forest—

something the Forest Service ignored. While other intermediate harvests generally do not allow creating large forest openings, in VDT logging units 20% or 30% of the entire unit can be converted into forest openings, where any individual opening can be up to 5 acres. A_018783 (20%, according to wildlife report); A_000070–71 (30%, according to EA); B_000011.

But where it analyzed how much mature forest would be lost and how much fisher habitat would be converted to openings—which are both so important for fisher—the Forest Service looked only at acres affected by regeneration logging. *See* A_018731–32 at Table 24 (existing condition), A_018784 at Table 80 (Alternative B); B_023929–30. It never considered acres of mature forest that could be lost, and acres of potential fisher habitat that could become open, due to VDT gaps. The agency did not even disclose how many acres of VDT will occur in mature forest fisher habitat and in all probable fisher habitat.

These numbers could be sizeable. For example, at End of the World, 10,497 acres (41%) of probable fisher habitat would be logged by intermediate harvest. A_018784. The wildlife report does not disclose how much of this would be by VDT, but site-wide, out of a total of 16,340 acres to be logged by intermediate harvests, 10,043 of those acres are VDT. A_017050 at Table 9. This means, project-wide, about 61% of intermediate harvest at End of the World is by VDT. If the same percentage applies to the 10,497 acres of intermediate logging in probable fisher habitat, then about 6,451 acres of VDT would occur in probable fisher habitat.

Using this estimate of 6,451 acres, if 20% of VDT units are converted to openings, then an additional 1,290 acres of openings would be created that the Forest Service never accounted for. If 30% of VDT units are converted, then the Forest Service failed to account for 1,936 acres of additional forest openings. Factoring in these numbers, as the Forest Service should have done, End of the World logging will increase site-wide forest openings in fisher habitat from

12% now to either 19.8% or 22.4% open. But since the Forest Service arbitrarily excluded these intermediate harvest openings from its analysis, and only considered the 1,244 acres of regeneration logging in probable fisher habitat, it vastly undercounted the increase in forest openings End of the World could cause. *See* A_018731–32 at Table 24, A_018784 at Table 80.

The above example focuses on the increase in forest openings in "probable" fisher habitat caused by VDT gaps at End of the World. The Forest Service similarly failed to consider the elimination of "mature forest" habitat from VDT gaps at End of the World. Likewise, at Hungry Ridge, the Forest Service failed to consider both of these factors when it authorized 1,987 acres of intermediate harvest in probable fisher habitat at Hungry Ridge. *See* B_023930 at Table 3-4.

In short, by ignoring VDT gaps, the Forest Service drastically undercounted logged openings and habitat loss and failed to take a hard look at potential impacts on fisher and other species that depend mature or old growth forests that will be logged and fragmented by both projects, in violation of NEPA.

3. Snake River Steelhead

Both project areas are home to at-risk fish species, including Snake River steelhead. SOF ¶¶ 28, 31. Already listed as "threatened" in the 1990s due to population declines and ongoing threats, steelhead returns from the ocean in recent years have plummeted to low levels not seen since the fish were listed. *See* Williams Decl.[5] The Forest Service admitted that many steelhead streams are already degraded and that logging and road activities authorized for each project can deliver sediment and degrade steelhead habitat, but it dismissed these adverse effects as being supposedly negligible. SOF ¶¶ 30 & 32. As discussed below, the Forest Service made multiple errors in reaching these conclusions, including failing to gather adequate baseline information on

[5] The Declaration of Rick Williams, a fisheries expert, includes figures and information on steelhead returns, which the Forest Service wrongly failed to consider in its NEPA analysis.

steelhead, especially considering recent plummeting returns from the ocean, and improperly dismissing all effects as "short-term."

a. Inadequate Baseline Population Information

Fundamental to NEPA's "hard look" requirement is determining the baseline conditions of the affected environment—something the Forest Service failed to do here. "Without establishing the baseline conditions before a project begins, there is simply no way to determine what effect the project will have on the environment and, consequently, no way to comply with NEPA." *Rose*, 921 F.3d at 1190 (quotations omitted). The purpose of NEPA "is to obviate the need for speculation by insuring that available data is gathered and analyzed prior to implementation of the proposed action." *LaFlamme v. FERC*, 852 F.2d 389, 400 (9th Cir. 1988). "A baseline estimate must be based on accurate information and defensible reasoning." *Great Basin Resource Watch v. BLM*, 844 F.3d 1095, 1103 (9th Cir. 2016) (quotation omitted).

