

No. 14-35553

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASCADIA WILDLANDS; OREGON WILD; and UMPQUA WATERSHEDS,
Plaintiffs-Appellants,

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS,
Defendant-Appellee,
and
THE COQUILLE INDIAN TRIBE,
Defendant-Intervenor-Appellee

On Appeal From The United States District Court
For The District Of Oregon (No. 6:13-cv-01559)

ANSWERING BRIEF FOR FEDERAL APPELLEE

SAM HIRSCH
Acting Assistant Attorney General

OF COUNSEL:

MARY ANNE KENWORTHY
Office of the Regional Solicitor
Department of the Interior
Portland, OR

STUART GILLESPIE
BRIAN C. TOTH
ELLEN J. DURKEE
Attorneys
Environment & Natural Resources Division
Department of Justice
P.O. Box 7415, Ben Franklin Station
Washington, D.C. 20044
(202) 514-4426
ellen.durkee@usdoj.gov

TABLE OF CONTENTS

	Page
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS	6
A. Statutory Background.....	6
1. The Coquille Restoration Act	6
2. National Environmental Policy Act.....	8
B. Relevant Forest Plans	9
1. Plans for Nearby Federal Lands.....	9
2. Coquille Forest Plan.....	12
C. The Kokwel Project.....	12
1. Elements of the Project	14
2. Environmental Assessment.....	16
3. ESA Consultation.....	18
SUMMARY OF ARGUMENT	21
ARGUMENT	23
I. STANDARD OF REVIEW	23

II.	THE CUMULATIVE EFFECTS ANALYSIS ADEQUATELY AND APPROPRIATELY TOOK INTO ACCOUNT THE RASLER SALE	24
A.	Impacts from the Rasler Sale Were Appropriately Taken Into Account in the Cumulative Impacts Analysis by Incorporating Rasler Sale Impacts into the Baseline	25
1.	The record demonstrates that impacts from the Rasler Sale were in fact incorporated and aggregated into the baseline	27
2.	Cascadia Wildlands provides no support for its contention that it is impermissible to aggregate and incorporate impacts from previously-approved projects into the baseline	30
B.	Cumulative Impacts to Late-Successional Species, Soils, and Roads Were Adequately Considered	34
1.	Late-Successional Species	35
2.	Soils	37
3.	Roads	39
C.	The Kokwel EA is Sufficiently Detailed	41
III.	THE KOKWEL PROJECT COMPILES WITH THE RESTORATION ACT	43
A.	“Objectives” Are Not “Standards and Guidelines” Within the Meaning of the Restoration Act	55
B.	The Objective on which Cascadia Relies Is Not an Enforceable Standard Requiring Projects on Matrix Land to be Invariably Consistent with Recommendations Made in Recovery Plans ..	50

C. The Restoration Act Allows BIA and the Tribe to Adopt
Objectives for Management of the Coquille Forest that Differ
from BLM’s Objectives55

CONCLUSION58

CERTIFICATE OF COMPLIANCE.....59

STATEMENT OF RELATED CASES59

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases:

<i>Bark v. U.S. BLM</i> , 643 F. Supp. 2d 1214 (D. Or. 2009).....	33
<i>Coalition for Sensible Transp., Inc. v. Dole</i> , 826 F.2d 60 (D.C. Cir. 1987).....	25, 26
<i>Dep’t of Transp. v. Public Citizen</i> , 541 U.S. 752 (2004).....	8
<i>Ecology Center v. Castaneda</i> , 574 F.3d 652 (9th Cir. 2009)	31
<i>Fence Creek Cattle Co. v. U.S. Forest Service</i> , 602 F.3d 1125 (9th Cir. 2010)	23
<i>Friends of Blackwater v. Salazar</i> , 691 F.3d 428 (D.C. Cir. 2012).....	44
<i>Friends of the Wild Swan v. Weber</i> , 2014 WL 4723559 *3 (9th Cir. Feb. 24, 2014)	41
<i>Fund for Animals, Inc. v. Rice</i> , 85 F.3d 535 (11th Cir. 1996)	44
<i>Gardner v. U.S. Bureau of Land Management</i> , 638 F.3d 1217 (9th Cir. 2011)	9, 32
<i>Grand Canyon Trust v. FAA</i> , 290 F.3d 339 (D.C. Cir. 2002).....	25
<i>Idaho Sporting Congress, Inc. v. Rittenhouse</i> , 305 F.3d 957 (9th Cir. 2002)	53, 54

<i>Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Management</i> , 387 F.3d 989 (9th Cir. 2004)	41, 42
<i>Kleppe v. Sierra Club</i> , 427 U.S. 390 (1976).....	26
<i>Lands Council v. McNair (Lands Council I)</i> , 537 F.3d 981 (9th Cir. 2008)	23, 31, 53, 54
<i>Lands Council v. McNair (Lands Council II)</i> , 629 F.3d 1070 (9th Cir. 2010)	46, 50, 51, 54
<i>Lands Council v. Powell</i> , 395 F.3d 1019 (9th Cir. 2005)	41
<i>League of Wilderness Defenders v. U.S. Forest Serv.</i> , 549 F.3d 1211 (9th Cir. 2008)	25, 31, 33, 42
<i>Muckleshoot Indian Tribe v. U.S. Forest Serv.</i> , 177 F.3d 800 (9th Cir. 1999)	41
<i>Native Ecosystems Council v. U.S. Forest Serv.</i> , 428 F.3d 1233 (9th Cir. 2005)	23
<i>Neighbors of Cuddy Mountain v. U.S. Forest Serv.</i> , 137 F.3d 1372 (9th Cir. 1998)	38, 40, 41
<i>Norton v. S. Utah Wilderness Alliance</i> , 542 U.S. 55 (2004).....	46, 50
<i>Or. Natural Res. Council Fund v. Brong</i> , 492 F.3d 1120 (9th Cir. 2007)	10, 11, 16, 17
<i>Or. Natural Res. Council v. Turner</i> , 863 F. Supp. 1277 (D. Or. 1994).....	44
<i>Piedmont Heights Civic Club, Inc. v. Moreland</i> , 637 F.2d 430 (5th Cir. 1981)	26, 27

<i>Pyramid Lake Paiute Tribe v. Dep't of the Navy</i> , 898 F.2d 1410 (9th Cir. 1990)	23
<i>River Runners for Wilderness v. Martin</i> , 593 F.3d 1064 (9th Cir. 2010)	30
<i>Robertson v. Methow Valley Citizens Council</i> , 490 U.S. 332 (1989).....	8, 10
<i>Russello v. United States</i> , 464 U.S. 16 (1983).....	57
<i>San Luis & Delta-Mendota Water Authority v. Jewell</i> , 747 F.3d 581 (9th Cir. 2014)	30
<i>Save Strawberry Canyon v. U.S. Dept. of Energy</i> , 830 F Supp. 2d 737 (N.D. Cal. 2011).....	26
<i>South Fork Band Council v. U.S. Dep't of the Interior</i> , 588 F.3d 718 (9th Cir. 2009)	41
<i>Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of the Interior</i> , 608 F.3d 592 (9th Cir. 2010)	42
<i>Tongass Conservation Society v. U.S. Forest Service</i> , 455 F. App'x 774 (9th Cir. 2011).....	31, 32
<i>United States v. Vidal-Mendoza</i> , 705 F. 3d 1012 (9th Cir. 2013)	32
<i>Vt. Yankee Nuclear Power Corp. v. Natural Res. Defense Council, Inc.</i> , 435 U.S. 519 (1978).....	31
<i>WildWest Inst. v. Bull</i> , 547 F.3d 1162 (9th Cir. 2008)	29

STATUTES:

Administrative Procedure Act

5 U.S.C. § 706(1).....	50
5 U.S.C. § 706(2)(A)	23

Coquille Restoration Act (“Restoration Act”)

Pub. L. 101-42, 103 Stat 91 (June 28, 1989)	6
Pub. L. No. 104-208, Div. B, Title V, § 501, 110 Stat. 3009-537 (1996)	6
25 U.S.C. § 715 <i>et seq.</i>	1, 6
25 U.S.C. § 715c.....	2
25 U.S.C. § 715c(d)(4)	6
25 U.S.C. § 715c(d)(5)	<i>passim</i>
25 U.S.C. § 715c(d)(6)	7
25 U.S.C. § 715c(d)(9)	1

Endangered Species Act

16 U.S.C. § 1531 <i>et seq.</i>	7
16 U.S.C. § 1533(f).....	3
16 U.S.C. § 1533(f)(1).....	44
16 U.S.C. § 1536(a)(2)	18, 34
16 U.S.C. § 1536(b)(3)(A).....	18

Federal Land Policy and Management Act

43 U.S.C. 1701 <i>et seq.</i>	9
-------------------------------------	---

National Environmental Policy Act

42 U.S.C. § 4321 <i>et seq.</i>	2
42 U.S.C. § 4332(2)(C)	8

National Forest Management Act

16 U.S.C. § 1604(g)(1)-(3)	46
----------------------------------	----

National Indian Forest Resources Management Act

25 U.S.C. § 3101 <i>et seq.</i>	5
25 U.S.C. §§ 3101-3120	55
25 U.S.C. § 3104(b)(2)	5, 12, 55
25 U.S.C. § 3107.....	7

Indian Self-Determination Act	
25 U.S.C. § 450f <i>et seq.</i>	7
28 U.S.C. § 1291	1
28 U.S.C. § 1331	1
RULES and REGULATIONS:	
36 C.F.R. pt. 219 (2000)	46
40 C.F.R. § 1501.4(b)	8
40 C.F.R. 1508.7	16, 24, 25, 26
40 C.F.R. 1508.9(a).....	41
40 C.F.R. 1508.9(a)(1).....	8
40 C.F.R. § 1508.7	16, 24, 42
40 C.F.R. § 1508.13	8
50 C.F.R. § 402.02	19, 28
50 C.F.R. § 402.14	18
47 Fed. Reg. 43026 (Sept. 30, 1982)	46
77 Fed. Reg. 21162 (April 9, 2012).....	46
Fed. R. App. P. 32.1	32
Fed. R. App. P. 4(a)(1)(B)	1

LEGISLATIVE HISTORY:

142 Cong. Rec. S9649 (August 2, 1996)	6
142 Cong. Rec. S9649, S9654 (daily ed. Aug. 2, 1996).....	47
135 Cong. Rec. S6634-05, 1989 WL 178807 (June 4, 1989).....	6, 5

TABLE OF ACRONYMS

BIA	U.S. Bureau of Indian Affairs
BLM	Bureau of Land Management
CEQ	Council on Environmental Quality
EA	Environmental Assessment
FWS	U.S. Fish and Wildlife Service
NEPA	National Environmental Policy Act
RMP	Resource Management Plan

JURISDICTIONAL STATEMENT

Cascadia Wildlands, Oregon Wild, and Umpqua Watersheds (collectively, “Cascadia Wildlands”) filed this lawsuit against the U.S. Bureau of Indian Affairs (“BIA”) to challenge BIA’s approval of a timber harvest project on lands held in trust by the United States for the benefit of the Coquille Indian Tribe. *See* Excerpts of Record (“ER”) 118-132. The district court had jurisdiction under 28 U.S.C. § 1331 (federal question) and 25 U.S.C. § 715c(d)(9) (Coquille Restoration Act). *See* ER 120. On June 24, 2014, the district court entered final judgment in favor of BIA and the Tribe. Supplemental Excerpts of Record (“SER”) 42. Cascadia Wildlands timely filed a notice of appeal on June 30, 2014. ER 147; Fed. R. App. P. 4(a)(1)(B). This Court’s jurisdiction rests on 28 U.S.C. § 1291.

