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**WESTERN ENVIRONMENTAL LAW CENTER**

April 22, 2021

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Malheur National Forest  
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Sent via email to: [objections-pnw-malheur@usda.gov](mailto:objections-pnw-malheur@usda.gov)

**OBJECTION: Crow Hazardous Fuels Reduction Project**

Dear Craig,

We are writing today to express our concerns about the Crow Project. As you are well aware, and as expressed in our scoping comments, we would like to see this area treated. It's a beautiful part of the Forest, rarely visited by people, and full of large trees that could, with treatment, be well on their way to becoming healthy old growth. Because of the density of trees, and its departure from what we have come to understand is historical range of variation (which is largely understood to be a good benchmark for forest health), it appears to me that many of the stands in the Crow Project are at uncharacteristically high risk of high-severity fire. Protecting this special place from unnatural fire risk and creating conditions for forest health are values we share, and we write these comments in that spirit.

First, we are in full support of the Desired Condition outlined on page 12 of the Silviculture Report:

- Move the landscape and stand types towards **reference conditions** for dry upland forest
- Increase the percentage of ponderosa pine, reduce Douglas-fir, grand fir, and western juniper
- Lower stand densities to increase tree growth and vigor and resistance to insects and disease, and increase longevity of remaining overstory ponderosa pine
- Promote quaking aspen and riparian hardwoods in areas where they are found
- Restore sage-steppe and dry and wet meadow areas where conifers have encroached
- Promote mountain mahogany regeneration
- Re-introduce fire as a process that perpetuates ponderosa pine as the major seral species by thinning fire sensitive species and by creating seed beds conducive to pine natural regeneration
- Restore fuel profiles to types primarily conducive to surface fire

- Increase stand resilience to fire, decrease resistance to [fire] control, increase firefighter effectiveness, increase safety of firefighters and the public
- Capture economic value of harvested timber

All of these can be accomplished. One of the main reasons we support of these Desired Conditions is the framework of **reference conditions**, which you define on page 12 of the Silviculture Report as the historic conditions, or (since historic conditions shifted from time to time as a result of fires, insect outbreaks and other disturbances) somewhere within the “Historic Range of Variability,” often referred to as HRV. *One of our key concerns* is that we may disagree on what science you should use to determine HRV, or that some of the proposed actions are not actually moving the landscape toward the reference conditions highlighted in the first bullet point.

Another concern is that this project is not entirely in accordance with the new amendment to the Eastside Screens. Since it’s the first project out of the gate under that amendment, it’s likely to get close scrutiny, and we suggest that this project stay carefully within the letter and intent of that policy.

Accordingly, we propose some upgrades to the preferred action that will help you bring the project in better alignment with best available science and current law.

## The Decision

The Purpose and Needs of the project are described as:

- Reduce hazardous fuel loadings (including surface fuels, ladder fuels, and crown fuels) to alter fire behavior (intensity, duration, rate of spread, torching, and crowning) and move the area towards conditions that will allow fire to play a more frequent and natural role on the landscape while exhibiting historical fire effects (mixed severity) from burning at low to moderate intensities during planned and unplanned ignitions.
- Salvage harvest recently killed trees that are surplus to other resource needs in order to reduce hazardous fuels and capture the economic value of those dead trees.

The FEA analyzes three alternatives that might accomplish these goals:

- The No Action Alternative
- The Proposed Alternative (proposed in scoping, not chosen in the DN/FONSI)
- The Preferred or chosen alternative, also known as “Alternative 3”

The main difference between the Proposed and Preferred Alternatives is that the proposed alternative would have removed ponderosa pine, Douglas fir, and grand fir up to 30” in diameter. The preferred alternative only removes trees up to 21”.

It appears from reading the EA and Record of Decision that the proposed alternative was the expected outcome up until the last minute. It is possible that some of the inconsistencies pointed out in the remainder of this letter are merely a result of editing oversights pursuant to that last minute change.