In its objections, FOC urged the Forest Service to provide information on steelhead population numbers and trends, and urged it to consider recently plummeting steelhead returns. A_000410–16; B_031097–99. For End of the World, neither the DN/FONSI, EA, nor the aquatics report provide any information on steelhead abundance at the project area, nor do they even mention the poor recent years of steelhead returns. The Biological Assessment included some survey information by watershed; however, those surveys are all very old. *See* A_000507–08. Many watersheds at End of the World have not been surveyed since the 1980s or 1990s, and even the most recently surveyed watersheds are 20 years old (2001). *Id.* The Ninth Circuit has found six- and ten-year-old wildlife data, without updated habitat surveys, to be too stale to satisfy NEPA. *Lands Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005) (six years old); *N. Plains Res. Council v. Surface Tranps. Bd.*, 668 F.3d 1067, 1085–86 (9th Cir. 2011) (ten years old). Relying on 20-, 30-, and 40-year old fish surveys here likewise violates NEPA.

For Hungry Ridge, neither the ROD, EIS, fisheries report, nor Biological Assessment provide any information on steelhead abundance at the project area, nor do they even mention the poor recent years of steelhead returns for the Snake River DPS. While an agency "need not measure actual baseline conditions in every situation—it may estimate baseline conditions using data from a similar are, computer modeling, or some other reasonable method," it must use some "method or estimate—aside from making generic statements." *Rose*, 921 F.3d at 1191. The Forest Service did not do that here, in violation of NEPA.

b. Failure to Consider Recent, Severe Steelhead Declines

The stale and lacking data here is particularly important since steelhead returns have plummeted in recent years, as Judge Winmill recently confirmed in *Friends of the Clearwater v. U.S. Forest Service*, 2021 WL 3408595, No. 3:20-cv-00322-BLW (D. Idaho Aug. 4, 2021). That case involved the "Lolo Insect and Disease Project" in the Nez Perce-Clearwater National Forests. Judge Winmill ruled that the Forest Service's failure to reinitiate ESA consultation in light of the "recent dramatic drop in steelhead returns" was arbitrary and capricious where the prior consultation relied on stale steelhead data from 2011–2015, when steelhead returns were at their highest since the 1980s. *Id.* at *6–*7. He also underscored the significance of population abundance in considering a project's effects:

> [F]or example, if a "high risk" steelhead population has 100 spawning individuals, and a proposed project will kill a significant percentage of those individuals, although the population would be in the "high risk" category in both scenarios, the risk to the population of 100 is much different than the risk to the population if it significantly declines below that number.

Id. at *6.

Similarly here, the Forest Service never disclosed in its NEPA documents this "recent dramatic drop in steelhead returns" and never factored it into its analysis for either project. This information was particularly important for the Forest Service to address, since all steelhead at

Hungry Ridge and part of End of the World are in the South Fork Clearwater "high risk" steelhead population. B_00556; SOF ¶ 28. Even throughout most of End of the World, where steelhead are part of the "moderate risk" Little Salmon River population, A_000504, the recent steelhead returns are so low that Forest Service had to grapple with that information. But the Forest Service failed to take a "hard look" at these important issues, in violation of NEPA.

c. Improperly Discounting Project Effects as "Short-Term"

An evaluation of environmental effects in a NEPA document must include a reasoned evaluation of short-term adverse impacts. *EPIC v. U.S. Forest Serv.*, 451 F.3d 1005, 1013 (9th Cir. 2006). An agency cannot simply provide an abrupt and unsupported conclusion that short-term impacts are insubstantial. *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 831 (9th Cir. 2008) (finding that the record lacked any scientific justification for the agency's conclusion that the short-term impacts were insubstantial), *vacated*, 559 F.3d 916 (9th Cir. 2009), *dismissed as moot*, 571 F.3d 859 (9th Cir. 2009).

