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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

IDAHO RIVERS UNITED, and FRIENDS OF THE CLEARWATER, *Plaintiffs,* v. NEZ PERCE-CLEARWATER FOREST SUPERVISOR CHERYL F. PROBERT; UNITED STATES FOREST SERVICE; NOAA FISHERIES; and U.S. FISH AND WILDLIFE SERVICE, *Defendants.*	No. 3:16-cv-102-CWD **PLAINTIFFS' OPENING BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION**

"*Those who do not remember the past are condemned to repeat it.*"
– George Santayana

INTRODUCTION

Plaintiffs ask the Court to protect one of our nation's outstanding treasures – the Selway/Middle Fork Clearwater Wild and Scenic River system – and prevent the Forest Service from repeating its past mistakes, by enjoining extensive logging and road work that threaten massive sedimentation into endangered fisheries habitat as well as scenic and visual blight of the Wild and Scenic River corridor.

Specifically, Plaintiffs seek injunctive relief to prohibit the Forest Service from moving forward with its Johnson Bar Fire Salvage Project, which would log 34 million board feet of timber from 2,104 acres of National Forest land, with massive clearcuts within the watershed of the Selway/Middle Fork Clearwater Wild and Scenic Rivers.

As explained below, the Project activities threaten serious and irreversible harms to water quality, endangered fish habitat, and Wild and Scenic values. Yet the Forest Service ignored or minimized these adverse impacts, while approving the Johnson Bar Project for the primary purpose of benefiting the local economy by salvaging burned timber. In so doing, the agency violated the Wild and Scenic Rivers Act, the National Forest Management Act (NFMA), the Endangered Species Act (ESA), and the National Environmental Policy Act (NEPA) in multiple respects, discussed below.

In particular, the Johnson Bar Final Environmental Impact Statement (FEIS) and Record of Decision (ROD) violate NEPA, the ESA, and NFMA in asserting that the Project poses no serious risks of sedimentation, and in fact will improve water quality and fisheries habitat. These assertions are scientifically inaccurate and factually false. As detailed in the accompanying declarations of Dr. Jennifer Pierce, a geomorphology expert at Boise State University, and F. Al Espinosa, a retired fisheries biologist with the

Forest Service, the geology of the Clearwater sub-basin is prone to mass sedimentation events, such as landslides; and logging and road work elevate those risks, particularly in wet years or after rain-on-snow events which regularly occur there and are expected to increase in the future with climate change. *See* Pierce, Espinosa Declarations. The Forest Service itself conducted a study after 900 landslides hammered the Clearwater region in 1995-96, and found most (70%) of the slides occurred in areas disturbed by roads or logging. Moreover, the Forest Service's Rocky Mountain Research Station has developed an analytical tool – called the "Geomorphic Road Assessment and Inventory Package" (GRAIP) – to project erosion from roads on Idaho forests. *Id.* Yet the Forest Service did not utilize GRAIP analysis here and never mentioned the 1990's landslides or report, instead relying on outdated and inaccurate models and factual misstatements to pretend the Project poses minimal erosion risks. *Id.*

The Forest Service has also avoided assessing the full scope of adverse cumulative impacts posed by the Johnson Bar Project, along with 2015 wildfires that burned in the same area and post-fire logging. The Forest Service should have released a Supplemental EIS for public comment to evaluate impacts of the 2015 fires, as NEPA requires. Instead, in violation of NEPA, it issued an "updated" FEIS issued in February 2016 to avoid allowing public comment.

As discussed in the accompanying declarations from Plaintiffs' representatives Kevin Lewis and Gary Macfarlane – and illustrated by recent photographs they attach – these adverse impacts are already occurring, impairing visual, scenic, and recreational values of the Wild and Scenic River corridor. Recent ugly clearcuts have marred the lower Selway corridor through post-fire logging on private and state lands, which the

Forest Service approved without heeding its Wild and Scenic River Act duties. It is similarly ignoring those duties here, in approving far more logging that will leave large sections of the Wild and Scenic corridor denuded for decades to come.

Just last week, Chief District Judge B. Lynn Winmill held that the Forest Service violated the Wild and Scenic Rivers Act by approving use of a Forest Service road within the Wild and Scenic corridor to access an Idaho state land parcel burned in the Johnson Bar wildfire. *See* Memorandum Decision, *Idaho Rivers United v. Hudson*, No. 3:15-cv-169-BLW (D. Idaho, March 28, 2016) (*Docket No. 41*). That ruling followed an injunction last summer to protect the Selway River from Idaho's proposed road construction. *Id.*, Memorandum Decision and Order (July 10, 2015) (*Docket No. 19*). Far more serious risks of harm are threatened here by the Forest Service's Wild and Scenic River Act violations, and similarly warrant injunctive relief.

Based on the many legal violations below, and the irreparable harms posed to water quality, fisheries, and visual and scenic values in the Wild and Scenic corridor, the Court should thus grant a preliminary injunction, and prohibit the Forest Service from proceeding with the Johnson Bar Fire Salvage Project.

STATEMENT OF FACTS

The Selway/Middle Fork Clearwater Wild and Scenic Rivers

The Selway and Lochsa Rivers flow together near Lowell, Idaho to form the Middle Fork Clearwater River. Because of their outstanding values, the Selway, Lochsa, and Middle Fork Clearwater were the very first rivers designated by Congress as protected rivers when it enacted the Wild and Scenic Rivers Act in 1968. *See* 16 U.S.C. § 1274(a)(1).