STATEMENT OF ISSUES

Cascadia Wildlands appeals from a district court judgment upholding BIA’s approval of the Coquille Indian Tribe’s proposed Middle Fork Kokwel Project (“Kokwel Project” or “Project”), a timber harvest and thinning project on land that Congress directed, in the Coquille Restoration Act (“Restoration Act”), 25 U.S.C. § 715 *et seq.*, be taken into trust for the Tribe’s benefit and use. The Restoration Act provides that these trust lands are to be managed under applicable environmental laws and “subject to the standards and guidelines of Federal forest

plans on adjacent or nearby Federal lands.” *See* 25 U.S.C. 715c. These trust lands are otherwise to be managed in accordance with laws pertaining to management of Indian trust lands. *Id.* Cascadia Wildlands’ appeal presents the following issues:

1. Did BIA violate the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.*, by failing to consider adequately cumulative impacts of the Kokwel Project in light of a previously-approved timber sale project on tribal trust lands?

2. Does the Kokwel Project violate “standards and guidelines” of relevant federal forest plans within the meaning of the Restoration Act?

STATEMENT OF THE CASE

Cascadia Wildlands brought this action to challenge BIA’s 2013 Decision Notice (ER 1-4) approving the Middle Fork Kokwel Project (“Kokwel Project” or “Project”), a tribal timber harvest and thinning project on lands in western Oregon known as the Coquille Forest, that were taken into trust for the benefit of the Tribe pursuant to the Restoration Act. ER 1,119. To comply with NEPA, an Environmental Assessment (“EA”) was prepared and BIA made a Finding of No Significant Impact. ER 1-4. BIA also concluded that the Project is consistent with standards and guidelines of relevant management plans. ER 2, 28, 35.

Cascadia Wildlands' complaint sets forth two claims for relief. One claim alleges that BIA violated NEPA by inadequately considering and disclosing the cumulative impacts of the Kokwel Project in light of another tribal timber project, known as the Lost 40/Rasler Timber Sales (hereafter referred to as the Rasler Sale), that BIA approved in a February 2011 Decision Notice. ER 129-131, 711-714. The other claim alleges that the Project violates the "standards and guidelines" provision of the Restoration Act because the Project is inconsistent with recommendations made in the 2011 Revised Recovery Plan for the Northern Spotted Owl ("Recovery Plan"), which is a non-binding guidance document prepared pursuant to ESA Section 4(f), 16 U.S.C. § 1533(f). ER 127-129; *see also* ER 13, 268, 293; *infra* at 44. Cascadia Wildlands does not allege that inconsistency with Recovery Plan recommendations violates the ESA. *See* ER 127-129; Cascadia Wildlands Brief ("Br.") 54. Rather, Cascadia Wildlands claims that such inconsistency violates the Restoration Act on the rationale that (a) one of the stated "objectives" of the management plan governing nearby federal land, *i.e.*, the Bureau of Land Management's ("BLM's") Coos Bay Resource Management Plan ("Coos Bay RMP"), is to achieve recovery of listed species in compliance with the ESA and approved recovery plans; (b) an "objective" is a "standard and guideline" within the meaning of the Restoration Act; and (c) the Restoration Act

therefore transforms discretionary actions recommended in the Recovery Plan into rigid mandatory limitations on the Tribe's use of its trust lands.

The Coquille Indian Tribe intervened as a defendant and the parties filed cross-motions for summary judgment.¹ Magistrate Judge Coffin made Findings and Recommendations recommending that Cascadia Wildlands' motion for summary judgment be denied and that the BIA's and Tribe's motions for summary judgment be granted. Cascadia Wildlands filed objections to the Magistrate Judge's Findings and Recommendations. Based on its own *de novo* review of the case, the district court (Judge McShane) found no error in the Findings and Recommendations and adopted them in full. ER 22-23. Accordingly, we treat the Findings and Recommendations as the district court's opinion.

The district court held that BIA complied with NEPA by adequately considering cumulative impacts of the Kokwel Project in light of the previously-approved Rasler Sale. ER 16-20. The court held that the Kokwel EA appropriately aggregated the impacts of the Rasler Sale into the baseline, rejecting Cascadia

¹ Based on a stipulation among the parties in district court, commercial thinning and described related activities in non-Riparian Reserve lands has proceeded. In a joint motion to expedite the appeal filed in this Court, the parties agreed that Appellees would provide Cascadia Wildlands with 21 days' notice prior to the initiation of non-stipulated ground-disturbing activities and that Cascadia Wildlands would not seek an injunction pending appeal based on this understanding, unless or until it receives notice of ground-disturbing activities.

Wildlands' contention that it is impermissible in a cumulative impacts analysis to aggregate previously-approved, but not yet completed, projects into the baseline. ER 16-20.

The district court also rejected Cascadia Wildlands' "tortured argument" (ER 13) that the Restoration Act transforms discretionary ESA recovery plan recommendations into mandatory requirements and limitations on the Coquille Tribe's use of its trust lands. ER 13. The court held that "'stated objectives'" set forth in the Coos Bay RMP are not "standards and guidelines" within the meaning of the Restoration Act that have the effect of requiring the Project to conform to discretionary recommendations set forth in the Recovery Plan. ER 14. The court stated that to the extent there is ambiguity in the term "standards and guidelines" in the Restoration Act, the court must apply a liberal construction of the term in favor of the Tribe, particularly given that one of Congress's purposes in taking the land into trust for the Tribe was to promote the Tribe's economic development. ER 16-17. Furthermore, the trust land is also to be managed in accordance with the National Indian Forest Resources Management Act, 25 U.S.C. § 3101 *et seq.*, and that Act directs BIA to manage tribal lands in support of written tribal objectives. ER 16-17 (citing 25 U.S.C. § 3104(b)(2)).

STATEMENT OF FACTS

A. Statutory Background

1. The Coquille Restoration Act

Western Oregon Indian tribes had their tribal status revoked by congressional enactments in the 1950s, leading to an end of federal services and removal from trust lands. *See* ER 221; 135 Cong. Rec. S6634-05 (Sens. Hatfield and Packwood) (June 14, 1989). Beginning in 1977, Congress began restoring recognition to terminated tribes and reestablishing authority of the tribes as sovereign governments. *Id.*; ER 221. Federal recognition of the Coquille Indian Tribe was reestablished in 1989 by Congress's enactment of the Restoration Act. *See* Pub. L. 101-42, 103 Stat 91 (June 28, 1989) (codified at 25 U.S.C. § 715 *et seq.*).

In 1996, Congress amended the Restoration Act to establish the 5,400-acre Coquille Forest and to direct that the Coquille Forest be held in trust by the United States for the benefit and use of the Tribe. 25 U.S.C. § 715c(d)(4). *See* Pub. L. No. 104-208, Div. B, Title V, § 501, 110 Stat. 3009-537 (1996), codified at 25 U.S.C. § 715c; ER 222. The purpose of creating these trust lands was “to provide a basis for restoring the Tribe’s culture as well as providing economic benefits.” 142 Cong. Rec. S9649 (August 2, 1996) (Statement of Sen. Hatfield). *See also* ER

7 (“The restoration of these lands provides a long-term revenue source for the tribal government and strengthens the Tribe’s cultural link to the land.”); ER 222 (establishment of the Coquille Forest was a significant element in the Tribe’s self-sufficiency plan and a long-term revenue source for the tribal government).

The Coquille Forest lands were formerly Oregon and California Act lands managed by BLM, Coos Bay District under a variety of statutes. SER 186. The Forest consists of twelve scattered, separate parcels that are intermingled with privately-owned and BLM lands. ER 222-23.

In relevant part, the Restoration Act provides:

The Secretary of Interior, acting through the Assistant Secretary for Indian Affairs, shall manage the Coquille Forest under applicable State and Federal forestry and environmental protection laws, and subject to critical habitat designations under the Endangered Species Act [16 U.S.C.A. § 1531 *et seq.*], and subject to the standards and guidelines of Federal forest plans on adjacent or nearby Federal lands, now and in the future. The Secretary shall otherwise manage the Coquille Forest in accordance with the laws pertaining to the management of Indian Trust lands and shall distribute revenues in accord with Public Law 101-630, 25 U.S.C. 3107.

25 U.S.C. § 715c(d)(5).

The Restoration Act provides that the Secretary of the Interior may enter into an Indian self-determination agreement that provides the Tribe with authority to manage the Coquille Forest. *See* 25 U.S.C. § 715c(d)(6). Pursuant to this provision and the Indian Self-Determination Act, 25 U.S.C. § 450f *et seq.*, the

Coquille Tribe and BIA entered into a compact under which the Tribe is responsible for all aspects of forest management, while BIA retains its inherently federal functions, including approval of Coquille Forest management plans and timber sales.

2. National Environmental Policy Act

NEPA imposes only procedural requirements and does not require federal agencies to reach a particular outcome or to elevate environmental impacts over other concerns. *E.g.*, *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 756-57 (2004); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). NEPA requires federal agencies to prepare a detailed statement on the environmental impacts of any “major Federal action[] significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). To determine whether there are significant environmental effects requiring an Environmental Impact Statement, an agency may prepare an EA, which is intended to be a brief and concise document. 40 C.F.R. §§ 1501.4(b), 1508.9(a)(1), 1508.13. Here, the Tribe took the lead in preparing an EA. Based on its own review of the EA and corresponding biological analyses, BIA made a Finding of No Significant Impact, thereby deciding that preparation of an Environmental Impact Statement was not required for the Kokwel Project. ER 2-3.

B. Relevant Forest Plans

1. Plans for Nearby Federal Lands

The Northwest Forest Plan and BLM's Coos Bay RMP are relevant management plans for the federal lands nearby the Coquille Forest.² The Northwest Forest Plan was developed in response to controversy over the Northern Spotted Owl and was adopted in April 1994 by the Secretaries for the Departments of the Interior and Agriculture. SER 1596. The Northwest Forest Plan is an integrated, comprehensive design for ecosystem management and intergovernmental and public collaboration that provides a management strategy to protect species associated with old-growth and late-successional forest habitat (such as the Northern Spotted Owl), as well as a sustainable source of timber and other resources. The Plan applies to over 24 million acres in 26 national forests (managed by the Forest Service) and land management districts managed by BLM in the Northwest. SER 47. The Northwest Forest Plan was not a stand-alone forest plan; rather it amended existing approved plans and would be incorporated into plans under development, but not yet approved. SER 56-58.

² BLM prepares land management plans under the framework of the Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. 1701 *et seq.* See *Norton v. S. Utah Wilderness Alliance* ("SUWA"), 542 U.S. 55, 58 (2004); *Gardner v. U.S. Bureau of Land Management*, 638 F.3d 1217, 1220 (9th Cir. 2011).

The Northwest Forest Plan allocated lands to various management categories and established standards and guidelines for activities on those lands. SER 47, 51-56. The core of the conservation component of the plan is an extensive system of reserves under six categories of land allocations (comprising 84 percent of the planning area), where scheduled timber harvest generally would not occur (though timber harvest activities may occur under certain circumstances). *Id.*; SER 75-76. One of the six categories of allocations are Riparian Reserves (totaling approximately 2.6 million acres); these areas are widths of land along streams, wetlands, and lakes that are to be managed with primary emphasis on protecting fish and other riparian-dependent resources. SER 54-55, 76. Lands not allocated to one of these six categories of reserves were designated as “matrix” lands, where most timber harvest would occur. SER 55; *see also Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1126 (9th Cir. 2007) (matrix lands are unreserved areas where timber harvest may go forward subject to environmental requirements). Approximately 4 million acres or 16 percent of the planning area addressed in the Northwest Forest Plan are matrix lands. SER 52, 55, 75-76.

“The [Northwest Forest] Plan’s ‘standards and guidelines’ are officially entitled ‘Standards and Guidelines for Management of Habitat for Late-Successional and Old-Growth Forest Related Species Within the Range of the

Northern Spotted Owl; Attachment A to the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl.”” *Or. Natural Resources Council Fund*, 492 F.3d at 1126 n.7; SER 1672-73. Some of these “standards and guidelines” apply to all land categories, while others apply to specific land allocations designated by the plan. Nowhere do these “standards and guidelines” require projects to conform to recommendations made in ESA recovery plans.