The Ninth Circuit found an agency's discussion of short-term effects to coho salmon to be inadequate in *PCFFA v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1092–94 (9th Cir. 2005), because coho have a three-year life span and the projects at issue spanned 16 years. Similarly, in *PCFFA v. National Marine Fisheries Service*, 265 F.3d 1028, 1037 (9th Cir. 2001), the Ninth Circuit held that an agency's analysis of the short-term effects of a project on anadromous fish was insufficient when it ignored the life cycle and migration pattern of the fish, as well as the fact that badly degraded habitat might lead to the extirpation of the fish.

Similarly here, the Forest Service discounted both projects' degradations of fish habitat by labeling them "short term" and by focusing on the long-term benefits it hopes each project will have. For End of the World, the sediment and fish habitat modeling in the aquatics report

shows increased sediment delivery, increased cobble embeddedness, and decreased summer and winter fish habitat conditions during and soon after the logging and road activities occur. *See* A_003305–06, A_003310–11; B_015721–23 at Tables 5–7. In five of seven watersheds at End of the World, these changes exceed the "suggested limits." A_003306 at Table 4, A_003311 at Table 1. But in the long-term, the agency claims these adverse effects will decrease. A_003311.

For Hungry Ridge, the sediment and fish habitat modeling in the fisheries report again shows increased sediment delivery, increased cobble embeddedness, and decreased summer and winter fish habitat conditions during and soon after Hungry Ridge logging and road activities occur. *See* B_015721–23 at Tables 5–7. But the Forest Service determined that, even when considered together with recent logging in Mill Creek at the Adams Camp and Doc Denney projects, any adverse effects to water quality and fish will be short-term and minimal. B_015727.

Far from "short term," each project involves 10 or so years of logging, three years of road decommissioning, and even more years for degraded areas to recover. *See* B_000011, B_000019. The End of the World aquatics report estimated project effects to streams will last 18 years. A_003307. Watershed impacts may continue beyond that timeframe—the Forest Service recognizes that disturbed areas "gradually recover and the greatest impact is assumed to occur within the first few years following implementation." A_0178622.

Steelhead have four- to five-year life cycles (*see* A_000566), meaning degradation the Forest Service admitted will occur from each project could last several life cycles—and cannot simply be dismissed as "short term." Even if the Forest Service correctly predicted watershed conditions will improve in the long-term (which they likely will not, as already discussed in Section I.E), potentially severe effects could occur in the next ten to twenty years to a species that is barely hanging on, which the Forest Service failed to adequately disclose and evaluate, in

violation of NEPA. [6]

4. Ignoring Recent Severe Degradation in Mill Creek

Recent, severe degradation of stream conditions in Mill Creek further undermines the Forest Service's rosy predictions about water quality impacts from both Hungry Ridge and End of the World. Mill Creek is one of two main watersheds at Hungry Ridge, and it is adjacent to End of the World. SOF ¶ 31. Mill Creek is particularly important for steelhead. *Id.* However, it has seen intensive historical logging. *See* B_000747. This is also where the Adams Camp and Doc Denny projects have taken place in recent years. *Id. See also* B_006129 (map). Mill Creek will see extensive additional logging as part of Hungry Ridge. *See* B_000072 (logging map).

When the Forest Service sampled Upper Mill Creek in 2011 for the proposed Adams Camp project, it found an average 28% cobble embeddedness. *See* B_018073. The Adams Camp EA projected that the project would not measurably increase cobble embeddedness. C_026499. Adams Camp got underway in 2016. B_006042. Subsequent data collected for the Hungry Ridge EIS found cobble embeddedness for the Upper Mill watershed at 53%—almost double what it was before Adams Camp started. B_000447.

The same thing happened in Lower Mill Creek. In 2011, cobble embeddedness was 12%. B_018073; C_026305. The Forest Service predicted that Doc Denny's activities would not measurably increase cobble-embeddedness there. C_026309–10. But after Doc Denny began in 2015 (B_006055) and Adams Camp began in 2016 (B_0060042), the Forest Service collected data in 2017, finding cobble embeddedness more than doubled to 25%. B_000447.

[6] *See* Williams Decl., ¶¶ 27 & 36 (concluding that reducing fish habitat conditions for "short term" at both sites, even if conditions improve after project completion, puts steelhead at risk of extirpation when considering plummeting steelhead returns to the Snake River basin, unknown population abundances at the sites, and current risk status of local populations).