Section 10 of the Act requires the Forest Service to place a "primary emphasis" on managing Wild and Scenic Rivers to "protect and enhance" their values, as follows:

> Each component of the national wild and scenic rivers system *shall be administered* in such manner as to *protect and enhance* the values which caused it to be included in said system without, insofar as is consistent therewith, limiting other uses that do not substantially interfere with public use and enjoyment of these values. In such administration *primary emphasis shall be given to protecting its esthetic, scenic, historic, archeologic, and scientific features*.

16 U.S.C. § 1281(a) (italics added for emphasis).

The Selway and Middle Fork Clearwater Rivers are also home to several imperiled fish species listed as "threatened" under the ESA: spring and fall Chinook salmon, steelhead, and bull trout. *See* Espinosa Decl., ¶ 10. Thus, it is "extremely important to know how these systems are functioning to support these valuable aquatic resources." *Id.*

The 2014 Johnson Bar Wildfire

The 2014 Johnson Bar fire burned approximately 13,000 acres within the Selway and Middle Fork Clearwater River watersheds, primarily on steep slopes with highly erosive soils within and adjacent to their designated Wild and Scenic River corridor. *See* FEIS, p. 1; ROD Attachment 2.[1]

After the fire, affected private landowners and the Idaho Department of Lands (IDL) moved quickly to harvest their burned timber. The Forest Service gave approval for logging on several private land parcels, which are encumbered by scenic easements purchased by the Forest Service under the Wild and Scenic Rivers Act to preserve and

[1] Because the Forest Service did not file the Administrative Record before this brief was due, Plaintiffs are unable to cite to it; however, the Court may review the key Forest Service documents cited here on the Project's website at: http://www.fs.usda.gov/project/?project=45214.

protect scenic values of the corridor. *See* Lewis Decl., ¶¶ 19-21 & Ex. 3.

The Forest Service also approved IDL's use of a Forest Service spur road to access the IDL parcel along the Selway River for road construction and logging, which prompted the related litigation, *IRU v. Hudson*, *supra*. As noted above, the Court granted a preliminary injunction barring IDL from using the road due to the substantial risk of harm from IDL's planned road building on its parcel. *See id*., *Docket No. 19*.

Following issuance of the injunction, IDL used helicopter logging (again with approval from the Forest Service) to clearcut most of its parcel, so that now a large area of steep slopes around Swiftwater Creek on the lower Selway is denuded due to the logging of adjoining private and state parcels, as illustrated in recent photos submitted herewith. *See* Lewis Decl., Ex. 4 (ground photos); Macfarlane Decl., Ex. 1 (aerial photos). These actions have thus already impaired scenic values of the corridor. *Id.*

2015 Wildfires

In 2015, additional wildfires, known as the Slide and Wash fires, burned some 47,000 acres on both sides of the Selway River around and adjacent to the Johnson Bar Project area. FEIS, p. 123. About 15 miles of the Selway Wild and Scenic River corridor burned between the Johnson Bar Project area and the Selway-Bitterroot Wilderness boundary. *Id.* The Forest Service is now proposing extensive salvage logging of these areas, as well as the Johnson Bar Project. *See* Macfarlane Decl., Exs. 3-6.

The 2015 fires burned at a higher intensity than the Johnson Bar fire – about 22% of the area burned at a high intensity, versus 4% in the Johnson Bar fire. *See* Burned Area Emergency Response (BAER) Reports. The Forest Service estimates potential sedimentation to the Selway River watershed may range from 10,908 to 20,760 cubic

yards per square mile for each of the first two post-fire years. *Id.* In comparison, the Forest Service's estimated sedimentation from the Johnson Bar fire is 940 cubic yards per square mile. *Id.* However, the U.S. Geological Survey projects that landslides and debris flows from the Slide and Wash fires could produce up to 130,000 cubic yards of sediment. *See* Pierce Decl., ¶ 16. This information was not included in the FEIS. *Id.*

Procedural History of the Project

Just weeks after the Johnson Bar fire was extinguished, the Forest Service published a Notice of Intent to prepare an EIS for the proposed Johnson Bar Fire Salvage Project. From the beginning, the Forest Service's stated purpose was to benefit the local economy by harvesting trees burned in the fire before they lose their economic value.

Even though the Forest Service claims that salvage logging must proceed rapidly because dead trees quickly lose market value within a year of being burned, the agency did not release a Draft Environmental Impact Statement (DEIS) until April 2015 for public comment. Plaintiffs submitted extensive comments on the DEIS, underscoring the ecological harms and impairment of Wild and Scenic values threatened by the Forest Service's proposal. *See* Lewis Decl., ¶ 33. These cited scientific studies documenting that salvage logging impedes ecological recovery after a fire, including by disturbing burned soils, removing vegetation and woody debris important for wildlife and fish, and increasing sedimentation threats. *Id.; see also* Pierce Decl., ¶12-13 (similar discussion). Plaintiffs also notified the Forest Service that it is violating its duty under Section 3(d) of the Wild and Scenic Rivers Act to have a comprehensive management plan in place for the Selway/Middle Fork Clearwater Rivers, as discussed below. *Id.*

On October 7, 2015, the Forest Service posted a "Final Environmental Impact

Statement" (FEIS) and a "Draft Record of Decision" (DROD) on its website. On November 23, 2015, Plaintiffs submitted timely objections to the FEIS and DROD under the Forest Service's objection resolution process. Plaintiffs participated in an objection resolution meeting on January 4, 2016, and received a final written response from the Objection Reviewing Officer on January 7, 2016. Lewis Decl., ¶¶ 34-35. The Objection Reviewer identified numerous deficiencies and errors in the FEIS and DROD, including changed conditions as a result of the 2015 fires; and instructed the Forest Service to add substantial new information and analysis before proceeding to approve the Project. *Id.*

The very next day – and without any notice to Plaintiffs or the public – the Forest Service posted an "updated" version of the FEIS on its website on January 8, 2016. Lewis Decl., ¶¶ 35-36. This "updated" FEIS is significantly longer – 25 pages – than the first FEIS and contains new information about the 2015 wildfires, as well as additional documentation for fisheries, hydrology, and other issues. Yet the Forest Service refused to release this "updated" FEIS as a Supplemental EIS as required under NEPA, and it did not allow public comment on it despite the new information. *Id.*

On February 17, 2016, Forest Supervisor Cheryl F. Probert signed the ROD approving the Johnson Bar Project, based on the "updated" FEIS. The Forest Service divided the Project's timber harvesting into two timber sale contracts, known as "Hot Deck" and "Peterson Point." Both contracts have been awarded and work is scheduled to begin on May 16, 2016. Lewis Decl., ¶ 40.

