

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

LEAGUE OF WILDERNESS)
DEFENDERS / BLUE MOUNTAINS)
BIODIVERSITY PROJECT, an Oregon)
nonprofit corporation,)
)
Plaintiff,)
)
)
vs.)
)
UNITED STATES FOREST)
SERVICE, an agency of the United)
States Department of Agriculture,)
)
Defendants,)
)
)
_____)

CV 03-1563-AS

FINDINGS AND RECOMMENDATION

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ASHMANSKAS, Magistrate Judge:

Plaintiff League of Wilderness Defenders (LWD) brings this action alleging defendant United States Forest Service violated the National Forest Management Act (Forest Act), 16 U.S.C. § 1600 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, when it approved and implemented the Bandit II Project (Bandit II) in the Ochoco National Forest in central Oregon. Bandit II includes, *inter alia*, a timber sale and pre-commercial thinning.¹ The matters before the court are LWD's motion for summary judgment (doc. #22), the Forest Service's cross-motion for summary judgment (doc. #37), and the Forest Service's motion to strike extra-record declarations (doc. #35).

For the reasons that follow, the court recommends that the Forest Service's motion

¹ Bandit II also includes underburning, riparian planting, hardwood enhancement, road construction and reconstruction, road inactivation, and conifer restoration. The project encompasses 39,200 acres of forestland.

to strike be **GRANTED**, LWD's motion for summary judgment be **GRANTED**, and the Forest Service's cross-motion for summary judgment be **DENIED**.

BACKGROUND

LWD brings this action for judicial review of the Forest Service's final agency action under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq.*

LWD seeks a declaratory judgment that the Forest Service's Environmental Assessment (EA) on Bandit II violates NEPA and the Forest Act and requests the court to enjoin the Forest Service from taking further action to implement Bandit II until it prepares an Environmental Impact Statement (EIS) on the project.

LWD alleges the Forest Service violated NEPA: (1) by failing to address applicable federal INFISH² standards in the EA; (2) by approving Bandit II in violation of those INFISH standards; (3) by failing to address applicable state water quality standards; (4) by approving Bandit II without adequately determining the cumulative impacts on the Ochoco National Forest of fire suppression activities, grazing, logging on private land, and road building; (5) by failing to disclose the scientific methodologies that support its conclusions; and (6) by preparing an EA rather than an EIS on Bandit II. In sum, LWD alleges the Forest Service violated the Forest Act by approving Bandit II even though it is inconsistent with the forest plan for the Ochoco National Forest.

The Forest Service alleges: (1) LWD failed to exhaust its administrative remedies regarding its allegation that the Forest Service did not address applicable INFISH

² "INFISH" is the Inland Native Fish Strategy, developed by the Forest Service and Bureau of Land Management to provide interim direction to protect habitat and populations of resident native fish outside of anadromous fish habitat in the Interior and Upper Columbia River Basin. AR 373-412.

standards in its EA; (2) Bandit II is consistent with the forest plan for the Ochoco National Forest; (3) the EA adequately assesses the cumulative impacts of Bandit II; and (4) the Forest Service was not required to prepare an EIS on Bandit II.

MOTION TO STRIKE

The Forest Service moves to strike the declarations of Johnathan Rhodes and Guy Pinjuv submitted on behalf of LWD on the ground that the declarations improperly supplement the Administrative Record on judicial review.

The scope of judicial review is governed by the Administrative Procedure Act (APA), 5 U.S.C. § 706. "When a plaintiff challenges a final agency action, judicial review normally is limited to the administrative record in existence at the time of the agency's decision." Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 200). See Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 420 (1971), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977)(Judicial review under the Administrative Procedure Act "is to be based on the full administrative record that was before the Secretary at the time he made his decision.").

The court, however, may consider extra-record materials if they meet any one of the following criteria: (1) they are necessary to determine if the agency considered all relevant factors and explained its decision; (2) the agency relied on documents not in the record; (3) they are necessary to explain technical or complex subject matter; or (4) they show agency bad faith. Southwest Center for Biological Diversity v. United States Forest Service, 100 F.3d 1443, 1450 (9th Cir. 1996). Post-decision declarations offered to either justify or attack an agency decision already made should not be considered. Id.

Rhodes' Declaration.

