

No. 14-35553

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CASCADIA WILDLANDS, OREGON WILD, and UMPQUA WATERSHEDS,
Oregon non-profit corporations,
Plaintiffs-Appellants

v.

UNITED STATES BUREAU OF INDIAN AFFAIRS, an agency of the
Department of the Interior,
Defendant-Appellee

and

THE COQUILLE INDIAN TRIBE, a federally recognized Indian tribe
Intervenor-Appellee

Appeal from the Denial of Summary Judgment
in the District Court for the District of Oregon

Reply Brief of Appellants

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INTRODUCTION

This case involves a challenge by Appellants (Cascadia) to the Kokwel timber sale issued by the Bureau of Indian Affairs (Bureau) on the Coquille Forest, created pursuant to the Coquille Restoration Act and managed by the Coquille Indian Tribe (Intervenors). The Kokwel EA lacks any substantive cumulative effects analysis, and, as a result, the Bureau takes an erroneous post-hoc litigation position that purports to aggregate past, present, and reasonably foreseeable actions under NEPA, rendering this well-established requirement a nullity. The Bureau and Intervenor fundamentally misconstrue the aggregate approach, which only applies to past actions, and attempt to apply it to admittedly reasonably foreseeable actions. Therefore, the Kokwel timber sale violates NEPA.

The Coquille Forest is subject to the mandatory requirements of the Coos Bay District of the Bureau of Land Management (BLM) Resource Management Plan (RMP), one of which requires compliance with listed species' recovery plans. According to the U.S. Fish and Wildlife Service (FWS), the Kokwel timber sale is inconsistent the northern spotted owl's recovery plan. Therefore, the Kokwel timber sale violates the requirement to comply with listed species' recovery plans.

ARGUMENT

I. THE FOREST SERVICE VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT

A. The Kokwel EA does not aggregate the effects of the ongoing and reasonably foreseeable Alder (Lost 40)/Rasler timber sales into the baseline

1. The Kokwel EA specifically states that it will analyze the cumulative effects of the Kokwel timber sale and the reasonably foreseeable Alder (Lost 40)/Rasler timber sales

The Bureau cannot escape its concession in the Kokwel EA that “Table 8 lists treatments proposed for the *foreseeable future* on CIT [*i.e.*, Coquille Indian Tribe] lands in the analysis area that *will be considered in the following resource-specific cumulative impact discussions.*” ER-49 (emphasis added). Table 8, in turn, lists only the “Alder (Lost 40)/Rasler Timber Sales” as projects proposed for the “foreseeable future.” ER-50. Thus, according to the Kokwel EA, the Alder (Lost 40)/Rasler timber sales are proposed for the “foreseeable future,” and their cumulative effects analysis should be found in the “resource-specific cumulative impact discussions.” Because the Alder (Lost 40)/Rasler timber sales are referred to as proposed for the “foreseeable future,” those sales are not past timber sales, and the Kokwel EA specifically states that it “assume[s] the combined relevant effects of all *past actions.*” ER-49 (emphasis added). Therefore, the Alder (Lost 40)/Rasler timber sales could not have been aggregated into the baseline.

The Bureau argues that Cascadia’s reliance on Table 8 is “selective reading,” Bureau Brief (Br.) at 29, but Cascadia points to a straightforward statement at ER-49 that projects listed in Table 8 are “foreseeable future” projects that would be discussed in the resource-specific cumulative effects analysis. The only projects listed in table 8 are the Alder (Lost 40)/Rasler timber sales. Therefore, it follows that a cumulative effects analysis should be found in the resource-specific discussions within the EA, but, as explained below, that is simply not the case.

2. The Bureau’s post-hoc litigation position that the Alder (Lost 40)/Rasler timber sales were aggregated into the baseline is not supported by the Kokwel EA
 - a. The Bureau relies on isolated phrases in different paragraphs under a section summarizing the No Action Alternative for its post-hoc litigation position

In stark contrast to the Kokwel EA’s concession that the cumulative effects of the reasonably foreseeable Alder (Lost 40)/Rasler timber sales would be analyzed within the resource-specific discussions of the EA, *see* ER-49-50, the Bureau argues, without citation, that the reasonably foreseeable Alder (Lost 40)/Rasler timber sales were aggregated into the baseline: the cumulative effects from the “Rasler Sale were considered by incorporating the impacts of the timber harvest activities approved in the Rasler Sale decision into the environmental baseline.” Bureau Br. at 24. Straining for support for its litigation position, the

Bureau cites to isolated phrases in two different paragraphs at ER-36 under the heading “Alternative 1-No Action”: “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.” Bureau Br. at 27. The Bureau, however, fails to explain how a section summarizing the No Action Alternative could justify aggregating reasonably foreseeable actions.

Because the Bureau’s sole justification for its litigation position is apparently found at ER-36, the isolated phrases cited to must be put in their context. The full sentences from which the Bureau selectively quotes is as follows, with the isolated phrases relied on by the Bureau in italics:

Alternative 1-No Action

The No Action Alternative provides a baseline for the comparison of the alternatives. This alternative describes the *existing conditions and the continuing trends*.