In May 1995, BLM adopted the Coos Bay RMP, supported by an EIS. *See* SER 145. The Coos Bay RMP designates land among the Northwest Forest Plan’s allocations and for various categories of land allocations and resources sets forth “Objectives” and “Management Actions/Direction.” *See, e.g.*, ER 230-235. The Coos Bay RMP defines “Objectives” as “[e]xpressions of what are the desired end results of management efforts.” ER 237. “Management Actions/Direction” are defined as the actual “[m]easures planned to achieve the stated objective.” ER 236. The substantive content of the Northwest Forest Plan’s “standards and guidelines” appears under the “management actions/direction” headings.³ *E.g.*,

³ The term “standards and guidelines” appears only rarely in the Coos Bay RMP and when it does, it generally refers specifically to the Northwest Forest Plan standards and guidelines. *See, e.g.*, SER 147, 148, 153, 163, 171. (In places, the RMP also uses the term “SEIS ROD” to refer to the Record of Decision for the Northwest Forest Plan. *See, e.g.*, SER 163, 171.)

compare SER 156-57, 161-167) (Coos Bay RMP management actions/direction for matrix lands) *with* SER 117-126 (Northwest Forest Plan standards and guidelines for matrix lands); SER 152-155 (Coos Bay RMP management actions/direction for riparian reserves) *with* SER 108-116 (Northwest Forest Plan standards and guidelines for riparian reserves).

Under the topic of “Special Status and SEIS Special Attention Species Habitat” and under the heading “Objectives,” the Coos Bay RMP states: “Protect, manage, and conserve federal listed and proposed species and their habitats to achieve their recovery in compliance with the Endangered Species Act, approved recovery plans, and Bureau special status species policies.” ER 230. Nowhere does there appear under the “management actions/direction” any requirement that projects comply with recommendations made in recovery plans for listed species.

2. Coquille Forest Plan

“[L]aws pertaining to the management of Indian Trust lands,” 25 U.S.C. § 715c(d)(5), include the National Indian Forest Resource Management Act of 1990, 25 U.S.C. § 3101 *et seq.* This Act directs BIA to develop forest plans for tribal lands that are “supported by written *tribal* objectives.” 25 U.S.C. § 3104(b)(2) (emphasis added). Accordingly, the Tribe developed, and in 1998 BIA approved, a stand-alone Resource and Management Plan for the Coquille Forest (“Coquille

Forest RMP”) that is consistent with the Tribe’s objective of managing the Forest in a manner that balances economic and non-economic values. ER 224-225; SER 176-177, 186-87.

The Coquille Forest RMP sets forth “objectives” and “management actions/direction” (and defines these terms the same as the Coos Bay RMP). *See* SER 172-215. The objective relevant to ESA listed species states: “Protect, manage and conserve federal listed species and their habitats in compliance with the Endangered Species Act.” SER 206. The content of management actions/direction are fully consistent with the Northwest Forest Plan standards and guidelines and with the Coos Bay RMP management actions/direction. ER 188. The Coquille Forest RMP contains no requirement that projects conform to recommendations in ESA recovery plans.

The 5,410-acre Coquille Forest is divided into two major land allocations: matrix and Riparian Reserves. SER 189. Over 50% of the Forest is protected as Riparian Reserves that are managed to protect aquatic values and to provide habitat for species, including the Northern Spotted Owl and marbled murrelet. SER 189-191. The remaining acres are matrix lands where timber harvesting and other management activities may occur in accordance with the Coquille RMP. SER 189, 199.

At all relevant times, the Annual Sales Quantity for the Coquille Forest was 3.6 million board feet. ER 1, 711. In 1998, the Coquille RMP declared an interim Annual Sales Quantity of 2 million board feet; this was an estimate of the annual volume of sales “likely to be achieved over the initial six years of the plan period” from lands allocated to planned sustainable harvest (*i.e.*, matrix lands). ER 226-227.⁴ Based on new sample plot data, this figure was revised to 3.6 million. *See* ER 1, 226, 711; SER 223-245.

C. The Kokwel Project

1. Elements of the Project

The Tribe proposed and designed the Kokwel Project in coordination with BIA and in consultation with the U.S. Fish and Wildlife Service (“FWS”). The Kokwel Project is designed to protect the long-term sustainability of the Coquille Forest, to generate revenue to fund critical tribal services, and to provide jobs vital to the Tribe’s self-sufficiency. ER 1-4, 35, 38. The Project proposes regeneration harvest in a total of 268 acres, all of which are matrix lands allocated for timber harvest; the harvest would be implemented through multiple sales (and in eight units) over a ten-year planning period (2013-2022) in mature stands (between 80 and 155 years old) located within Sections 24-25, Township 30S, Range 11W. ER

⁴ *See also* SER 169 (Coos Bay RMP likewise explains Annual Sales Quantity figure is neither a minimum nor maximum level; it is an approximation).

1, 36-40, 91, 99. The intent of regeneration harvest is to develop new stands while maintaining some of the biological legacy from previous stands. Approximately 1,608 green legacy trees are retained on site through the life of new stand development in order to contribute to development of high quality dispersal habitat and to accelerate the development of late-successional elements used by Northern Spotted Owls, such as large diameter trees, multiple canopy layers, and hunting perches until the next harvest rotation (80 years). ER 38, 60, 91-92. On all but approximately 12 acres, timber will be yarded by a skyline system. ER 39. This harvest is consistent with the Northwest Forest Plan standards and guidelines and with the management actions/direction set forth in the Coos Bay RMP and Coquille Forest RMP. ER 35.

The Project also proposes commercial thinning on 221 acres of matrix lands with trees between 24 and 43 years of age. ER 36, 60. Commercial thinning would occur on five units located on three scattered parcels of tribal land. ER 42. “The intent of commercial thinning is to manage the growth and density of an existing stand to promote healthy forest conditions, increase diversity and complexity of the stand, and increase the productivity of the stand in developing wood products.” ER 41. All but 20 acres of commercial thinning would be conducted by skyline yarding. The Project also includes young tree thinning by

skyline yarding in 42 acres of Riparian Reserves.⁵ ER 42-44. This thinning improves structural diversity and accelerates the development of late-successional characteristics, while meeting the Northwest Forest Plan's Aquatic Conservation Strategy. ER 42-43.

To access harvest units, 2.92 miles of new roads will be constructed and 3.31 miles of existing roads will be renovated. ER 46-48. Approximately 1.32 miles of roads will be decommissioned at the end of use. *Id.*

2. Environmental Assessment

The Tribe prepared an EA that analyzed the environmental impacts of the Kokwel Project on various resources, including late-successional species (such as Northern Spotted Owl and marbled murrelet), soils, and water resources. ER 24-117. For each resource, the direct and indirect effects of the Kokwel Project were considered. *See, e.g.*, ER 60-67, 70-84. Cumulative impacts were also analyzed to consider “the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions,” 40 C.F.R. 1508.7. As the EA explains, the environmental baseline (or no action alternative) describes “existing condition and the continuing trends” and includes projects covered by earlier decision records. ER 36.

⁵ The Tribe voluntarily withdrew an initial proposal to thin 28 acres of mature stands designated as Riparian Reserves. ER 44-45, 116-17.

The Rasler Sale was a project covered by an earlier decision record. In a February 2011 Decision Notice, BIA had approved the Rasler Sale, a tribal timber harvest project on Coquille Forest trust lands (to be conducted over an approximately five-year period commencing in 2011). ER 711-714. This project included regeneration harvest (in units located within Sections 24 and 25, Township 30S, Range 11W and in a separate parcel (the Lost 40 unit in Section 29), thinning, and associated activities. *Id.* BIA's approval of the Rasler Sale was based on an EA analyzing environmental impacts of that project, a Finding of No Significant Impact for the Rasler Sale, and formal ESA consultation. ER 711-714, 716-809. No party filed suit to challenge BIA's approval of the Rasler Sale and the validity of that project is not at issue here.

In the Kokwel analysis, the Rasler Sale impacts were aggregated and incorporated into the baseline and, in that way, impacts from that project were taken into account in the cumulative impacts analysis conducted for the proposed Kokwel Project. ER 36, 49-50; *see* Argument II. In addition, the Kokwel EA specifically identifies four units of Rasler Sale regeneration harvest located in the analysis area that were already under contract or expected to be under contract soon and confirms that this timber sale activity was considered in the cumulative impacts analyses for specific resources. ER 49-50.

3. ESA Consultation

ESA Section 7(a)(2) requires all federal agencies to “insure” that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered . . . or threatened species or result in the destruction or adverse modification” of designated critical habitat of such species. 16 U.S.C. 1536(a)(2). The Tribe prepared a Biological Assessment that analyzed the impacts of the Kokwel Project on, *inter alia*, the Northern Spotted Owl and marbled murrelet. ER 150-220. Because the Biological Assessment concluded that the Project was likely to adversely affect the Northern Spotted Owl and marbled murrelet, the Tribe requested formal consultation with FWS. *See* 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14; ER 194, 246-338.

The FWS prepared a Biological Opinion in which it found, *inter alia*, that the proposed regeneration harvest was likely to adversely affect Northern Spotted Owl by reducing the amount of nesting, roosting, and feeding habitat within the 1.3 mile home ranges of four individual spotted owl sites (the sites are located on BLM land). ER 284, 288-293-95. The FWS concluded, however, that the Tribe’s proposed action would not jeopardize the continued existence of the Northern Spotted Owl. ER 998-99. (There is no designated critical habitat on tribal land and thus no adverse modification of critical habitat. ER 56, 139.) The FWS

reached its no-jeopardy conclusion based on its review of the current status of the Northern Spotted Owl, the environmental baseline for the action area (which, consistent with ESA regulations, incorporated effects from the Rasler Sale as that project was covered by a prior Section 7 consultation), the effects of the Kokwel project that will be added to that environmental baseline, and cumulative effects (which, consistent with ESA regulations, include non-federal actions that are reasonably certain to occur within the action area). *See* 50 C.F.R. § 402.02. Based on consideration of the habitat conditions that would remain when Kokwel Project harvests are added to the baseline (that takes into account habitat impacts from implementation of Rasler Sale activities), the Biological Opinion concluded that the large reserve network in the area would continue to fulfill its role in the survival and recovery of the Northern Spotted Owl at the provincial scale, explaining that (1) the surrounding habitat conditions provide for connectivity among adjacent provinces, (2) the timber harvest activities will occur in the matrix land use allocation which is intended for timber production, and (3) the revised Northern Spotted Owl recovery plan is reliant on the Northwest Forest Plan for the federal contribution to recovery.⁶ ER 298-299.

⁶The Biological Opinion also concluded that the proposed action is not likely to jeopardize the continued existence of the marble murrelet because the action area is expected to continue to fulfill its role in the survival and recovery of the

The FWS stated in the Biological Opinion that the proposed action appeared to be inconsistent with two Actions (Actions 10 and 32) set forth in the Revised Recovery Plan for the Northern Spotted Owl (ER 293). Included in the “Conservation Recommendations” section of the Biological Opinion were recommendations related to these two Recovery Plan Actions.⁷ ER 293, 300-301.

murrelet, explaining, among other reasons, that no harvest will occur in Late Successional Reserves, Northwest Forest Plan standards and guidelines will be followed, and no harvest units will occur within any occupied or un-surveyed suitable habitat for the murrelet. ER 299.

⁷ Recovery Action 10 states: “Conserve spotted owl sites and high value spotted owl habitat to provide additional demographic support to the spotted owl populations.” ER 515. Citing Recovery Action 10, the Biological Opinion recommended, as a discretionary conservation measure, light thinning prescription on the acreage proposed for regeneration harvest, or, if regeneration harvest is carried out, application of ecological forestry principles. ER 301.

