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From: Austin Starnes, Staff Attorney
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Re: Blue Mountains Biodiversity Project – **Supplemental** Scoping Comments on the Mottet Vegetation Management Project

Submitted online at: <https://cara.fs2c.usda.gov/Public/CommentInput?Project=67275>

District Ranger Collin:

Blue Mountains Biodiversity Project (“BMBP”) hereby submits these supplemental scoping comments on the Mottet Vegetation Management Project (the “Mottet project” or “Project”) on the Umatilla National Forest’s Walla Walla Ranger District. These comments should be considered in conjunction with organizational comments submitted by BMBP’s director Karen Coulter.

BMBP is an environmental nonprofit organization based in eastern Oregon that has been working to protect and restore the ecosystems of the Blue Mountains and Eastern Oregon Cascades since 1991. BMBP’s focus is working to stop or modify management projects that threaten the biodiversity and ecological integrity of the landscape such as logging, road building, livestock grazing, herbicide and biocide use, and mining. BMBP’s work area encompasses federal public lands in eastern Oregon and southeastern Washington, including the Deschutes, Ochoco, Malheur, Umatilla, Fremont-Winema, Wallowa-Whitman National Forests. BMBP prioritizes the protection of old growth; sensitive, threatened, and endangered species; water quality; roadless areas; and natural ecological processes.

BMBP submits these comments in part to urge against the use of the Secretary’s Memorandum 1078-006 (“Secretary’s Memo” or the “Memo”) emergency situation

determination (“ESD”)¹ under section 40807 of the Infrastructure Investment and Jobs Act (“IIJA”). As discussed below, the use of the ESD is inappropriate for the Mottet project. And even if it were, then the associated stifling of public engagement and limited alternatives analysis under the ESD may, in fact, prohibit the Forest Service from determining the actual best management solution for the Mottet project area.

BMBP requests that the Forest Service analyze the environmental effects of the Mottet project in an environmental impact statement (“EIS”), with a full alternatives analysis and robust 45-day public comment period, and engage in the pre-decisional objection process under 36 C.F.R. part 218 consistent with past practices.

I. The authorized emergency actions are unlikely to achieve the desired conditions of and Forest Plan direction for the Mottet project area.

The Secretary’s Memo declares that our “National Forests are in crisis due to uncharacteristically severe wildfires, insect and disease outbreaks, invasive species, and other stressors whose impacts have been compounded by too little active management,” and thus requires the Secretary to make an ESD under section 40807 of the IIJA. Memo at 2. “These threats,” the Memo continues, “combined with overgrown forests, a growing number of homes in the wildland-urban interface, and more than a century of rigorous fire suppression” led to 112,646,000 acres (59% of all National Forest System lands) falling under this ESD. *Id.*

The Mottet project’s scoping materials identify a purpose and need to:

reduce the risk and extent of, and increase the resilience to, insect and disease infestation; and to reduce hazardous fuels. This project aims to enhance the resilience of forest ecosystems to current environmental stressors, including drought, wildfire, insects and diseases, and to foster their capacity to adapt to future climate conditions.

Mottet Scoping Letter at 2. To achieve these desired conditions, the Forest Service is proposing almost 19,000 acres of commercial logging in a ~48,000-acre project area encompassing prime recreation opportunities. *Id.* at 5. However, the authorized emergency actions under the ESD are

¹ BMBP is aware the Forest Service has its own “ESD” program under 36 C.F.R. § 218.21 and refers to the emergency authority under IIJA section 40807 as “EAD.” For purposes of these comments, any reference to ESD or EAD refers only to the use of an emergency authorization under IIJA section 40807, as directed under the Secretary’s Memo 1078-006.

unlikely to address these threats nor provide relief. In many cases, the authorized emergency actions may actually worsen these conditions.

Under section 40807 of the IIJA, an emergency situation exists only where “immediate implementation” of authorized emergency actions are necessary to provide “[r]elief from hazards threatening human health and safety” or mitigate “threats to natural resources on National Forest System land or adjacent land.” 16 U.S.C. § 6592c(a)(2)(A) & (B). “Authorized emergency actions” include the following:

- (A) the salvage of dead or dying trees;
- (B) the harvest of trees damaged by wind or ice;
- (C) the commercial and noncommercial sanitation harvest of trees to control insects or disease, including trees already infested with insects or disease;
- (D) the reforestation or replanting of fire-impacted areas through planting, control of competing vegetation, or other activities that enhance natural regeneration and restore forest species;
- (E) the removal of hazardous trees in close proximity to roads and trails;
- (F) the removal of hazardous fuels;
- (G) the restoration of water sources or infrastructure;
- (H) the reconstruction of existing utility lines; and
- (I) the replacement of underground cables.

16 U.S.C. § 6592c(b)(2). A majority of these authorized actions intended to address the threat of severe wildfire and insect and disease outbreaks boil down to one action: increased logging.