Scope and Impacts of Johnson Bar Salvage Project.

The Project's two timber sales will harvest approximately 34 million board feet of timber off 2,104 acres of National Forest land. ROD at 6, 26. Approximately 70% of the

harvested acres will be clear-cut. ROD Attachment 3. Clear-cutting will occur from within the designated Wild and Scenic River corridor to a maximum of three miles away from the designated boundary. ROD Attachment 2. Timber harvesting will be visible from Highway 12 on the Middle Fork Clearwater River, and the Selway River road. FEIS at 224.

The Project will utilize approximately 146.3 miles of forest roads for harvesting, log hauling and tree planting operations. ROD at 6. Of these, 2.3 miles of new "temporary" roads will be built, 16.9 miles of existing roads reconstructed, and maintenance and reconditioning work done on 57.8 miles of existing roads. *Id.* Ten new and existing helicopter landings will be used for landing logs, one of which is located on the Selway River within the Wild and Scenic corridor. *Id.*

The "updated" FEIS and ROD dismiss the potential sedimentation impacts by asserting that Project activities will be "hydrologically disconnected" from streams in the area. FEIS, pp. 39, 131, 435; ROD, pp. 6, 16, 27, 39, 43. But neither document explains what "hydrologically disconnected" means or justifies this counter-intuitive assertion. *Id.* The FEIS merely states "roads and salvage units are placed in such a manner that any small amount of sediment produced will be filtered out or deposited long before reaching the river." FEIS p. 27. As Dr. Pierce explains, this statement is inaccurate because the project area is hydrologically connected to the Selway and Middle Fork Clearwater River systems. *See* Pierce Decl., ¶¶ 30-31. Most sediment in the area is transported by large episodic events like floods. *Id.* Thus, Project road building and logging could easily cause sedimentation that directly impacts the Selway and Middle Fork Clearwater Rivers. *Id.*

The extensive roadwork needed for the Project violates provisions in the 1998

Biological Opinion (BO) from the National Marine Fisheries Service (NMFS) for endangered steelhead in the Selway basin. Appendix 1 of the BO prohibits the road work approved by the Forest Service for the Johnson Bar Salvage Project, stating:

> Build new roads only to replace existing roads in RHCA's, or directly repair human caused damage to steelhead habitat in streams.
>
> Do not widen roads by increasing cut and fill slope areas in order to accommodate more traffic and/or larger vehicles than can presently use the road.
>
> Do not open closed and revegetated roads for management purposes unless necessary to repair human-caused damage to steelhead habitat.

See Espinosa Decl., ¶ 31 (quoting Biop); Macfarlane Decl., Ex. 7 (copy of Biop).

The Forest Service asserts that the Project will have a net benefit to soils and water quality because 21.3 miles of existing roads will be decommissioned after the Project, thus allegedly reducing the amount of sediment delivered to streams. FEIS pp. 11, 90, 239, 377, 387. Yet the FEIS and ROD downplay the fact that an already decommissioned road (Road #470B) will be reopened to facilitate the Project; and fail to acknowledge that the roads to be decommissioned are already closed, non-system roads, which have no relationship to Project activities and were selected merely to appear to offset the impacts of new road building in other areas of the Project. *Id.*, pp. 25, 89, 418.

Moreover, the FEIS relies on two flawed and inaccurate models, NEZSED and WEPP, to estimate sedimentation impacts. FEIS Appendix C. The FEIS acknowledges NEZSED is inadequate, but says it is required by the Forest Plan. FEIS at 73. Neither model is capable of estimating potential mass erosion caused by project-level decisions such as the Johnson Bar Project. *See* Espinosa Decl., ¶¶ 14-19, 38-41.[2]

[2] The flaws of the NEZSED model were previously discussed by Magistrate Judge Williams, who cautioned against relying on that model. *See Idaho Conservation League*

Remarkably, Defendants failed to utilize – or even mention – the analysis tool that the Forest Service developed for the purpose of estimating sediment impacts of roads. The "Geomorphic Road Analysis and Inventory Package" (GRAIP) was prepared and tested by the Forest Service's Rocky Mountain Research Station in Idaho to help land managers evaluate impacts of road systems on erosion and sediment delivery to streams, including the risk of landslides. *See* Pierce Decl., ¶¶ 28-29. The FEIS and ROD do not explain why the Forest Service failed to utilize this state-of-the-art tool in the Johnson Bar analysis.