Recovery Action 32 states: Because spotted owl recovery requires well distributed, older and more structurally complex multi-layered conifer forests on Federal and non-federal lands across its range, land managers should work with the Service as described below to maintain and restore such habitat while allowing for other threats, such as fire and insects, to be addressed by restoration management actions. These high-quality spotted owl habitat stands are characterized as having large diameter trees, high amounts of canopy cover, and decadence components such as broken-topped live trees, mistletoe, cavities, large snags, and fallen trees.” ER 301; *see also* ER 539-40. Citing Action 32, the Biological Opinion recommended as a discretionary conservation measure, avoiding harvest of those relatively more structurally complex portions of stands that meet characteristics described in Recovery Action 32. ER 301.

However, the FWS made clear that adoption of these Conservation

Recommendations was discretionary, not required, explaining:

When projects are proposed, the Service may provide conservation recommendations, which are *discretionary agency activities* to minimize or avoid adverse effects of a proposed action on listed species or critical habitat, to help implement recovery plans, or to develop information. *These recommendations are advisory and do not carry any binding legal force. . . .*

ER 301 (emphasis added). The Biological Opinion also noted that the Department

of the Interior's "Secretarial Order 3206 [titled "American Indian Tribal Right,

Federal-Tribal Trust Responsibilities and the Endangered Species Act]

distinguishes the unique status of tribal lands and indicates recovery contributions

should focus on federal government and state lands and less so on Tribal land."

ER 293; *see also* ER 301 (Secretarial Order "places the burden of endangered

species recovery primarily on federal and state governments and secondarily upon

Tribes").

On February 25, 2013, the local BIA Superintendent made a Finding of No Significant Impact based on the EA and supporting biological analyses and issued a Decision Notice approving the Kokwel Project. ER 1-4.

SUMMARY OF ARGUMENT

Impacts from the previously-approved Rasler Sale on tribal trust lands were appropriately and adequately considered in the cumulative impacts analysis for the

Kokwel Project by aggregating and incorporating Rasler Sale impacts into the environmental baseline. The record confirms that Rasler Sale impacts were in fact incorporated into the baseline. Cascadia Wildlands fails to support its contention that such approach is permissible only for projects previously-approved *and* fully-completed. Furthermore, Cascadia Wildlands' position is at odds with the principles that absent a statutory requirement, an agency may determine its procedures and a reviewing court cannot impose its own notions of the best procedure on the agency. Impacts to late-successional wildlife species, soils, and roads from the Kokwel Project, including consideration of incremental impacts in the context of cumulative impacts, were adequately considered and disclosed in the Kokwel EA.

There is no merit to Cascadia Wildlands' contention that the Kokwel Project violates the Restoration Act because it is inconsistent with a stated objective in BLM's Coos Bay RMP that supposedly requires timber harvest activities in matrix lands to conform to discretionary recommendations made in recovery plans. A plan objective is not, as Cascadia Wildlands contends, a "standard and guideline" within the meaning of the Restoration Act. Moreover, the objective on which Cascadia Wildlands relies is not an enforceable, rigid standard requiring activities on matrix lands to be consistent with, or limited by, discretionary

recommendations in recovery plans. In any event, the Restoration Act confers discretion on BIA to approve objectives for management of the Coquille Forest based on the Tribe's objectives and needs, which may differ from BLM's stated objectives for management of public lands.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews *de novo* a district court's grant of summary judgment, as well as its legal interpretations of statutes. *Fence Creek Cattle Co. v. U.S. Forest Service*, 602 F.3d 1125, 1131 -1132 (9th Cir. 2010); *Pyramid Lake Paiute Tribe v. Dep't of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990). This Court reviews BIA's decision applying the same standards of review applicable to the district court. Because the Restoration Act and NEPA do not contain their own standards of review, BIA's decision is reviewed under the APA, 5 U.S.C. § 706(2)(A). *See Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1238 (9th Cir. 2005). Review under the arbitrary and capricious standard is narrow, and a court may not substitute its judgment for that of the agency. *Lands Council v. McNair* ("*Lands Council I*"), 537 F.3d 981, 987 (9th Cir. 2008). Rather, a court "will reverse a decision as arbitrary and capricious only if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important

aspect of the problem, or offered an explanation 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.” *Id.* (internal quotations omitted).

II. THE CUMULATIVE EFFECTS ANALYSIS ADEQUATELY AND APPROPRIATELY TOOK INTO ACCOUNT THE RASLER SALE

A cumulative impact is defined in Council on Environmental Quality (“CEQ”) regulations implementing NEPA as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions.” 40 C.F.R. § 1508.7. The purpose of a cumulative impacts analysis is to determine whether “individually minor” projects pose a “collectively significant” impact when combined. 40 C.F.R. § 1508.7.

The Kokwel EA addressed cumulative impacts within the analyses of various environmental resources, such as upland forest vegetation, weeds, wildlife (including threatened and endangered species), soils, roads, aquatic habitats, and water resources. *See* ER 49, 54-55, 66-70, 84. Impacts from the previously-approved Rasler Sale were considered by incorporating the impacts of the timber harvest activities approved in the Rasler Sale decision into the environmental baseline. The district court correctly concluded that by using this approach, the

Tribe and BIA adequately and appropriately considered the previously-approved Rasler Sale in the cumulative impacts analysis for the Kokwel Project.

A. Impacts from the Rasler Sale Were Appropriately Taken Into Account in the Cumulative Impacts Analysis by Incorporating Rasler Sale Impacts into the Baseline

NEPA and implementing regulations do not prescribe any specific method for analyzing cumulative impacts. Ultimately it is within the agency's discretion to determine how best to analyze cumulative impacts as related to other federal projects. An agency "is free to consider cumulative effects in the aggregate or to use any other procedure it deems appropriate. It is not for this court to tell the [agency] what specific evidence to include, nor how specifically to present it."

League of Wilderness Defenders v. U.S. Forest Serv., 549 F.3d 1211, 1218 (9th Cir. 2008); *see also id.* ("agency may aggregate its cumulative effects analysis pursuant to 40 C.F.R. § 1508.7"). One acceptable approach -- and the one used here -- is to aggregate and incorporate the effects of previously-approved projects into the environmental baseline. In other words, cumulative impacts may be appropriately assessed by incorporating "the effects of other projects into the background 'data base' of the project at issue." *Grand Canyon Trust v. FAA*, 290 F.3d 339, 342 (D.C. Cir. 2002) (quoting *Coalition for Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 71 (D.C. Cir. 1987); *see also Coalition for Sensible Transp.*, 826 F.2d at 70 ("[i]t

makes sense to consider the ‘incremental impact’ of a project for possible cumulative effects by incorporating the effects of other projects into the background ‘data base’ of the project at issue”); *Piedmont Heights Civic Club, Inc. v. Moreland*, 637 F.2d 430, 441 (5th Cir. 1981) (NEPA satisfied “[w]here the underlying data base includes approved projects and pending proposals”); *Save Strawberry Canyon v. U.S. Dept. of Energy*, 830 F Supp. 2d 737, 752 (N.D. Cal. 2011) (an agency may consider the incremental impact of a project for cumulative effects by incorporating the effects of other projects into the background data base); *cf. Kleppe v. Sierra Club*, 427 U.S. 390, 415 n.26 (1976) (agency may take “into consideration the environmental effects of [an]existing project” when preparing the environmental analysis for another project).

This approach reasonably allows the agency to consider whether the incremental effects of the project when aggregated with other projects incorporated into the baseline are “collectively significant.” 40 C.F.R. § 1508.7. This approach is a cautious one because it allows for consideration of the full extent of combined impacts of the proposed project and previously-approved projects (even though some areas may ultimately not be harvested to the full extent approved because, for example, of declining timber values). *See Coalition for Sensible Transp.*, 826 F.2d at 71 (incorporating effects of a pending project into the baseline reflects planning

on the basis of what might be regarded as the worst-case scenario). For example, the environmental analysis here considered and disclosed the extent to which late-successional wildlife habitat would remain when and if the Kokwel Project and the Rasler Sale harvest activities are fully completed. *See* ER 55-60. This approach also avoids unnecessary duplication of other previously analyzed projects by factoring the effects of those projects into the baseline condition. *See Piedmont Heights*, 637 F.2d at 441 (“NEPA does not require an agency to restate all of the environmental effects of other projects presently under consideration.”).

Cascadia Wildlands raises factual and legal objections to the baseline approach. Neither has merit.

1. The record demonstrates that impacts from the Rasler Sale were in fact incorporated and aggregated into the baseline

Cascadia Wildlands argues that the BIA’s and Tribe’s position that impacts from Rasler Sale activities were aggregated and incorporated into the environmental baseline is an unsupported litigation position that is contradicted by the EA and record. Br. 35-38. To the contrary, the EA explains that the environmental baseline reflected both the “existing conditions and the continuing trends” and specifically stated that it includes “projects covered by earlier decision records” (ER 36), which describes the Rasler Sale. Moreover, as explained in the Kokwel EA, Geographic Information System (“GIS”) data was used to analyze the

impacts of the Kokwel Project and the record documents that the GIS baseline data files used in that analysis reflected the removal of timber from ultimate completion of the Rasler Sale.⁸ SER 298-301; *see also* ER 724. Maps used to analyze the effects of the Kokwel Project activities on the Northern Spotted Owl and marbled murrelet also confirm that the cumulative impacts analysis assumed that habitat was not present in areas approved for treatment by the earlier Rasler Sale decision. *See* ER 766 (Rasler Sale map), ER 216, 219 (Kokwel Project map omitting from baseline habitat those areas where previously-approved Rasler Sale treatments would occur); *see also* ER 99, 766 (Kokwel roads map includes new roads approved by Rasler Sale decision). Habitat loss from the Rasler Sale is captured in baseline data pertaining to various types of habitat in the watershed. The Kokwel EA and Biological Opinion report the same baseline habitat data and pursuant to ESA regulations, the baseline used in the Biological Opinion includes federal projects in the action area that have undergone section 7 consultation, *see* 50 C.F.R. § 402.02. *See* ER 55, 175, 284 (baseline habitat reported same in EA, Biological Assessment, and Biological Opinion); *see also* ER 251 (analytic framework for jeopardy determination). The Rasler Sale had undergone section 7 consultation. ER 712

⁸ The Rasler Sale EA also reports that GIS data was used to determine impacts of that project. ER 724.

Based on a selective reading of the EA, Cascadia Wildlands suggests (Br. 36-37) that the Kokwel EA says that only the impacts of past actions were aggregated and incorporated into the baseline and that the Rasler Sale was not treated as a past action because the EA refers to Rasler Sale regeneration harvest units as “treatments proposed for the foreseeable future” (ER 49). However, the EA is properly read as a whole. *See WildWest Inst. v. Bull*, 547 F.3d 1162, 1172 (9th Cir. 2008). Nowhere does the EA state that only fully-completed past actions were aggregated and incorporated into the baseline; rather it states that projects covered by earlier decision records were included in the baseline (ER 36). In the passage on which Cascadia Wildlands relies, the Kokwel EA identified (in Table 8) regeneration harvest units approved in the earlier Rasler Sale decision record that were already under contract or were expected soon to be under contract (and thus where active harvest was reasonably foreseeable) and the EA stated that these activities were considered in the resource-specific cumulative effects analyses. ER 49-50. The flagging of imminent regeneration harvest activity and the explicit assurance that these activities were considered in the cumulative impacts analysis does not negate the explanation that impacts from projects covered by earlier decision records were incorporated into the environmental baseline (ER 36). When the EA is read as a whole and considered in light of the supporting record, it

can reasonably be discerned that in considering cumulative impacts, the BIA and Tribe followed the approach of aggregating and incorporating the Rasler Sale impacts into the baseline. *See River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1078 (9th Cir. 2010) (court will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned); *San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 608, 616, 620-21, 630 (9th Cir. 2014) (an agency's reasoning need only be reasonably discernible from the record; the reviewing court cannot insist on perfection in explanation). The fact that Rasler Sale regeneration harvest units were specifically identified in the Kokwel EA is not a failing. Accordingly, there is no merit to Cascadia Wildlands' argument that the Rasler Sale impacts were not in fact incorporated into the baseline.