## The 2021 Eastside Screens

Despite being planned by the Malheur National Forest, the relevant Forest Plan for this project area is the Ochoco Forest Plan. This project area was formerly in that Forest, but is now administered by the Malheur. The Ochoco Forest Plan was signed in 1989, and amended in 1995. In 1995, pursuant to considerable public concern regarding the loss of old growth, the Forest Service, amended all the Forest Plans for Forests east of the Cascades in Region Six in one Record of Decision. That rule is commonly referred to as the Eastside Screens. The Screens divided conditions into two categories which it called Scenarios A and B. Scenario A applies in biophysical environments where “one or both of the late and old structural stages (LOS) falls below HRV.” Scenario B applies where LOS is above HRV. Only Scenario A applies in the Crow project, FEA, page 1-14, so only Scenario A will be discussed in the remainder of this letter.

On January 15, 2021 a small, but important, element of the 1995 Eastside Screens was amended. According to the final Record of Decision on that project the purpose was to “account for current science and ensure continued protections for wildlife habitat.” Screens Record of Decision, page 14. Only elements of Scenario A were amended. Two key updates relevant to this project were made:

- Amendment to the 21” Rule
- Amendment to the Snag and Green Tree Retention Rule

These two changes form the basis of two of our most significant concerns about the Crow Project Decision Notice and Finding of No Significant Impact (DN/FONSI). Each addressed below.

### Old Growth and Amendment to the 21” Rule

The 1995 version of the Screens had a blanket prohibition on removal of trees >21” in stands “outside LOS.” The 2021 amendment updated that simple standard to a far more nuanced guideline which now reads as follows:

*Outside of LOS, many types of timber sale activities are allowed. The intent is still to maintain and/or enhance a diverse array of LOS conditions in stands subject to timber harvest as much as possible, by adhering to the following plan components: Managers should retain and generally emphasize recruitment of old trees and large trees, including clumps of old trees. Management activities should first prioritize old trees for retention and recruitment. If there are not enough old trees to develop LOS conditions, large trees should be retained, favoring fire tolerant species where appropriate. Old trees are defined as having external morphological characteristics that suggest an age of >150 years. Large trees are defined as grand fir or white fir >30” dbh or trees of any other species >21” dbh. Old and large trees will be identified through the best available science. Management activities should consider appropriate species composition for biophysical environment, topographical position, stand density, historical diameter distributions, and spatial arrangements within stands and across the landscape in order to develop stands that are resistant and resilient to disturbance.*

(underline added)

Notably, one of the key shifts in direction was that prior to the 2021 amendment, managers were only expected to consider diameter when working to “maintain and/or enhance” LOS conditions.

(1995 *Eastside Screens*, 6.2.a) The 2021 amendment requires managers to first protect old trees, regardless of size. If there are not sufficient old trees to attain LOS conditions, it requires managers to protect large trees. Large trees are defined as trees >21" for all species except grand/white fir, which don't count as large until they are 30." According to the science cited in the amendment, the reason for increasing the diameter limit on grand/white fir is that they are a fast-growing tree, that are not resistant to fire, and have grown into excessive abundance pursuant to the lack of low-intensity fire in the last 100 years. (2021 *Screens Amendment EA*, pp 12-13)

Further supporting this change was a paper by Andrew Merschel, published in 2019, based on research in the Ochoco & Deschutes National Forests which have very similar ecosystems to those found on the Crow project. That paper found that over 60% of the grand fir over 21" are less than 125 years old, meaning that they are not old growth, and are mostly present because of the change in fire regime. (Merschel et al. 2019). Figure 1 of that paper is shown here.

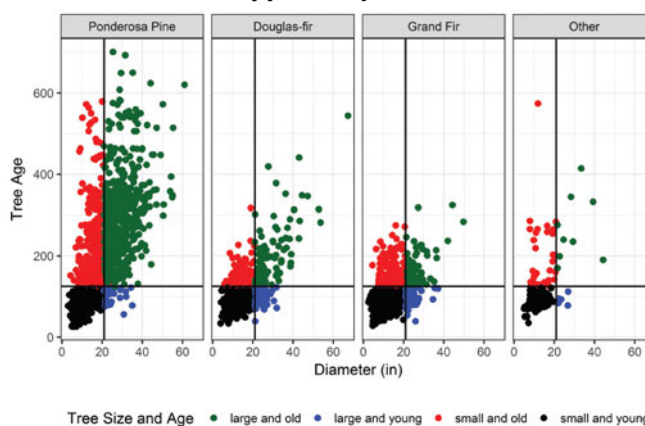


Figure 1. Relation between tree size and age for 3940 trees cored in the East Cascades and Ochoco Mountains. Columns represent different species, a vertical line separates small (<21 in. dbh) from large (>21 in.) trees, and a horizontal line separates young (<125 years) and old (>125 years) old in 2014.

