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IN THE UNITED STATES DISTRICT COURT

FOR DISTRICT OF OREGON

PORTLAND DIVISION

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; and **KENT CONNAUGHTON**, Regional Forester, Pacific Northwest Region of the Forest Service,

Defendants.

Case Number: 3:10-cv-1397-SI

PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION TO PARTIALLY VACATE DEFENDANTS' ILLEGAL RECORD OF DECISION OR IN THE ALTERNATIVE FOR A PERMANENT INJUNCTION AGAINST CERTAIN HERBICIDE SPRAYING

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INTRODUCTION

Defendants the United States Forest Service and Regional Forester Connaughton (collectively the "Forest Service") continue to insist in their responsive brief on remedy that plaintiff League of Wilderness Defenders/Blue Mountain Biodiversity Project's ("LOWD") requested remedy of partial vacatur on the illegal 2010 ROD (AR 22620) is "extraordinary" and "drastic." *E.g.*, Def. Rem. Br. (Doc. 81-1) at 4, 29.[1] To the contrary, LOWD cited extensive case law in its opening brief holding that vacatur under the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2)(A), is in fact the "presumptive" and "ordinary" statutory remedy after a federal court holds that an agency's decision is arbitrary, capricious or contrary to law. LOWD Remedy Br. (Doc. 68) at 5. The Forest Service ignores this on point case law and instead cites a U.S. Supreme Court case addressing vacatur under a different statute and circumstances quite different from those in this case. Doc. 81-1 at 7.

Rather than LOWD's requested partial vacatur remedy for the Forest Service's illegal Record of Decision ("ROD"), it is the Forest Service's treatment of the case law cited in its brief that is truly extraordinary. The Forest Service's case citations range from highly selective to bordering on disingenuous. If the Forest Service's argument had merit, the Forest Service should have been able to cite at least one National Environmental Policy Act , 42 U.S.C. § 4332 ("NEPA"), case that actually remands an illegal agency decision without also ordering at least partial vacatur or issuing a substantial injunction. The Court will find no such case cited in the Forest Service's brief. That is because the relevant case law and the applicable statute directly support LOWD's requested,

[1] In an earlier brief, the Forest Service also called vacatur the "nuclear option." Doc. 57 at 1.

"normal" remedy of remand with partial vacatur. Under that same law, it is the Forest Service's request for a remand without vacatur as a "remedy" for its NEPA violation that would be "extraordinary," if not unprecedented.

Of course the Forest Service's complete lack of supporting case law is not the only thing in their brief that is extraordinary. Substantial, controlling 9th Circuit case law, cited in this Court's summary judgment opinion and in LOWD's summary judgment briefing, Doc. 60 at 49-55; Doc. 21 at 27, 29, underscores the importance under NEPA of properly analyzing and publicly disclosing a proposed agency action's cumulative impacts. The Forest Service, however, repeatedly insists that this Court's summary judgment ruling, finding a substantial violation of this case law, only identified a "limited procedural error." Doc. 81-1 at 10, 15, 19, 22, 24. Significantly, the same 9th Circuit case law that carefully scrutinizes agencies' analysis of cumulative impacts, does not hesitate to enjoin agency actions that commit such "limited procedural errors." More recent case law, decided after the U.S. Supreme Court's decision in *Monsanto v. Geerston Seed Farms,* 130 S. Ct. 2743 (2010), similarly orders vacatur or partial vacatur as the appropriate remedy for similar "limited procedural" violations of NEPA.

In fact, remedial orders enjoining or vacating agency decisions that are not supported by a valid NEPA analysis are quite necessary in order to uphold NEPA's procedural requirements. Those mandatory NEPA procedures require that agencies conduct a complete and public analysis of their proposed actions' impacts, including their cumulative impacts, BEFORE those agencies implement their decisions. The Forest Service's insistence that this Court allow it to continue to implement its illegal decision

while it complies with NEPA and corrects its "limited procedural error" would turn NEPA's action-forcing procedures into an after-the-fact, meaningless exercise.

The Forest Service supports its extraordinary request for a remand without vacatur by arguing that a partial vacatur of its decision would have "extremely disruptive consequences." Doc. 81-1 at 15. The Forest Service offers declarations from several of its employees and employees of other cooperating governmental agencies to support this argument. Essentially those declarations insist that it is essential for the Forest Service to be able to use herbicides under its 2010 ROD and that requiring the Forest Service to operate under the herbicide use rules (with some significant modifications) that it followed for many years before 2010 would have dire consequences.