Rhodes is an expert "on the effects of current proposed uses of land and water on

nonpoint sources of pollution, water quality, channel morphology, and native trout and salmon habitat." Rhodes Decl., ¶ 2. Rhodes analyzed the Forest Service's Bandit II EA and asserts it (1) "fail[s] to take a hard look at [alternative 4's] likely cumulative effects on sediment delivery," *id.*, ¶¶ 7-14, and (2) fails to "credibly estimate the effects of [alternative] 4 and other past and on-going activities on cumulative sediment delivery," thereby usurping "the determination and effects on INFISH objectives and fish habitat conditions in the EA." *Id.*, ¶¶ 15-20.

Pinjuv Declaration.

Pinjuv is a forensic scientist who has expertise as a research forester, forest economic analyst, and private forest consultant. He now researches forest growth modeling systems in New Zealand. Pinjuv Decl., ¶ 1. Pinjuv analyzed the Forest Service's Bandit II EA and asserts it "fails to take a hard look at [alternative 4's] likely effect on shade reduction . . . and potential increase in water temperatures." ¶¶ 2-8.

LWD argues both declarations should be considered by the court because they establish the Forest Service "failed to consider all relevant factors and failed to adequately explain the full implications of their decision" allowing Bandit II to be implemented." Pl.'s Resp. to Motion to Strike, p. 2. LWD also asserts the challenged declarations respond to the "technical and complex nature of the cutting edge science regarding wildfires, forest growth and canopy, hydrology, water quality, and riparian health, including fish habitat." *Id.*

Contrary to LWD's assertion that the Forest Service failed to consider these relevant factors, the Administrative Record reflects that the Forest Service specifically discussed the effects of sediment delivery and increased sunlight on water quality and water temperature as part of its decision to implement Bandit II. *See, e.g.*, AR 3136-3144. Moreover, the

apparent purpose of the declarations offered by LWD is not to educate the court on technical and complex issues but to dispute the Forest Service's conclusions derived from its analysis of those factors. The court concludes that consideration of extra-record materials submitted for that purpose is inappropriate.

Accordingly, the court grants the Forest Service's motion to strike the Rhodes and Pinjuv declarations.

MOTIONS FOR SUMMARY JUDGMENT

STANDARDS.

Summary Judgment.

Summary judgment should be granted if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). As here, where the court is reviewing the record pursuant to the Administrative Procedure Act, summary judgment is appropriate for deciding the legal issue of whether the agency could reasonably have found the facts as it did. Occidental Engineering Co. v. Immigration and Naturalization Service, 753 F.2d 766, 770 (9th Cir. 1985).

Review of Agency Actions.

LWD's claims under both NEPA and the Forest Act are reviewable under the APA. 5 U.S.C. §706(2)(A). Forest Guardians v. U.S. Forest Service, 329 F.3d 1089 (9th Cir. 2003)

The court reviews the agency action to determine whether it is arbitrary and capricious and may not set it aside unless there was no rational basis for it. Friends of the Earth v. Hintz, 800 F.2d 822, 831 (9th Cir. 1986). The arbitrary and capricious standard is appropriate for resolution of factual disputes implicating substantial agency expertise.

Ninilchik Traditional Council v. United States, 227 F.3d 1186, 1194 (9th Cir. 2000).

Review under the standard is narrow and the reviewing court may not substitute its judgment for that of the agency. See United States Postal Service v. Gregory, 122 S. Ct. 431, 434 (2001). The agency, however, must articulate a rational connection between the facts and law found and the conclusions made. See Midwater Trawlers Co-op v. Department of Commerce, 282 F.2d 710, 716 (9th Cir. 2002). Thus, the reviewing court must determine whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Hells Canyon Alliance v. United States Forest Serv., 227 F.3d 1170, 1177 (9th Cir. 2000). For example, the court may reverse if the agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of the agency's expertise. See Pacific Coast Fed. of Fishermen's Ass'n, Inc. v. National Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir. 2001). Thus, the inquiry, though narrow, must be searching and careful. Ninilchik, 227 F.3d at 1194.

“Deference to an agency’s technical expertise and experience is particularly warranted with respect to questions involving . . . scientific matter.” United States v. Alpine Land and Reservoir Co., 887 F.2d 207, 213 (9th Cir. 1989), cert. denied, 498 U.S. 817 (1990). Nevertheless, the "presumption of agency expertise may be rebutted if the decisions, even though based on scientific expertise, are not reasoned." Greenpeace v. NMFS, 80 F.Supp.2d 1137, 1147 (W.D. Wash. 2000).