2. Cascadia Wildlands provides no support for its contention that it is impermissible to aggregate and incorporate impacts from previously-approved projects into the baseline

Cascadia Wildlands also argues that it is legally impermissible to aggregate and incorporate impacts from a previously-approved, not yet fully completed, federal project into the baseline. Br. 37-49. However, the Supreme Court and this Court have repeatedly held that absent a statutory or constitutional requirement, an agency is free to determine its own procedures and a reviewing court may not impose its own notion of what procedures are best on the agency. *E.g., Vt. Yankee*

Nuclear Power Corp. v. Natural Res. Defense Council, Inc., 435 U.S. 519, 543-44 (1978); *Lands Council I*, 537 F.3d at 994; *League of Wilderness Defenders*, 549 F.3d at 1218. Here there is no statutory or constitutional requirement dictating how cumulative impacts may be assessed.

Citing *Ecology Center v. Castaneda*, 574 F.3d 652 (9th Cir. 2009), and *League of Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211 (9th Cir. 2008), Cascadia Wildlands argues (Br. 42-45) that only fully completed past federal projects can be aggregated and incorporated into the baseline. To the contrary, while those cases affirmatively approve aggregating fully-implemented past projects into the baseline, they do not preclude aggregating and incorporating a previously-approved, but not yet fully implemented project, into the baseline.

On the other hand, in *Tongass Conservation Society v. U.S. Forest Service*, 455 F. App'x 774 (9th Cir. 2011), this Court declined to limit the aggregate approach to fully completed past actions. In that case, plaintiffs argued that the agency violated NEPA by failing to consider adequately planned future timber activities in the cumulative impacts analysis. *Id.* at 777. The court dismissed the argument because plaintiffs failed to show why aggregation of cumulative impacts “may not be applied to harvests that have already been approved under a separate environmental impact statement.” *Id.* Cascadia Wildlands argues (Br. 40-41) that

Tongass is immaterial because it is an unpublished opinion. However, Fed. R. App. P. 32.1 recognizes the persuasive value of unpublished opinions and allows parties to cite them for that purpose. Cascadia Wildlands also incorrectly suggests (Br. 40) that this statement is *dicta* because *Tongass* was decided on administrative exhaustion grounds. To the contrary, the Court only tentatively stated that “it does not *appear* that [the plaintiffs] raised concerns about the cumulative impacts from these future projects before the Forest Service.” *Tongass*, 455 F. App’x at 777 (emphasis added), and proceeded to address and reject plaintiffs’ arguments on the merits.⁹ *Id.*

Cascadia Wildlands also argues (Br. 38-39) that a CEQ guidance memorandum addressing “Consideration of Past Actions in Cumulative Effects Analysis” (June 24, 2005), authorizes aggregation of effects only for wholly past actions, but does not authorize aggregation of ongoing or reasonably foreseeable actions that have already been approved. However, at no point does the memorandum prohibit agencies from aggregating into the baseline impacts from

⁹ Cascadia Wildlands also incorrectly suggests that this holding was *dicta* because the Court then stated that “even *if* we were to find some merit to some aspect of [plaintiffs’] arguments concerning the cumulative impact of future projects, we would still deny [plaintiffs] relief on the ground that the error was harmless.” *Id.*, 455 F. App’x at 777 (emphasis added). When a decision rests on two or more grounds, none is relegated to *dicta*. See *United States v. Vidal-Mendoza*, 705 F. 3d 1012, 1016 n.5 (9th Cir. 2013).

projects that were approved in the past.¹⁰ Moreover, the CEQ memorandum emphasizes that agencies retain substantial discretion to determine how to conduct a cumulative effects analysis and suggests that the extent and form of information for an appropriate cumulative effects analysis should be guided by common sense; it eschews any rigid rule requiring cataloguing and listing of individual past actions. ER 811-813. The same rationale applies to previously-approved projects.

Cascadia Wildlands suggests (Br. 45) that it makes no sense to aggregate and incorporate the impacts of a previously-approved project in the baseline if that project has not yet been fully completed because the impacts of the project are not identified or verifiable by the public. To the contrary, the aggregate approach makes sense where, as here, the separate and individual impact of the previously-approved project of concern was analyzed in the Rasler EA, a publicly-available document of which Cascadia Wildlands was aware. *See* SER 43 (2011 comments

¹⁰ Cascadia Wildlands argues that the government's citation in district court to *Bark v. U.S. BLM*, 643 F. Supp. 2d 1214, 1223 (D. Or. 2009), and that case's reference to this memorandum constitutes an impermissible post hoc rationalization because the CEQ memorandum was not cited in the Kokwel EA. To the contrary, the Kokwel EA and administrative record confirm the fact that the impacts from the Rasler Sale were aggregated and incorporated into the baseline and government counsel does not provide a post-hoc rationalization when explaining the legal bases and support for an approach that the agency took. Indeed, in *League of Wilderness Defenders*, this Court rejected a lower court's view that the government's citation to this very same memorandum in a summary judgment motion amounted to a post-hoc rationalization. 549 F.3d at 1218.

on Rasler EA). Notably, the ESA regulations governing Section 7(a)(2) consultations provide that the environmental baseline includes federal projects that have already undergone Section 7 consultation, regardless of whether those projects have been implemented.

B. Cumulative Impacts to Late-Successional Species, Soils, and Roads Were Adequately Considered

Cascadia Wildlands argues that the consideration and disclosure of cumulative impacts was inadequate with respect to late-successional listed species (Northern Spotted Owl and marbled murrelet), soils, and roads because the discussion was too conclusory and lacked quantitative information.¹¹ Br. 27-33. To the contrary, the EA and supporting record demonstrate that BIA adequately considered cumulative impacts to these resources.

1. Late-Successional Species

The Kokwel EA provides sufficient information to demonstrate that BIA adequately considered cumulative impacts to certain late-successional wildlife

¹¹ Cascadia Wildlands argues (Br. 24-25) that the Kokwel EA is inadequate as to each of the three resources because it does not discuss the impacts of the Rasler Sale separate and apart from the Kokwel Project or discuss Rasler Sale impacts specifically within the resource-specific sections. This is just another way of arguing that aggregation and incorporation of impacts of the Rasler Sale into the baseline is impermissible. However, as explained above, an agency need not detail the individual impacts of other projects and may instead aggregate the known impacts of previously-approved projects into the baseline condition.

species (Northern Spotted Owl and marbled murrelet). The EA states that under the baseline condition there are 42,587 acres of Northern Spotted Owl-capable habitat in the Middle Fork Coquille River watershed, 28,108 acres of nesting, roosting and foraging habitat, and 15,377 acres of dispersal habitat. ER 55-56. These baseline habitat figures conservatively assume habitat diminishment from full implementation of activities approved in the Rasler Sale. *See supra* Section II.A.1. The EA discloses that the Kokwel Project regeneration harvest would remove approximately 268 acres of nesting, roosting, and foraging habitat. ER 64. BIA reasonably concluded that this loss of habitat was not significant in the context of combined cumulative effects, because this loss would not appreciably diminish the amount of spotted owl suitable habitat at the provincial level and because most core areas for owls occur on BLM lands within the watershed and these areas are not expected to change substantially over time. ER 66.

The EA also explains that the lands where commercial thinning would occur lack stand structure and complexity to qualify as nesting, roosting and foraging habitat and that commercial thinning would treat and maintain (not wholly remove) approximately 265 acres of dispersal habitat. ER 60. BIA reasonably concluded that the incremental impact on Project on dispersal habitat would not be significant viewed in the context of cumulative impacts, because there remains sufficient

habitat for connectivity. ER 63; *see also* ER 184, 186, 194-96 (FWS finds commercial thinning and thinning in young riparian reserves is not likely to adversely affect owls); ER 251 (FWS analysis for ESA emphasizes range-wide survival and recovery needs). Moreover, over the long-term, thinning would benefit habitat by opening the canopy, encouraging development of multi-layer habitat and encouraging tree and understory growth. ER 60-61, 66-67.

The EA also considered and disclosed the Project's localized impacts on nest patch (300 meter), core areas (.5 miles), and home ranges (1.3 miles) for historic Northern Spotted Owl sites in the vicinity of the Project. There are no such sites on tribal trust lands; there are, however, sites on adjacent BLM lands. The EA explains that the Kokwel Project would not impact the core area or nest patch of any owl sites as these areas occur outside the project area. ER 57-58. The EA discloses that the Kokwel Project is likely to affect areas within the 1.3 mile home ranges for four sites. Specifically, the Project would remove or modify approximately 267 acres of nesting, roosting, and foraging habitat within the home ranges of four sites. Tables 10, 11, and 12 in the EA quantify baseline conditions for nest patch, core areas, and home ranges for these four sites and disclose the amount of various types of habitat that would remain after the Kokwel Project harvest. Because the baseline figures take into account the Rasler Sale project, the

remaining habitat figures disclose the combined impact of projects on the four owl sites.

Cascadia Wildlands criticizes (Br. 28) the EA for providing nearly the same cumulative effects discussions for the Northern Spotted Owl and for marbled murrelet and for failing to provide information unique to each species. However, both species are late-successional species using similar habitat and the amount of capable habitat in the watershed for the species is reported to be the same, ER 59; thus it is hardly remarkable that the cumulative impacts to the species are similar. Moreover, the EA contains relevant information unique to each species and thus the information on which the cumulative impacts are based differs. For example, although there are historic owl sites on adjacent lands, there are no known marbled murrelet sites and a low likelihood of marbled murrelet occupancy in suitable habitats. ER 64.

2. Soils

The Kokwel EA determined that compaction and disturbance to soils from the Project would result primarily from ground-based operations and road construction and found that compaction and disturbance to soils is localized and not cumulatively significant. ER 69; *see also* ER 20. Nearly all of the Rasler Sale and Kokwel Project harvest operations will be conducted using skyline cable

systems, which minimizes compaction and disturbance from ground-based equipment. ER 69, 726. Both projects also include best management practices designed to minimize soil impacts. ER 101-104,729. The Kokwel EA explains that information regarding the effectiveness of best management practices on minimizing soil compaction and disturbance indicates that cumulative effects to soil resources would not exceed Coquille Forest RMP standards for detrimental soil conditions.¹² On-going monitoring will assure that impacts to soils in fact stay within those standards or mitigated by appropriate measures when needed. ER 69.

Citing *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998), Cascadia Wildlands argues (Br. 31-32) that the EA had to set out specific quantitative soil compaction data to assure that the agency took a hard look at this issue. *Neighbors of Cuddy Mountain* involved, however, an EIS that the Court found inadequate because it failed to specify how much old-growth habitat was removed by other projects within the analysis area. *Id.*, 137 F.3d at 1379. That decision does not require that soil compaction data be reported in this EA, particularly given that an EA is supposed to be brief and concise, and need not meet requirements for an EIS. *See infra* Section II.C.

¹² The best management practices come from the BLM's RMP and were not challenged in this case. Accordingly, monitoring data regarding the effectiveness of BLM's best management practices need not be set out in the Kokwel EA.

The explanation in the Kokwel EA relevant to soils, combined with the fact that both Projects incorporate best management practices, and that there will be ongoing monitoring of soil conditions to ensure that impacts will not be significant or exceed applicable standards (or mitigated if needed) was adequate and provides sufficient bases for the finding that soil impacts will not be significant. No more is required.