Although a reviewing court must defer to agency expertise when examining an agency's rationale and record support for its decision, such deference is not appropriate at the remedy stage after a Court has found a NEPA violation. As the 9th Circuit recently explained when addressing a district court's erroneous refusal to enjoin an agency decision that violated NEPA, "deference to agency experts is particularly inappropriate when their conclusions rest on a foundation tainted by procedural error." *Sierra Forest Legacy v. Sherman,* 646 F.3d 1161, 1186 (9th Cir. 2011) (per curiam opinion). Here all of the Forest Service's declarants offer conclusions that clearly presume the Forest Service's illegal 2010 decision was correct and that any supplemental cumulative effects analysis will be a pro forma exercise. Those conclusions thus "rest on a foundation tainted by procedural error."

The conclusions and assertions of dire consequences in the Forest Service's declarations also fail to explain why using herbicides, shortly after this Court has

determined that the NEPA analysis underlying that herbicide use was legally flawed, is, only now, so imperative. In 2005 the Regional Forester authorized the Wallowa-Whitman National Forest ("WWNF"), and other national forests in the region, to consider amending their management plans to allow for a greater use of herbicides. Instead of reacting to that regional decision with any sense of urgency, the WWNF took about five years to develop and analyze a plan for increasing herbicide use. Other nearby national forests have taken even longer to do so, and one national forest immediately adjacent to the WWNF has only just started the process of amending its plan to allow for such increased herbicide use. Nowhere in its brief or in its supporting declarations does the Forest Service even attempt to explain why it would be "extremely disruptive" to require the Forest Service to restrict its use of herbicides while it corrects its legally flawed NEPA analysis when apparently it was not "extremely disruptive" for the Forest Service to take many years to analyze (albeit improperly) and authorize such herbicide use.

In contrast to the Forest Service's extraordinary and legally unsupportable demand for a remand without vacatur, LOWD's motion, Doc. 67, asks the Court for an appropriate partial vacatur of the Forest Service's illegal ROD while the Forest Service corrects its incomplete NEPA analysis and reconsiders its decision in light of that new public analysis. The post-*Monsanto* case law cited in LOWD's initial supporting memorandum directly supports such relief as the presumptive and appropriate remedy under the APA for a NEPA violation and rejects agency arguments that vacatur of the agency's illegal order would be unduly disruptive or should be stayed. In fact by requesting only a partial vacatur of the illegal ROD LOWD has recognized that addressing infestations of invasive plants is important. LOWD has carefully tailored its

remedial request to give the Forest Service the flexibility to use newer herbicides in the areas where herbicide use was previously evaluated and the ability to respond to the more recent invasive infestations using non-herbicide methods. Doc. 67, Doc. 68 at 15-16. The Forest Service's suggestion of a remand without any sort of vacatur would deny LOWD a meaningful remedy for the NEPA violation it has proven and would nullify the Court's opinion upholding NEPA's requirement that the Forest Service properly analyze and consider the cumulative impacts of any proposal to increase herbicide use before the Forest Service implements such increased use.

I. Vacatur is a statutory remedy to which courts have fashioned a limited equitable defense.

Ordinarily LOWD, in its reply brief would focus exclusively on responding to the Forest Service's arguments in its opposing brief. The Forest Service's brief however simply ignores substantial, highly relevant case law in LOWD's opening brief. For example, the Forest Service asserts, without citing case law, that "vacatur is neither the presumptive remedy, nor the appropriate remedy in this case." Doc. 81-1 at 3. But LOWD's opening brief clearly cited two recent NEPA cases specifically holding that vacatur is in fact the "presumptive" or "presumptively appropriate" remedy under the APA for a NEPA violation. Doc. 68 at 5. The Forest Service's brief simply ignores these cases. Rather than attempting to distinguish those and other on point cases, the Forest Service creates a straw man argument, insisting that LOWD is arguing that this Court must mechanically apply vacatur and has no equitable discretion regarding vacatur. Under these circumstances LOWD feels compelled to reiterate at least some of the law LOWD actually cited and the arguments LOWD actually made in its opening brief.