**Objection:** WELC objects to the lack of a clear prohibition on the removal of old trees “having morphological characteristics that suggest an age of  $\geq 150$  years” as required by the 2021 amendment to the Eastside Screens.

Pages 7-8 of the DN/FONSI contains a long list of “Actions Common to All Vegetation Treatments.” It specifies that “no trees >21” would be cut” but does not specify that no trees “having external morphological characteristics that suggest an age of >150 years” will be cut.

The DN/FONSI refers back to Appendix A of the FEA to describe additional specific treatments to be carried out. But Appendix A contains management practices that appear to me to be contrary to the 2021 Screens. For example, around mahogany and aspen Appendix A says to remove all trees less than 21”. App A, page 3. But best available science shows that that would include removing a lot of old trees.

This apparent assumption that old trees and trees greater than 21” can be considered practical substitutes for each other also seems to be present in the Silviculture Report which assumes that young & stem exclusion stands can move directly to old forest types when “old forest is defined by the number of ... trees over 21”. (Silviculture Report, page 7.)

This error is not present in all situations. Appendix A clearly states that old trees will not be removed from skips and gaps. That clear language is great, and clearly in accord with the 2021 rule. But when the DN/FONSI addresses skips and gaps, it fails to make such a distinction.

Confused about this inconsistency, we contacted the Ranger District asking for clarification. Lori Bailey responded that there are a number of places in the Draft DN/FONSI that reference retention of old trees:

- Page 5 states that HFRA projects (which this is under) must be designed to retain old trees.
- Page 8 states that Commercial thin treatments will be designed pursuant to Franklin and Johnson 2012 principles, which “include retaining and promoting old trees”
- Page 9 states that the outcome of “Commercial Thin LOS Enhancement” prescriptions would be to protect and retain large trees.

This is all well and good. But it is too unspecific to determine whether it actually complies with the recently amended Eastside Screens and thus the Ochoco National Forest plan. NEPA requires that proposed actions must be specific enough that the public can determine what the Forest Service is actually planning to do, and whether it’s in compliance with the law. Vague statements that the proposed action could potentially be carried out in a way that complies are insufficient.

More troublesome, the fact that old trees are specifically called out for protection in some cases suggests that they are specifically not being protected in other cases. Rather, there are several places in the EA that are specific about how trees will be selected for removal, and in most of those cases the criteria are based on whether they are greater than 21” dbh, not whether they are old. Some examples:

- Appendix A, page 2, “Actions Common to All Vegetation Treatments” provides a list of common actions, including the following:
  - “No trees greater than 21 inches DBH would be cut with the following exceptions:
    - They are deemed a hazard to operations
    - Ponderosa pine, grand fir and Douglas-fir up to 30 inches in specified commercial thin treatments.”

Notably, neither this bullet point, nor the larger list contains a prohibition on the removal of old trees as required by the 2021 Screens. Given that protection of old trees is the first requirement of the new rule, it should top this list. Given the socio-political context in which this decision is being made, and the importance the conservation community places on good faith retention of old trees, it should top this list. This is the place where specifics are spelled out, and a prohibition on the removal of old trees is missing. It is not appropriate to ask the public to believe that if the direction given in the EA is to protect trees greater than 21” (apparently regardless of age) that the actual prescriptions will be different.

- DN/FONSI, page 9, “Commercial Thin LOS Enhancement” states that “This treatment would maintain all stands in late and old structure habitat by not removing trees greater than 21 inches DBH.”