While the Forest Service listed this updated information in a table in the Hungry Ridge EIS, it failed to acknowledge, explain, or consider these substantial increases in cobble embeddedness since 2011, that contradicted its rosy projections. *See* B_00436–56. Notably, the Hungry Ridge fisheries report claimed—falsely—in its cumulative effects section that over the years "data suggest that no increases in deposited sediment in mainstem Mill Creek have occurred and conditions may have improved, particularly in Lower Mill." B_015726. And both the EIS and the fisheries report admitted sediment from Adams Camp and Doc Denny would be "additive to sediment inputs resulting from Hungry Ridge", but discounted them as "minimal" because modeling for Adams Camp and Doc Denny projected "immeasurable changes to cobble embeddedness." *Id.*, B_000455. This wholly ignored the recent data showing cobble embeddedness doubled in Upper and Lower Mill after these projects got underway, violating NEPA's hard look requirement.

Not only does this data undermine the Hungry Ridge analysis for Mill Creek, it also undermines the rosy predictions the Forest Service made about "negligible" and "unmeasurable" impacts to water and fish throughout the Hungry Ridge and End of the World project areas. The Hungry Ridge EIS and End of the World EA, and their supporting documents, rely upon exactly the same hopeful, but wrong, assertions made in the EAs for Adams Camp and Doc Denny that logging and roads would not affect streams. Without considering the import of the recent, severe degradation of Mill Creek, the Forest Service failed to take a hard look at either project.

5. Old Growth, Degraded Watersheds, and Grizzly Bear

Where the Forest Service fails to demonstrate a project's compliance with the governing Forest Plan under NFMA, the Ninth Circuit and this Court have regularly found related NEPA violations. For example, in *Native Ecosystems*, the court held that the Forest Service's failure to

calculate elk hiding cover in the manner specified in the forest plan "arbitrarily and capriciously skewed the EIS's elk herd hiding cover percentage," and thus the "EIS did not provide a full and fair discussion of the potential effects of the project on elk hiding cover and did not inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts." 418 F.3d at 964–65 (quotations omitted). *See also Lands Council v. Cottrell*, 731 F. Supp. 2d 1074, 1090 (D. Idaho 2010) (failure to properly assess impacts on species as mandated by forest plan and NFMA "serves to establish a violation of NEPA").

Here, for the same reasons the Forest Service failed to comply the Forest Plan (*see* Section I, *supra*), the agency also violated NEPA. For old growth, the Forest Service failed to verify locations and amounts of existing old growth in the manner specified in the Forest Plan. Likewise, for the two degraded watersheds at End of the World and five at Hungry Ridge, the Forest Service failed to gather and utilize information on flows and flushing capabilities. *Id*. As a result, the End of the World EA and the Hungry Ridge EIS failed to provide a full and fair discussion of the potential effects to old growth and degraded watersheds.

Similarly, based on its erroneous "no effect" determination for grizzly bear, not only did the Forest Service wrongly refuse to engage in ESA consultation (as discussed in Section IV below), but it also wrongly refused to consider effects to grizzly in the End of the World EA and the Hungry Ridge EIS, violating NEPA. *See WildEarth Guardians v. Jeffries*, 370 F. Supp. 3d 1208, 1231 (D. Oregon 2018) ("no effect" finding violated ESA, and "[f]or these same reasons the Forest Service failed to take a 'hard look' . . . in violation of NEPA").

C. Cumulative Impacts.

These Forest Service violations of NEPA's "hard look" requirement are magnified by its wholesale failure to address the cumulative impacts posed by End of the World and Hungry Ridge to these same values and resources. Cumulative impact is defined as "the impact on the

environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions." 40 C.F.R. § 1508.27(7). "Consideration of cumulative impacts requires some quantified or detailed information that results in useful analysis, even when the agency is preparing an EA and not an EIS." *Ctr. for Envtl. Law and Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1007 (9th Cir. 2011) (cleaned up).