As Plaintiffs explained in their opening brief, vacatur is the presumptively appropriate remedy for a violation of the APA. Specifically, the plain language of Section 706(2)(A) of the APA requires reviewing courts to "set aside" arbitrary and capricious agency decisions. Plaintiffs' opening brief then identified numerous opinions from both the United States Supreme Court and the Ninth Circuit, each consistent with the APA's statutory admonition, explaining that "*[i]n all cases* agency action *must be set aside* if the action was arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." *E.g.*, *Fed. Commc'ns Comm'n v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 300 (2003) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413-14 (1971)) (emphasis added); *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 567-68 (9th Cir. 2000) ("[A]gency action taken without observance of the procedure required by law will be set aside."); see also Doc. 68, at 3-5, citing multiple additional cases.[2]

II. In its effort to cast vacatur as an "extraordinary" remedy, the Forest Service has relied on inapplicable standards, while distorting relevant precedent.

The Forest Service responds to this case law generally by dismissing it as "general statements contained in *dicta."* Doc. 81-1 at 5. Frankly LOWD has never seen the Supreme Court's seminal discussion of the APA in *Overton Park* dismissed so summarily. The Forest Service does directly address one of these decisions, *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973)), in a footnote, Doc. 81-1 at 6 n.3, stating correctly that this record

[2] The Ninth Circuit continues to routinely order vacatur for APA violations. See *Center for Biological Diversity v. BLM,* 2012 WL 5193100 (9th Cir. Oct.11.2012) (vacating Biological Opinion and ROD).

review case was not decided under the APA. Of course all of the other cases cited by LOWD on this point, including obviously *Overton Park*, are APA cases.

Given the Forest Service's refusal to address the most relevant case law, and its chiding of LOWD for citing one non-APA case, the agency's reliance on the Supreme Court's decisions in *Webster v. Doe*, 486 U.S. 592 (1988), *U.S. Bancorp Mortgage Company v. Bonner Mall Partnership*, 513 U.S. 18 (1994), and *Alvarez v. Smith,* 558 U.S. 87 (2009), is especially puzzling.

The Forest Service correctly notes that in *Webster*, the Supreme Court explained, in the context of refusing to dismiss a former CIA employee's constitutional challenge to his termination under the APA, that "traditional equitable principles" would apply if the trial court were to find for the plaintiff and then consider granting "declaratory or injunctive relief." 486 U.S. at 604-05. *Webster*, however, does not mention vacatur or discuss how "traditional equitable principles" might apply to that remedy.

The Forest Service insists, citing *U.S. Bancorp* and *Alvarez*, that "the Supreme Court has stated on several occasions that vacatur is also 'an extraordinary remedy.'" Doc. 81-1 at 7. Both of those cases address the standard for vacating a lower court's opinion under 28 U.S.C. § 2106 after a case has become moot and neither of the underlying cases involved the APA. In sharp contrast to the mandatory language of Section 706(2)(A), 28 U.S.C. § 2106 explicitly authorizes appellate courts to exercise discretion in modifying lower courts' judgments. In *U.S. Bancorp*, the Supreme Court held that vacating a court opinion after the case has become moot because of a voluntary settlement is not proper and in that context refers to such vacatur as an "extraordinary remedy." 513 U.S. at 26.

LOWD fails to see how this decision has any relevance to the issue of vacatur of an illegal agency action under the APA.

But if *U.S. Bancorp* is simply irrelevant, the Forest Service's citation to *Alvarez* in an apparent attempt to create additional authority for vacatur being an "extraordinary remedy" is almost tortured. The majority opinion in *Alvarez* actually holds that when a case has become moot because of "happenstance" the Supreme Court would "normally [] vacate the lower court judgment…." 130 S. Ct. at 581. *Alvarez* then specifically limits the holding in *U.S. Bancorp* to situations where the mootness is caused by the parties' voluntary acts. The phrase "the extraordinary remedy of vacatur" only appears in *Alvarez* in Justice Stevens' dissenting opinion when he is citing and quoting *U.S. Bancorp*. 130 S. Ct. at 584. Of course, the Forest Service fails to note that when citing generally to *Alvarez* to support its argument that vacatur in this case is "an extraordinary remedy."