As explained by geomorphology expert Dr. Pierce, the FEIS and ROD are riddled with numerous other scientific errors and omissions, resulting "in a substantial under-estimation of possible sediment inputs to the Clearwater and Selway River systems" from the Johnson Bar Project. *See* Pierce Decl., ¶ 3. Besides failing to apply the GRAIP analysis tool, errors and omissions identified by Dr. Pierce include:

(1) substantially under-stating the likely sedimentation from burned areas, where (as noted above) the USGS has projected sediment levels from landslides and other mass wasting events at a scale about ten-fold larger than the Forest Service, yet the FEIS does not address that analysis;

(2) failing to assess landslide risks, despite the well-known geology and precipitation patterns of the Clearwater basin that have caused repeated landslide and flood events almost every decade over the past century, including the 1995-96 landslides studied by the Forest Service (McClelland et al. 1997) which found that 70% of the slides were tied to roads and logging – yet that report and its lessons are not even

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v. Bennett, 2005 WL 1041396 (D. Idaho 2005). *See also Lands Council v. Powell*, 395 F.3d 1019, 1034-35 (9th Cir. 2004) (addressing flaws in similar sediment model).

mentioned in the FEIS and ROD, much less evaluated in terms of sedimentation risks;

(3) the risks associated with rain-on-snow events causing further landslides and mass erosion events is also not addressed, even though climate change projections anticipate warmer winter temperatures and intensified frequency of rain-on-snow events than seen in the past; and

(4) the assertion that the Project will improve sediment and water quality is "highly questionable and almost certainly wrong," including because it fails to acknowledge studies showing that post-fire logging actually contributes to increased sedimentation and water quality impairment in numerous ways, including through soil disturbance, removal of downed vegetation, and other impacts. *See* Pierce Decl., ¶¶ 14-33. As a result of these many errors and omission, Dr. Pierce concludes:

> the oversights and errors discussed above in the Johnson Bar FEIS and ROD regarding likely sedimentation impacts are, in my opinion, scientifically unjustified and merit a re-evaluation of this project. In this case, the effects of recent 2015 fires, climate-driven changes in future fire activity and rain-on-snow, influence of landslides on infrastructure, the failure to apply the GRAIP model, and the obvious hydrologic connectivity between the project area and the Clearwater River system must be considered.

Id., ¶ 34; *see also* Espinosa Declaration (making many of the same points).

ARGUMENT

I. APPLICABLE LEGAL STANDARDS.

To win injunctive relief under Fed.R.Civ.P 65, Plaintiffs must establish that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction is in the public interest. *Winter v. NRDC*, 555 U.S. 7, 20 (2008). Under the Ninth Circuit's sliding scale approach, an injunction is appropriate if Plaintiffs raise

serious questions going to the merits and the balance of hardships tips sharply in their favor. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011).

The Court reviews the Forest Service's decision under the APA to determine whether it is "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 it presented a "rational connection between the facts found and the conclusions made." *Native Ecosystems Council v. United States*, 418 F.3d 953, 961 (9th Cir. 2005). A decision is arbitrary and capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.,* 463 U.S. 29*,* 43 (1983).

II. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS OF THEIR CLAIMS.

A. A Supplemental EIS is Required.

Plaintiffs' Fourth Claim for Relief alleges an obvious NEPA violation – Defendants approved the Johnson Bar ROD based on the "updated" FEIS without issuing it as a Supplemental EIS for public comment following the 2015 wildfires and objection resolution decision. *See* Complaint, ¶¶ 106-17.

Under the CEQ's NEPA regulations, the Forest Service must prepare and release a Supplemental EIS for public comment when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii). Similarly, under the Forest Service's objection

resolution regulations, it must allow public comment on supplemental or revised EISs that are based on new information or changed circumstances. 36 C.F.R. § 218.22(d).

As the objection resolution officer found, the 2015 wildfires that burned extensive areas adjacent to the Johnson Bar Fire Salvage Project area constitute "significant new circumstances or information" requiring the Forest Service to release a Supplemental EIS for public comment before approving the Project. Lewis Decl., ¶¶ 34-35. But rather than prepare a Supplemental EIS and allow public comment, the Forest Service resorted to its stratagem of characterizing the new analysis as an "updated" FEIS to approve the Project, and refused to allow public comment on the new discussion and information it provided. *Id.* This violates NEPA; and the Court may properly enjoin Project implementation until the Forest Service has complied with NEPA. *See* 40 C.F.R. §§ 1502.2(f), 1506.1(a) (NEPA regulations prohibit agency taking any action or making any commitment of resources before complying with NEPA analysis requirements).

B. The FEIS Is Inadequate, Scientifically Inaccurate, and Misleading.

Plaintiffs are also likely to succeed on their Fifth Claim for Relief, which alleges that the Forest Service violated NEPA by approving the Johnson Bar Project based on the inadequate, scientifically inaccurate, and misleading FEIS. *See* Complaint, ¶¶ 118-27.

The Complaint identifies numerous defects in the FEIS, but the Court may focus on two critical flaws for this injunction motion: (1) the FEIS's erroneous assertions that sedimentation impacts will be minor and do not threaten water quality or fisheries habitat; and (2) its failure adequately to assess cumulative impacts. These flaws are detailed in the accompanying Pierce, Espinosa, Lewis, and Macfarlane Declarations, and summarized below:

1. The FEIS Grossly Misrepresents Sedimentation Risks.

As explained above, and detailed in the Pierce and Espinosa declarations, the Clearwater sub-basin features highly erosive soils that are prone to mass wasting events, like landslides and debris flows, even under natural conditions; but when the top "ash cap" soil layer is disturbed – such as through road work or logging activities – these risks become magnified. In wet years or after intensive storm events, dozens and even hundreds of landslides have occurred regularly in the Clearwater area, including in the mid-1990's.[3] The Forest Service analyzed these slides in a 1997 report (McClellan et al.) which found that roads and logging were associated with 70% of the slides. *See* Espinosa Decl., ¶ 12; Pierce Decl., ¶¶ 23-25; Macfarlane Decl., Ex. 1 (copy of 1997 report).