The Ninth Circuit has, time and again, rejected NEPA analyses that unreasonably limit the geographic scope of a cumulative impacts analysis. *See Bark*, 958 F.3d at 871–73; *Klamath-Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 993–97 (9th Cir. 2004); *Idaho Sporting Cong.*, 305 F.3d at 973; *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002); *Kern v. BLM*, 284 F.3d 1062, 1078–79 (9th Cir. 2002); *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1313 (9th Cir. 1990). Remarkably, the End of the World DN/FONSI and EA do not even mention Hungry Ridge, in their cumulative effects discussions or anywhere else. *See* A_000001; A_000057. Likewise, the Hungry Ridge ROD did not even mention End of the World. *See* B_000001. The Hungry Ridge EIS cumulative effects section acknowledged End of the World is a foreseeable future action located "adjacent" to Hungry Ridge. B_000740 (map); B_000744–47 at Table C-2. But it did not provide any quantified or detailed information about cumulative effects to wildlife, forest health, fish, or streams from this adjacent project. *See id.*

This violates NEPA. *See Ecology Ctr. v. Kimbell*, No. CV04-557-C-EJL, 2005 WL 1027203, at *2–5 (D. Idaho Apr. 28, 2005) ("The mentioning of the other [logging] project, however, offers no real discussion or analysis of the cumulative impact of the two projects on the vegetation in the area."); *Bark*, 958 F.3d at 871–73 (similar). Again, End of the World and Hungry Ridge together will generate an astonishingly large amount of timber—some 317 million board feet—by logging over 40 square miles of public lands with old growth and fish habitats for

many imperiled and sensitive species, contributing to habitat loss, fragmentation, and degradation that started decades ago by other logging and road projects. By refusing to acknowledge or meaningfully assess the potential cumulative adverse impacts of the two projects, the Forest Service blatantly violated NEPA's "hard look" requirement.

III. NEPA VIOLATION FOR FAILURE TO PREPARE EIS: END OF THE WORLD.

Plaintiff FOC next seeks summary judgment on its First Claim for Relief, which challenges the Forest Service's arbitrary and capricious approval of End of the World based on the EA and DN/FONSI instead of preparing a full EIS. *See* ECF No. 12, ¶¶ 163–72, 182–85.

A. Applicable NEPA Standards.

The "threshold question in a NEPA case is whether a proposed project will 'significantly affect' the environment, thereby triggering the requirement for an EIS." *Blue Mtns*, 161 F.3d at 1212 (quoting 42 U.S.C. § 4332(2)(C)). To decide if an EIS is required, courts turn to the CEQ NEPA regulations defining "significantly." *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 865 (9th Cir. 2005). The regulations list ten non-exhaustive "intensity" factors for evaluating whether a project's impacts may be significant. 40 C.F.R. § 1508.27(b). The presence of any one intensity factor can be sufficient to require an EIS. *Ocean Advocates*, 402 F.3d at 865.

If the agency decides not to prepare an EIS, the FONSI must set forth a "convincing statement of reasons" explaining why the action will not significantly impact the environment. *Blue Mtns.*, 161 F.3d at 1212; 40 C.F.R. § 1508.13. "[T]he EA is where the [agency's] defense of its position must be found." *Rose*, 921 F.3d at 1191 (quotation omitted). To prevail on a claim seeking an EIS, a plaintiff "need not demonstrate that significant effects will occur. A showing that there are *substantial questions* whether a project may have a significant effect on the environment is sufficient." *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2002). "This is a low standard." *Boody*, 468 F.3d at 562.

B. An EIS Was Required for End of the World.

The Forest Service violated these NEPA requirements by approving End of the World based on the EA and DN/FONSI, rather than preparing a full EIS as it did for Hungry Ridge. It is hard to comprehend how the Forest Service could find that this decade-long project on nearly 50,000 acres of public lands—which will log around 19,000 acres (nearly 30 square miles) of forest and construct 15 miles of road to harvest 144 million board feet within old growth, other wildlife habitat, and sensitive fish watersheds—will have no significant effects.

As many decisions cited above and below underscore, logging and road construction threaten many adverse environmental impacts; hence, large logging projects are usually evaluated with EISs, and courts often order an EIS when an agency fails to prepare one, including for logging projects much smaller than End of the World. *See*, *e.g.*, *Bark*, 958 F.3d at 871 (ordering EIS for timber sale affecting 11,742-acre project area); *Blue Mtns*, 161 F.3d at 1214 (ordering EIS for 4,186 acres of timber sales); *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193–95 (9th Cir. 1988) (ordering EIS for several timber lease sales); *Oregon Wild v. BLM*, 2015 WL 1190131, No. 6:14-CV-0110-AA (D. Oregon, Mar. 14, 2015) (ordering EIS for 265 acres of logging); *Cascadia Wildlands v. U.S. Forest Serv*., 937 F. Supp. 2d 1271, (D. Or. 2012) (ordering EIS for 2,100 acres of logging); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1080 (E.D. Cal. 2004) (ordering EIS for logging 1,354 acres to harvest less than 6 million board feet).