3. Roads

The Kokwel EA states that, according to GIS data, there are 543 miles of road in the action area under the baseline condition. ER 75. This figure assumed and incorporated construction of the 3.21 miles of new roads approved in the Rasler Sale decision. ER 721; *see also* 98-99 (Kokwel Sale Harvest and Road Map documenting roads in Rasler Creek area (sections 24, 25), including roads proposed for the Rasler Sale in this area).¹³ Although the Kokwel Project proposes to construct an additional 2.92 miles of new roads, ER 69, the total impacts of the new road construction proposed in these two sales would only slightly increase road densities. ER 70. Because road densities in the action area will remain at approximately 4.7 mi/mi², the combined impact of the projects presents a low risk

¹³ Neither project entails new road construction to conduct thinning treatments in the Mead Creek area. ER 48, 729.

of impact to watersheds. ER 84. The Kokwel EA thus reasonably concluded that the sales do not pose a cumulatively significant impact on the watershed. *Id.*¹⁴

Cascadia Wildlands asserts that the EA only tallies the amount of road construction and fails to address the environmental effects of this activity.

However, disclosure of impacts of road construction is not limited to the roads section of the EA. Impacts from road activities are considered within discussions of impacts to specific resources, such as water resources and soil. *See* ER 68-69, 75, 78, 80-84; *see also* ER 738-39, 751-56 (Rasler Sale EA likewise discussed impacts of roads on water quality and fisheries)¹⁵

In sum, the EA adequately addresses the three issues.

¹⁴ In a footnote (Br. 32 n.10), Cascadia Wildlands complains that the Kokwel cumulative effects analysis fails to disclose potential impact from noxious weeds as a result of the combined construction of new roads. Besides the fact that Cascadia Wildlands did not properly preserve this argument because it failed to raise it in briefing before the Magistrate Judge, the Kokwel EA summarizes the possible noxious weeds in the analysis area and notes that while the Project could increase the potential for noxious weeds, mitigation measures will minimize any cumulatively significant impacts. *See* ER 52, 55; *see also* ER 104 (identifying mitigation measures for minimizing spread of noxious weeds).

¹⁵ Cascadia Wildlands argues that the statement in the Kokwel EA that “[o]ver time, the expected cumulative effect of incremental improvements from each project is to reduce road density and improve road conditions in the watershed” makes no sense because the Rasler Sale and Kokwel projects entail net increase in new roads. Br. 33 (quoting ER 70). However, this statement refers generally to the Tribe’s goal of reducing road density over the Forest as a whole through incremental steps.

C. The Kokwel EA is Sufficiently Detailed

Cascadia Wildlands, citing many cases that were challenges to Environmental Impact Statements, argues that the Kokwel EA is insufficiently detailed.¹⁶ However, an EA need not meet all the requirements of an EIS or contain comparable detail. Rather, an EA is supposed to be a “concise public document” designed to “[b]riefly provide sufficient evidence and analysis” to determine whether to prepare an Environmental Impact Statement or instead to make a Finding of No Significant Impact. 40 C.F.R. 1508.9(a). An EA is not required to include “an exhaustive examination of every possible environmental event.” *Friends of the Wild Swan v. Weber*, 2014 WL 4723559 *3 (9th Cir. Feb. 24, 2014).

Although *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Management*, 387 F.3d 989, 994 (9th Cir. 2004) (cited Br. 27) involved a challenge to EAs, the situation and record were different than here. In *Klamath-Siskiyou*, BLM had divided an original timber-sale project into four component sub-projects, each of which BLM independently analyzed, thus obscuring the cumulative impact of what

¹⁶ E.g., *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005) (cited Br. 25); *Neighbors of Cuddy Mountain*, 137 F.3d 1372, 1380 (9th Cir. 1998) (cited Br. 27-28); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800 (9th Cir. 1999) (cited Br. 27); *South Fork Band Council v. U.S. Dep’t of the Interior*, 588 F.3d 718 (9th Cir. 2009) (cited Br. 28).

was actually one integrated project. While here the time horizon for implementation of the Rasler Sale and Kokwel projects overlap to some extent, planning for the Rasler Sale began several years prior to the Kokwel Project (*see* ER 721) and the BIA decision notice approving the Rasler Sale issued two years before the decision notice for the Kokwel Project (ER 1-4, 711-714). Furthermore, in *Klamath Siskiyou Wildlands*, the Court found that the analysis “only consider[ed] the effects of the very project at issue” even though there were four other projects in the same area. *Id.*, 387 F.3d at 994, 996. The EA was described as containing only a table in which the agency disclosed whether or not there would be cumulative significant impact on certain resources. *Id.* at 994. Here, as explained above, the cumulative impacts analysis included consideration of impacts of the Rasler Sale by incorporating them into the baseline condition. Moreover, subsequent to *Klamath-Siskiyou Wildlands Ctr.*, this Court decided *League of Wilderness Defenders*, clarifying that an agency “may aggregate its cumulative effects analysis pursuant to 40 C.F.R. § 1508.7.” *Id.*, 549 F.3d at 1218.

Similarly, Cascadia Wildlands’ reliance (Br. 34) on *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep’t of the Interior*, 608 F.3d 592, 603 (9th Cir. 2010), is misplaced. Although that case involved an EA, Cascadia Wildlands mistakenly contends that Rasler Sale impacts were not incorporated into the

cumulative impacts analysis here (Br. 34). As we explained above, they were considered. Moreover, Cascadia Wildlands' selective quotation of a discussion in the Kokwel EA of cumulative effects on water resources to illustrate that only impacts from the Kokwel Project were considered ignores that this passage also states that cumulative effects on water resources are expected to be minimal because the analysis area comprises a very small percentage of the Middle Fork Coquille watershed, timber management on Coquille trust lands is minimal when combined with management on surrounding private land, and under a method for assessing risk of road networks to water resources, watersheds within the action area are in a low risk category and implementation of the proposed action would not change the risk category. ER 84.

In sum, cumulative impacts were adequately considered and the district court correctly concluded that the Kokwel EA was adequate.

III. THE KOKWEL PROJECT COMPLIES WITH THE RESTORATION ACT

Cascadia Wildlands contends that the Kokwel Project violates the Restoration Act because it is inconsistent with Actions 10 and 32 set forth in the Revised Recovery Plan for the Northern Spotted Owl. The Recovery Plan was prepared pursuant to ESA Section 4(f), which provides that a recovery plan incorporate, *inter alia*, "objective measurable criteria" which, when met, would

result in delisting of a species, and a descriptions of actions “as may be necessary” to achieve the goal of conservation and survival of listed species. 16 U.S.C. § 1533(f)(1). The ESA does not treat recovery plan recommendations as imposing rigid limitations on federal agency actions. *See, e.g., Fund for Animals, Inc. v. Rice*, 85 F.3d 535, 547-48 (11th Cir. 1996) (holding “recovery plans are for guidance purposes only”); *Friends of Blackwater v. Salazar*, 691 F.3d 428, 432-34 (D.C. Cir. 2012) (criteria in recovery plan is not binding on FWS in deciding whether to delist species); *Or. Natural Res. Council v. Turner*, 863 F. Supp. 1277, 1284 (D. Or. 1994) (“The recovery plan presents a guideline for future goals but does not mandate any actions, at any particular time, to obtain those goals.”). Moreover, by its own terms, implementation of the Revised Recovery Plan for the Northern Spotted Owl is purely discretionary, not obligatory. ER 437,453-467.

Nowhere do the standards and guidelines of the Northwest Forest Plan provide that projects must conform to, or are limited by, recommendations made in ESA recovery plans, and Cascadia Wildlands does not contend otherwise. Nor do the “management actions/direction” sections of the Coos Bay RMP, which is where the Northwest Forest Plan’s standards and guidelines are incorporated.

The district court rightly rejected Cascadia Wildlands’ attempt to use the Restoration Act to bootstrap and transform discretionary recommendations in the

Recovery Plan into rigid mandates and limitations on the Tribe's use of its trust lands. Cascadia Wildlands incorrectly contends that a stated "objective" in the Coos Bay RMP to "[p]rotect, manage, and conserve federal listed species . . . and their habitats in compliance with the Endangered Species Act, approved recovery plans, and [BLM] special status species policies" (ER 230) is a "standard and guideline" within the meaning of the Restoration Act.

A. "Objectives" Are Not "Standards and Guidelines" Within the Meaning of the Restoration Act

The Restoration Act requires that BIA and the Tribe manage the Coquille Forest "subject to the standards and guidelines of Federal forest plans on adjacent or nearby Federal lands, now and in the future." 25 U.S.C. § 715c(d)(5). The Restoration Act does not define the term "standards and guidelines," but by using this term, Congress must have intended that Coquille Forest management be subject to something less than the entirety of the federal plan governing management of nearby federal lands. The district court correctly held that "objectives" in the Coos Bay RMP are not "standards and guidelines" within the meaning of the Restoration Act to which management of the Coquille Forest is subject.

As explained further in Section III.B below, drawing a distinction between "objectives" and "standards and guidelines" is consistent with, and supported by,

cases holding that federal land management plan objectives or goals are not enforceable mandates and are distinguishable from enforceable forest plan standards. *See, e.g., Norton v. S. Utah Wilderness Alliance* (“SUWA”), 542 U.S. 55, 72 (2004) (“will-do” projections of agency actions in land use plans are not legally binding commitment); *see also Lands Council v. McNair* (“*Lands Council II*”), 629 F.3d 1070, 1077 (9th Cir. 2010) (distinguishing between enforceable standard an objective). Generally speaking, forest plans establish goals and objectives for units and provide specific standards and guidelines for management of forest resources.¹⁷ A forest plan objective is what the agency hopes and plans will be the outcome of implementation of the forest plan based on the standards and guidelines that govern project activities. Objectives allow the agency to gauge how well it is managing the land over the long term. *See supra* n. 17. Objectives are distinct from standards and guidelines. *Id.* The Restoration Act reflects this distinction by only subjecting the Coquille Forest to “standards and guidelines” of

¹⁷ *See* 16 U.S.C. 1604(g)(1)-(3) (National Forest Management Act); National Forest System Land & Resource Management Planning, 47 Fed. Reg. 43026, 43039 (Sept. 30, 1982) (formerly codified at 36 C.F.R. pt. 219 (2000)); National Forest System Land Management Planning, 77 Fed. Reg. 21162, 21204, 21241 (April 9, 2012). The National Forest Management Act and the Forest Service’s planning regulations are cited to illustrate a distinction between goals and objectives and standard and guidelines. However, neither the National Forest Management Act nor the Forest Service regulations apply to the BLM, BIA, or to the Coquille Forest.

adjacent forest plans and omitting any requirement to comply with objectives in those adjacent forest plans.

The context and content of the relevant federal plans confirm that stated “objectives” in the Coos Bay RMP are not “standards and guidelines” within the meaning of the Restoration Act. The Northwest Forest Plan is formally titled “Standards and Guidelines” (*see supra* at 10-11) and the Northwest Forest Plan was known to Congress at the time it promulgated the Restoration Act. *See* 142 Cong. Rec. S9649, S9654 (daily ed. Aug. 2, 1996) (statement of Sen. Mark Hatfield) (referencing “President Clinton’s forest plan” – that is, the Northwest Forest Plan). As explained *supra* at 9-12, the Northwest Forest Plan “Standards and Guidelines” were incorporated into the federal land management plans within the range of the Northern Spotted Owl. SER 73. The sections of the Coos Bay RMP under the headings “management actions/direction” are where the content of the standards and guidelines of the Northwest Forest Plan are incorporated. *Compare, e.g.,* ER 226-27 (Coos Bay RMP management actions/direction for matrix lands) *with* SER 117-126 (Northwest Forest Plan’s “standards and guidelines” for matrix lands). Accordingly, in the BLM management plan, the corollary to Northwest Forest Plan “standards and guidelines” are “management actions/direction.”

