

UMPQUA WATERSHEDS, INC.
IN RE JOHNSON CREEK COMMERCIAL THINNING PROJECT

IBLA 99-174

Decided September 9, 2004

Appeal from a decision of the Area Manager, Swiftwater Resource Area, Roseburg District Office, Bureau of Land Management, denying a protest of the decision to authorize the Johnson Creek Commercial Thinning Project. Environmental Assessment No. OR-104-97-16.

Vacated and Remanded.

1. Endangered Species Act of 1973--National Environmental Policy Act of 1969: Finding of No Significant Impact--Rules of Practice: Generally--Rules of Practice: Mootness--Timber Sales and Disposals

When, on appeal of a timber sale, key issues regarding implementation of the Northwest Forest Plan and compliance with the Aquatic Conservation Strategy and the Endangered Species Act of 1973 have been decided in Federal court by an agreement settling litigation, or by the preparation of further environmental documentation, and those issues that remain must await the development of a new site-specific consultation process and the issuance of new biological opinions, BLM's decision denying appellant's protest and authorizing commercial thinning will be vacated and the case remanded to BLM for further action after reconsultation and issuance of new biological opinions.

APPEARANCES: Frances Eatherington, Roseburg, Oregon, for Umpqua Watersheds, Inc.; Jay K. Carlson, Field Manager, Swiftwater Field Office, Bureau of Land Management, Roseburg, Oregon.

OPINION BY ADMINISTRATIVE JUDGE PRICE

Umpqua Watersheds, Inc. (Umpqua) has appealed the December 22, 1998, decision of the Area Manager of the Swiftwater Resource Area, Roseburg (Oregon) District, Bureau of Land Management (BLM), denying its protest of the decision to authorize the Johnson Creek Commercial Thinning Project (Project) pursuant to the site-specific analysis contained in Environmental Assessment No. OR-104-97-16 dated May 8, 1998, pursuant to the National Environmental Policy Act of 1969 (NEPA), as amended, 42 U.S.C. § 4332(2)(C) (2000). (Ex. 24, EA. ^{1/}) The Project entails the harvesting of second growth forest on 303 acres in the Smith River Watershed, ^{2/} which represents a harvest of 2,300 thousand board feet of timber. (Ex. 12 at 1.)

Background

The Project is on lands subject to Matrix and Land Use Allocations, as described in at 6-7 of the Record of Decision for *Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl/Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the Northern Spotted Owl* (1994 ROD) and in Chapter 2 of the 1995 Roseburg Resource Management Plan (RMP). ^{3/} Forest stands within the Matrix are managed for timber production and to maintain biodiversity. (Ex. 24, EA at 2, citing Standards and Guidelines (S&G's) at B-

^{1/}With its Answer dated Mar. 12, 1999, BLM submitted the administrative record for the Johnson Creek sale, organized and presented as Exs. 1-58. As a matter of convenience, the pages of each document were numbered separately and by reference to the exhibit number. For example, page 6 of the EA, Ex. 24, was manually numbered 24-7 (the title page being 1). We will cite both document name and exhibit number, but will retain the original page numbers of each document as, for example, Ex. 24, EA at 6.

^{2/} The Project is located in secs. 2, 9, 11, and 15, T. 21 S., R. 7 W., Willamette Meridian. The harvest areas are unit 2A, consisting of 39 acres; unit 2B, consisting of 107 acres; unit 9A, consisting of 81 acres; unit 9B, consisting of 20 acres; unit 15A, consisting of 5 acres; unit 15B, consisting of 43 acres; and unit 15C, consisting of 8 acres. (Proposed Logging Plan, Ex. 26.)

^{3/} The Matrix lands are the acreage within the range of the northern spotted owl that is not subject to six specific land use allocations, *i.e.*, Congressionally reserved areas, late successional reserves, adaptive management areas, managed late successional areas, administratively withdrawn areas, and riparian reserves. (1994 ROD at 6-7.)

6.)^{4/} The Matrix consists of a “General Forest Management Area” (GFMA) and “Connectivity/Diversity” Blocks (CDB’s). The GFMA is managed for timber harvest, while the CDB’s are managed not only for timber harvest, but to provide connectivity between Late-Successional Reserves and Riparian Reserves. In turn, the Riparian Reserves lie in portions of watersheds “where riparian-dependent resources receive primary emphasis.” (Ex. 24, EA at 2, citing S&G’s at B-12.) Units 2A, 9A, and 15B of the Project contain study blocks for a laminated root rot study. (Ex. 24, EA at 2.) In addition, the Project is designed to achieve objectives of the *Aquatic Conservation Strategy* (ACS). (Ex. 24, EA at 3; see also Attachment A to 1994 ROD at B-9 to B-34.)

The Project lies within the Cleghorn Creek, Johnson Creek, and Halfway Creek drainages, all of which are covered by the Middle and Upper Smith River Watershed Analysis (Smith River WSA) completed in October 1995 (Ex. 55). The EA states the following:

The [1995 Roseburg] RMP (pg. 34) requires that late-successional forests be retained in watersheds that comprise 15% or less late-successional forests on Federal lands in fifth field watersheds, i.e., watersheds between 20 and 200 square miles. Any timber stands greater than approximately 80 years of age are considered late-successional habitat (S&G’s, pg. B-2). For the Middle and Upper Smith River Analytical Watershed, analysis of current forest inventories shows that of the 30,594 acres of federal ownership (62% of the watershed), approximately 10,800 acres (35%) are late-successional forests (80 years or older). 3200 acres (10%) are greater than 200 years (Old Growth) (Smith River WSA, pg. 11). Two of the units are within a connectivity/diversity block (Section 2 and the adjacent section 35). The RMP (pg. 34) requires that 25-30% of each connectivity block be maintained in late-successional forest. Because the Proposed Action Alternative in this EA proposes to commercially thin timber stands that are 30 to 40 years of age there would be no change in the amount or percentage of late-successional type forests on federal lands within the Middle and Upper Smith River Watershed.

(Ex. 24, EA at 2.)

^{4/} S&G’s are also known as Project Design Features (PDF’s), which constitute best management practices in Appendix D to the RMP. The ROD refers to them as S&G’s. The S&G’s were appended to the ROD as Attachment A, and it is that document that we will cite.