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<sup>1</sup> It’s not entirely clear which paper you’re citing here. The references at the end of the EA only list Franklin, J. F., Johnson, K. N., Churchill, D. J., Hagmann, K., Johnson, D., & Johnston, J. (2013). Restoration of dry forests in eastern Oregon: a field guide. The Nature Conservancy, Portland, OR. However, Franklin and Johnson, *A Restoration Framework for the Federal Forests in the Pacific Northwest*, 110 J. FOR. 429, 429-439 (2012) would have also been a good citation for this principle.

- DN/FONSI page 9, "Commercial Thin Connectivity Corridors" states that "Thinning would occur throughout the diameter range (up to 21" DBH for all species) and would remove most of the understory." Although this prescription assures the reader that "would not degrade LOS status" this statement is troubling in light of the following:
- Silviculturist Report, page 7, states "Stand acres currently characterized by SEOC, SECC, YFMS, and UR structural stages have the ability to move directly into OFSS or OFMS structural stages when old forest structure is defined by the number of large trees over 21" DBH per acre."

In one way or another, these statements seem to assume that protection of trees greater than 21" will result in protection of old growth. But, as shown in Figure 1 above, that's not accurate. Perhaps more importantly, it's not what the applicable law requires.

**Proposed Resolution:** Include a clear and unambiguous statement at the top of the list titled "Actions Common to All Vegetation Treatments" in the DN/FONSI that states that "no trees exhibiting external morphological characteristics that suggest an age of >150 years shall be cut unless they are deemed a hazard to operations."

**Additional Recommendation:** In each place in the Decision Notice that prescribes that all conifers up to 21" shall be removed replace that language with "all conifers up to 21" and not exhibiting external morphological characteristics that suggest an age of >150 years shall be cut."

**Standard v. Guideline:**

A likely response to our proposed resolution is that the new rule is a guideline, not a standard, so adherence to a diameter limit is an acceptable way to carry out the intent. The 2012 Planning Rule provides the distinction between a standard and a guideline:

- "A standard is a mandatory constraint on project and activity decisionmaking, established to help achieve or maintain the desired condition or conditions, to avoid or mitigate undesirable effects, or to meet applicable legal requirements." 36 C.F.R. § 219.7(e)(1)(iii)
- "A guideline is a constraint on project and activity decisionmaking that allows for departure from its terms, so long as the purpose of the guideline is met. (§ 219.15(d)(3)). Guidelines are established to help achieve or maintain a desired condition or conditions, to avoid or mitigate undesirable effects, or to meet applicable legal requirements." 36 C.F.R. § 219.7(e)(1)(iv)

First, given the socio-political context of this decision and its extreme controversy with some important stakeholders, we strongly recommend against attempting to deviate from the specific recommendations for action provided in the guideline. That would be one of the most egregious violations of trust that could be carried out at this juncture. Further, as described below, even if such deviation was legal, this EA & DN/FONSI lack the analysis or the support of applicable science that would be required to justify a departure from the plain language of the guideline.

The 2012 Planning Rule provides a test for how to determine whether a project plan may substitute an alternative method of achieving the intent of the guideline besides adherence to the specific

actions stated. It states that a project that varies from the exact language will be determined to be consistent with the guideline if it “is designed in a way that is as effective in achieving the purpose of the applicable guidelines.” 36 C.F.R. § 219.15(d)(3)(ii) (emphasis added).

There is no analysis in the EA, DN/FONSI, or specialist reports that provides a justification for the assumption that simply retaining trees >21” produces the same result as retaining actual old trees. Indeed, we know this to be demonstrably false based on the analysis supporting the 2021 amendment to the Screens. Hence, if there is an argument to be made that such a substitution would produce the same outcome, the argument has not been made in this EA, and the Forest Service cannot legally rely on a justification that is not in the administrative record for this project.

In fact, the best available science (which was quoted in our scoping comments, and referenced above) demonstrates that old trees and trees >21” are not synonymous. First, old trees have a social value different from young large trees that was cited and acknowledged in the 2021 amendment to the Screens. That can’t be replaced with a diameter limit. Old trees - as distinguished from large trees - provide critical habitat functions and form the foundation for forests that are resilient to future change because they have persisted through past climatic and disturbance variability (Marcot et al. 2018, Hessburg et al. 2015, Bull 1997).