BMBP agrees that the ecological health of our National Forests has degraded and must be addressed. However, this degradation was borne of the Forest Service’s fire suppression and logging practices over the last century. Further contributing to the declining health of our forests is climate change, the increasingly seen and felt effects of which are only being expedited by logging on National Forest System lands.

It is well-established that the main driver of severe wildfires is not increased fuel loading, but rather climate change and weather events.² In Oregon, the timber industry is the top source of greenhouse gas emissions, representing a major contributor to the worsening climate crisis.³ Logging not only decreases the current carbon stores of these forests—releasing stored carbon

² Keyser, A, A Westerling. 2017. Climate drives inter-annual variability in probability of high severity fire occurrence in the western United States. *Environ. Res. Lett.* 12 065003.

³ Law, B.E., Hudiberg, T.W., Berner, L.T., Kent, J.J., Buotte, P.C., Harmon, M.E., 2018. Land use strategies to mitigate climate change in carbon dense temperate forests. *Proc. Natl. Acad. Sci. U.S.A.* 115 (14) 3663-3668, <https://doi.org/10.1073/pnas.1720064115> (2018).

dioxide back into the atmosphere at faster pace than the natural carbon cycle of living forests—but also inhibits the potential future sequestration and storage of carbon dioxide from the atmosphere.⁴ Moreover, by logging trees before they grow into what is generally considered a “large” tree with thick bark, the Forest Service is perpetually stunting the development of the most fire resilient trees on the landscape.⁵ The proposed large-scale logging in the Mottet project will open up the canopy and reduce the basal area of targeted stands, thus allowing more solar radiation to dry out the forest floor and allowing wind-driven wildfires to increase in severity and speed.⁶ The proposed logging will only worsen the primary drivers of severe wildfire, thereby bringing about the very emergency the ESD is purportedly trying to address.

If the Mottet project area is in a state of emergency, it is not an emergency that the Forest Service can log its way out of. Therefore, the use of the ESD for the Mottet project is inappropriate and unwarranted.

II. The use of the Secretary’s emergency situation determination authority is inconsistent with the inclusive democratic principles the management of our public lands are supposed be based on.

The use of the ESD frustrates the statutory goals of the National Environmental Policy Act (“NEPA”) and the purpose of the Forest Service’s pre-decisional administrative review (“objections”) process, which will then unnecessarily limit the Forest Service from determining the best way to address the on-the-ground conditions of the Mottet project area.

a. A limited alternatives analysis will prevent the Forest Service from identifying the best course of action for the Mottet project area.

NEPA was enacted in order to “promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321. In pursuit of this purpose, NEPA requires that federal agencies take a “hard look” at the environmental consequences of their actions and foster meaningful public engagement in the decisionmaking process. *Robertson v. Methow Valley*

⁴ Mildrexler, D.J., Berner, L.T., Law, B.E., Birdsey, R.A. and Moomaw, W.R., 2020. Large trees dominate carbon storage in forests east of the cascade crest in the United States Pacific Northwest. *Frontiers in Forests and Global Change*, 3, p.594274.

⁵ Moris, J.V., Reilly, M.J., Yang, Z., Cohen, W.B., Motta, R. and Ascoli, D., 2022. Using a trait-based approach to assess fire resistance in forest landscapes of the Inland Northwest, USA. *Landscape Ecology*, 37(8), pp.2149-2164

⁶ Fitzgerald, S., Bennet, M. 2013. A Land Manager’s Guide for Creating Fire-Resistant Forests. Oregon State University, Northwest Fire Science Consortium, available at <http://www.nwfirescience.org/sites/default/files/publications/A%20Land%20Managers%20Guide%20for%20Creating%20Fire-resistant%20Forests%20.pdf>

Citizens Council, 490 U.S. 332, 349–50 (1989). NEPA does not require certain outcomes, but does “prescribe the necessary process.” At the heart of the NEPA process is the development and analysis of “a reasonable range of alternatives to the proposed agency action.” 42 U.S.C. § 4332(C)(iii). However, section 40803 of the IIA allows the Forest Service to develop and analyze only a single action alternative and the baseline no-action alternative under an ESD. 16 U.S.C. § 6592c(c)(1). That said, there is nothing in the IIA that expressly limits the range of alternatives analyzed to just the one proposed action and the no-action alternative. Even under the ESD, the Forest Service may—and should—analyze a full suite of reasonable alternatives to the proposed action.

Allowing the Forest Service to consider only a single proposed action alternative dramatically limits the consideration of management activities that may differ from the Forest Service’s preferred action, yet still meet the purpose and need of the Mottet project. From the incredibly limited information in the Scoping letter, it is unclear whether immediate or expedited action is necessary in the Mottet project to begin with. Under these circumstances then, the use of the ESD for the Mottet project simply doesn’t make sense. There is no reason to preemptively restrict the range of potential solutions to such a complex problem. Rather, the Forest Service should forgo the use of the ESD for the Mottet project and instead engage with interested and knowledgeable stakeholders and analyze a full range of alternatives under NEPA before making a final decision.

b. Forgoing the objection process frustrates public engagement in the management of National Forests and may prevent the Forest Service from determining the best course of action.