STATUTORY REQUIREMENTS.

NEPA.

NEPA requires federal agencies "to prepare an environmental impact statement (EIS) whenever they propose to undertake any "major Federal action[] significantly affecting the quality of the human environment." Inland Empire Public Lands Council v. U.S. Forest Service, 88 F.3d 754, 757-58 (9th Cir. 1996); 42 U.S.C. § 4332(2)(C). "The goal of NEPA is two-fold: (1) to ensure the agency will have detailed information on significant environmental impacts when it makes its decisions; and (2) to guarantee that this information will be available to a larger audience. NEPA's goal is satisfied once this information is properly disclosed; thus, NEPA exists to ensure a process, not to ensure any result." *Id.* at 758. "[I]t is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process." Sierra Club v. Espy, 38 F.3d 792, 796 (5th Cir. 1994).

The Council of Environmental Quality has promulgated regulations allowing agencies to tier their environmental analysis from programs of broad scope (*e.g.*, Forest Plans) to site-specific projects of narrow scope (*e.g.*, timber sales) in order to eliminate repetitive discussions of the same issues. The site-specific analysis may incorporate the provisions of the broader analysis. 40 C.F.R. § 1508.28(a); 1500.4(i); 1502.20. Inland Empire, 88 F.3d at 757. ("Tiering is appropriate . . . [f]rom a program, plan, or policy statement or analysis of lesser scope or to a site-specific statement or analysis."). See also Oregon Natural Resource Council v. Lyng, 882 F.2. 1417, 1422-24 (9th Cir. 1989).

An agency may prepare an EA to determine whether the proposed action significantly affects the environment, thereby requiring the preparation of an EIS. 40 C.F.R. § 1501.4(a), 1508.9(a). The agency need not prepare an EIS if the agency makes a "finding of no significant impact" (FONSI) as the result of the EA of the proposed action. Department of Transp. v. Public Citizen, 124 S.Ct. 2204, 2210 (2004)("The EA is to be a

'concise public document' that '[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS]."). *Id.*; 40 C.F.R. §§ 1501.4(e), 1508.9(a), and 1508.13. See also Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 443 (7th Cir. 1990) (An EA is a "rough-cut, low budget environmental impact statement designed to show whether a full-fledged environmental impact statement . . . is necessary.").

The Forest Act.

The Forest Act imposes procedural and substantive requirements on the Forest Service in the development of Land and Resource Management Plans to manage national forests and contemplates a two stage approach to forest planning. The first is the approval of a forest plan, following a comprehensive environmental impact study undertaken in accordance with NEPA. Each forest plan establishes basic guidelines and sets forth the planning elements that will be employed by the Forest Service in future site-specific decisions in that forest. Sierra Club v. Robertson, 28 F.3d 753, 755 (8th Cir. 1994). On approval of the forest plan, the second stage is the assessment and implementation of site-specific projects, which must be consistent with the forest plan. 16 U.S.C. § 1604(i); Inland Empire, 88 F.3d at 757.

The Forest Service's duty is "to provide diversity of plant and animal communities." *Id.* 16 U.S.C. § 1604(g)(3)(B). "This duty to ensure viable, or self-sustaining, populations, applies with special force to 'sensitive species.'" *Id.* at 758; Oregon Natural Resources Council v. Lowe, 836 F. Supp. 727, 733 (D. Or. 1993).

STATEMENT OF FACTS.

The following facts are either undisputed based on the parties' concise statements of material fact or are based on the Administrative Record.

a. Issuance of Bandit II EA.

In May 2001, the Forest Service issued an EA analyzing environmental impacts of the Bandit project on the Marks Creek Watershed and Veazie Creek Subwatershed of the Ochoco National Forest. AR 1388-1505.

In January 2002, the Forest Service issued a Finding of No Significant Impact (FONSI) and Decision Notice (DN) implementing Bandit pursuant to Alternative 5 of the Decision Notice.³ AR 1849. On February 12, 2002, however, the Forest Service withdrew the DN. AR 1934.

On December 24, 2002, the Forest Service issued a new EA on the project, which it now called Bandit II. AR 3384. On March 4, 2003, the Forest Service issued a FONSI and Decision Notice implementing Bandit II in accordance with Alternative 4 of the reissued EA. AR 3028-30, 3523.