Remarkably, the Johnson Bar Project FEIS and ROD do not even mention these past landslides or explore their ramifications for the Johnson Bar Project. To the contrary, as explained above, the Forest Service minimized the risks of sedimentation impacts based largely on use of the NEZSED and WEPP models that are not appropriate for estimating landslide and erosion risks; yet failed to utilize the Forest Service's own GRAIP analytical tool, which was developed for just these purposes. As a result, the Forest Service's assertions that sedimentation risks will be minor and will not harm water quality or fisheries habitat lack any scientific credibility. In truth, the Johnson Bar Project threatens to cause or contribute to major new sources of mass erosion and sedimentation into the Selway and Middle Fork Clearwater rivers and tributary streams,

[3] In 1974-1976, storms and landslides were experienced in the Clearwater on a scale generally similar to those of 1995-1996. Pierce Decl., ¶ 34; Macfarlane Decl., Ex. 1, p. 10. Major landslide occurrences were also reported in 1919, 1934, 1948, 1964, and 1968, with damage in some years "equal to or more severe" than in 1995. *Id.* Additional slides on a lesser scale occurred in the 1980s, the early 1990s, and again in 1996-97. *Id.*

posing serious risks to water quality and fisheries habitat. *See* Pierce, Espinosa Decls.

NEPA requires that Forest Service's FEIS take a "hard look" at environmental impacts, which "must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made," and must include a "discussion of adverse impacts that does not improperly minimize negative side effects." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2010)(citations omitted). Moreover, the FEIS must be based on professional and scientific integrity. 40 C.F.R. § 1502.24. Information used to inform the NEPA analysis "must be of a high quality," and "[a]ccurate scientific analysis . . . [is] essential to implementing NEPA." 40 C.F.R. § 1500.1(b). As the Ninth Circuit has repeatedly held, agencies thus violate NEPA when they rely on an EIS that lacks scientific integrity, fails to candidly address adverse effects and scientifically-based criticism, or is so incomplete or misleading that the decision-maker and the public cannot make an informed decision. *Kraayenbrink, supra*; *Earth Island Institute v. USFS,* 442 F.3d 1147, 1159-66 (9th Cir. 2006); *NRDC v. USFS*, 421 F.3d 797, 813 (9th Cir. 2005); *Native Ecosystems Council v. USFS,* 418 F.3d 953, 964-66 (9th Cir. 2005) (all holding EISs unlawful that relied on inaccurate science or misleading information).[4] These authorities are on point here, and confirm that an injunction is appropriate based on these NEPA violations.

2. Inadequate Discussion of Cumulative Impacts.

Because the Forest Service refused to allow public comment on the "updated" FEIS, Plaintiffs could not respond to its new discussion of the 2015 wildfires and

[4] *See also Center for Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1165-68 (9th Cir. 2003) (reversing because "the Final EIS fails to disclose responsible scientific opposition to the conclusions upon which it is based"); *Seattle Audubon Society v. Espy*, 998 F.2d 699, 704-05 (9th Cir. 1993) (reversing EIS that rested on "stale scientific evidence, incomplete discussion of environmental impacts, and false assumptions").

cumulative impacts, which is obviously inadequate and incomplete.

The "updated" FEIS fails to evaluate accurately and candidly the cumulative impacts threatened by the private, state, and federal post-fire logging that will generate further risks of mass erosion and sedimentation, or the cumulative impacts of these activities in impairing scenic, aesthetic and other values of the Wild and Scenic River corridor. *See* Lewis, Macfarlane Declarations. In particular, the "updated" FEIS does not address new salvage logging that the Forest Service is currently proposing in the wake of the 2015 fires, *see* Macfarlane Decl., ¶¶ 19-21 & Exs. 3-6. Neither does it consider how private and state land logging after both the 2014 and 2015 fires will combine with the Johnson Bar Project and other salvage logging on federal lands to degrade the scenic and aesthetic beauty of the Selway Wild and Scenic River corridor for decades to come. *Id.;* Lewis Decl., ¶¶ 20-25, 32, 35.

Under NEPA, the agency is required to consider cumulative impacts, which result from the incremental impact of the action when added to other past, present, and reasonably foreseeable actions. 40 C.F.R. § 1508.7; *Lands Council v. Powell,* 395 F.3d 1019, 1027-31(9th Cir. 2005)*; Klamath Siskiyou Wildlands Center v. BLM*, 387 F.3d 989, 993-97 (9th Cir. 2004). Failure to take a "hard look" at cumulative impacts renders an EIS invalid. *Id.* The Forest Service's failure to take such a "hard look" at cumulative impacts here thus again justifies an injunction in this case.[5]

C. Multiple Violations of the Wild and Scenic Rivers Act.

Plaintiffs are also likely to succeed in their First, Second, and Third Claims that

[5] Because the Forest Service's ESA consultation in this case was based on a 2015 Biological Assessment (BA) which did not address the subsequent 2015 wildfires and was premised on the same faulty analysis of sedimentation risks to fisheries habitat as the FEIS, Plaintiffs are similarly likely to prevail on their Seventh Claim for Relief challenging the ESA consultations. *See* Complaint, ¶¶ 133-39.

the Forest Service has violated Sections 3, 10, and 12 of the Wild and Scenic Rivers Act and NMFA in approving the Johnson Bar Project. *See* Complaint, ¶¶ 87-105.

1. No Comprehensive River Plan.

Under the First Claim, the Forest Service is plainly violating its duty to adopt a comprehensive river management plan for the Selway, Lochsa and Middle Fork Clearwater Wild and Scenic Rivers.