....

Ongoing activities would continue to occur on existing projects. These include silvicultural activities in young stands, compliance with Oregon fire control regulations, harvesting and construction of roads across Tribal land under existing right-of-way agreements, routine road maintenance, control of noxious weeds and other *projects covered by earlier decision records*.

ER-36. The Bureau would have this Court believe that two isolated phrases contained in a summary of the No Action Alternative provides the basis for the agency’s alleged aggregation of all past, present, and reasonably foreseeable

cumulative effects. This is contradicted by the Kokwel EA's admission under the heading entitled "Cumulative Actions Considered" that refers to project "proposed for the foreseeable future" and directs the reader to Table 8, which lists only the Alder (Lost 40)/Rasler timber sales. ER-49-50. The Kokwel EA specifically states that the No Action Alternative "describes the existing conditions," which would not include "future foreseeable" projects like the Alder (Lost 40)/Rasler timber sales, timber sales that have *not yet been fully implemented*.

The reason the No Action Alternative for the Kokwel EA contains statements about providing a baseline is because the No Action alternative is required under NEPA to provide a baseline for comparison of effects from the action alternatives.¹ *See Ctr. for Biological Diversity v. U.S. Dep't of the Interior*, 623 F.3d 633, 642 (9th Cir. 2010) ("A no action alternative in an EIS allows policymakers and the public to compare the environmental consequences of the status quo to the consequences of the proposed action. The no action alternative is meant to 'provide a baseline against which the action alternative []' ... is evaluated."); *League to Save Lake Tahoe v. Tahoe Regional Planning*, 739

¹ The Bureau also points to maps in the Kokwel EA. *See* Bureau Br. at 28. The Bureau makes too much of basic information that must be included in the EA as part of the no action alternative: "The No Action Alternative provides a baseline for the comparison of alternatives." ER-36. Furthermore, these maps do not demonstrate which roads, if any, were constructed as part of the reasonably foreseeable Alder (Lost40)/Rasler timber sales because the Kokwel EA provides no such information.

F.supp.2d 1260, 1275-76 (E.D. Cal. 2010) (“In *Friends*, as with many NEPA cases, the baseline was expressed as the ‘no-action’ alternative.”). To cover for its lack of a cumulative effects analysis, the Bureau presents a tortured reading of the Kokwel EA that conflates and confuses an agency’s obligation to assess reasonably foreseeable cumulative effects with an agency’s obligation to analyze a no action alternative. The Kokwel EA’s reference to the baseline under the no action alternative section is a routine statement that allows for the comparison of alternatives, not a blanket statement that all past, present, and reasonably foreseeable actions are aggregated into the baseline.

- b. Pictures of GIS files do not demonstrate that cumulative effects of the reasonably foreseeable Alder (Lost 40)/Rasler timber sales have been aggregated into the baseline for purposes of a cumulative effects analysis

The Bureau also points to pictures of computer files that purport to show Geographic Information System (GIS) data that were allegedly “used to analyze the impacts of the Kokwel Project....” Bureau Br. at 27-28; SER-298-301 (pictures of GIS files). Even accepting the farfetched premise that GIS data can include reasonably foreseeable timber sales that have not yet been completed, it remains unclear how GIS data alone can provide useful information for a cumulative effects analysis. *See Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999) (cumulative effects analysis must contain “sufficient detail” so as to be “useful to the decisionmaker in deciding whether, or

how, to alter the program to lessen cumulative impacts”). The limited narrative contained therein provides no guidance about how pictures of computer files can be translated into a useful cumulative effects analysis. It is not even clear that the data is accurate because the current GIS Coordinator apparently pieced together information used by a previous employee that did not document the earlier work: “Current GIS Coordinator has attempted to describe the attributes to best ability [sic] *without documentation from previous employee who actually did the work in 2008.*” ER-298 (emphasis added). In other words, there is little basis to conclude that the data from 2008 is even accurate if it occurred without documentation.

The Bureau also cites to ER-724 without explanation, but it appears that the citation is aimed at the following sentence in the Alder (Lost 40)/Rasler timber sales EA: “Quantifications of acreages, mileages, etc. are based on estimates obtained from geographic information systems (GIS) or other methods.” ER-724. From this citation, it appears that the extent of the information from the GIS data pertains to acreage and mileage, and, even assuming this information could substantiate a cumulative effects analysis, nothing at SER-208-301 or ER 724 informs the public about how much acreage or mileage would be entailed in the foreseeable Alder (Lost 40)/Rasler timber sales, and no information about the acreage or mileage was included in the Kokwel EA’s cumulative effects analysis.

B. Aggregating the effects of reasonably foreseeable actions into the baseline for the purpose of a cumulative effects analysis is not supported by the CEQ memorandum or case law

1. The CEQ memorandum does not permit an agency to aggregate ongoing or reasonably foreseeable actions into the baseline

Cascadia explained at length in its opening brief that the authority for aggregating past actions in a cumulative effects analysis stems from the CEQ Memorandum, *see* Bureau Br. at 37-49 (addressing the CEQ memorandum and case law); ER-811-814 (CEQ memorandum), and the Bureau and Intervenor do not contest that basic underpinning. The Bureau, however, misconstrues the CEQ memorandum, *see* Bureau Br. at 32-33, and Intervenor fails to even address the CEQ memorandum in its very limited cumulative effects argument, *see* Int. Br. at 27-31 (Intervenor’s cumulative effects argument).