On April 25, 2003, LWD appealed the Bandit II EA, FONSI, and Decision Notice. AR 3588. The Forest Service denied the appeal on June 9, 2003. AR 3665.

b. Purpose of Bandit II.

The Bandit II project resulted from the Forest Service's 1998 analysis of the poor condition of the Marks Creek Watershed in the Ochoco National Forest. The Forest Service identified five areas of concern that drove the analysis: (1) adverse changes in the water quality and quantity; (2) changes in upland forest vegetation; (3) increased risk of unplanned fires; (4) increased populations of noxious plants and weeds; and (5) increased human use. AR 571-72.

c. Scope of Bandit II.

There are 121 miles of streams in the Marks Creek watershed. AR 3058. Bandit II

³ The DN contained five alternative proposed courses of action.

proposes the commercial logging of 3.7 million board feet of timber located on 1,852 acres of forest in the watershed. AR 3028, 3693. The project includes 5,118 acres of pre-commercial thinning and 464 acres of pile-and-burn, AR 3040, 9,525 acres of underburning, AR 3028, and 1.8 miles of new road construction and 8.9 miles of road reconstruction. AR 3695.

d. Condition of the Marks Creek Watershed.

Streams and riparian areas of the watershed are in "less than satisfactory" condition because of historic livestock grazing and previous timber harvest practices.

AR 2869. These past practices have resulted, inter alia, in higher than ideal water temperatures, decreased large woody debris that is necessary to hold sediment, provide pools, cover for fish, and maintain ideal water temperatures, reduced pool frequency, increased sedimentation, and unstable banks. Id. Maximum water temperatures average between 65 and 77 degrees fahrenheit, thereby exceeding maximum state water quality standards of 64 degrees fahrenheit for the summer months. Id.

Timber harvest activities, including associated road building has adversely affected "sediment delivery, shade, channel morphology, as well as easy access for recreationists." Id. Accordingly, "[f]ish distribution throughout the watershed is limited." Id.

e. Effects of the Hash Rock Fire.

In August and September 2000, the Hash Rock fire burned 4,600 acres of forest within the watershed. AR 3043. As a result of the fire, sediment delivery into the streams has increased and is expected to continue until vegetation is reestablished and stream channels stabilize. AR 3064, 3140. "Increased sediment from reactivated landslides and bank erosion will be a chronic problem in the fire perimeter." AR 3140. The Forest Service, however, concludes "fire-related sediment effects into Marks Creek have been

minor to date due to the lack of high-intensity storms and vegetative recovery." Id.

f. Redband Trout.

The redband trout is listed as a "sensitive species" by the Forest Service and the state of Oregon. AR 2878, 2183. "Redband trout populations are currently depressed reflecting degraded habitat conditions within the project area." AR 3114. The Forest Service states "[t]he combination of habitat modification, low summer flows, high summer stream temperatures, lack of suitable riparian vegetation, and increased sediment has an effect on the fish habitat and populations of redband in the [Bandit II] area."

AR 3114.

According to the Forest Service, implementation of Alternative 4 for Bandit II will "produce some localized effects to habitat for redband trout . . . from increased sediment yield. . . but would not likely contribute towards federal listing [under the Endangered Species Act] or loss of viability to the population or species." AR 3115.

g. INFISH.

The Forest Service developed the Inland Native Fish Strategy (INFISH) in 1995 to "provide interim direction . . . intended to maintain options for inland native fish by reducing the risk of loss of populations and reducing potential negative impacts to aquatic habitats." AR 377.

Under INFISH, the Forest Service has established interim Riparian Management Objectives (RMOs) that "provide the criteria against which attainment or progress toward attainment of the riparian goals is measured. [T]hey provide the target toward which managers aim as they conduct resource management activities across the landscape." The Forest Service expects the RMOs would be "achieved over time." AR 394-97.

The existing condition of "aquatic resources" in the Marks Creek watershed do not

meet INFISH RMOs. AR 3114.

ANALYSIS.

a. Exhaustion of Administrative Remedies.

The Forest Service asserts LWD is estopped from asserting the EA does not comply with INFISH because LWD did not raise the issue during the EA process or on administrative appeal.