As for the Forest Service's straw man argument that LOWD is improperly insisting on the mechanical application of vacatur, the introduction to LOWD's opening brief and its subsequent more specific discussion, explicitly acknowledged that lower courts, including the 9th Circuit, have held that the remedy of vacatur is subject to a limited equitable defense. Doc. 68 at 1. Most recently, in *California Communities Against Toxics v. U.S. Environmental Protection Agency*, the Ninth Circuit acknowledged that a district court need not set aside an illegal agency decision in every instance, and adopted a two-factor test that allows an agency to avoid vacatur of its illegal decisions in "limited circumstances." 688 F.3d 989, 992, 994 (9th Cir. 2012). This test, originally set forth by the D.C. Circuit in *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Commission*, 988 F.2d

146, 150 (D.C. Cir. 1993), essentially offers agencies a limited affirmative defense to avoid otherwise mandatory vacatur under the APA.

In a vain attempt to avoid the limited nature of the defense adopted by *California Communities,* the Forest Service offers misleading citations to 9th Circuit cases such as *Humane Soc'y v. Locke*, 626 F.3d 1040, 1053 n. 7 (9th Cir. 2010). Doc. 81-1 at 8. The Forest Service's parenthetical describing this case neglects to include the phrase "in rare circumstances," which is the phrase actually used by the 9th Circuit to describe when a remand without vacatur is available under the APA. Indeed, in *Humane Society*, the 9th Circuit directed the district court to vacate the agency decision that violated the APA. The opinion explains that vacatur was appropriate because the government had not specifically requested a remand without vacatur and it was not readily apparent that any special circumstances existed to warrant a remand without vacatur. *Id.* This discussion in the *Humane Society* opinion thus directly supports LOWD's position, Doc. 68 at 12-13, that the agency seeking to avoid the vacatur of its illegal decision must establish any special circumstances that could justify a remand without vacatur.

The Forest Service's citation to *Pit River Tribe v. USFS*, Doc. 81-1 at 8-9, similarly avoids the main thrust of that opinion's discussion of the remedy for a NEPA violation by an agency when it extended certain gas leases. The Forest Service quotes the Ninth Circuit's general statement that "relief for a NEPA violation is subject to equity principles," but the Forest Service ignores the remainder of the court's remedy discussion, which identified multiple cases in which flawed agency decisions were enjoined, and the 9th Circuit ultimately holds that the district court was wrong to not both set aside the

illegal lease extensions and enjoin any ground-disturbing activities. 615 F.3d 1069, 1080-81 (9th Cir. 2010).

The Forest Service seems to believe that simply labeling vacatur as "equitable" leads to the conclusion that it is an "extraordinary" or "drastic" remedy. Under the APA however, vacatur is in fact a statutory remedy for which the courts, as permitted by 5 U.S.C. Sec 702, have developed a limited equitable defense. The Forest Service also complains that treating vacatur under the APA as the presumptive remedy improperly puts "a thumb on the scales" when granting such relief. Doc. 81-1 at 6. The Supreme Court has certainly barred the application of any presumptive thumb when courts consider requests for injunctions. *Monsanto*, 130 S. Ct. at 2757. However, in the case of vacatur under the APA it is Congress, by using the mandatory language in Section 706(2)(A), that put its thumb on the remedial scale. LOWD and the cases it cites are simply following that statutory remedial mandate from Congress.

III. The Supreme Court's decision in *Monsanto v. Geertson Seed Farms* strengthened the presumption in favor of vacating illegal agency decisions.

Before turning to the specific arguments offered by the Forest Service to avoid vacatur, LOWD must also address the Forest Service's treatment of *Monsanto*, and the lower court opinions following that Supreme Court decision. In *Monsanto v. Geertson Seed Farms*, the United States Supreme Court explained that a permanent injunction is not warranted "if a less drastic remedy (such as partial or complete vacatur of [the agency's] decision) [would be] sufficient to redress [the] injury." 130 S. Ct. at 2761. The Forest Service argues, Doc. 81-1 at 6-7, that this holding must be limited to the specific facts of that case and insists that "*Monsanto* does not stand for the proposition that vacatur is the presumptively appropriate remedy for NEPA violations." The Forest