The purposes of the Project are several. For the Matrix portion of the Project area, the primary purpose is to produce a sustainable supply of timber and forest products and improve stand health; for the Riparian Reserve portion, it is to restore structural diversity of plant communities by accelerating the development of large conifers of differing form and structure with an eye toward future coarse woody debris; for the root rot study, the purposes are to rank the severity of the disease and determine stand treatment to manage its effects and foster a healthy forest ecosystem that supports populations of native species, including protection of riparian areas and waters; and for the Key Watershed, to reduce existing roads and undertake watershed restoration projects to manage watershed conditions for at-risk salmonids and resident fish species. (Ex. 24, EA at 3.) The EA determined that the Project area would benefit from commercial thinning, which is appropriate when “developing stands reach a combination of stem diameter and surplus volume to permit an entry that is economical.” (Ex. 24, EA at 1, citing RMP at 149.)

The EA considered three alternatives, including no action. Alternative A, the proposed action, was conventional logging utilizing cable and ground-based methods; existing roads would be fully upgraded to reduce impacts on water quality; and unneeded roads would be decommissioned. Alternative B was the same as Alternative A, except that Unit 2B would be deleted to eliminate the renovation of road 21-7-3.4 and the potential impacts of the road on fisheries. (Ex. 24, EA at 5.) The EA considered and eliminated the alternative of deleting the improvement and use of road 21-7-3.4 and logging unit 2B by helicopter. This alternative was eliminated, however, because there are no suitable landing sites in the vicinity of the unit. (Ex. 24, EA at 8.)

The Project would result in temporary road construction on approximately 1.1 miles of public land. Approximately 10.9 miles of government road would be renovated (that is, the road would be restored to its original design) and improved (that is, installing or maintaining drainage structures, reshaping the road surface, and surfacing certain road segments with crushed rock beyond the original design of the road). Approximately 0.9 miles of road would be decommissioned on a long term basis, although future use was a possibility, and approximately 0.7 miles of government road would be fully decommissioned with no possibility of future use. (Ex. 24, EA at 5.)

The EA considered direct, indirect, and cumulative impacts on botanical resources, fisheries, hydrology in a key watershed, soils, and wildlife. (Ex. 24, EA at 11-12, Appendices D, E; see also Ex. 25, Botanical Report prepared April 21, 1998; Ex. 26, Proposed Logging Plan prepared April 7, 1998; Ex. 29, Soils Report prepared February 26, 1998; Ex. 31, Fisheries Report prepared February 19, 1998; Ex. 32,

Silviculture Report prepared February 17, 1998; Ex. 34, Wildlife Report prepared January 28, 1998; and Ex. 35, Hydrology Report prepared November 26, 1997. In response to the issues related to, and impacts on, these resources, BLM developed a number of PDF's, which are "site specific measures, restrictions, requirements or structures included in the design of a project to reduce adverse environmental impacts." (Ex. 24, EA at 6.) As stated, these PDF's appear in the RMP as Best Management Practices (Appendix D to RMP at 129), and in the 1994 ROD as the S&G's (Attachment A to ROD). (Ex. 24, EA at 6.)

In July 1998, a second iteration of the Upper Smith River 5th Field Watershed Analysis was completed. (Ex. 15.)

The EA concluded that the proposed Project conforms to the 1995 RMP and its October 1994 *Roseburg District Proposed Resource Management Plan/Environmental Impact Statement*; the February 1994 *Final Supplemental Environmental Impact Statement on Management of Habitat for Late-Successional and Old Growth Forest Related Species Within the Range of the Northern Spotted Owl*, and its associated April 1994 ROD, also known as the Northwest Forest Plan (NFP). (Ex. 24, EA at 1.)

On August 19, 1998, the Area Manager issued his Finding of No Significant Impact (FONSI), submitted as Ex. 13. Noting that the "ROD permits 'timber harvest and other silvicultural activities . . . in that portion of the matrix with suitable forest lands, according to standards and guidelines [S&G]' (C-39 of S&G)," and that the "S&G's (pg. C-32) and the RMP (pg. 25) also permit silvicultural practices to ' . . . acquire desired vegetation characteristics needed to attain Aquatic Conservation Strategy [ACS] objectives,'" the Area Manager concluded that a FONSI was warranted, and that the proposed action is consistent with the ACS in that it would meet, or not prevent the attainment of, ACS objectives. (Ex. 13, FONSI at 1.) He expressly acknowledged that formal consultation with the National Marine Fisheries Service (NMFS) of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce, pursuant to section 7(a)(2) of the Endangered Species Act of 1973 (ESA), as amended, 16 U.S.C. § 1536(a)(2) (2000), was ongoing, and conditioned the FONSI upon completion of such formal consultation. (Ex. 13, FONSI at 1.) The FONSI was accompanied by a page captioned *Test for Significant Impacts*, which consists of 10 questions relating to the nature and extent of effects of the proposed action, with a "yes" or "no" box to be checked, and brief remarks supporting the box checked. All 10 "no" boxes were checked to document the FONSI. (Ex. 13, FONSI at 2.)

On August 24, 1998, the Area Manager issued a Decision Document, in which he stated the objectives to be achieved by going forward with the timber sale. In

addition, the Decision Document responded to comments submitted by Umpqua. (Ex. 12.) Accordingly, a Notice of Availability was published on August 25 and September 1, 1998.

On September 8, 1998, Umpqua protested the sale, and on December 22, 1998, BLM denied the protest. Umpqua timely appealed, and also petitioned to stay the decision.^{5/}

On November 24, 1998, NMFS issued a Programmatic Biological Opinion (BO), in which, among other things, it concluded that the proposed timber sales^{6/} are not likely to jeopardize the continued existence of potentially affected salmonid species.^{7/} (Ex. 3, BO at 1.)

^{5/} This Board denied the stay on Mar. 5, 1999.

^{6/} In addition to the Johnson Creek sale, the Programmatic BO identified the Final Curtin, Dream Weaver, Buck Fever, Sweet Pea, Happy Summit, Bell Mountain, and Christopher Folley sales. (Ex. 3, BO at 1.)