End of the World triggers many of the CEQ "significance" factors, demonstrating that an EIS was required. As detailed in Section II, above, End of the World logging and roads threaten to remove and fragment old growth and mature forest habitats used by fisher and other sensitive species, degrade watersheds important for ESA-listed steelhead, and reduce forest health—

especially considering the additive and synergistic effects of Hungry Ridge, Doc Denny, and Adams Camp under the cumulative effects significance factor, 40 C.F.R. § 1508.27(b)(7). *See Blue Mtns*, 161 F.3d 1208 (EIS required for logging project where "[n]o document explores the collective impacts" of nearby logging projects, together totaling 40 to 55 million board feet); *Ecology Ctr.*, 2005 WL 1027203 at *2–5 (EAs did "not adequately discuss or analyze cumulative environmental impact of [two logging] projects and, therefore USFS's findings of no significant impact and, thus no need for an EIS, was in error").

The project's effects on forest health and fire risk are highly controversial and highly uncertain, also requiring an EIS. *See* 40 C.F.R. § 1508.27(b)(4) & (5). The Ninth Circuit recently confirmed this in *Bark*, 958 F.3d at 870, where it held that a smaller project ostensibly intended to "reduce the risk of wildfires and promote safe fire-suppression activities" required a full EIS, when appellants "identif[ied] considerable scientific evidence showing that variable density thinning will not achieve this purpose." Here, like in *Bark*, FOC identified considerable scientific evidence showing that extensive, landscape-scale logging will not achieve End of the World's stated purposes to "reduce wildfire risks," "increase resilience" to insects or diseases, and "restore forest vegetation." A_000003–4. In the DN/FONSI section on "highly controversial" issues, the Forest Service says "staff examined current relevant science" regarding many issues, including "insects and disease" and "fire ecology" among many others raised by the public. A_000020. But as already discussed in Section II.A.1, neither the DN/FONSI nor the EA engaged in these issues.

Moreover, there are substantial questions about the project's effects to fisher, goshawk, marten, pileated woodpecker, and other species in the project area that depend on old growth and other mature forest habitat. Again, fisher are not even mentioned in the DN/FONSI, which only

acknowledged there "would be effects" from some activities, including "potential but minor short-term losses of habitat for wildlife." A_000019. This conclusion is arbitrary and capricious, as it is not rationally connected to the evidence in the wildlife report: directly eliminating 1,244 acres of fisher habitat, including 588 acres of important mature forest habitat that will not reestablish as such for 100 to 150 years for a sensitive species that appears to be barely hanging on in the project area. *See* SOF ¶¶ 19–23. This is even more true due to habitat lost to extensive VDT logging and cumulative losses at Hungry Ridge, which the Forest Service also failed to consider in the DN/FONSI, rendering effects highly uncertain. 40 C.F.R. § 1508.27(b)(5).[7]

There are also substantial questions about impacts to ESA listed species, another significance factor requiring an EIS. 40 C.F.R. § 1508.27(b)(9). For steelhead, the FONSI focused only on positive aspects of End of the World, without acknowledging the plummeting steelhead returns, already-degraded stream conditions at the site, and adverse effects to streams the project may cause for the next decade or two. A_000021–22. With respect to grizzly, the FONSI relies on the Forest Service's "no effect" finding, *id.*, which is contrary to USFWS and evidence showing recent grizzly sightings there, as explained in Section IV below.

Finally, there are substantial questions about whether the project threatens legal violations. 40 C.F.R. § 1508.27(b)(10). In the FONSI, the Forest Service asserted the project complies with all laws, including the ESA and NFMA, asserting it complies with all Forest Plan desired conditions, objectives, standards, and guidelines. A_000022–23. However, as already

[7] *See* Jageman Decl. at ¶¶ 39–46 (explaining that, based on effects disclosed in wildlife reports, "both projects will have short-term and long-term adverse effects to fisher" which "may render each project area unsuitable for fisher for many decades," and noting that VDT gaps and cumulative effects are "other important factors bearing on fisher that were not considered in the [wildlife reports] and other project documents, which in my professional opinion make it even more likely that these projects will preclude fisher from living in the area").

explained there are at least substantial questions about whether Forest Service complied with the Forest Plan requirements to ensure at least 5% existing old growth in each OGAA, and to demonstrate an upward trend in fish habitat conditions in the Jungle and Cold Springs watersheds. There are also at least substantial questions as to whether the Forest Service violated the ESA with respect to grizzly, as discussed next.