The Bureau argues that “at no point does the memorandum prohibit agencies from aggregating into the baseline impacts from that were approved in the past.” Bureau Br. at 32. This argument widely misses the mark because it is the Bureau that seeks an exception to the rule established in the CEQ’s memorandum. The CEQ memorandum specifically applies to *past actions*, not ongoing or reasonably foreseeable actions, and the Bureau has not rebutted Cascadia’s numerous citations in their opening brief demonstrating that aggregation applies only to past actions. *See* Cascadia Br. at 38-39 (citing extensively from the CEQ memorandum’s

references to *past actions*). The Bureau's silence in the face of Cascadia's citations from the CEQ memorandum speaks volumes.

Indeed, in a recent case from the Eastern District of California, Judge Karlton faulted the Forest Service for its many failings in bringing the same argument as the Bureau does here:

There is much wrong with the Forest Service's argument. *First, the use of this "aggregate" procedure refers only to "past" activities. Defendant cites no case stating that current activities overlapping the proposed project may be considered in the aggregate with past activities....* The court concludes that the Forest Service's attempt to use the "aggregate" procedure in this case is not supported by the cases it cites.

Second, even if they "aggregate," the cumulative effects must be included in the Environmental Assessment (or the EIS if one had been prepared). 40 C.F.R. § 1508.9 ("Environmental Assessment ... [s]hall include brief discussions ... of the environmental impacts of the proposed action and alternatives; *Center for Biological Diversity v. Salazar*, 695 F.3d 893, 917 (9th Cir. 2012) ("An EA also 'must fully assess the cumulative impacts of a project'"). *The court knows of no law, regulation or case that permits the Forest Service to hide this discussion anywhere other than where the public expects to find it. In fact, the draft Environmental Assessment does contain a "Cumulative Effects" section, but that section contains no analysis at all of the cumulative effects of the [Project] – individually or in the aggregate with other projects.*

Conservation Congress v. U.S. Forest Serv., No. 13-0832- LKK-DAD, 2013 WL 4829320 at * 13 (E.D. Cal. Sept. 6, 2013) (emphasis added). As Judge Karlton made clear, the "aggregate" approach only applies to *past actions*.

The reason that the CEQ memorandum permits the aggregation of past actions is because those past actions exist as "present effects": "CEQ regulations

do not require the consideration of the individual effects of all past actions to determine *the present effects of past actions*.” ER-813 (emphasis added); Pl. Br. at 39. Here, the Alder (Lost 40)/Rasler timber sale is *not a past action*. The Bureau uses the contrived phrase “previously-approved but not yet fully implemented” (Bureau Br. at 31) in an attempt to characterize the Alder (Lost 40)/Rasler timber sales as past actions, but this phrase means nothing more than “present” or “ongoing.”²

2. The Bureau and Intervenor misconstrue case law interpreting the CEQ memorandum

The Bureau misconstrues and quotes *League of Wilderness Defenders v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008) (*LOWD*), out of context, arguing that: “[a]n 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’ and ‘agency may aggregate its cumulative effects analysis pursuant to 40 C.F.R. § 1508.7.’” See Bureau Br. at 25. The Bureau would apparently have this Court believe that any and all cumulative effects can be aggregated, which would simply dispense with NEPA’s well-established cumulative effects requirement. The Bureau omits that the quotes about aggregating cumulative effects are for *past*

² Furthermore, the Bureau cannot escape the EA’s characterization of those sales as reasonably foreseeable. See ER-49-50.

actions, not present or reasonably foreseeable actions. *See* Cascadia Brief at 44-45 (quoting from *LOWD* and explaining that aggregating cumulative impacts pertains to *past actions*). Because Cascadia fully addressed *LOWD* in its opening brief, it will not repeat those arguments here.

Citing to *Ecology Center v. Castaneda*, 574 F.3d 652 (9th Cir. 2009), and *LOWD*, 549 F.3d 1211, the Bureau argues that “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.” This argument ignores the CEQ memorandum in its entirety, which, as explained above, provides the basis for permitting agencies to aggregate only past actions. The Bureau also argues that the equivocal statement in *Tongass Conservation Society v. U.S. Forest Serv.*, 455 F.App’x 774 (9th Cir. 2011), regarding aggregation is persuasive. Cascadia addressed the Magistrate’s reliance on *Tongass* in detail at pages 40-41 of its opening brief, and, unlike the appellants in *Tongass*, Cascadia has “shown that the aggregation of cumulative impacts ... may not be applied to harvests that” are admittedly reasonably foreseeable actions because the CEQ memorandum provides no such authority for aggregating anything but past actions.