^{7/} In its July 16, 1998, Biological Assessment (BA), BLM determined that the timber sales were likely to adversely affect the Umpqua River cutthroat trout, the Oregon Coast coho salmon, and the Oregon Coast steelhead trout. The Umpqua River cutthroat trout is a specific population of the trout described as an “Evolutionarily Significant Unit” (ESU). The habitat for the latter two species overlaps that of the Umpqua River cutthroat trout. (Ex. 3, BO at 1.)

Following the Area Manager’s FONSI, the Fish and Wildlife Service (FWS), U.S. Department of the Interior, with the concurrence of NMFS, removed the Umpqua River cutthroat trout from the list of threatened and endangered (T&E) species, effective Apr. 26, 2000. 65 FR 24420 (Apr. 26, 2000).

We also note that FWS’s T&E designation of the Oregon Coast coho salmon, which is also an ESU, was overturned by a Federal district court on Sept. 10, 2001, in Alsea Valley Alliance v. Evans, 161 F. Supp. 2d 1154 (D. Or.). That ruling was stayed by a Federal circuit court which has yet to reach the merits. In addition, in response to the Alsea Valley ruling, NMFS stated in a July 25, 2002, notice of findings that it supports removal of the Oregon Coast coho salmon from the list of T&E species pending the results of further study. 67 FR 48601 (July 25, 2002). NMFS has not made a final decision, nor has FWS acted on the question of de-listing. So long as the species remains a listed T&E species, however, it is entitled to the “protective requirements of [section 7 of the ESA].” Umpqua Watersheds, Inc., 158 IBLA 62, 84 (2000).

Nonetheless, questions material to the implementation of the NFP surfaced in Federal court.^{8/} In Oregon Natural Resources Council Action v. U.S. Forest Service (ONRC), 59 F. Supp. 2d 1085 (W.D. Wash. 1999), plaintiffs challenged the FS's and BLM's interpretation and implementation of the survey and manage (S&M) requirements for Category 2 species.^{2/} Under the regional forest management plan there at issue, FS and BLM were to undertake the design of protocols and implement Category 2 surveys immediately. When completed, those surveys would provide the basis for designating managed sites for Category 2 species, including managing their habitat on those designated sites. For known or suspected ranges of the red tree vole (a primary food species for the northern spotted owl) and salamander species, surveys were to precede the design of all ground-disturbing activities that were to be "implemented in 1997 or later." (Attachment A to 1994 ROD at C-5.) For the 71 remaining Category 2 species, development of survey protocols was to have begun in 1994 as soon as possible, and was to have been completed prior to ground-disturbing activities that were to have been implemented in fiscal year 1999. (Attachment A to 1994 ROD at C-5; see also Table C-3, ROD at C-49.) The agencies had issued memoranda "equating issuance of an [EIS] with the 'implementation' of ground-disturbing activities," ONRC, 59 F. Supp. 2d at 1092. Pursuant to that interpretation,

^{8/} Regrettably, the Board's knowledge of these cases is limited to the courts' published decisions and some key pleadings in the lawsuits. We have provided a number of opportunities for the parties to explain events in this and other timber sale appeals, and to provide additional pleadings and documents that could assist us in better understanding the status of timber sales as a whole in light of the litigation, as well as the actions undertaken by the affected agencies in response thereto. The Solicitor's Office did not enter its appearance. While BLM has endeavored to be responsive to our requests, many questions linger.

^{2/} The S&M requirements pertain to the range of certain at-risk species and the particular habitats they are known to occupy. These requirements are described in four categories, in descending order of priority. Under Category 1, known locations of certain species must be managed to protect them by barring logging on a specified number of acres surrounding such locations. Under Category 2, which includes 77 rare species markedly at risk from harvesting old-growth and late-successional forests, surveys must be conducted before ground-disturbing activities can be undertaken. Category 3 requires surveys for species "whose characteristics make site and time-specific surveys difficult." (Attachment A to 1994 ROD at C-4 to C-5.) Lastly, Category 4 relates to regional surveys to identify species and acquire more information about them to determine levels of protection for them. (Attachment A to 1994 ROD at C-4 to C-5.) The Category 2 requirement is implemented in two phases

no survey would have been required for the salamander species and red tree vole for “[p]rojects with NEPA decisions signed prior to October 1, 1996, and contracts offered before January 1, 1997,” ONRC, 59 F. Supp. 2d at 1092, even though the 1994 ROD stated that these six species were to be accorded the “highest priority” under the S&M requirements. (Attachment A to 1994 ROD at C-4.) Similarly, no survey would have been required for the remaining 71 species for any timber sale for which an EIS had been completed before October 1, 1998. ONRC, 59 F. Supp. 2d at 1092. Plaintiffs further alleged that the development of significant new information required the agencies to further supplement the EIS. On cross-motions for summary judgment Judge William L. Dwyer granted plaintiffs’ motion:

The ROD’s category two survey requirements are clear, plain, and unmistakable. For the salamanders and red tree voles, surveys must be completed prior to the design of ground-breaking activities to be implemented on or after October 1, 1996. For other category two species, surveys must precede ground-disturbing activities implemented on or after October 1, 1998. For any timber sales in which ground-disturbing activities did not commence by those dates, the surveys must be done. Agency actions exempting timber sales from the [Northwest Forest] plan’s category two survey requirements by equating “implemented” with “NEPA decision” are unlawful and must be set aside under the APA [Administrative Procedure Act], 5 U.S.C. § 706(2)(A) [2000][footnote omitted].

ONRC, 59 F. Supp. 2d at 1094. Moreover, the district court invalidated FS’s and BLM’s jointly issued *Interim Guidance for Survey and Manage Component 2 Species: Red Tree Vole*, dated November 4, 1996, which had been extended through September 30, 1999. ONRC, 59 F. Supp. 2d at 1094. The parties eventually settled the litigation, and that settlement agreement was approved by the court in a Stipulation for Order Dismissing Action on December 17, 1999 (Stipulation).