Service, however, notably failed to address recent decisions – cited in Plaintiffs' opening brief – in which lower federal courts applying *Monsanto* have come to exactly that conclusion and have ordered at least partial vacatur of agency decisions issued in violation of NEPA. *Center for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 952 (N.D. Calif. 2010) (granting partial vacatur to remedy a NEPA violation, after considering the effect of *Allied-Signal* and *Monsanto*); *In re Polar Bear Endangered Species Act Listing 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 239 (D.D.C. 2011) (concluding, in light of relevant precedent, that vacatur is the "appropriate remedy" for a violation of NEPA and the APA, and thus vacating an illegal rule); *Reed v. Salazar*, 744 F. Supp. 2d 98, 119 (D.D.C. 2010) (vacating a flawed agency decision and acknowledging that vacatur constitutes the "default remedy" for a violation of NEPA and the APA after *Allied-Signal* and *Monsanto*); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (granting partial vacatur and explaining that "both the Supreme Court and the D.C. Circuit Court have held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA"). And LOWD has recently located yet another NEPA case finding that vacatur is the "ordinary" APA remedy and granting partial vacatur. *Defenders of Wildlife v. Salazar,* 2012 WL 2812309, *32 (M.D. Fl. 2012). Collectively, these decisions represent the current state of the law regarding the proper remedy for violations of NEPA and the APA; the Forest Service cannot escape their impact simply by refusing to acknowledge their existence.[3]

[3] Rather than addressing these cases, as noted above, the Forest Service argues incorrectly, Doc. 81-1 at 7, that the U.S. Supreme Court's characterization, in *U.S. Bancorp*, of vacatur under a completely different statute is controlling.

Two of these opinions, each applying *Monsanto* and *Allied-Signal* in support of an order to vacate an illegal agency decision, merit additional consideration. In *Center for Food Safety*, the district court for the Northern District of California explained that an agency's failure to consider its decision's environmental impacts was "not minor or insignificant," given NEPA's structure and purpose. 734 F. Supp. 2d at 953. Moreover, the court expressed concern arising from "[the agency's] apparent position that it is merely a matter of time before they reinstate the same … decision, or a modified version of this decision," reflecting the agency's "apparent perception that … conducting the requisite comprehensive review is a mere formality." *Id.* Similarly, the *Van Antwerp* court applied the "presumptively appropriate remedy" of vacatur, in part, because development authorized under a permit issued in violation of NEPA was otherwise likely to proceed. 719 F. Supp. 2d at 78.

IV. The Forest Service cannot ignore the actual requirements of NEPA when arguing that its NEPA violation was a "limited procedural error" requiring only a remand without vacatur.

Finally, before addressing some of the specific flaws in the Forest Service's arguments against partial vacatur, LOWD must reiterate some of the NEPA case law set forth in its opening brief that the Forest Service's response once again simply ignores. The Forest Service's arguments go against the most basic statutory requirements of NEPA and substantial 9th Circuit case law requiring that the remedy for any NEPA violation must uphold those essential statutory requirements. Generally NEPA requires that agencies comply with its procedures before implementing their decisions and

specifically NEPA requires that an agency properly and publicly consider and analyze the cumulative impacts of its decision before it implements that decision.

NEPA is a procedural statute whose primary purpose is to require federal agencies to analyze and publicly disclose the environmental impacts of their proposals before making or implementing any final decision. See 42 U.S.C. § 4332(c); 40 C.F. R. §§ 1500.1, 1501.2; *Robertson v. Methow Valley Citizens Council,* 490 U.S 332, 348-49 (1989). NEPA is only effective if environmental considerations are involved in the initial decision making process, prior to the federal agency taking action. *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) ("allowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA"). Thus in order to uphold NEPA's basic statutory purpose, it was common practice, before *Monsanto*, to enjoin, at least in part, Forest Service projects that violated NEPA, *see e.g. Lands Council v. Powell*, 395 F.3d 1019, 1037 (9th Cir. 2005); *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 975 (9th Cir. 2002); and that practice was equally applicable in the context of agency decisions authorizing herbicide or pesticide spraying. See Doc. 68 at 8, citing multiple cases. As explained above, after *Monsanto*, federal courts have applied the presumptive remedy of vacatur or partial vacatur to uphold NEPA's basic purpose and to insure that agency decisions issued in violation of NEPA are not implemented until after the agency has prepared a public, corrected NEPA analysis.

In terms of the more specific NEPA requirement to analyze cumulative impacts, this Court's opinion cited the specific regulations and cases demonstrating that an agency's obligation to analyze a proposal's cumulative impacts is a significant part of NEPA's

overall procedural framework. Doc. 60 at 50, *citing* numerous Ninth Circuit opinions; see also 40 C.F.R. §§ 1508.7, 1508.25(c)(3), 1508.27(b)(7). LOWD's opening brief cited numerous 9th Circuit cases granting substantial relief in order to prevent an agency from implementing its decision until after it had properly analyzed cumulative impacts. Doc. 68 at 14-15; *see*, *e.g.*, *High Sierra Hikers Assoc. v. Blackwell,* 390 F.3d 630, 644-45 (9th Cir. 2004)(affirming injunction against certain activities in certain areas to remedy cumulative impacts violation).