Congress amended Section 3(d) of the Wild and Scenic Rivers Act in 1986 to require that any newly-designated river must have a "comprehensive management plan . . . to provide for the protection of the river values," which "shall address resource protection, development of lands and facilities, user capacities, and other management practices necessary or desirable to achieve the purposes of this chapter." 16 U.S.C. § 1274(d)(1). For previously designated rivers, including the Selway, Lochsa, and Middle Fork Clearwater, the 1986 amendments required that existing river plans be reviewed and updated within ten years to meet the same requirements of "comprehensive management plans." 16 U.S.C. § 1274(d)(2).

The 1986 amendments thus directed the Forest Service to ensure that it had a comprehensive management plan in place by 1997 for the Selway, Lochsa and Middle Fork Clearwater Rivers – yet the Forest Service has not updated the existing River Plan since it was adopted in 1969. *See* Lewis Decl., Exh. 1 (copy of 1969 Plan). The Forest Service is now almost three decades overdue in fulfilling its duty under Section 3(d) to have a comprehensive management plan for these rivers.

The Forest Service recently conceded that the existing 1969 River Plan does not meet the requirements of Section 3(d) for a comprehensive management plan. It admitted

in its 2014 Forest Plan Assessment for the Nez Perce National Forest that:

> The existing river management plan is aged and does not meet the criteria established in Section 3 of the Wild and Scenic Rivers Act as amended in 1986. The plan lacks sufficient detail in several areas including monitoring, user capacities, and development plans.

See Lewis Decl., Exh. 2 at p. 15-22.

Without a valid comprehensive river management plan that complies with Section 3(d), the Forest Service cannot adequately evaluate the Johnson Bar Project to determine whether it is meeting land management requirements under Sections 10 and 12 of the Act. *See* 16 U.S.C. § 1281(a), 1283(a). Thus, by approving the Project to proceed without a valid comprehensive management plan, the Forest Service has violated Section 3(d) of the Wild and Scenic Rivers Act, 16 U.S.C. § 1274(d)(1)-(2).

2. Violation of Sections 10(a) and 12(a).

Additionally, Plaintiffs are likely to prevail on their Second Claim that the Forest Service violated Sections 10(a) and 12(a) of the Act, 16 U.S.C. §§ 1281(a) & 1283(a), by failing to place a primary emphasis on Wild and Scenic values within the Selway and Middle Fork Clearwater Rivers area when it approved the Johnson Bar Project.

As quoted above, Section 10(a) requires the Forest Service to "protect and enhance" Wild and Scenic Rivers, and place a "primary emphasis" on preserving their "esthetic, scenic, historic, archeological, and scientific features." 16 U.S.C. § 1281(a). To carry out that duty, Section 12(a) further requires the Forest Service to take actions to protect Wild and Scenic values on lands "within or adjacent to" the designated river corridor. *Id.* § 1283(a). These management requirements apply to the entire Johnson Bar Project area, because virtually all project activities will occur within or adjacent to the designated Wild and Scenic corridor. *See Wilderness Soc'y v. Tyrrel*, 918 F.2d 813, 819

(9th Cir. 1990) (addressing Act's application to adjacent lands).

Yet the Forest Service's avowed primary purpose for the Johnson Bar Project is to benefit the local economy through salvage logging. FEIS at 11. Reflecting that purpose, the ROD selected "Alternative 4–Economic Feasibility" for implementation. ROD at 25. Accordingly, the Project will allow extensive clearcuts and other logging to mar the scenic and aesthetic values in and around the Wild and Scenic corridor for decades to come, as attested in the Lewis and Macfarlane Declarations.

By allowing economic factors to drive the decision-making process, and thereby threaten the scenic and aesthetic integrity of the Wild and Scenic corridor, the Forest Service has violated its duties under Sections 10(a) and 12(a) of the Wild and Scenic Rivers Act, warranting an injunction.

3. Unlawful commercial logging in Wild and Scenic area.

Even though the Forest Service does not have a comprehensive river management plan that complies with Section 3(d) of the Act, its existing 1969 River Plan – which the Forest Service says it is following, *see* FEIS, p. 236 – actually prohibits the commercial logging approved within the Wild and Scenic area. Because that 1969 River Plan is incorporated into the existing Forest Plan, the Forest Service has violated NFMA in approving the Project under Plaintiff's Third Claim. *See* Complaint, ¶¶ 102-05.

NFMA requires that the Forest Service develop and regularly revise Forest Plans for each National Forest. 16 U.S.C. §§ 1604(a), (e) & (g)(3)(B). All subsequent agency actions, including site-specific management activities, must be consistent with the governing Forest Plan. 16 U.S.C. § 1604(i); *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1377 (9th Cir.1998).

Commercial timber harvesting within the area of the Selway and Middle Fork Clearwater Wild and Scenic Rivers is prohibited by the existing 1969 River Plan, which is incorporated into the Nez Perce National Forest Plan. *See* NEZ PERCE FOREST PLAN, at V-2 and Appendix L (1987). The 1969 River Plan remains the governing river plan in effect, and provides that timber may not be cut for commercial purposes within the Selway and Middle Fork Clearwater River corridors. *See* Lewis Decl., Exh. 1, p. 11. Timber harvest is allowed only for specific purposes when other management alternatives are impractical, as follows:

> "Timber cutting will be done only for the following:
>
> (a) Public safety and/or recreational purposes in selected areas.
>
> (b) Control of fire, insects and disease when such cutting is determined to be the only practical method of control
>
> (c) Approved road and trail locations."

Id. *Accord* 16 U.S.C. § 1283(a).

The Johnson Bar FEIS and ROD violate the River Plan and the Forest Plan, and hence NFMA's consistency requirement, because they failed to consider any non-harvest action alternatives and because timber harvesting is not the only practicable method of achieving non-economic resource values in the Wild and Scenic area. *See Cuddy Mtn, supra*; *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1068-70 (9th Cir. 1998) (both finding NMFA consistency violations). Hence, injunctive relief is appropriate on this claim as well.