The many significance factors present here thus require reversing the End of the World EA and DN/FONSI for violating NEPA's EIS requirement.

IV. ESA VIOLATIONS FOR FAILURE TO CONSULT OVER GRIZZLY BEAR.

Finally, Plaintiff FOC seeks summary judgment on its ESA challenges to the End of the World and Hungry Ridge projects for arbitrarily determining they pose "no effect" to grizzly bear and failing to consult with USFWS, as set forth in the Fourth, Seventh, Eighth, and Ninth Claims for Relief in its First Amended Complaint. *See* ECF No. 12, ¶¶ 177–81, 190–206.[8]

A. ESA Requirement to Consult When an Action "May Affect" a Listed Species.

Congress enacted the ESA "to halt and reverse the trend toward species extinction, whatever the cost." *TVA v. Hill*, 437 U.S. 153, 184 (1978). The "heart of the ESA" is its Section 7 consultation requirement. *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 495 (9th Cir. 2011). Section 7 requires each federal agency to "insure that any action . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." 16 U.S.C. §1536(a)(2).

[8] These claims are reviewed under the APA "arbitrary and capricious" standard of review, discussed above. Because the Eighth and Ninth Claims are brought under the ESA citizen suit provision challenging the Forest Service's failure to consult, those claims are not limited to the AR; the Court may thus properly consider FOC's Declaration of David Mattson, a grizzly bear expert, since it "may consider evidence outside the administrative record for the limited purposes of reviewing [the] ESA claim." *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 497 (9th Cir. 2011).

The first step in complying with Section 7 is to obtain "a list of any listed or proposed species or designated or proposed critical habitat that may be present in the action area." 16 U.S.C. § 1536(c)(1); 50 C.F.R. § 402.12(c). If listed species "may be present" in the area, the action agency must prepare a Biological Assessment (BA) to determine whether the proposed action directly and indirectly "may affect" the listed species. 16 U.S.C. § 1536(c)(1); 50 C.F.R. §§ 402.02, 402.12(f), 402.14(a). If the agency determines the proposed action "may affect" any listed species, then it must consult with USFWS. 50 C.F.R. § 402.14(a)–(b).

The threshold for a "may affect" determination is low and ensures "actions that have any chance of affecting listed species or critical habitat—even if it is later determined that the actions are not likely to do so—require at least some consultation under the ESA." *Karuk Tribe of Cal. v. U.S. Forest Serv.*, 681 F.3d 1006, 1027 (9th Cir. 2012). "[A]ny possible effect, whether beneficial, benign, adverse, or of an undetermined character" triggers the consultation requirement. *Kraayenbrink*, 632 F.3d at 496. Therefore, an agency must consult in every situation except when a proposed action will have "no effect" whatsoever on a listed species.

B. Arbitrary and Capricious No Effect Findings for Grizzly Bear.

Based on recent evidence of grizzly bear in the Nez Perce-Clearwater National Forests in 2019 and 2020, USFWS updated its map of where grizzly "may be present" in December 2020 to include the Hungry Ridge and End of the World project areas. *See* SOF ¶¶ 24–27. This evidence included a verified grizzly bear (the White Bird bear) in the End of the World project area in 2019. SOF ¶ 25. And in April 2020, a grizzly was confirmed nearby (right next to the End of the World area), which might have been the White Bird bear or another grizzly. *Id.*

In response to USFWS's updated map, the Forest Service prepared grizzly BAs for both Hungry Ridge and End of the World. SOF ¶ 27. The BAs concluded, however, that each project would have "no effect" on grizzly and listed the same reasons. A_000656; B_024032–33.