In our scoping comments, we cited Andrew Merschel’s 2019 paper that shows that in ecosystems very similar to those in Crow, he found that 20% of the pine less than 21” were older than 125 years. Included here is Figure 1 from that paper showing the distribution of age and diameter limit. It is clear from this chart that many ponderosa pine <21” are older than 150 years. Some ponderosa less than 21” were over 500 years old! Consequently, diameter limit is not an adequate substitute for age.

Admittedly, diameter limits are easier to measure, and it’s likely that this EA was written before the final contours of the 2021 amendment were known. But that is not sufficient justification for the approach taken in the Crow project. The law is clear that morphological characteristics are to be used to identify old trees for retention because morphological characteristics are more accurate predictors of age than diameter for most species.

As stated above, the Forest Service can easily satisfy this objection by including a clear and unambiguous statement at the top of the list titled “Actions Common to All Vegetation Treatments” in the DN/FONSI that states that all prescriptions will start with designation and retention of all existing old trees using morphological characteristics and not diameter.

### **Snags & the 2021 Amendment to the Snags & Green Tree Replacement Rule**

“Most (if not all) wildlife species rely on moderate to high levels of snags and down logs for nesting, roosting, denning and feeding. Large down logs are a common and important component of most old and late structural forests.” (1995 *Eastside Screens*, 6.d.4.a. *parentheses in the original*). This scientific understanding has not changed since the mid 1990s when this requirement was written.

One of the two purposes for this project is “salvage harvest recently killed trees that are surplus to other resource needs in order to reduce hazardous fuels and capture the economic value of those dead trees.” This is contrary to the new language in the amended Screens.

The 1995 rule required retention of snags >21” at “100% potential population levels of primary cavity excavators.” It may have allowed the above proposed action. The new rule has a clear standard:

*Maintain all snags > 20 inches (or whatever is the representative DBH of the overstory layer if it is less than 20 inches) OR complete a snag analysis using the best available science on species ecological requirements as applied through current snag tools, models, or other documented procedures to maintain or increase diverse snag composition, size, structure, and distribution (i.e. groups or clusters) for a diverse composition of wildlife species and ecological site conditions.*

Under either prong of the standard, maintenance of existing snags is required. Under the first prong, all snags >20 inches must be maintained. If the Forest Service elects to not retain all snags greater than 20”, it must conduct a snag retention analysis that results in the retention of a diverse range of snags of different species, sizes, and spatial arrangement. But there is no language in the snag retention provision that allows a project to fall below existing levels of snags. The goal expressed in the standard itself is to “*maintain or increase diverse snag composition.*” An action alternative that removes snags as part of its purpose and need is contrary to the 2021 Screens without a Forest Plan amendment.

**Objection:** We object to the lack of a clear prohibition on removal of snags greater than 20 inches in diameter.

**Proposed Resolution:** Include clear, unambiguous language in the DN/FONSI in the list of “Actions Common to all Vegetation Treatments” that no snags greater than 20 inches in diameter will be removed unless they are a clear hazard to human safety.

Specific Suggestion:

- Modify the first bullet to read “During thinning activities, dead lodgepole, grand fir, Douglas fir, and ponderosa pine trees *less than 20*” that are surplus to other resource needs may be considered for salvage opportunities in selected units.’

NOTE: As we discussed on the phone, I look forward to working with you to better understand, and lay out the evidence for wildlife needs for snags and down wood, and figuring out a way to show the tradeoffs between that and the elevated fire risk issues that you raised in response. In the meantime, I believe that the above language will keep you within the letter of the law.

## Conclusion

It is not surprising to me that in the first project out the door under the new rules that errors would be made. As we said in the opening to this letter, we share many values and goals in common, and



write this in that spirit. That said, we do not mince words here. There are problems with this EA that, if not fixed, make it vulnerable in court.

The lead objector in this matter, and person to contact regarding resolution is Pam Hardy, Attorney, Western Environmental Law Center, [REDACTED]

Best Regards

Pam Hardy  
Western Environmental Law Center

## References

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