D. Other Forest Plan Violations.

Plaintiffs are likely to prevail on other NMFA violations in their Sixth Claim for Relief, which alleges violations of Forest Plan requirements regarding soils, watershed

conditions, fisheries habitat, and elk habitat. *See* Complaint, ¶¶ 128-32.

As explained by former Clearwater National Forest fisheries biologist F. Al Espinosa – who is intimately familiar with these watersheds and their fisheries – the Johnson Bar Project does not comply with Forest Plan standards for water quality and fisheries. *See* Espinosa Decl., ¶¶ 2-7, 20-24. Appendix A of the Nez Perce National Forest Plan requires an upward trend in habitat quality within watersheds that do not meet habitat objectives. FEIS at 102. The significant fishery watersheds and their habitat-sediment conditions in the Project area include Goddard Creek, Swiftwater Creek, Elk City Creek, Lower O'Hara Creek, and the Lower Selway River. Espinosa Decl., ¶ 20. According to data in the FEIS, these watersheds and streams are substantially degraded and do not meet their Forest Plan objectives. *Id*. (citing FEIS section 3.5.6.1, Table 3-19). The Forest Service's reliance on the NEZSED and WEPP models to estimate sediment impacts and future watershed conditions is again misplaced, since they are not appropriate for that task and the Forest Service did not employ better-suited models (such as the FISHSED model or GRAIP). *Id.,* ¶¶ 13-24. Because the Forest Service cannot demonstrate compliance with the Forest Plan standards for watersheds and fisheries, as required by NMFA's consistency provision, Plaintiffs are thus likely to prevail on their Sixth Claim for Relief, again warranting injunctive relief.[6]

III. INJUNCTIVE RELIEF IS NEEDED TO AVOID IRREPARABLE HARM.

Injunctions are usually appropriate in environmental cases, like this, because

[6] Plaintiffs will also likely prevail on their Seventh Claim for Relief, which challenges the Forest Service's ESA consultations over Project impacts to listed salmon, steelhead and bull trout as being deeply flawed scientifically, for the same reasons discussed above. *See* Complaint, ¶¶ 133-38; Espinosa Decl., ¶¶ 28-43.

"[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction to protect the environment." *Earth Island Institute v. U.S. Forest Service*, 351 F.3d 1291, 1299 (9th Cir. 2003) (quoting *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 545 (1987)). Injunctive relief is necessary here to preserve the status quo and prevent irreparable injury.

An injunction is appropriate, first, because Plaintiffs have already been deprived of their procedural right to comment on the Supplemental EIS, and thus have suffered procedural injury that can only be remedied by halting the Johnson Bar Project until the Forest Service has fully complied with NEPA. *See Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 970 (9th Cir. 2003); *High Sierra Hikers Association v. Blackwell*, 381 F.3d 886 (9th Cir. 2004). As explained in *High Sierra*:

> In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action. *Thomas v. Peterson*, 753 F.2d 754, 764 (9th Cir. 1985). While an injunction does not automatically issue upon a finding that an agency violated NEPA, "the presence of strong NEPA claims gives rise to more liberal standards for granting an injunction." *American Motorcyclist Ass'n v. Watt*, 714 F.2d 962, 965 (9th Cir. 1983). If environmental injury is sufficiently likely, the balance of harms will usually favor the issuance of an injunction to protect the environment. *Amoco*, 480 U.S. at 545.

Id., at 898.

Second, irreparable environmental injury is imminent here, warranting an injunction. Earth-disturbing actions and tree cutting will begin as early as May 16th and continue for two years, unless an injunction is issued. As many cases recognize, injunctive relief is appropriate to prevent logging where an agency has not properly evaluated its likely impacts under NEPA or violated other environmental laws. *See, e.g.,*

Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1297-99 (9th Cir. 2003); *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372, 1382 (9th Cir. 1998); *Portland Audubon Soc'y v. Lujan*, 795 F. Supp. 1489, 1509 (D. Or. 1992), *aff'd*, 998 F.2d 705 (9th Cir. 1993) ("Courts in this circuit have recognized that timber cutting causes irreparable damage and have enjoined cutting when it occurs without proper observance of NEPA procedures and other environmental laws").

An injunction is even more appropriate to prevent unlawful logging here because of the irreparable impacts threatened to the scenic, aesthetic, and recreational values of the Selway/Middle Fork Clearwater Wild and Scenic Rivers corridor, including their adjacent Forest Service lands where extensive clear-cuts and other logging are imminent. As explained above, the Forest Service has already allowed irreparable harm to these values by approving large clearcuts on private and state lands that burned in the Johnson Bar Fire, impairing the scenic and aesthetic values of the lower Selway River. *See* Lewis and Macfarlane Declarations. The far more extensive logging approved under the Johnson Bar Project will cause much greater damage to the scenic, aesthetic and recreational values that are protected under the Wild and Scenic Rivers Act for the lower Selway. *Id.* An injunction is needed to protect the future integrity of the lower river corridor, which otherwise will be degraded for generations to come. *Id.*

Finally, an injunction is warranted here because the Johnson Bar Project also threatens irreparable harm to habitat for ESA-listed fish species, including salmon, steelhead and bull trout. *See* Espinosa Declaration. The Selway and Middle Fork Clearwater Rivers and their tributaries provide key spawning and rearing habitats for spring and fall Chinook salmon, steelhead, and bull trout. *See* Espinosa Decl., ¶¶ 10, 37.