The stated “objectives” in the BLM’s Coos Bay RMP are distinct from “management actions/direction” and, as the district court correctly held, the stated “objectives” are not “standards and guidelines” within the meaning of the Restoration Act. Consistent with that understanding, the Coquille RMP adopted almost verbatim the “management actions/direction” of the Coos Bay RMP (which in turn are consistent with the standards and guidelines of the NWP). *Compare, e.g.*, ER 226-27 (Coquille RMP’s management actions/direction for special status species) with ER 230-35 (Coos Bay RMP’s management actions/direction for special status species). However, objectives in the Coquille Forest RMP appropriately differ from objectives stated in BLM’s Coos Bay RMP. *See infra* Section III.C. Relevant here, the Coquille RMP states an objective to comply with the ESA (SER 206), but it does not include the BLM Coos Bay RMP objective on which Cascadia Wildlands relies, *i.e.*, “to achieve . . . recovery in compliance with . . . [the ESA and] approved recovery plans” (ER 230).

Cascadia Wildlands argues (Br. 50) that stated objectives in the Coos Bay RMP should be treated as “standards and guidelines” within the meaning of the Restoration Act because a sentence in the Coos Bay RMP refers to both “objectives” and “management actions/direction” in a way that suggests they both fit within Northwest Forest Plan’s definition of “standards and guidelines.” The

Northwest Forest Plan defines “standards and guidelines” as “the rules and limits governing actions, and the principles specifying the environmental conditions or levels to be achieved and maintained.” ER 433. The sentence in the Coos Bay RMP on which Cascadia Wildlands relies states: “[T]he stated objectives and management actions/direction will provide the direction and limits that govern actions and also provide the principles that specify the environmental conditions or levels to be achieved and maintained.” ER 229. This singular sentence cannot carry the weight of Cascadia Wildlands’ argument. The sentence refers to “objectives” and “management actions/direction” in the disjunctive and read as a whole, the Coos Bay RMP clearly differentiates between these terms. The Coos Bay RMP defines “objectives” as “[e]xpressions of what are the desired end results of management efforts.” ER 237. This definition does not equate to required “rules and limits” or “environmental conditions or levels” that must be achieved or maintained. ER 229. Objectives are readily distinguishable from the management actions/direction in the Coos Bay RMP which provide the actual rules, limits, and conditions governing on-the-ground projects and actions. *See* ER 236 (defining management actions/direction as “[m]easures planned to achieve the stated objective.”). Management actions/direction are the specific measures that meet the Northwest Forest Plan’s definition of standards and guidelines (and, as explained

above, management actions/direction are the section of the BLM RMP that corresponds to the Northwest Forest Plan's "standards and guidelines"). Given the clear distinction between objectives and management actions/direction in the Coos Bay RMP and overall context, "objectives" are not "standards and guidelines" within the meaning of the Restoration Act.

B. The Objective on which Cascadia Relies Is Not an Enforceable Standard Requiring Projects on Matrix Land to be Invariably Consistent with Recommendations Made in Recovery Plans

Assuming *arguendo* that the Coquille Forest were subject to the objectives in the Coos Bay RMP, there would still be no basis for holding that the Kokwel Project violates the Restoration Act because a forest plan objective is not a mandatory requirement from which the land management agency lacks discretion to deviate. Both the Supreme Court and this Court have held that forest plan objectives are not enforceable mandatory obligations. *Norton v. S. Utah Wilderness Alliance* ("SUWA"), 542 U.S. 55, 72 (2004) ("will-do" projections of agency actions in land use plans are not legally binding); *see also Lands Council v. McNair* ("*Lands Council II*"), 629 F.3d 1070, 1077 (9th Cir. 2010) (distinguishing between enforceable standards and discretionary objectives). In *SUWA*, the Court held that an objective in a BLM land use plan to conduct "Use Supervision and Monitoring in designated areas" was not an enforceable mandate under 5 U.S.C. §

706(1), explaining that this provision was merely a “will-do projection” of the agency. 542 U.S. at 72. Similarly, in *Lands Council II*, this Court held that a forest plan “goal” or “objective” of “maintaining a 40% population potential” of sensitive species was not an enforceable standard. 629 F.3d at 1077.

The objective cited by Cascadia Wildlands in the instant case is even less definitive and more aspirational than the objectives in *SUWA* or *Lands Council II*. The objective seeks to protect listed species and their habitat “to achieve their recovery in compliance . . . [with] approved recovery plans” ER 230. However, “[a]chieving recovery” is simply a goal that the BLM would like to achieve at an unidentifiable point in the future (but probably cannot accomplish by its actions alone). The full phrase “to achieve [] recovery in compliance . . . with approved recovery plans” does not create an enforceable mandatory requirement that actions in matrix lands conform rigidly to, or be strictly limited by, recommendations made in recovery plans. A recovery plan is a guidance document, not a regulatory document setting forth requirements with which entities must comply. The Revised Recovery Plan for the Northern Spotted recognizes that “recovering a species” is a dynamic process,” “recovery may be achieved without fully following the guidance and that no single set of recovery actions must be followed by every project to achieve recovery; rather, “[t]here may be many paths

to recover a species.” ER 454. The recovery actions themselves have considerable discretion built into them. *See* ER 515-517, 529-30.

Stated differently, Cascadia Wildlands’ position necessarily, but incorrectly, assumes that the Coos Bay RMP requires BLM projects on matrix lands to be invariably consistent with discretionary recommendations in recovery plans. The plan is not properly read to compel such result or diminishment of BLM’s discretion. If BLM had intended to require that management actions in matrix land be strictly constrained by discretionary recommendations in recovery plans, it would set forth such requirements as specific, mandatory management actions/direction. BLM did not do that. Notably, the management actions/direction for matrix lands do not direct application of the “objectives” of the special status species section; rather, they direct application of the “management actions/direction” in the special status species section.¹⁸ SER 156.

¹⁸ One of the objectives for matrix land allocations is to “[p]roduce a sustainable supply of timber and other forest commodities to provide jobs and contribute to community stability.” SER 156. While providing connectivity between late-successional reserves is also a stated objective for matrix land, the “management actions/direction” section for matrix land states “[a]pply the management actions/direction in the Special Status and SEIS Special Attention Species and Habitat section” and proscribes specific requirements to provide connectivity. SER 156-57. It is telling that the management actions/direction for matrix lands do not direct application of the “objectives” of the special status species section. Moreover, while the management actions/direction in the special status species section apply to all land allocations, the objectives for that section also refer to

Because BLM is not required by the Coos Bay RMP to conform its actions to recommendations in recovery plans, the Tribe and BIA certainly are not required by the Restoration Act to conform tribal projects to such recommendations. *See also infra* Section II.C.

Cascadia Wildlands’ reliance on *Lands Council I*, 537 F.3d at 999, and *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 962-63 (9th Cir. 2002), for the proposition that compliance with “Forest Plan Standards is *not* discretionary” (Br. 53) is misplaced. Those cases did not involve any dispute over whether the provision in question was a standard or a mere objective (much less involve the question of whether objectives are “standards and guidelines” within the meaning of a statute enacted for the benefit an Indian Tribe). Both *Lands Council I* and *Idaho Sporting Congress* involved specific, quantifiable standards that governed management actions in National Forests. *See Idaho Sporting Cong.*, 305 F.3d at 962-63 (discussing a Forest Plan Standard requiring “[d]edication of 55,000 acres of old-growth habitat, well-distributed throughout the forest, by the

objectives for various land allocations, including matrix land, SER 162, and within the special status species section, the management actions/direction for listed species states in relevant part: “Implement the land use allocations and management actions/direction of [the RMP]. . .” and proscribes specific standards in matrix lands for the protection of spotted owls (*e.g.*, retain 100 acres of best habitat as close as possible to known activity centers). SER 165. The Kokwel Project is consistent with all relevant Coos Bay management actions/direction. ER 35.

year 1991.”) (citation omitted)); *Lands Council I*, 537 F.3d at 999 (discussing a Forest Plan standard that “requires the Forest Service to maintain at least ten percent old-growth throughout the forest”); *compare Lands Council II*, 629 F.3d 1077 (distinguishing the ten percent old-growth standard from goal of maintaining potential species populations and explaining that a goal is an objective, not a requirement). Here, Cascadia Wildlands cannot establish the existence of any comparable standard to those at issue in *Idaho Sporting Cong.* and *Lands Council I*. Neither the Northwest Forest Plan “standards and guidelines” nor the Coos Bay RMP “management actions/direction” require compliance with discretionary recommendations in biological opinions or in recovery plans. ER 230-31, 443, 451.

There is no merit to Cascadia Wildlands’ suggestion that management actions/direction in the Coos Bay RMP do in fact require compliance with Recovery Plan recommendations because the Coos Bay RMP includes a management actions/direction stating, as follows: “Based on the results of consulting/conferencing, modify, relocate or abandon the proposed action.” Br. 51 (quoting ER 230). This management action/direction does not require compliance with recommendations in approved recovery plans. Rather, it simply requires the BLM to consult with the Fish and Wildlife Service (“FWS”) pursuant to the ESA

for any action that is likely to adversely affect federal listed species and make modifications, if necessary, to comply with the ESA. ER 230. In this case, there is no claim that the Project fails to comply with the ESA. Moreover, the Tribe and BIA consulted with the FWS regarding the Kokwel Sale, ER 35, and the Biological Opinion concludes that the Project complies with the ESA; the FWS expressly stated in that Biological Opinion (and in the Recovery Plan itself) that recovery action recommendations are not obligatory. ER 300-301.

C. The Restoration Act Allows BIA and the Tribe to Adopt Objectives for Management of the Coquille Forest that Differ from BLM's Objectives

The Restoration Act requires BIA otherwise to manage the Coquille Forest in “accordance with the laws pertaining to the management of Indian Trust lands,” 25 U.S.C. § 715c(d)(5), which includes the National Indian Forest Resource Management Act of 1990, 25 U.S.C. § 3101 *et seq.* See ER 225 (finding that the Coquille RMP was developed after consideration of BIA’s “[t]rust [r]esponsibility for management of Indian trust lands under NIFRMA and other Indian laws.”). That Act directs BIA to develop forest plans for tribal lands that are “supported by written *tribal* objectives.” 25 U.S.C. § 3104(b)(2) (emphasis added). In the Restoration Act too, Congress authorized BIA to develop a stand-alone forest plan for the Coquille Forest in consultation with the Tribe. 25 U.S.C. § 715c(d)(5).

Pursuant to these statutes, BIA and the Tribe developed a plan for the Coquille Forest based on the Tribe's objectives to forge a sustainable forest management paradigm that balances economic and non-economic values. *See* ER 225; *see also* 135 Cong. Rec. S6634-05, 1989 WL 178807 (June 4, 1989) (statement of Sen. Robert Packwood) (describing the potential for the Restoration Act to provide the Tribe "the opportunity to overcome the adverse effects of 34 years of termination and enjoy the fruits of a government-to-government relationship with the United States, a strengthened tribal identity and economic self-sufficiency.").