The Forest Service’s objection process is designed to allow a final opportunity for interested individuals or entities to seek a final independent Forest Service review, negotiate, and resolve disputes about a proposed project before a final decision is made. 36 C.F.R. part 218. The overall purpose of the pre-decisional objection process is to facilitate the Forest Service’s “collaborative approach to forest management ... resulting in better, more informed decisions.” 78 Fed. Reg. 18,483 (March 27, 2013). The objection process is not likely to significantly delay any implementation, as the public is required to submit any objections within 45 days after the publication of a legal notice regarding the availability of a draft EIS. 36 C.F.R. § 218.25(a)(1)(ii). The Forest Service may then begin the objection negotiation and resolution process, where

discussion with interested stakeholders may produce more nuanced and appropriate management decisions—and potentially less litigation—in the Mottet project.

Without the objection process—especially in conjunction with the limited alternatives analysis—the Forest Service is left trying to solve a problem with one arm tied behind its back. The Forest Service has a valuable problem-solving resource in the individuals and organizations that live, recreate, and work in and around the Umatilla National Forest, and BMBP implores it to take advantage of that resource. The Forest Service should forgo the use of the ESD for the Mottet project and instead continue its collaborative approach to forest management with the objection process.

III. There is no “emergency,” as the term is normally used, that would justify the use of the ESD for the Mottet project.

The Secretary’s Memo declares that 112,646,000 acres (59%) of National Forest System lands are in a state of emergency, leading to the current ESD under section 40807 of the IIJA. However, the standalone term “emergency” is defined nowhere in the IIJA nor the Secretary’s Memo, meaning there is no special meaning intended for the term beyond its common usage. An “emergency,” as the term is usually used, is defined as “an unforeseen combination of circumstances or the resulting state that calls for immediate action;”⁷ “a state of things unexpectedly arising, and urgently demanding immediate action;”⁸ or “[a] situation that demands unusual or immediate action and that may allow people to circumvent usual procedures....”⁹ The conditions in the Mottet project do not align with any of the ordinary usages of “emergency.”

The Secretary’s Memo highlights that 66,940,000 acres of National Forest System lands are “under a very high or high fire risk,” while “roughly 78,800,000 acres ... are at risk of experiencing[] insect and disease infestations.” Secretary’s Memo at 2. “These threats,” the Secretary continues “combined with overgrown forests, a growing number of homes in the wildland-urban interface, and more than a century of rigorous fire suppression” contributed to the present declaration of an emergency. *Id.* None of these conditions are “unforeseen,”

⁷ Webster’s Third New International Dictionary of the English Language 1961 and Merriam-Webster’s Collegiate Dictionary (11th ed. 2004)

⁸ The Oxford English Dictionary (2d ed. 1991)

⁹ Black’s Law Dictionary 260, 562 (8th ed. 2004).

unexpected,” or demand “unusual” action. In fact, as the Secretary’s Memo makes clear, these conditions are more than a century in the making under the supervision of the Forest Service.

The mere threat of a wildfire does not amount to an emergency that would allow the Forest Service to circumvent the otherwise mandatory full alternatives analysis under NEPA and objection process under the forest Service’s planning regulations. In *FSEEE v. U.S. Forest Service*, 2017 WL 2962771, at *5 (E.D. Wash. July 11, 2017), the district court addressed a challenge to a Service emergency declaration under the Forest Service’s NEPA regulations at 36 C.F.R § 220.4(b) to address a wildfire that was at that moment burning toward a town. The court upheld the emergency declaration, distinguishing between a specific wildfire, which is usually not foreseeable and can create an emergency, and wildfires generally, which are “common and their general existence is foreseeable.” *Id.* at *6. The Ninth Circuit affirmed, noting that individual fires and their course, intensity and duration are unforeseeable and present emergency situations “when viewed at the time the fire is raging.” *FSEEE v. U.S. Forest Service*, 726 Fed. Appx. 605, 606 (9th Cir. 2018). The mere increased threat of wildfire and insect and disease outbreak from over a century of Forest Service management is not an unforeseeable emergency, but rather a foreseeable and very serious concern that requires a full analysis of reasonable alternatives in an EIS and robust public engagement, including a 45-day comment period on the EIS and a pre-decisional objection process. This is a problem that requires the best available decisionmaking processes we have in place, not simply increased logging. Because there is no unforeseeable “emergency” present in the Mottet project area, the proposed use of the ESD is inappropriate and unnecessary.

Conclusion

For the foregoing reasons, BMBP respectfully requests that the Forest Service **not** use the ESD authority for the Mottet project. Instead, the Forest Service should use all available resources to address the declining health of our national forests, including robust public participation, a full alternatives analysis contained in an EIS, and the use of the objection process.

Thank you for your consideration of these comments,



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