The Forest Service has misrepresented the Project's impacts, ignored the history of landslides and other mass sedimentation events, and failed to apply available models to properly assess sedimentation impacts, thereby grossly understating the likely adverse impacts of the Project on these ESA-listed fish and their habitats. *Id.*, ¶¶ 10-43. As fisheries expert Mr. Espinosa explains:

> If implemented, the Project will certainly delay the recovery of degraded watersheds and fish habitats; and will cause further adverse impacts to these resources. Those adverse impacts could be severe if the Project activities (road construction and reconstruction, helicopter landing construction, logging) trigger or contribute to mass erosion events, such as the landslides seen regularly in the Clearwater Basin. Moreover, the Project threatens adverse cumulative impacts with the other logging that has recently occurred or is pending as a result of recent wildfires in the area. Given the threatened status of the salmon, steelhead and bull trout species at risk in the Project area, and the likely adverse harms threatened by the Project, the Court should grant an injunction halting the Project at least until the Forest Service has completed a scientifically credible analysis and demonstrated compliance with Forest Plan and ESA requirements.

Id., ¶ 45. Injunctive relief is usually appropriate to prevent irreparable harms to ESA-listed species and their critical habitats, as is the situation here. *TVA v. Hill,* 437 U.S. 153, 194 (1978). *See also Cottonwood Envt'l Law Ctr v. U.S. Forest Service*, 789 F.3d 1075, 1088-92 (9th Cir. 2015) (injunctions appropriate where plaintiff demonstrates likely irreparable harm to a listed species).

In short, Plaintiffs have abundantly established that "irreparable injury is likely in the absence of an injunction," *Winter v. NRDC*, 555 U.S. at 22, thus warranting entry of injunctive relief here.

IV. THE BALANCE OF HARDSHIPS AND PUBLIC INTEREST FAVOR AN INJUNCTION.

Finally, the balance of the hardships and public interest weigh strongly in favor of enjoining the Forest Service from implementing the Johnson Bar Fire Salvage Project

based on the scientifically inaccurate and legally defective FEIS and ROD.

The threatened harms to Plaintiffs and their members from environmental damage caused by the Johnson Bar Project weigh heavily in the balancing of equities. As the Ninth Circuit noted in *Earth Island Institute*, *supra*, 351 F.3d at 1308-09, "it is also appropriate to consider the broader public interest in the preservation of the forest and its resources. . . . Those resources include any living trees."

The Forest Service's unlawful decision also undermines the public interest because the agency has failed to protect the Congressionally-designated Selway and Middle Fork Clearwater Wild and Scenic River corridor. This violation comes on top of similar legal violations, such as that found by Judge Winmill in the recent *IRU v. Hudson* and other decisions.[7]

By contrast, the Forest Service cannot claim any legitimate injury or prejudice from being directed to do its job and follow the law. Moreover, the timber sale contracts were awarded after this litigation was filed, and the contractors bid on them with full notice of this litigation. While the Forest Service may contend that an injunction would harm the local community by not providing income and jobs relating to the timber sales, its FEIS overstates those alleged economic benefits.[8] In any event, the Forest Service's

[7] The Forest Service also failed to protect the Lochsa and Middle Fork Clearwater Wild and Scenic corridor's scenic values from adverse impacts threatened by massive loads of industrial equipment – so-called "mega-loads"– which Judge Winmill has enjoined. *See* Memorandum Decision and Order, *Nez Perce Tribe and Idaho Rivers United v. U.S. Forest Service*, No. 3:13-cv-348-BLW (D. Idaho Sept. 12, 2013) (*Docket No. 44*).

[8] The current Forest Plan is based on an economic analysis of the local timber industry from the 1970s. *See* 1987 Forest Plan FEIS Appendix B, at B-82. To supplement that dated information, the FEIS misrepresents information from a 1992-94 study for the Interior Columbia Basin Ecosystem Management Project. FEIS at 55. The FEIS states that six small towns in the local area have a "low" economic resiliency rating; however,

statutory mission and directive is to manage the National Forest and the Wild and Scenic Rivers in accordance with the mandates of the Wild and Scenic Rivers Act, NFMA, NEPA and the ESA – not subjugate those duties and interests to local economic interests. The long-term environmental damage caused by the Forest Service's imminent road building and clear-cutting in the Middle Fork Clearwater and Selway Wild and Scenic River corridors cannot be undone once it occurs, and far outweighs economic concerns.

The public interests also weigh heavily in favor of an injunction. The public has a strong interest in the Forest Service correctly following the law and its own regulations. When an agency disregards the law, "it disregards the public interest and undermines its own credibility." *Western Watersheds Project v. Rosencrance*, No. 09-CV-298-EJL, 2011 WL 39651, at *14 (D. Idaho 2010). Moreover, Congress has already mandated that the Selway and Middle Fork Clearwater's Wild and Scenic values be protected, by designating them as protected rivers under the Wild and Scenic Rivers Act and through the Act's commands in Sections 10(a) and 12(a) that the Forest Service must "protect and enhance" their values. The Court should give full force to these Congressional mandates by entering the requested injunction barring the Forest Service from proceeding with the Johnson Bar Project pending adjudication of this case on the merits.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court grant this motion and enjoin the Forest Service from implementing the Johnson Bar Fire Salvage Project pending resolution of this case on the merits.

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the report actually assigns a "high" or "medium-high" rating to five of those towns. *See* Charles Harris et al., RURAL COMMUNITIES IN THE INLAND NORTHWEST, at 89-90 (U.S.F.S., Oct. 2000). The FEIS ignores the fact that the 1992-94 study found that travel and tourism employed more people than the timber industry in Grangeville, Idaho, the largest town in the economic analysis area. *Id.* at 53.

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Respectfully submitted,

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