In Pacific Coast Federation of Fishermen’s Association v. NMFS, No. C97-775R (W.D. Wash.), decided by order entered on April 29, 1998, on cross-motions for summary judgment (PCFFA I), plaintiffs attacked the sufficiency of NMFS’s Programmatic BO and its conclusion that various timber sales would not jeopardize the survival of the coho salmon or Umpqua cutthroat trout. In particular, plaintiffs in that case alleged that NMFS had failed to use the best available scientific information and had not considered enough evidence in reaching the “no jeopardy” conclusion, that such conclusion conflicted with the evidence before the agency, and that NMFS had authorized site-specific actions without adequate consultation as required by the ESA. PCFFA I at 3. The Programmatic BO had embraced a streamlined ESA

consultation mechanism by which interdisciplinary teams determined whether specific management actions were likely to adversely affect a T&E species, using a “matrix of pathways and indicators” set forth in the Programmatic BO and a checklist. The Matrix of Pathways and Indicators and checklist showed the information needed to implement and attain ACS objectives. PCFFA I at 9-10. Although the Matrix of Pathways and Indicators and checklist showed adverse effects in the watershed and inadequate evidence of mitigation, in three site-specific BO’s NMFS concluded that the proposed timber projects were not likely to jeopardize the continued existence of the Umpqua cutthroat trout. PCFFA I at 15.

Ruling on cross-motions for summary judgment, Judge Barbara Jacobs Rothstein upheld the Programmatic BO. However, she found that, while NMFS properly had assumed the FS and BLM would comply with the ACS on a programmatic basis, in subsequent site-specific timber BO’s NMFS had failed to ensure or verify compliance with the ACS on a project level. The court therefore found that “NMFS could not have rationally concluded, based on evidence of adverse effects and lack of evidence of significant mitigation before it, that the proposed actions were consistent with the ACS’s mandate that agencies maintain and restore aquatic systems within the range of the northern spotted owl.” PCFFA I at 16. The EA for the Johnson Creek sale was modified as a result of PCFFA I, and formal consultation with NMFS was undertaken. The Johnson Creek thinning project was offered for sale on September 22, 1998. In November and December 1998, NMFS issued four site-specific BO’s in which it again concluded that the proposed timber sales would not jeopardize coho salmon or cutthroat trout survival and recovery.

Another lawsuit followed. In Pacific Coast Federation of Fishermen’s Association v. NMFS (PCFFA II), 71 F. Supp. 2d 1063 (W.D. Wash 1999), aff’d in part, vacated in part, 265 F.3d 1028 (9th Cir. 2001), ^{10/} plaintiffs challenged the four BO’s as inadequate to ensure or verify compliance with the ACS, arguing, among other things, that consistency with ACS objectives is properly measured at the project level (6th field), rather than at the 5th field watershed scale, and that FS and BLM had ignored watershed analysis and riparian violations to reach the no jeopardy determination. PCFFA II, 71 F. Supp. 2d at 1068. Ruling on cross-motions for summary judgment in an order dated September 30, 1999, the district court agreed, finding that the ACS requires compliance at all four (regional, province or river basin, watershed, and site) spatial scales: “Thus, not only must the ACS objectives be met

^{10/} The circuit court’s opinion initially was reported at 253 F.3d 1137 (9th Cir. 2001). On Sept. 5, 2001, the court issued an amended opinion that changed only the final paragraph to partially vacate Judge Rothstein’s order to the extent that it pertained three sales. That change does not affect this appeal.

at the watershed scale (as NMFS argues), each *project* must also be consistent with ACS objectives, i.e., it must maintain the existing condition or move it within the range of natural variability.”^{11/} PCFFA II, 71 F. Supp. 2d at 1069-70. The court therefore found that NMFS had acted arbitrarily and capriciously because NMFS had failed to adequately assess short term impacts, PCFFA II, 71 F. Supp. 2d at 1070; that NMFS had “failed to use watershed analysis to determine whether the watersheds at issue are within the acceptable range of variability,” PCFFA II, 71 F. Supp. 2d at 1072; that NMFS was obligated to require some relationship between the benefits to be gained which were used to justify allowing projects in riparian reserves and maintaining or restoring an aquatic function to further ACS objectives, PCFFA II, 71 F. Supp. 2d at 1073; that NMFS had “allowed the agencies to ignore the best scientific information available;” and that “[i]n light of the overwhelming evidence of the ongoing degradation to the habitat of the endangered aquatic species in the Umpqua River Basin,” NMFS’s approach was “not rationally calculated to achieve the goals of the ACS,” PCFFA II, 71 F. Supp. 2d at 1073. Thus, NMFS’s second round of BO’s and their “no jeopardy” conclusions were invalidated. NMFS appealed.

On appeal, the Ninth Circuit Court of Appeals vacated Judge Rothstein’s September 1999 decision, but only to the extent that she had prohibited three timber sales (the Red Top Salvage II, Sugar Pine Density Management, and Little River projects). As to those sales, the circuit court found the NMFS’s “no jeopardy” BO’s sustainable, as there was no evidence “call[ing] into question” NMFS’s conclusion that the sales were not likely to jeopardize the continued existence of a T&E fish species. The circuit court affirmed in all other respects. PCFFA II, 265 F.3d at 1038.

^{11/} As the district court noted, the “range of variability” at the watershed or subwatershed scale is the “distribution of conditions of smaller subwatersheds that support acceptable populations of anadromous salmonids and other aquatic and riparian dependent organisms. Reeves Decl. at 8, ¶ 15.” PCFFA II, 71 F. Supp. 2d at 1069.