Two of the Forest Service's listed reasons for making its "no effect" finding wrongly disagree with USFWS's finding that grizzly "may be present" in both project areas. First, the Forest Service points out that the Bitterroot Ecosystem is considered "unoccupied" by grizzly because there has been no observation of two or more reproductive females, or one female reproducing in two separate years. A_000656. This is erroneous, because for Section 7 consultation the issue is whether the species "may be present" in the area, not whether it is "occupied." *See Alliance for the Wild Rockies v. Kruger*, 950 F. Supp. 2d 1172, 1181 (D. Montana 2013) (using "occupancy" rather than "may be present" standard to avoid Section 7 consultation violates the ESA).

Second, the Forest Service noted that the White Bird bear was a male dispersing from 200 miles away, and there "have been no further reports of grizzly bears in the project area or surrounding sub-watersheds, indicating that this was a transient bear and not a residential animal." *See* A_000656. To the contrary, the recent grizzly presence indicates other dispersing grizzly will attempt to occupy the project areas over the next decade. *See* Mattson Decl., ¶ 29. Given the recent grizzly sightings, the Court should reject the Forest Service's refusal to agree with USFWS, the expert wildlife agency. *See WildEarth Guardians*, 370 F. Supp. 3d at 1230–31 (Forest Service erroneously made "no effect" finding for wolf on basis that "no wolves were known to consistently occupy the Project Area" where record contains "numerous references to gray wolves' presence in the Forest").

Other reasons the Forest Service provided to support its no effect finding essentially

claim that, even if grizzly are in the area, each project would have absolutely no effect on them, reasons which are also arbitrary and capricious. According to the Forest Service, "bear security" (which depends on road density and is important for bears (C_006414–15)) will not be reduced because even though each project involves new road construction, most new roads and some existing roads will be decommissioned. A_000656. But the Forest Service never considered whether road density will increase in the short-term while each project is underway. Road densities will likely increase at each project area for the next decade or more before enough roads are decommissioned. These types of short-term impacts must be considered. *See PCFFA*, 265 F.3d at 1037 (record lacked scientific evidence to support the decision to disregard the short-term effects of a timber project).

The Forest Service also asserted—without any explanation—that each project "would not increase the potential for negative interactions with grizzly bears as a result of . . . human/grizzly conflicts . . . ." A_000656. This completely ignores the risk of human/grizzly conflicts based on the many workers that will be on the ground for the next 13 or so years in each project area, which creates a significant risk to grizzly. *See* C_006409 (70% to 90% of gizzly bear deaths are caused by humans); Mattson Decl., ¶ 29 ("no doubt that there will be increased risk of human/ grizzly bear conflicts and disturbance and displacement of any nearby bears while the End of the World and Hungry Ridge projects are underway"). Additionally, none of the rationales proffered by the Forest Service address the disturbance impacts to grizzly from the noise, light, and activity associated with ten plus years of logging, log hauling (including roughly 63,400 round trips), and road work.

In *Native Ecosystems Council v. Kruger*, 946 F. Supp. 2d 1060 (D. Mont. 2013), the Forest Service's conclusion that a logging project would have no effect on grizzly was arbitrary

and capricious, even where there were no grizzlies living in the area and they only might pass through. There, the wildlife report acknowledged the project would result in "disturbance effects due to increased traffic, human activity, and equipment use during project activities," but the Forest Service claimed that the project would "maintain the connectivity for transitory bears that might move through the project area" so there would be no effect. *Id.* at 1079. The court reversed, because those disturbance effects alone—even though they "may be discountable or insignificant given the maintenance of connectivity for grizzly bears that might travel through the area"—counted as "any possible effect" requiring ESA consultation. *Id.* It also reversed because of the Forest Service failed to "analyze whether the temporary increase in road density and the temporary decrease in summer secure areas during the Project's 5–10 year duration would affect transitory grizzly bears." *Id.* at 1079–80

The Forest Service made the same errors here. It was arbitrary and capricious for the agency to conclude these massive logging projects would have absolutely no effect on grizzly and to refuse to engage in Section 7 ESA consultation. Accordingly, the Court should vacate, reverse, and remand for these additional violations.

CONCLUSION

For the foregoing reasons, Plaintiff FOC respectfully requests that the Court grant this Motion for Summary Judgment and vacate, reverse, and remand the End of the World EA and DN/FONSI and/or the Hungry Ridge EIS and ROD.

Dated this 1st day of October, 2021.

Respectfully submitted,

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