C. The Kokwel EA cumulative effects analysis is insufficient under this Circuit's case law

The Kokwel EA unequivocally states that the Alder (Lost 40)/Rasler timber sales are “future foreseeable” projects and those sales’ cumulative effects would be addressed within resource-specific discussions in the Kokwel EA. *See* ER-49-50. However, as demonstrated in Cascadia’s opening brief at 24-35 and below, the Kokwel EA fails to provide any quantitative analysis of cumulative effects for the reasonably foreseeable Alder (Lost 40)/Rasler timber sales, and instead reiterates the logging prescriptions and alleged impacts from the Kokwel timber sale itself.

First, the Bureau quotes at length from the Kokwel EA to support its argument that it took a hard look at the cumulative effects of the Alder (Lost 40)/Rasler timber sale on late-successional species, soils and roads, *see* Bureau Br. at 34-41, but conspicuously absent from these citations to the Kokwel EA is any quantitative analysis or environmental impacts from the reasonably foreseeable Alder (Lost 40)/Rasler timber sales that could formulate any semblance of a cumulative effects analysis. Instead of assessing the cumulative impacts, the only environmental effects disclosed are from the Kokwel EA itself. Such an approach has repeatedly been struck down by this Court. *See* Cascadia Br. at 34 (citing *Te-Moak Tribe* and *Klamath-Siskiyou*).

Second, the Bureau repeatedly points to statements in the Kokwel EA and the Rasler EA in an attempt to piece together a post-hoc cumulative effects

analysis for the Kokwel EA. For example, the Bureau argues that “[n]early all of the Rasler Sale and Kokwel Project harvest operations will be conducted using skyline cable systems, which minimizes compactions and disturbances from ground-based equipment” and that “[b]oth projects also include best management practices designed to minimize soil impacts.” Bureau Br. at 37-38. Though it would still fall short because it lacks any quantitative or non-perfunctory analysis, the Bureau’s attempt to piece together a post-hoc cumulative effects analysis at this stage is too little too late. The same is true of the Bureau’s argument that “the total impacts of the new road construction proposed in these two sales would only slightly increase road densities.” Bureau Br. at 39. The Bureau’s post-hoc rationalization is evident because the Kokwel EA does not disclose, let alone analyze, the number of miles of new road construction from the Alder (Lost 40)/Rasler timber sales. See ER-69-70 (roads section only disclosing 2.92 miles of road construction from the Kokwel timber sale). In other words, by looking at the Kokwel EA, there is no way of telling how much road construction was approved pursuant to the Alder (Lost 40)/Rasler timber sales. Counsel’s attempt to cobble together a post-hoc cumulative effects analysis is unavailing.

Finally, the Bureau criticizes Cascadia’s citation to *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1379 (9th Cir. 1998), arguing that it “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.” Bureau Br. at 38. *Neighbors of Cuddy Mountain*, 137 F.3d at 1379, held that without basic information on environmental impacts, the public could not ascertain whether the agency took the requisite hard look: “[t]o ‘consider’ cumulative effects, some quantified or detailed information is required. Without such information, neither the courts nor the public, in reviewing [an agency’s] decisions, can be assured that the [agency] provided the hard look that it is required to provide.”

The Bureau’s argument implicitly concedes that it provided no information related to soil compaction for the Kokwel timber sale or the Alder (Lost 40)/Rasler timber sales, but the bigger issue is that the Bureau failed to provide *any* information useful to a cumulative effects analysis as it relates to soils, which frustrates the public’s ability to review the Kokwel EA. Finally, to the extent the Bureau argues that a cumulative effects analysis is not required under an EA, case law contradicts such a claim. *See Kern v. BLM*, 284 F.3d 1062, 1076 (9th Cir. 2002) (“Given that so many more EAs are prepared than EISs, adequate consideration of cumulative effects requires that EAs address them fully.”).

II. THE BUREAU VIOLATED THE COQUILLE RESTORATION ACT

Pursuant to the Coquille Restoration Act, the Bureau manages 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). “Federal lands adjacent to the Coquille Forest are managed under the BLM Coos Bay District – Final Proposed Resource Management Plan [PRMP] /Environmental Impact Statement [EIS] dated September 1994.”³ ER-224. The Coquille Forest RMP “adopt[s] the existing BLM Coos Bay District Final PRMP/EIS [CBD-RMP] as the Resource Management Plan and Environmental Impact Statement for management of the Coquille Forest” in order “to comply with this management mandate” in the Coquille Restoration Act. *Id.*

The Coos Bay RMP requires consultation with the Fish and Wildlife Service (FWS) “for any proposed action that may affect federal listed or proposed species or their critical or essential habitat. Based on the results of consultation/conferencing, modify, relocate, or abandon the proposed action” to comply with “the Endangered Species Act, approved recovery plans, and Bureau special status species policies.” ER-230. The Bureau consulted with the FWS. The FWS found the project to be inconsistent with the northern spotted owl’s recovery plan and suggested modifications to comply with the recovery plan. ER-293, 301. Instead of heeding the FWS’ recommendations, the Bureau ignored the

³ See *Cascadia Br.* at 50 n. 11.

modifications that would have otherwise made the timber sale consistent with the recovery plan and the Coos Bay RMP. ER-140 ¶¶ 38, 39.