The Coquille RMP does not adopt as an objective for the Tribe's trust lands, the BLM's objective to achieve recovery of listed species in compliance with the ESA, approved recovery plans, and BLM policies. The fact that the Coquille RMP does not adopt all of BLM's objectives comports with the discretion granted to BIA in the Restoration Act and with Congress's purpose in taking this land in trust for the benefit of the Coquille Tribe. Congress intended that BIA develop objectives for the Coquille Forest based on tribal needs. Furthermore, it is reasonable and to be expected that the Tribe's objectives differ from BLM's discretionary objectives because BLM's mission is to manage public (not tribal) lands under the framework of statutes that are inapplicable to the Tribe and BIA. Congress's distinct purposes in taking land into trust for the benefit of the Tribe

would not be taken into account if the Coquille RMP were required to adopt the entirety of BLM's Coos Bay RMP, including BLM's objectives. (It would also make the Restoration Act's directive to develop a stand-alone Coquille Forest Plan a meaningless exercise.) In the Restoration Act, Congress intended and clearly left room for the Tribe and BLM to set different objectives by only subjecting the Coquille Forest to the "standards and guidelines" in adjacent federal forest plans. 25 U.S.C. § 715c(d)(5). If Congress had intended for the Coquille Forest to be managed under the entirety of the adjacent federal land plan it could have said so using different language. *See, e.g.*, Br. at 56 (claiming that Congress "intended for the Coquille Forest to be subject to the existing forest plan" and the entire "Coos Bay Resource Management Plan"). "The short answer is that Congress did not write the statute that way." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

Cascadia Wildlands' interpretation of the Restoration Act is contrary to the plain language of the Restoration Act and would unduly restrict the Tribe's use of lands that Congress directed be taken into trust for the benefit of the Tribe. By contrast, BIA's interpretation comports with the plain language and congressional intent by safeguarding BIA's ability and discretion to manage the Coquille Forest according to the Tribe's own objectives, while subjecting the Forest to the

“standards and guidelines” in adjacent forest plans. ER 15-16. Accordingly, BIA’s reasonable interpretation of the Restoration Act should be upheld.

CONCLUSION

For the foregoing reasons, the district court judgment should be affirmed.

SAM HIRSCH
Acting Assistant Attorney General

OF COUNSEL:

MARY ANNE KENWORTHY
Office of the Regional Solicitor
Department of the Interior
Portland, OR

STUART GILLESPIE
BRIAN C. TOTH
ELLEN J. DURKEE
Attorneys
Environment & Natural Resources Division
Department of Justice
P.O. Box 7415, Ben Franklin Station
Washington, D.C. 20044
(202) 514-4426
ellen.durkee@usdoj.gov

90-1-4-14049
October 15, 2014

**CERTIFICATE OF COMPLIANCE PURSUANT TO
FED. R. APP. P. 32(A)(7)(C) AND CIRCUIT RULE 32-1
FOR CASE NUMBER 14-3553**

I certify that pursuant to Fed. R. App. P. 32(a)(7)(c) and Ninth Circuit Rule 32-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 13,210 words (answering briefs must not exceed 14,000 words).

October 15, 2014.

s/

Ellen J. Durkee

STATEMENT OF RELATED CASES

There are no other related cases in this Court under Ninth Circuit Rule 29-2.6.

STATUTORY ADDENDUM

Relevant Provision of Coquille Restoration Act

25 U.S.C. § 715c. Transfer of land to be held in trust

(a) Lands to be taken in trust

The Secretary shall accept any real property located in Coos and Curry Counties not to exceed one thousand acres for the benefit of the Tribe if conveyed or otherwise transferred to the Secretary: Provided, That, at the time of such acceptance, there are no adverse legal claims on such property including outstanding liens, mortgages, or taxes owed. The Secretary may accept any additional acreage in the Tribe's service area pursuant to his authority under the Act of June 18, 1934 (48 Stat. 984) [25 U.S.C.A. § 461 et seq.].

(b) Lands to be part of reservation

Subject to the conditions imposed by this section, the land transferred shall be taken in the name of the United States in trust for the Tribe and shall be part of its reservation.

(c) Lands to be nontaxable

Any real property taken into trust for the benefit of the Tribe under this section shall be exempt from all local, State, and Federal taxation as of the date of transfer.

(d) Creation of Coquille Forest

(1) Definitions

In this subsection:

(A) the term “Coquille Forest” means certain lands in Coos County, Oregon, comprising approximately 5,400 acres, as generally depicted on the map entitled “Coquille Forest Proposal”, dated July 8, 1996.

(B) the term “Secretary” means the Secretary of the Interior.

(C) the term “the Tribe” means the Coquille Tribe of Coos County, Oregon.

(2) Map

The map described in subparagraph (d)(1)(A), and such additional legal descriptions which are applicable, shall be placed on file at the local District Office of the Bureau of Land Management, the Agency Office of the Bureau of Indian Affairs, and with the Senate Committee on Energy and Natural Resources and the House Committee on Resources.

(3) Interim period

From September 30, 1996, until two years after September 30, 1996, the Bureau of Land Management shall:

(A) retain Federal jurisdiction for the management of lands designated under this subsection as the Coquille Forest and continue to distribute revenues from such lands in a manner consistent with existing law; and,

(B) prior to advertising, offering or awarding any timber sale contract on lands designated under this subsection as the Coquille Forest, obtain the approval of the Assistant Secretary for Indian Affairs, acting on behalf of and in consultation with the Tribe.

(4) Transition planning and designation

(A) During the two year interim period provided for in paragraph (3), the Assistant Secretary for Indian Affairs, acting on behalf of and in consultation with the Tribe, is authorized to initiate development of a forest management plan for the Coquille Forest. The Secretary, acting through the Director of the Bureau of Land Management, shall cooperate and assist in the development of such plan and in the transition of forestry management operations for the Coquille Forest to the Assistant Secretary for Indian Affairs.

(B) Two years after September 30, 1996, the Secretary shall take the lands identified under subparagraph (d)(1)(A) into trust, and shall hold such lands in trust, in perpetuity, for the Coquille Tribe. Such lands shall be thereafter designated as the Coquille Forest.

(C) So as to maintain the current flow of revenue from land subject to the Act entitled "An Act relating to the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant land situated in the State of Oregon" (the O & C Act), approved August 28, 1937 (43 U.S.C. 1181a et seq.), the Secretary shall redesignate, from public domain lands within the tribe's service area, as defined in this subchapter, certain lands to be subject to the O & C Act. Lands redesignated under this subparagraph shall not

exceed lands sufficient to constitute equivalent timber value as compared to lands constituting the Coquille Forest.

(5) Management

The Secretary of Interior, acting through the Assistant Secretary for Indian Affairs, shall manage the Coquille Forest under applicable State and Federal forestry and environmental protection laws, and subject to critical habitat designations under the Endangered Species Act [16 U.S.C.A. § 1531 et seq.], and subject to the standards and guidelines of Federal forest plans on adjacent or nearby Federal lands, now and in the future. The Secretary shall otherwise manage the Coquille Forest in accordance with the laws pertaining to the management of Indian Trust⁴ lands and shall distribute revenues in accord with Public Law 101-630, 25 U.S.C. 3107.

(A) Unprocessed logs harvested from the Coquille Forest shall be subject to the same Federal statutory restrictions on export to foreign Nations that apply to unprocessed logs harvested from Federal lands.

(B) Notwithstanding any other provision of law, all sales of timber from land subject to this subsection shall be advertised, offered and awarded according to competitive bidding practices, with sales being awarded to the highest responsible bidder.

(6) Indian Self-Determination Act agreement

No sooner than two years after September 30, 1996, the Secretary may, upon a satisfactory showing of management competence and pursuant to the Indian Self-Determination Act [25 U.S.C.A. § 450f et seq.], enter into a binding Indian self-determination agreement (agreement) with the Coquille Indian Tribe. Such agreement may provide for the tribe to carry out all or a portion of the forest management for the Coquille Forest.

(A) Prior to entering such an agreement, and as a condition of maintaining such an agreement, the Secretary must find that the Coquille Tribe has entered into a binding memorandum of agreement (MOA) with the State of Oregon, as required under paragraph 75.

(B) The authority of the Secretary to rescind the Indian self-determination agreement shall not be encumbered.

(i) The Secretary shall rescind the agreement upon a demonstration that the tribe and the State of Oregon are no longer engaged in a memorandum of agreement as required under paragraph 75.

(ii) The Secretary may rescind the agreement on a showing that the Tribe has managed the Coquille Forest in a manner inconsistent with this subsection, or the Tribe is no longer managing, or capable of managing, the Coquille Forest in a manner consistent with this subsection.

(7) Memorandum of agreement

The Coquille Tribe shall enter into a memorandum of agreement (MOA) with the State of Oregon relating to the establishment and management of the Coquille Forest. The MOA shall include, but not be limited to, the terms and conditions for managing the Coquille Forest in a manner consistent with paragraph (5) of this subsection, preserving public access, advancing jointly-held resource management goals, achieving tribal restoration objectives and establishing a coordinated management framework. Further, provisions set forth in the MOA shall be consistent with federal¹ trust responsibility requirements applicable to Indian trust lands and paragraph (5) of this subsection.

(8) Public access

The Coquille Forest shall remain open to public access for purposes of hunting, fishing, recreation and transportation, except when closure is required by state or federal law, or when the Coquille Indian Tribe and the State of Oregon agree in writing that restrictions on access are necessary or appropriate to prevent harm to natural resources, cultural resources or environmental quality; Provided, That the State of Oregon's agreement shall not be required when immediate action is necessary to protect archaeological resources.

(9) Jurisdiction

(A) The United States District Court for the District of Oregon shall have jurisdiction over actions against the Secretary arising out of claims that this subsection has been violated. Consistent with existing precedents on standing to sue, any affected citizen may bring suit against the Secretary for violations of this subsection, except that suit may not be brought against the Secretary for claims that the MOA has been violated. The Court has the authority to hold unlawful and set aside actions pursuant to this subsection that are arbitrary and capricious, an abuse of discretion, or otherwise an abuse of law.

(B) The United States District Court for the District of Oregon shall have jurisdiction over actions between the State of Oregon and the Tribe arising out of claims of breach of the MOA.

(C) Unless otherwise provided for by law, remedies available under this subsection shall be limited to equitable relief and shall not include damages.
[subsections 715c(d)(10)-(12) omitted as they are not relevant]

Relevant Provisions of NEPA and implementing regulations

42 U.S.C. § 4332(C): Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall--

* * * *

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

- (i) the environmental impact of the proposed action,
- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

40 C.F.R. § 1508.7:

Cumulative impact is the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.

40 C.F.R. § 1508.9:

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

**Relevant Provision of National Indian Forest Resource Management
Act of 1990**

25 U.S.C. § 3104 Management of Indian forest land

(a) Management activities

The Secretary shall undertake forest land management activities on Indian forest land, either directly or through contracts, cooperative agreements, or grants under the Indian Self-Determination Act [25 U.S.C. 450f et seq.].

(b) Management objectives

Indian forest land management activities undertaken by the Secretary shall be designed to achieve the following objectives--

(1) the development, maintenance, and enhancement of Indian forest land in a perpetually productive state in accordance with the principles of sustained yield and with the standards and objectives set forth in forest management plans by providing effective management and protection through the application of sound silvicultural and economic principles to--

(A) the harvesting of forest products,

(B) forestation,

(C) timber stand improvement, and

(D) other forestry practices;

(2) the regulation of Indian forest lands through the development and implementation, with the full and active consultation and participation of the appropriate Indian tribe, of forest management plans which are supported by written tribal objectives and forest marketing programs;

(3) the regulation of Indian forest lands in a manner that will ensure the use of good method and order in harvesting so as to make possible, on a sustained yield basis, continuous productivity and a perpetual forest business;

(4) the development of Indian forest lands and associated value-added industries by Indians and Indian tribes to promote self-sustaining communities, so that Indians may receive from their Indian forest land not only stumpage value, but also the benefit of all the labor and profit that such Indian forest land is capable of yielding;

(5) the retention of Indian forest land in its natural state when an Indian tribe determines that the recreational, cultural, aesthetic, or traditional values of the Indian forest land represents the highest and best use of the land;

(6) the management and protection of forest resources to retain the beneficial effects to Indian forest lands of regulating water run-off and minimizing soil erosion; and

(7) the maintenance and improvement of timber productivity, grazing, wildlife, fisheries, recreation, aesthetic, cultural and other traditional values.

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2014, I served the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate ECF system and that all participants in the case were served through that system.

s/
Ellen J. Durkee
Appellate Section
Department of Justice
P.O. Box 7415, Ben Franklin Station
Washington, D.C. 20044
(202) 514-4426
ellen.durkee@usdoj.gov

October 15, 2014
90-1-4-14049