In response to this and other litigation,^{12/} BLM and the FS prepared the *Draft SEIS for Amendments to the Survey and Manage, Protection Buffers, and other Mitigation Measures-Standards and Guidelines S&M*, which was issued as a final SEIS in November 2000 (2000 FSEIS). The joint ROD for the 2000 FSEIS, styled “*Record of Decision and Standards and Guidelines for Amendments to Survey and Manage, Protection Buffers, and other Mitigation Measures Standards and Guidelines*” was issued in January 2001 (2001 ROD).^{13/}

Given the issues presented in these cases and their general implications for all timber sales in the Pacific Northwest, on April 11, 2000, we issued an order to show cause why we should not set aside the decision and remand the case for compliance with the decisions in ONRC and PCFFA I and II. BLM responded to that order on May 12, 2000, arguing against remand on two principle grounds. First, BLM noted that the parties had reached a settlement agreement in ONRC by which field surveys were to be completed so that affected timber sales could go forward, or sales would not be awarded until they conformed to S&M requirements. In particular, the parties’ dispute regarding red tree voles and Category 2 S&M species was settled, and that settlement agreement was approved by the court on December 17, 1999. Second, noting that the PCFFA II decision, to which BLM was not a party, had been appealed to the Ninth Circuit, BLM argued that it did not constitute a ruling that BLM had failed to comply with the ACS, but was instead a question of the adequacy of NMFS’s BO. BLM therefore moved the Board to retain jurisdiction, adjudicate the “non-

^{12/} Klamath Siskiyou Wildlands Center v. Bureau of Land Management, No. 03-3006-CO (D. Or. Jan. 15, 2003) (agency decision stayed); Headwaters and ONRC Fund v. U.S. Forest Service, No. 02-1519-JO (D. Or. Nov. 8, 2002) (dismissed by stipulation Apr. 9, 2004); BARK v. Larsen, No. 02-904-HU (D. Or. July 8, 2002) (agency decision stayed). (See March 2003 *Draft Supplemental EIS Clarification of Language in the 1994 Record of Decision for the Northwest Forest Plan; National Forests and Bureau of Land Management Districts Within the Range of the Northern Spotted Owl* (2003 DSEIS) at 9.)

^{13/} In the Summary, the 2001 ROD is explained as follows: “This Decision makes it possible for the Agencies to more efficiently provide the level of species protection intended in the [NFP]. Our Decision retains the major elements of Survey and Manage, restructuring them for clarity, describing criteria and processes for changing species assignments in the future, and removing 72 species in all or part of their range because new information indicates they are secure or otherwise do not meet the basic criteria for Survey and Manage. This Decision applies to administrative units of the USDA Forest Service and the USDI Bureau of Land Management * * * within the range of the spotted owl.” (2001 ROD at 1.)

litigated issues,” and suspend the appeal until the matter was judicially resolved, averring that it intended to meet its commitment for S&M species in accordance with the Stipulation in ONRC. (Response to Show Cause at 3.) Umpqua did not respond to or otherwise acknowledge BLM’s response to the show cause order.

Meanwhile, BLM and the FS began work on yet another supplemental EIS, which culminated in the issuance of the 2003 DSEIS. The 2003 DSEIS clarifies language pertaining to implementation and achievement of the ACS.

By order dated July 11, 2003, we requested a status report from the parties, and on July 25, 2003, BLM filed its report. BLM advised that the Johnson Creek sale had not been awarded and that it had taken no action on the sale.^{14/} It clarified the sequence of events with respect to the NMFS’s BO’s, and maintained that the litigation “concerned the consultation process used by the NOAA Fisheries [NMFS] in the preparation of its Biological Opinion and did not address any action by the BLM.” (July 25, 2003, Response to Request for Status at 1.) Nonetheless, BLM stated that the “consultation process has been on hold since the September 5, 2001, Ninth Circuit Court Order [^{15/}] while NOAA Fisheries has been working on changing its consultation process to comply with the court orders. BLM intends to resubmit this sale for consultation as soon as that new process has been developed.” (Response to Status Order of July 11, 2003, at 1.) BLM confirmed that the 2001 ROD was issued in response to the litigation in ONRC, and, citing the 2001 ROD at 18, stated that “no additional surveys are required except for red tree voles.” (July 25, 2003, Response to Request for Status at 1-2.) BLM thus avers:

The current protocol does not require surveys for red tree voles in the area in which these sales are located. In summary, no additional surveys for Survey and Manage species are required beyond those that were completed prior to the issuance of the decision that is the subject of this appeal. All known sites of Survey and Manage species that were

^{14/} The Johnson Creek Commercial Thinning Project was not among those enjoined by Judge Rothstein. Nevertheless, as BLM’s status report, discussed above, indicates, the sale is located in a Key Watershed, and is directly affected by the district court’s and Ninth Circuit’s conclusions in PCFFA II regarding the adequacy of the BO’s to which ACS compliance is tied.

^{15/} We assume that this is a reference to the amended decision issued by the Ninth Circuit on Sept. 5, 2001. PCFFA II, 265 F.3d at 1028. If that assumption is incorrect, the Board has not been provided a copy of this order, and has no knowledge of its content or the circumstances leading to its issuance.

found during sale preparation will be protected under the contract in accordance with the appropriate Management Recommendations.

(July 25, 2003, Response to Request for Status at 2.) BLM concludes its status report as follows:

BLM does not anticipate having to make any changes in the decision for this sale. The only issue that is unresolved is that BLM is still waiting for valid biological opinions from NOAA Fisheries on this sale. BLM will re-initiate consultation as soon as NOAA Fisheries is ready to implement the new consultation process being developed in response to the past court orders. Upon receipt of a Biological Opinion for these sales, BLM will notify the Board.

(July 25, 2003, Response to Request for Status at 2.) Umpqua did not respond to or otherwise acknowledge BLM's status report, and the Board has received no further communication from BLM concerning NMFS's progress toward issuing new BO's.

Arguments of the Parties and Analysis

With this background in mind, we now turn to Umpqua's Statement of Reasons for appeal (SOR). Broadly speaking, Umpqua questions the decision in five areas: the quality and reasoning of the analyses pertaining to water quality and the watershed; S&M obligations relative to the red tree vole and Category 2 species; the agencies' approach to noxious weeds; objections to what Umpqua refers to as "pre-decisional logging"; and the allegation that the decision rejecting the protest on the basis that it merely reiterated previous comments and claims is wrong.