The Bureau is statutorily required to comply with resource management plan standards. *See* 25 U.S.C. § 715c(d)(5). “Once a land use plan is developed, ‘[a]ll future resource management authorizations and actions ... shall conform to the approved plan.’” *Oregon Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007) (citing 43 C.F.R. § 1610.5–3(a)). According to the FWS, the Kokwel timber sale is inconsistent with the spotted owl’s recovery plan, and, therefore, the Kokwel timber sale violates the Coos Bay RMP.

To avoid this result, the Bureau and Intervenor argue that “[n]o agency or entity is required *by the ESA* to implement the recovery strategy or specific actions in a recovery plan,” Int. Br. at 33 (emphasis added), Bureau Br. at 44, and that “agencies retain the discretion to adopt or reject such recommendations” in biological opinions from the FWS. Appellants do not dispute this, as all recommendations in a biological opinion are discretionary, even recommendations to avoid jeopardy to the species. *See Bennett v. Spear*, 520 U.S. 154, 170 (1997).

However, as explained in Cascadia’s opening brief, *Cascadia has not brought a claim under the ESA*. Instead, Cascadia’s claim arises under the Bureau’s obligations pursuant to an RMP, and the RMP at issue requires compliance with a species’ recovery plan. The Coos Bay District of the BLM chose, within its RMP, to require

compliance with recovery plans, and this commitment binds the Bureau until the Coos Bay RMP is revised.

A. “Standards and Guidelines” does not exclusively refer to the “Management Actions/Direction” sections of the Coos Bay RMP

To escape the recovery plan compliance standard, the Bureau argues that by using the term “standards and guidelines” in the Coquille Restoration Act, “Congress must have intended that Coquille Forest management be subject to something else than the entirety of the federal plan governing management of nearby federal lands.” Bureau Br. at 45. Ignoring the plain language of the Restoration Act, the Bureau contends that what Congress really meant was that the Coquille Forest is only subject to the “management action/direction” sections and not the “objectives” section of the Coos Bay RMP. This argument fails for four reasons.

First, this argument is a post-hoc litigation position, and the Bureau’s interpretation is refuted by the Bureau’s own documents in the record. For example, the Coquille Forest Plan states:

In consultation with the Coquille Indian Tribe, the Bureau of Indian Affairs has determined that the most efficient and effective manner to comply with this management mandate [*i.e.*, the standard and guideline provision in the Coquille Restoration Act] is to adopt the existing BLM Coos Bay District Final PRMP/EIS [CBD-RMP] as the Resource Management Plan and Environmental Impact Statement for management of the Coquille Forest.

ER-224. This demonstrates that the Bureau understood that the Coos Bay RMP was adopted without qualification. The Bureau's argument that the Coquille Forest is subject to only unidentified pieces of the Coos Bay RMP is a post-hoc rationalization, unsupported by the record. *See* Cascadia Br. at 36 (setting forth cases prohibiting the post-hoc rationalization of agency action).

The Kokwel EA also runs counter to the Bureau's arguments. In the section entitled "Management Direction and Conformance with Existing Plans" the EA states that "[t]he proposed action [*i.e.*, the Kokwel timber sale] complies with...the Coos Bay District ROD and [RMP] (USDI 1995)." ER-35. The EA does not limit the application of the Coos Bay RMP. Instead, the EA alleges that the Kokwel timber sale complies with the Coos Bay RMP. According to the EA, this project, and the Coquille Forest in general, is subject to the Coos Bay RMP.

Second, the phrase "standard and guideline" is not "precise and limiting" language, Int. Br. at 36, but rather general language that refers to the enforceable provisions of a plan, the rules and limits that apply to agency action. *See California ex rel. Lockyer v. U.S. Forest Service*, 465 F.Supp.2d 917, 922 (2006) (Land and Resource Management Plans (also referred to as forest plans) and National Monument Plans contain standards and guidelines); *see Oregon Natural Desert Ass'n v. Wetzel*, 2005 WL 2002403 * 1 (D. Or. Aug, 17, 2005) (BLM rangelands are managed by standards and guidelines). The Bureau and Intervenor

repeatedly argue that the Coquille Forest is held to some lesser standard than the neighboring BLM lands, but the BLM itself could only be held accountable to follow the standards and guidelines of the Coos Bay RMP because these provisions of the plan “provide the direction and limits that govern actions.” ER-229.