Exhaustion of administrative remedies is a jurisdictional prerequisite to judicial review of the Forest Service's final agency action implementing Bandit II. Gallo Cattle Co. v. U.S. Dept. of Agriculture, 159 F.3d 1194, 1197 (9th Cir. 1998). "Persons challenging an agency's compliance with NEPA must 'structure their participation so that it . . . alerts the agency to the part[ies'] position and contentions,' in order to allow the agency to give the issue meaningful consideration." Dep't of Transportation v. Public Citizen, 124 S. Ct. 2204, 2213 (2004)(internal citation omitted).

In its administrative appeal of the Bandit II EA, LWD argued that "[b]ecause it is clear that the streams in the planning area are at risk or are not properly functioning according to . . . INFISH, the [Forest Service] will violate the CWA and [the Forest Act] if the Bandit II project is implemented." AR 3617. LWD also argued the Forest Service's approval of Bandit II was "unreasonable" because "the fish habitat [in the project area] is in poor condition and currently not meeting INFISH's RMOs." AR 3636.

On this record, the court finds LWD challenged the Forest Service's compliance with INFISH standards and, therefore, exhausted its administrative remedies on that issue.

b. Failure to Address INFISH Standards.

LWD asserts the Bandit II EA violates NEPA because it fails "to adequately reference INFISH standards" based on the lack of any "substantive discussion of INFISH

standards, guidelines, or RMOs in the Environmental Consequences Chapter of the EA." Plf.s' Mem., p. 17. Specifically, LWD argues the Forest Service ignored INFISH's timber management standard TM-1b, which states that timber harvests are prohibited in Riparian Habitat Conservation Areas (RHCA) such as those encompassed within the Bandit II project area, unless "silvicultural practices" do not "retard attainment of [RMOs] and . . . avoid[] . . . adverse effects on inland native fish." AR 400.

The Forest Service admits that, in the short-term, Bandit II will adversely effect the redband trout and retard attainment of the RMOs within RHCAs. Def's Mem., p. 7. The Forest Service, however, asserts it did consider INFISH requirements, pointing to its conclusory statement in the Bandit II FONSI that "Alternative 4 [of the Bandit II EA] complies with all applicable Forest Plan direction, including both Management-Area and Forest-Wide standards and guidelines." *Id.* AR 3535. The Forest Service justifies this conclusion on the ground that conditions in the Bandit II project will improve in the long-term as a result, *inter alia*, of the timber harvest, pre-commercial thinning, underburning, and reduction of sediment delivery. For example, according to the Forest Service, "[p]opulations of . . . redband trout would begin to increase when the channels become stable and water temperatures decrease." AR 3063. The Forest Service, however, offers no substantive analysis to support that proposition.

On review of the record as a whole, the court notes the Forest Service acknowledges the existence of INFISH on several occasions. The court, however, discerns no substantial specific analysis or discussion by the Forest Service in the Bandit II EA as to whether the requirements and standards set forth in INFISH are met by Bandit II. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1213-14 (9th Cir. 1998) (An EA and its administrative record must support the Forest Service's conclusions

regarding the environmental impact of a timber sale). The Forest Service has failed to cite where in the Bandit II EA or the administrative record it addressed specifically, either qualitatively or quantitatively the extent of the short-term adverse impacts of Bandit II on the redband trout and the short-term retardation of the attainment of the RMOs, and the extent to which, qualitatively or quantitatively, those adverse impacts will be offset in the long term by anticipated improvements within the Bandit II project area.

The court concludes the Forest Service may have paid lip service to INFISH in the Bandit II EA, but did not take the requisite "hard look" at the environmental consequences of Bandit II required under NEPA when it failed substantively to address the applicability of INFISH standards to Bandit II.

c. Approval of Bandit II Contrary to INFISH.

LWD asserts the Forest Service not only failed to address INFISH standards adequately in the EA, but also violated the Forest Act by ignoring those standards in the EA and issuing the resulting FONSI and DN implementing Bandit II.

The essence of LWD's argument is that Bandit II admittedly will result, inter alia, in a short-term increase in sediment that will adversely affect aquatic resources and retard the attainment of INFISH RMOs, for instance, by increasing the water temperature in streams within RHCAs encompassed by the Bandit II project area. LWD argues those impacts violate INFISH and, therefore, are inconsistent with the forest plan for the Ochoco National Forest. Accordingly, LWD asserts Bandit II violates the Forest Act. Inland Empire, 88 F.3d at 757.