More particularly, Umpqua's water-related arguments consist of the following allegations:

1. that measuring sale impacts at the watershed or 5th field level masks impacts that are discernible at the project or 6th field level (SOR at 22-23);
2. that BLM cannot lawfully maintain the watershed in a degraded condition, and that "the ACS requires that the BLM maintain currently functioning watersheds and restore degraded watersheds" (SOR at 24);
3. that improvement of road 21-7-3.4 in unit 2B actually constitutes the construction of a new road, that it will traverse two riparian reserves,

- will result in unacceptable impacts on water quality, and that the decision to do so was made over the strong objections of BLM's fisheries biologist (SOR at 24-26);
4. that there is a conflict between the Fisheries Report (Ex. 31) and the Geotechnical Report (Ex. 23) regarding erosion associated with road 21-7-3.4 (SOR at 26-28);
 5. that BLM will be logging and yarding within 20 feet of streams, which could result in serious impacts not analyzed in the EA, and that yarding is inconsistent with the ACS (SOR at 28-29);
 6. that, with respect to temporary roads, BLM erroneously assumed that the effects are temporary in nature, an assumption lacking supporting scientific data (SOR at 30-31);
 7. that logging on unstable and potentially unstable soils will occur in violation of the NFP standards and guidelines pursuant to which such areas are included in riparian reserves (SOR at 31-32); and
 8. that BLM failed to consider impacts occurring on privately owned lands, and BLM thus "has no way of know[ing] what the cumulative effect of Johnson Creek is on the entire watershed" (SOR at 32-33).

In its Answer, BLM responds that it fully addressed Umpqua's water-related arguments in its protest decision. BLM maintains that it "has not arbitrarily adopted the analysis of the 5th field in determining ACS compliance," and that such analysis is the result of the recommendations and work of the Forest Ecosystem Management Assessment Team (FEMAT).^{16/} (Answer at 2.) Citing FEMAT's July 1993 Report, *Forest Ecosystem Management: An Ecological, Economic, and Social Assessment*, at V-59, BLM argues that FEMAT does not define implementation of the ACS at four spatial scales, as Umpqua contends, but instead provides that "four key components of the [ACS] * * * **should be addressed.**" (Emphasis in the original.) BLM further argues that Umpqua's position that an action cannot degrade at the project level, even when such impacts are short-term, means that no timber harvest, road upgrade, or restoration work could ever occur. (Answer at 2.)

^{16/} The FEMAT Report is the backbone of the ACS, and was accepted by the court in PCFFA I and II and by the Ninth Circuit on appeal as representing the best scientific information on achieving and maintaining aquatic ecosystem health. PCFFA II, 71 F. Supp. 2d at 1069.

With respect to Umpqua's arguments that BLM is degrading certain indicators of ACS consistency, BLM responds by admitting that the sale will degrade four indicators on a short-term basis at the 6th field scale. However, BLM points out that two of these "degrades" results from replacing stream culverts, which, according to the BA, will immediately and significantly reduce stream sedimentation. Another "degrade" is associated with thinning in the Riparian Reserves, but BLM notes that the BA concluded that "[s]ediment delivery * * * is not expected due to the proposed erosion-limiting logging practices, and also due to the protective buffer zones between the sale units and the adjacent streams." (Answer at 3, citing the BA, Ex. 18 at 3.) BLM explains that two spatial scales were analyzed, and on different temporal scales. Thus, the 5th field is at the watershed scale and is evaluated over the long-term (20-200 years), whereas the 6th field is at the sub-watershed scale (that is, a region of the 5th field) and is evaluated in the short-term (i.e., the length of the project), because it is at the project level that "take" is determined for purposes of the ESA. (Answer at 3.)

Regarding the argument that maintaining a degraded watershed is illegal, BLM asserts that the ACS is a "multifaceted strategy," and further responds by noting the restorative activities were undertaken and protective zones were identified to restore the ecological health of the aquatic ecosystem. (Answer at 4-5.) BLM further notes that Umpqua has come forward with nothing that demonstrates that the BA's analysis of baseline watershed conditions and its conclusion that the project does not retard or prevent the attainment of ACS objectives is incorrect or unfounded. (Answer at 5.)

As to road 21-7-3.4, BLM acknowledges that improvement will have greater short-term impacts than leaving it in its present state, but denies that the modest improvements that are planned constitute new road-building or will result in the same impacts as would be occasioned by constructing a new road. BLM likewise acknowledges differences in opinion expressed by members of the Inter-disciplinary Team who participated in the preparation of the EA, but nonetheless defends the process by which competing individual views were considered in the course of developing the team's recommendations to the decision-maker. (Answer at 6-7.)

BLM takes a similar view of the perceived differences between the opinions expressed in the Geotechnical Report (Ex. 23) and the Fisheries Report (Ex. 31). It explains that the former evaluated the "failure potential of these stream crossings," but also noted a field examination showed the road fills to be stable at present, whereas the latter, consistent with the field observations, concluded that there were no signs of erosion. (Answer at 7, citing Ex. 23 at 2, 3 and Ex. 31 at 2, respectively.)

On the topic of yarding, BLM maintains that the “need to yard the felled trees was shown in the EA because of the unacceptable fuel hazards risk,” and that “[h]arvesting trees to lower stand densities and produce late-successional characteristics is considered restoration work and is being funded through the sale of timber products.” (Answer at 9.) According to BLM, the goal is to produce uniformly spaced Douglas Fir trees with a density of 200-300 trees per acre, with the expectation that

thinning would occur at a time when competition for growing space causes tree mortality. Thinning is the only way to control stocking and acquire desired vegetation characteristics. Allowing thinning to occur naturally does not control stocking. It allows the stand to change in an uncontrolled manner with the strong potential for delaying the desired vegetation characteristics.

(Answer at 9.) BLM denies that yarding constitutes a silvicultural system, stating that it is only a method of removing felled timber. (Answer at 9.) BLM’s final point on the subject is that the Johnson Creek sale was designed to achieve a balance between the amount of wood removed and that left in place, to ultimately achieve desirable canopy openings for vigorous tree growth, introduce diversity in the stand, and encourage deep canopies. Thus, BLM states that “[y]arding corridors are typically 20-25 feet wide, in most cases this will be less than the spacing between the residual trees.” (Answer at 10.)

Regarding the allegedly limited extent of BLM’s analysis of the impacts of temporary roads urged by Umpqua, BLM responds by setting forth what its analysis determined, with citations, concluding that it has only the burden of demonstrating that the overall action at issue will not have significant impacts, not that it will have no impacts. (Answer at 10-12.)