Third, assuming *arguendo* that their interpretation of “standard and guideline” is “precise and limiting” language, Int. Br. at 36, “standards and guidelines” is defined by the Coos Bay RMP to include both objectives and management recommendations, which would include the recovery plan standard. Although, the term “standards and guidelines” is not explicitly defined in the Coos Bay RMP, the Northwest Forest Plan (NWP) and the Coos Bay RMP define “Standards and Guidelines” and “Objectives and Management Actions/Direction” almost identically. The Coos Bay RMP defines “Objectives and Management Actions/Direction as the provisions that “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. The Northwest Forest Plan defines “standards and guidelines as “[t]he rules and limits governing actions, and the principles specifying the environmental conditions or levels to be achieved and maintained.” ER-433. Thus, even if the phrase “standards and guidelines” was intended by Congress to reference some specific part of the Coos

Bay RMP, by definition it would include the “objectives and management actions/direction” of the Coos Bay RMP.⁴

Finally, even if the Court accepts the proposition that “standards and guidelines” exclusively refers to the “management actions/direction” sections, the Coos Bay RMP contains a management action/direction that requires consultation with the FWS and modification of a project based on that consultation. The relevant management actions/direction within the RMP provides: “Consult with the [FWS] or National Marine Fisheries Service (NMFS) for any proposed action that may affect federal listed or proposed species or their critical or essential habitat. Based on the results of consultation/conferencing, modify, relocate, or abandon the proposed action.” ER-230. The Bureau argues that this management action/direction only requires “modifications, if necessary, to comply with the ESA.” Bureau Br. at 55.

⁴ The Bureau and Intervenor point to Forest Service planning regulations attempting to draw a “distinction between goals and objectives and standards and guidelines.” Bureau Br. at 46. However, National Forest Plans are organized differently than Resource Management Plans, and it is more instructive to look at the actual description of that Plan in interpreting its organization. The Bureau also describes the terms “objectives and management actions/direction” as “disjunctive” and argue that because of this differentiation, they cannot be considered “standards and guidelines.” Bureau Br. at 49. However, “standards and guidelines” is also a disjunctive term, “standards” being the levels to be achieved and “guidelines” being approaches designed to achieve these levels or conditions. *See* BLM, ARIZONA STANDARDS FOR RANGELAND HEALTH AND GUIDELINES FOR GRAZING ADMINISTRATION http://www.blm.gov/pgdata/etc/medialib/blm/az/pdfs/3809.Par.41426.File.dat/AZSn_G.pdf (last visited Oct. 29, 2014) (defining “standard and guideline” in more detail and highlighting the disjunctive nature of the term).

However, no modification suggested by the FWS in a biological opinion will ever be “necessary,” *see Bennett*, 520 U.S. at 170, and ESA compliance is not the “objective” to be achieved in the Coos Bay RMP.⁵ Management actions/direction are “measures planned to achieve the stated objectives,” ER-236, and the stated objective in this case is compliance with “the Endangered Species Act, approved recovery plans, and Bureau special status species policies.” ER-230. The Bureau is not permitted to cherry-pick objectives for compliance. Selectively picking which objectives to comply with would substantively undermine the management framework for the Coquille Forest, allowing the Bureau to forgo compliance with numerous standards that the BLM is held to within the Coos Bay RMP. This was not the Congressional intent. Indeed, Senator Hatfield, the Act’s sponsor, stated that the Coquille Restoration Act is “intended to establish a Coquille Forest for the Coquille Tribe that will mesh into the broader forest management of Coos County.” *Id.*

⁵ The Bureau points to the objectives in the Coquille Forest Plan which only includes the objective of ESA compliance, Bureau Br. at 56, and argues that the adoption of the Coos Bay RMP would render the creation of the Coquille Forest Plan a “meaningless exercise.” Bureau Br. at 57. The Coquille Forest Plan adopts the federal management regime in Part I, including the standards and guidelines of the Coos Bay RMP, ER-224, and “[t]ribal management direction is contained in Part II the RMP which sets forth *additional* direction, standards and practices established by the Coquille Indian Tribe for archaeological and cultural resources on Coquille Forest lands.” *Id.* (emphasis added). Intervenor’s management regime was to serve in addition to the federal management regime, and the incorporation of the objectives and management actions/direction of the Coos Bay RMP does not undermine or render superfluous this Part II of the Coquille Forest Plan.

B. “Standards and Guidelines” does not Exclusively Refer to the Northwest Forest Plan Amendment to the Coos Bay RMP

The Bureau argued, and the lower court found, that Congress’s use of the phrase “standards and guidelines” refers to the NWP because that phrase appears in the official NWP title and the “NWP is the only document where the term standards and guidelines appears.” ER-15; Int. Br. at 40-41. This interpretation of the Restoration Act is unworkable.

First, the Court’s interpretation conflicts with the provision of the Coquille Restoration Act providing that the management regime will change over time: “the standards and guidelines of Federal forest plans on adjacent or nearby lands, *now and in the future*.” (emphasis added). If Congress had intended this “standard and guideline” provision to only refer to the static 1994 NWP, it would render this “now and in the future provision” meaningless and superfluous. *See* Cascadia Br. at 55-56 (cases on principals of statutory construction). Congress intended for the Coquille Forest to be subject to the existing forest plan and any future amendments adopted by the Coos Bay BLM.

Second, the Coquille Forest RMP, pursuant to its own terms, “adopt[s] the existing BLM Coos Bay District Final PRMP/EIS [CBD-RMP] as the Resource Management Plan and Environmental Impact Statement for management of the Coquille Forest” in order “to comply with this management mandate” in the Coquille Restoration Act. ER-224. Had Congress intended the Coquille Forest to

be subject to only the NWP, then Congress would not have explicitly adopted the “existing BLM Coos Bay District Final PRMP/EIS.” There is no limitation here to the NWP.