In the context of a section 7 consultation under the Endangered Species Act, the Ninth Circuit rejected a biological opinion that ignored short-term impacts of the proposed action on listed species that were inconsistent with the Aquatic Conservation Strategy

(ACS) in the Northwest Forest Plan. See Pacific Coast Federation of Fisherman's Associations, Inc. v. NMFS 256 F.3d, 1028, 1036-37 (9th Cir. 2001)(PCFFA). The court found that NMFS violated section 7's consultation requirements by ignoring short-term impacts of "[timber sales] with a relatively small area of impact but that carried a high risk of degradation when multiplied by many projects and continued over a long time period." Id. The court held that it is arbitrary and capricious to disregard the short-term impacts of localized projects when those projects "can have aggregate effects across an entire watershed."

LWD asserts that although PCFFA is an ESA case, the court's holding is applicable to this case because the role of the ACS in the Northwest Forest Plan is analogous to and serves the same purpose as the role of INFISH in the forest plan at issue here. The only difference is that the ACS addresses anadromous fish habitat while INFISH addresses native inland species.

The Forest Service asserts PCFFA does not apply to this case because it addressed provisions of the Northwest Forest Plan that govern the management of forests west of the Cascades and not forests such as the Ochoco National Forest, located east of the Cascades. In addition, whereas NMFS failed to address short-term impacts in PCFFA, the Forest Service argues it did address such impacts in the Bandit II EA. The Forest Service also notes the Northwest Forest Plan, unlike the forest plan for the Ochoco National Forest, requires an environmental analysis at four different "spatial" levels, i.e., impacts of projects at a relatively small localized scale, as well as the impacts of projects on an area-wide scale. Finally, the Forest Service argues it is entitled to deference regarding the methodology and "choice of studies" it uses in analyzing the environmental impacts of projects.

The court rejects the Forest Service's efforts to distinguish the scope of analysis of INFISH standards in the Ochoco forest plan from the ACS standards in the Northwest Forest Plan. First, the court concludes the geographic location of a forest rationally should have no bearing on the nature and extent of an assessment of the environmental impact of a timber sale on a national forest. Second, the court has previously found the Forest Service did not adequately address INFISH standards in the Bandit II EA. Third, the Forest Service cites no authority for the proposition that it can ignore the short-term impacts of a timber sale covering a small site-specific area of an RHCA within a watershed merely because the forest plan does not specifically provide for compliance at different "spatial" levels within the forest. Noncompliance with INFISH at the local level, resulting in short-term adverse impacts on species, may certainly have similar cumulative impacts across an entire watershed within a national forest east of the Cascades as would noncompliance with the ACS at the local level resulting in short-term impacts to a species in a forest west of the Cascades. Finally, the Forest Service is not entitled to any deference in the choice of a "methodology" that violates the requirements of the law.

The court, therefore, concludes the Forest Service violated the Forest Act by approving the implementation of Bandit II without first establishing that short-term adverse impacts of the project on redband trout and short-term retardation of RMOs set forth in INFISH would not be inconsistent with the Ochoco forest plan.

d. Failure to Address State Water Quality Standards.

The Oregon Department of Environmental Quality has established a summertime 64 degree water temperature standard for species such as redband trout in the Marks Creek Watershed. The water temperature standard for redband trout in the watershed other than in summertime is 55 degrees.

Alternative 4 of the Bandit II EA states that Bandit II "is not expected to produce measurable increases or decreases in the maximum water temperature" and that "[o]ver time, shade will increase, causing a decrease in water temperature." AR 3143 (emphasis added).

LWD asserts the Forest Service's analysis ignores the state standard that during nine months of the year, the maximum temperature for streams in the Marks Creek watershed should be 55 degrees, not 64 degrees. The Forest Service states that the state standard of 55 degrees was established after the Bandit II EA was issued, the project will meet the maximum water temperature standard of 64 degrees and, in any event, the project will not increase or decrease existing water temperatures in the project area.

The court need not decide whether the Forest Service addressed applicable existing state water temperature standards when it issued the Bandit II EA. The court has found the Forest Service's Bandit II EA and the resulting FONSI and DN violated NEPA and the Forest Act on other grounds. Any future environmental assessment for a project in the Marks Creek watershed would be required to consider the 55 degree water standard and determine whether the project would raise water temperatures above that standard.

e. Failure to Determine Cumulative Impacts of Fire Suppression Activities, Grazing, Logging and Road Building.