Of the parties’ arguments, several have been decided by the courts, and upheld on appeal before the Ninth Circuit. Thus, Umpqua’s first argument that impacts are to be measured at four spatial scales, including at the project level, was upheld in PCFFA II, 71 F. Supp. 2d at 1068-70. Its second argument that BLM must maintain currently functioning watersheds and restore degraded watersheds also was sustained. PCFFA I at 13-16; PCFFA II, 71 F. Supp. 2d at 1069, 1070. The court likewise agreed with Umpqua’s third and fifth lines of argument pertaining to project activity in riparian reserves and potential impacts on water quality. PCFFA II, 71 F. Supp. 2d at 1071, 1072-73. Further, the court squarely rejected Umpqua’s eighth contention to the effect that BLM had failed to consider impacts occurring on private lands. PCFFA II, 71 F. Supp. 2d at 1071. Although not entirely free from

doubt, it appears that Umpqua's sixth and seventh contentions, relating to the impacts of temporary roads and logging on unstable soils, in the main were decided against the Government,¹ at least to the extent they involve ground-disturbing activities in riparian areas, consistency with the ACS, and NMFS's failure to verify compliance with the ACS. PCFFA I at 13-14, 16; PCFFA II, 71 F. Supp. 2d at 1071-73.

To the extent it can be argued that the PCFAA decisions did not resolve fully the seventh assertion, that logging on unstable and potentially unstable soils will occur, the record does not support Umpqua's claim. BLM challenges the contention by citing the NFP, which states: "Riparian Reserves include those portions of a watershed directly coupled to streams and rivers, that is, the portions of a watershed required for maintaining hydrologic, geomorphic, and ecologic processes that directly affect standing and flowing waterbodies, * * *, stream processes, and fish habitats. (Answer at 12, emphasis in original.) BLM states, moreover, that two conditions must exist before unstable or potentially unstable slope lands are reserved: "(a) moderate or higher probability of landslides occurring under the specific management prescription," and "(b) moderate or higher probability that any resulting landslides would reach an intermittent or perennial stream." (Answer at 12.) BLM notes that the soil scientist specifically addressed the sites of concern to Umpqua, and he concluded that they did not meet the requisite slope stability criteria. BLM therefore concludes that Umpqua has not shown that the project design fails to meet ACS objectives. (Answer at 13.) Our review of the record confirms BLM's statements with respect to the conditions under which unstable or potentially unstable lands are to be reserved, and accordingly, we reject Umpqua's allegations to the contrary.

The question of whether an action can degrade any indicator, even on a short-term basis, also has been decided. Thus, the court in PCFFA II acknowledged that the Programmatic BO upheld in PCFFA I anticipated some site-specific degradation. PCFFA II, 71 F. Supp. 2d at 1068, 1070. The court acknowledged that "NMFS is also correct that evidence in the checklists and matrixes that a project will result in some degradation does not, standing alone, constitute ACS noncompliance." PCFFA II, 71 F. Supp. 2d at 1070. Instead, recognizing that site-specific degradations will occur, the central question for the court was when and at what scale to measure overall consistency with ACS objectives. PCFFA II, 71 F. Supp. 2d at 1070-71. We therefore reject the express or implied assertion that any action that causes any site-specific degradation is absolutely prohibited.

As to S&M obligations, Umpqua is critical of the Interim Guidance and sequencing of surveys for red tree voles and other Category 2 species. Umpqua specifically challenges the assertion that issuance of a NEPA decision constitutes

project “implementation” for purposes of applying the Interim Guidance (Ex. 53), a definition that had the effect of excluding or postponing surveys for Category 2 species. (SOR at 34-38.)

BLM responds that, pursuant to the Interim Guidance, surveys for red tree voles are needed

only when a project is located in a fifth field watershed where Federal ownership exceeds 10% of the watershed (therefore, those with less need no surveys nor management) and in watersheds where less than 40% of the Federal land is red tree vole habitat (having approximately 60 percent or greater crown closure, coniferous trees with an average diameter at breast height of approximately 10 inches or greater), and will be maintained through the end of the decade. Under these conditions we will have met the habitat threshold (potential habitat sufficient for dispersal) for red tree voles. Suitable habitat therefore would include pole-sized second growth timber as well. If this requirement can not be met th[e]n specific management is specified.

(Answer at 16, emphasis in original.) On the related question of the proper definition of “implementation,” BLM adheres to the view, set forth in the Interim Guidance, that issuance of a NEPA decision constitutes “implementation.” (Answer at 18.) As discussed, however, this line of reasoning was invalidated by the court. ONRC, 59 F. Supp. 2d at 1094.

What remains of Umpqua’s SOR are its allegations regarding noxious weeds, felling trees for administrative purposes, and, to some extent, road construction and rehabilitation. On the subject of noxious weeds, Umpqua’s chief complaint is that BLM is perpetuating the problem “by thinning excessively, especially in the reserves, and road building.” (SOR at 18.) Umpqua also questions whether equipment is actually being washed to minimize the spread of noxious weeds, and argues that BLM should be required to prove that equipment is in fact washed. (SOR at 38-39.) BLM responds that Umpqua has misquoted the 1994 Decision Record, which does not state that few timber sales have been implemented with the equipment washing requirement. To the contrary, the 1994 ROD states: “The few NFP sales with this provision that have been implemented on the ground have not had sufficient time to monitor its effectiveness.” (Answer at 19, citation omitted.) While Umpqua’s concern is to be appreciated, more than a generalized expression of doubt or disagreement is necessary to demonstrate error in BLM’s decision rejecting Umpqua’s protest on this point. Great Basin Mine Watch, 160 IBLA 340, 364 (2004); In Re Stratton Hog Timber Sale, 160 IBLA 329, 332 (2004). Absent facts relative to the

degree of thinning in the project area or evidence showing that washing equipment is ineffective, we find no basis for disturbing BLM's decision.