Third, the assumption that only the NWP contains “standards and guidelines” is flatly rebutted by the NWP itself. Every forest plan contains standards and guidelines. It is a generic term, and the NWP makes that clear by stating that it is amending the existing standards and guidelines of every National Forest and BLM District plan within the range of the northern spotted owl:

Although these standards and guidelines supplement existing plans, they also incorporate certain standards and guidelines from Draft National Forest Plans and the revised Draft BLM Resource Management Plans. When these standards and guidelines were prepared, beginning in April 1993, BLM Districts and National Forests either had completed (current) Forest and Resource Management Plans, or they were in the process of developing such plans. For those units that had not completed their plans, the then-current version, or draft, of the unit's preferred alternative was identified (see page C-2). These current plans and draft plan preferred alternatives were used as the base or starting point for these standards and guidelines. Therefore, except as specifically excepted (see page C-3), standards and guidelines from current plans and draft plan preferred alternatives apply where they are more restrictive or provide greater benefits to late-successional forest related species than the provisions of these standards and guidelines.

SER-73 (emphasis added). Additionally, in the section of the NWP, “Relationship to Existing Forest Service and BLM Plans,” the NWP states:

Standards and guidelines and land allocations in the existing plans not directly superseded will remain in effect. These standards and guidelines and land allocations will be incorporated into plans which are being developed.

Id.

Not only is it clear that the Coos Bay RMP contained standards and guidelines beyond those within the NWP, these standards and guidelines were used as the basis for the development of the NWP. The fact that nearly every BLM District and National Forest required recovery plan compliance within their plans was likely relied upon by the drafters. Congress is presumed to have been aware of this regulatory framework when it adopted the Coquille Restoration Act. ER-15 (citing *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 319-320 (1983)).

Fourth, the lower Court concluded that the Coquille Forest is subject to “other management actions/direction” within the Coos Bay RMP besides the NWP standards and guidelines. ER-12. If Congress intended for its use of “standards and guidelines” to only reference the NWP, then the Bureau’s management of the Coquille Forest would not be subject to the “other management actions/direction” in the Coos Bay RMP beyond the NWP. *Id.* Therefore, the lower Court’s finding is unworkable and contradictory.

Finally, had Congress intended the Coquille Forest’s management to be subject to the standards and guidelines of the NWP, it would have said so. It did not. *See* Int. Br. at 41 (“the Northwest Forest Plan was developed amidst a great deal of publicity and public input...Congress should be presumed to have been aware of that document

when it enacted the Coquille Forest Act less than two years later.”). Congress stated that it was subject to the standards and guidelines of the forest plan on the adjacent federal land, and this is admittedly the Coos Bay RMP. ER-224; Cascadia Br. at 57 (citing case law on the evidence of Congress’ intent).

C. The Recovery Plan compliance standard in the Coos Bay RMP is enforceable

The Bureau argues that the standard for recovery plan compliance is unenforceable because it is categorized as an “objective” referencing *Norton v. S. Utah Wilderness Alliance* (“SUWA”), 542 U.S. 55 (2004), and *Lands Council v. McNair*, 629 F.3d 1070 (9th Cir. 2010). Bureau Br. at 50. First, other courts have ruled on whether agency action has complied with resource management plan “objectives” within the range of the NWP. Second, the Bureau misconstrues these cases in asserting that any forest or resource plan standard labeled as an “objective” is unenforceable.

Courts in this Circuit have enforced two other “objectives” within the Coos Bay RMP and other RMPs amended by the Northwest Forest Plan. “Two major management concepts underlay the objectives and management actions/direction: (1) Ecological Principles for Management of Late-Successional Forests, and (2) the Aquatic Conservation Strategy.” ER-229. Both the objectives to “[p]rotect and enhance conditions of late-successional and old growth ecosystems,” ER-229, and the nine objectives of the Aquatic Conservation Strategy (beginning on ER-229)

have been enforced by courts. *See League of Wilderness Defenders v. Allen*, 615 F.3d 1122, 1141 (9th Cir. 2010) (determining whether the logging project complied with the “objective of Late-Successional Reserves [] to protect and enhance conditions of late-successional and old-growth forest ecosystems); *see Bark v. Northrop*, 2014 WL 1414310 *1 (D. Or. April 11, 2014) (determining whether a logging project “compl[ied] with Aquatic Conservation Strategy (ACS) objectives”).

Furthermore, the Bureau misconstrues *SUWA* and *Lands Council*. *SUWA* does not apply here. First, this case is not brought under 5 U.S.C. § 706(1), but 5 U.S.C. § 706(2)(A), (D). *See Valentini v. Shinseki*, 860 F.Supp.2d 1079, 1096-97 (C.D. Cal. Mar 16, 2012) (citing *Oregon Natural Desert Ass'n v. Bureau of Land Management*, 625 F.3d 1092 (9th Cir. 2010)) (*SUWA* does not apply to cases brought under 5 U.S.C. § 706(2)(A), (D)). This case does not concern an agency failure to act, and, therefore, *SUWA* is inapplicable.