LWD asserts the Forest Service's analysis of the cumulative impacts of grazing is "woefully" inadequate and that the Forest Service fails "to measure and predict sedimentation and damage to fish habitat and soils-particularly as a result of road construction/reconstruction and increased road use." Pltf.s' Resp. Mem., p. 13.

The Forest Service asserts it did analyze the cumulative impacts of other activities on water quality within the project area.

The Administrative Record reflects that the Forest Service did consider cumulative impacts from the activities described by LWD. See e.g., Bandit II EA, Ch. 3. AR 3042-3159. The court perceives the issue pertains to the thoroughness of the analysis. The court notes an EA is not the comprehensive environmental review contemplated by an EIS, but is rather a "rough low budget environmental impact statement." Cronin v. U.S. Dept. of Agriculture, 919 F.2d 439, 443 (7th Cir. 1990). For purposes of an EA, the court concludes the Forest Service's cumulative impacts analysis was sufficient, if not extensive.

f. Failure to Disclose Scientific Methodologies Supporting the Forest Service's Conclusions.

LWD essentially challenges the science the Forest Service relied on in the Bandit II EA. LWD asserts the Forest Service's analysis of the effects of the loss of shade cover and increase in sedimentation on water quality and temperature in the project area is inadequate. To support the assertion that the Forest Service's scientific analysis was inadequate, LWD relies on the declarations from its own experts who address those issues and dispute the conclusions drawn by the Forest Service's experts. The court has stricken the declarations. See pp. 4-6.

The court defers to the Forest Service's experts in this matter. United States v. Alpine Land and Reservoir Co., 887 F.2d at 213. The issues in this case predominantly concern the scope and adequacy of the Bandit II EA, not the science supporting it.

g. Failure to Prepare an EIS.

The court has identified substantial flaws in the Bandit II EA, primarily arising from the Forest Service's inadequate, or lack of any, analysis of the short-term impacts of Bandit II on the redband trout and whether those short-term impacts will retard the attainment of the RMOs set forth in INFISH. An EA is supposed to be a document from

which the Forest Service can determine whether to prepare an EIS in light of likely environmental impacts arising from the proposed project. Department of Transp. v. Public Citizen, 124 S.Ct. at 2210. The court concludes the Bandit II EA is inadequate for that purpose because it does not quantitatively or qualitatively address the extent of the short-term adverse impacts of the projects. It seems to the court the EA performed one of the essential functions assigned to it, i.e. to establish that Bandit II will, at least in the short-term, adversely impact redband trout and retard the attainment of INFISH RMOs. In light of that conclusion, and based on the court's finding that the Forest Service's further analysis of those consequences was inadequate, the court concludes that it is now appropriate for the Forest Service to prepare an environmental impact statement if the Bandit II project is to proceed. For that reason, the court recommends that the Forest Service be required to prepare an EIS on Bandit II.

INJUNCTIVE RELIEF.

"Absent 'unusual circumstances,' an injunction is the appropriate remedy for a violation of NEPA's procedural requirements." Thomas v. Peterson, 753 F.2d 754, 764 (9th Cir. 1985)(internal citations omitted). "Irreparable damage is presumed to flow from a failure properly to evaluate the environmental impact of a major federal action." Id. In light of the above findings, the court concludes LWD is entitled to an injunction prohibiting the implementation of Bandit II pending the completion of an EA or an EIS that complies with the requirements of NEPA and the Forest Act.

CONCLUSION

Based on the foregoing, the court recommends that the Forest Service's motion to strike (#35) should be **GRANTED**, LWD's motion for summary judgment (#22) should be

GRANTED, and the Forest Service's cross-motion for summary judgment (#37) should be **DENIED**. The court further recommends that the Forest Service should be enjoined from approving Bandit II pending the preparation of an EIS on the project.

SCHEDULING ORDER

The above Findings and Recommendation will be referred to a United States District Judge for review. Objections, if any, are due **June 21, 2005**. If no objections are filed, review of the Findings and Recommendation will go under advisement on that date. If objections are filed, a response to the objections is due fourteen days after the date the objections are filed and the review of the Findings and Recommendation will go under advisement on that date.

IT IS SO ORDERED.

DATED this 6th day of June, 2005.

/s/ Donald C. Ashmanskas

Donald C. Ashmanskas
United States Magistrate Judge