Umpqua further contends that BLM has been cutting trees for sale in the Johnson Creek timber sale, sometimes in riparian reserves, before any decision to log the sale was issued, and before any Biological Opinion was received from the NMFS, actions Umpqua claims are illegal. (SOR at 39-40.) BLM admits that it has cut trees, but characterizes this activity as merely felling trees for the administrative purpose of developing a volume estimate for the project, and, had no decision issued, those trees would have remained in place as interim coarse woody debris. (Answer at 19.) In addition, BLM notes that a total of 95 trees, or 0.4 percent of the trees available for harvest were felled, a "very minor" action that provides "more accurate volume information about a particular timber stand for the decision maker." (Answer at 20.) We do not find, as a general matter, that felling trees for the purpose of assessing the commercial volume of a timber stand equates to logging, and appellant has cited no provision or authority compelling a different conclusion. Nor do we find, in this case, that felling to sample trees rose to the level of logging.

The last and most troublesome matter to be considered is Umpqua's complaint regarding road 21-7-3.4 in Unit 2 and temporary roads in general. Road building and rehabilitation are obviously activities that pose significant issues affecting ACS compliance and the nature and extent of impacts on listed or threatened fish species at the project or site level.^{17/} The 1993 FEMAT Report makes it abundantly clear that the "approximately 110,000 miles of roads" on the Federal lands are of "particular concern" because of the destructive impacts on fish habitat, riparian habitat, and water quality caused by the increased streamflow, runoff, and sedimentation associated with roads. (FEMAT Report at II-38 and II-40.) The FEMAT Report concludes that the magnitude of such impacts is exacerbated by FS's and BLM's declining capacity to properly monitor and maintain roads to manage such

^{17/} Umpqua's fourth water-related argument is that conflicting opinions regarding erosion associated with road 21-7-3.4 were expressed in the Fisheries and Geotechnical Reports. Umpqua suggests that this alleged difference of opinion demonstrates error in BLM's decision. First, we are not convinced that a conflict has been shown. Our reading of the reports is consistent with BLM's view that the reports address closely related but different topics (failure potential of particular stream crossings versus the absence of signs or erosion and present stability). See Answer at 7. Second, as a general matter, no great significance *per se* attaches to a difference of opinion among members of an interdisciplinary team. As BLM suggests, the process anticipated individual views from which the team's recommendations would be synthesized for presentation to decisionmakers.

impacts, which directly affects and impairs the capacity of Key Watersheds to function properly and contribute to attainment of ACS objectives, which performance begins with quality watershed analysis.^{18/} (FEMAT Report at II-40.) Controlling and preventing road-related impacts thus is a vital component of a restoration program. (FEMAT Report at II-38.) To that extent, Umpqua's concerns regarding roads are well-taken. The task before us is more complex, however.

The Ninth Circuit aptly posed the dilemma:

The NMFS argues that Pacific Coast and the district court inappropriately have required NMFS to serve as a review board or oversight committee for BLM and USFS determinations of ACS consistency. This argument appears significant, but in fact lacks substance. The NMFS is required under NFP to determine whether or not a project is likely to adversely affect a listed species. The NMFS is *not required* by NFP to determine ACS consistency. However, in *PCFFA I*, the district court held that NMFS was permitted to assume that implementation of projects under USFS's * * * or BLM's [land management plans] would result in "no jeopardy" to the listed fish species if those projects were conducted in accordance with ACS. Therefore, because NMFS is allowed to equate ACS consistency with a no jeopardy finding, NMFS chooses to inquire into ACS consistency. Presumably, other methods of reaching a jeopardy determination are available to NMFS. The coincidence of ACS consistency inquiries is immaterial. The NMFS's primary obligation is to determine a project's effect on listed fish species. The action agencies, as part of their analyses, must also determine ACS consistency. That they are able to discharge dissimilar duties by the same means does not allow either party to fail to undertake its responsibilities.

PCFFA II, 265 F.3d at 1034-35.

On the one hand, the courts have roundly criticized and rejected NMFS's approach to determining, pursuant to the ESA, the jeopardy to T&E species posed by

^{18/} "Watershed analysis is a systematic procedure for characterizing watershed and ecological processes to meet specific management and social objectives. This information then guides management prescriptions, including setting and refining boundaries of Riparian Reserves and other Reserves, sets restoration strategies and priorities, and reveals the most useful indicators for monitoring environmental changes." (FEMAT Report at II-12.)

this and other timber sales. As stated, NMFS assumed in its BO's that the action agencies would comply with the ACS, an assumption that has since been invalidated. On the other hand, it appears that BLM assumed or determined that the Johnson Creek commercial thinning sale is consistent with the ACS, in significant part because of the no jeopardy determination contained in NMFS's Programmatic and subsequent site-specific BO's. One thing is certain, however: matters can lawfully go no further until consultation is reinitiated and new BO's are prepared. See PCFFA II, 71 F. Supp. 2d at 1073; see also Environmental Protection Information Center v. Simpson Timber Co., 255 F.3d 1073, 1076 (9th Cir. 2001). Indeed, BLM has advised the Board that it is still waiting for valid BO's. (July 25, 2003, Response to Request for Status at 2.) Thus, the question is whether, at this juncture, we can or should attempt to adjudicate Umpqua's allegations pertaining to road 21-7-3.4 in Unit 2 and temporary roads, when the context for those arguments could change or vanish following consultation and issuance of new BO's.

BLM states that it "does not anticipate having to make any changes in the decision for this sale" as a result of new BO's (July 25, 2003, Response to Request for Status at 2). However, we decline to assume that nothing about the Johnson Creek project design can or will change when consultation is concluded, and we are unable to forecast whether and to what extent subsequent events may resolve Umpqua's concerns or alter the factual predicate on which its arguments regarding road-related project activity rests. Given all the circumstances in this case, the proper course is to vacate BLM's decision so that all relevant developments and conclusions, as described herein, can be taken into account when consultation has occurred and new BO's have been prepared.^{19/}

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and the case is remanded to BLM to await further consultation with NMFS and issuance of new BO's, and for action not inconsistent with the conclusions reached in this opinion.

T. Britt Price
Administrative Judge

^{19/} We expressly leave it to BLM on remand to initially determine what effect, if any, the 2001 ROD may have on the S&M species at issue in the lawsuits described above.

I concur:

C. Randall Grant, Jr.
Administrative Judge