Second, *SUWA* involved a vague “use supervision and monitoring” provision that lacked a clear indication of binding commitment within the plan itself. *Environmental Protection Information Center v. Blackwell*, 389 F.Supp.2d 1174, 1211 (N.D. Cal. Oct. 3, 2004) (citing *SUWA*, 542 U.S. 55). Here, the plan at issue states that the objectives and management actions/direction provide

“direction and limits that govern actions.” ER-229. Therefore reliance on *SUWA* is misplaced.

Third, the Bureau’s reliance on *Lands Council* is also misplaced. *Lands Council* concerned compliance with a forest-wide goal of “maintaining a 40% population potential” for sensitive species. 629 F.3d at 1076. Plaintiffs were challenging the Forest Service’s determination that by maintaining 10% of old-growth forests the agency would achieve the goal of 40% population potential. *Id.* Plaintiffs argued that a recent study required the Forest Service to maintain 14% of old-growth to achieve the 40% goal. *Id.* at 1077. The Court stated that it would not “choose[] among scientific studies in determining whether the Forest Service has complied with the underlying Forest Plan,” *id.* at 1076, but the Court never stated that Forest Service did not need to comply with the 40% goal. In other words, the goals or objectives in a plan are “mandatory as to the object to be achieved, [but] it leaves BLM discretion to decide how to achieve that object.”⁶ *SUWA*, 542 U.S. at 66. Here, the object to be achieved is recovery plan compliance, and the FWS determined that the Kokwel timber sale was inconsistent with the recovery plan. *SUWA* and *Lands Council* are inapposite.

⁶ Although this quote from *SUWA* refers to the non-impairment standard for Wilderness Study Areas (WSA) under FLPMA, and not specifically goals in resource management plans, it is instructive because WSAs have a very general “non-impairment” standard. While BLM has discretion in deciding whether or not an activity impairs the wilderness characteristics of the WSA, the duty to not take or permit actions that would impair WSAs is mandatory.

In addition, *SUWA* concerned a plan commitment for the agency to take at some future date, a “will do” commitment, Bureau Br. at 50 (citing *SUWA*, 542 U.S. at 72), and *Lands Council* concerned a forest-wide goal, a desired future condition. *Lands Council*, 629 F.3d at 1076. Compliance with a recovery plan is not a contemplated future end result; rather, it is a concrete standard for agency action being taken. In other words, pursuant to FWS’ determination, a timber sale being planned by the Bureau or BLM is either consistent with the recovery actions in a recovery plan or not. Cascadia is not requesting that the Bureau take some action. Cascadia is attempting to get the agency to not take an action that will permanently remove 300 acres of unique old-growth habitat for listed species in violation of Recovery Actions 10 and 32.

The Bureau and Intervenor further attempt to cloud⁷ the issue of compliance with a recovery plan, Bureau Br. at 51, but the process provided in the Coos Bay RMP is straightforward. Pursuant to the RMP, the Bureau consults with FWS, and the FWS prepares a Biological Opinion. In the Biological Opinion, the FWS determines whether the project is consistent or inconsistent with relevant recovery plans and the Recovery Actions therein. If inconsistent, the Bureau must relocate, modify, or abandon the project.

⁷ The Bureau repeatedly states that these lands are designated as matrix lands. Bureau Br. at 51-52. The recovery plan applies to both reserved and non-reserved land allocations, which includes matrix lands. The special status species section of the Coos Bay RMP applies to all land allocations, including matrix lands. ER-230.

In conclusion, the statutory scheme created by the Coquille Restoration Act is “quite innovative and unique” and involved “some very substantial concessions” on behalf of the Coquille Tribe. 142 Cong. Rec. S9649 (1996) (Statement of Sen. Hatfield). The Coquille Restoration Act pulled substantial acreage out of the recently formed NWP, which could have required federal agencies revisit the entire NWP pursuant to NEPA. To avoid this outcome, and in exchange for the trust relationship, the Tribe agreed that the management of the Coquille Forest had to fit within “the parameters of the current discourse regarding the Federal lands,” and as such was required to comply with the standards and guidelines of the Coos Bay BLM RMP. *Id.* According to Senator Hatfield, “I want to emphasize again the unique arrangement of this provision. It is intended to establish a Coquille Forest for the Coquille Tribe that will mesh into the broader forest management of Coos County.” *Id.* As such, the Bureau’s argument that the Coquille Forest’s management framework is “something less than” the Coos Bay RMP is contrary to the Congressional intent in promulgating the Coquille Restoration Act.

III. CONCLUSION

For the foregoing reasons, Cascadia respectfully requests that this Court reverse the District Court and vacate the Kokwel EA, FONSI, and Decision Notice.

Respectfully submitted this 29th day of October, 2014.

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Ninth Circuit Case No. 14-35553
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/s/ Sean T. Malone
Attorney for Appellants
Date: October 29, 2014

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I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 29, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Sean T. Malone

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