The Forest Service ignores this law and makes no attempt to reconcile it with the repeated assertion in its brief that its failure to properly analyze the cumulative impacts of the 2010 ROD was only a "limited procedural error." Doc. 81-1 at 10, 15, 19, 22, 24. As noted above, although LOWD's opening brief challenged the Forest Service to cite a case ordering remand without vacatur for a NEPA violation, see Doc. 68 at 12, the Forest Service's argument again fails to cite a single NEPA case ordering a remand without vacatur as an appropriate remedy for a NEPA violation generally or a cumulative impacts violation specifically.

The Forest Service does argue that its compliance with other laws can somehow substitute for compliance with NEPA. Doc. 81-1 at 13-14. Although the Forest Service should be aware of this case law, it does not cite any of the numerous cases, including 9th Circuit cases, rejecting very similar arguments. *Klamath-Siskiyou Wildlands Center v. BLM,* 387 F.3d 989, 998 (9th Cir.2004) (rejecting argument that facility's clean air permit could substitute for NEPA evaluation of air impacts); *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1248 (9th Cir. 1984) (EPA herbicide registration process under FIFRA does not satisfy NEPA).

V. The Forest Service cannot establish that its NEPA violation is not serious by rearguing the parties' summary judgment motion or submitting agency declarations that attempt to offer a corrected or supplemental cumulative effects analysis.

The first prong of the *Allied Signal* test for determining whether a Court should decline to order vacatur is "how serious the agency's errors are." *California Communities*, 688 F.3d at 992, citing *Allied Signal*, 988 F.2d at 150-51. The Forest Service's brief attempts to establish that its failure to properly analyze cumulative effects is not serious and is in fact a "minor procedural violation." It does this both by offering arguments in its brief and multiple declarations from Forest Service declarants and declarants from the employees of other agencies who work with the Forest Service on herbicide or invasive plant issues.

In certain respects those arguments and declarant statements improperly seek to reargue the parties' summary judgment motions on LOWD's cumulative impacts claims. *See*, *e.g.*, Doc. 81-1 at 12, insisting that "the project has already considered many of these cumulative impacts" and offering list of record cites; *see also* Bautista Decl. ¶ 3, 4 (claiming that existing analysis has already shown the project has a very low likelihood of causing new or serious cumulative impacts). The Forest Service even offers arguments that this Court has already specifically rejected. For example, this Court explained that "the Forest Service cannot start with the assertion that directs impacts will be minimal and conclude that a thorough cumulative impacts analysis is therefore not needed." Doc. 60 at 52. Nevertheless, the Forest Service's brief on remedy argues that "when the starting point for analysis already presents a low risk of serious adverse impacts, and cumulative impacts are not anticipated to present a further risk of serious adverse impacts." Doc. 81-1 at 11, citing Doc. 75, Bautista Decl. ¶ 3-5. Similarly the Forest

Service insists there will in fact be no "serious' cumulative effects, citing to the record, post hoc explanations in declarations and assertions in declarations regarding post-decisional monitoring. Doc. 81-1, at 11-13, citing multiple declarations.[4] But this Court has already held, quoting *Klamath-Siskyou Wildlands Ctr.,* 387 F.3d at 996*,* that "'the potential for … serious cumulative impacts is apparent here, such that the subject requires more discussion' than the Project EIS provides". Doc. 60 at 55.

Offering post hoc declarations to support a merits argument that this Court has already rejected or to "cure" a NEPA violation that occurred when the ROD was issued is improper under NEPA, the APA and the law of the case doctrine. *See*, *e.g.*, *Blue Mtns. Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (compliance with NEPA must be found in an actual NEPA document); *Bunker Hill v. EPA,* 572 F.2d 1286, 1292 (9th Cir. 1977) (court cannot uphold agency decision on basis of post-hoc rationalizations); *Arizona v. California*, 460 U.S. 605, 618 (1983) (explaining that the law of the case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case"). More generally, the 9th Circuit recently clarified that a court should usually not defer to the expert declarations offered by an agency at the remedial stage of a case:

> [F]ederal experts are not always entitled to deference outside of administrative action…. Deference to agency experts is particularly inappropriate when their conclusions rest on a foundation tainted by procedural error.
>
> If the federal government's experts were always entitled to deference concerning the equities of an injunction, substantive relief against federal government policies would be nearly unattainable, as government experts will

[4] At least two declarants claim they have monitored the impacts of herbicide applications. Doc. 77, Desser Decl. ¶ 1; Doc. 76, Yates Decl. ¶ 18, but there are no actual monitoring reports cited or attached. LOWD has repeatedly asked for such reports (*see* AR 22753), which are required by both the new and old planning regulations. 36 C.F.R. § 219.12(a)(2012); 36 C.F.R. § 219.12(k)(1999).

> likely attest that the public interest favors the federal government's preferred policy regardless of procedural failures.

Sierra Forest Legacy, 646 F.3d at 1185-86. It is quite clear from reading most of the Forest Service's declarations that its declarants' opinions are based at least in part on the Forest Service's invalid cumulative impacts analysis and on their belief that any supplemental analysis is unnecessary and should not result in any serious reexamination of the agency's illegal decision.[5] Thus those declarations "rest on a foundation tainted by procedural error" and should not be used by this Court as a basis for denying LOWD the partial vacatur remedy that it is otherwise entitled to under the APA. Indeed, the district court in *Center for Food Safety,* 734 F. Supp. 2d at 953, expressed serious concerns when faced with similar arguments from a federal agency seeking to avoid partial vacatur of its decision that violated NEPA, and ultimately decided to partially vacate the agency decision.

The supplemental NEPA cumulative effects analysis required by this Court's opinion must be set forth in a public, NEPA-compliant document. *Blackwood,* 161 F.3d at 1214. This Court should reject the Forest Service's arguments and declarations

[5] Specifically, declarants assert that cumulative impacts will be minimal, clearly prejudging the agency's reconsideration of its flawed analysis making it likely to amount to no more than a *pro forma* exercise. *See* Bautista Decl. ¶ 9 (arguing that "[t]he potential for the acknowledged uncertainty to result in any unanticipated cumulative impacts is low based upon the prior analysis for this Project, and our observations associated with similar projects"); *see also* Bohnsock Decl. ¶ 7 (concluding that "[n]on-herbicide treatments alone would be less effective than integrated methods"); *see also* Desser Decl. ¶ 5 (reasoning that "the risk of non-herbicide treatments amounting to anything significant is relatively low and these impacts are not controversial); *see also* Porter Decl. ¶ 6 (asserting that non-federal landowners use the herbicides at issue "with no adverse effects"); *see also* Sharratt Decl. ¶ 2 (relying on personal experience to conclude that "herbicide use has few adverse impacts"); *see also* Yates Decl. ¶ 18 (noting that no members of the ranger district invasive weed staff have "reported unusual or unanticipated, adverse effects from the application of herbicides.")

minimizing the need for such an analysis and attempting to comply with NEPA in post-hoc declarations and order the partial vacatur requested by LOWD so that on remand the Forest Service will be required to issue a new and reconsidered decision in light of its supplemental NEPA analysis.

VI. Requiring the Forest Service to return to a modified version of its pre-2010 ROD Invasive Plant Treatment Regime while it corrects its NEPA error and reconsiders its decision would not be unduly disruptive.

In terms of the "disruption" required to avoid vacatur under *California Communities* and *Allied Signal,* the exceptional nature of ordering a remand without vacatur should dictate that the Court find much more than the ordinary disruption that occurs whenever an agency decision is found to be legal and vacated under the APA. As the 9th Circuit cautioned in *Sierra Forest Legacy,* agency witnesses who have a stake in the NEPA process or the decision at issue will always feel that not allowing them to do what they had already decided to do (based on a procedurally flawed analysis) is disruptive or against the public interest. 646 F.3d at 1186.

It is also important to remember that the partial vacatur LOWD requests is not intended to be a permanent solution. It is only a placeholder, returning things to the status quo before the Forest Service issued its illegal decision, with certain modifications to allow the Forest Service limited use of potentially less harmful herbicides and the ability to use non-herbicide methods on thousands of additional, infested acres. See Motion, Doc.67; Doc. 68 at 15-16. This remedy would only remain in place until the Forest Service prepared the public NEPA analysis required by the Court's opinion and then reconsidered its decision in light of that new analysis. The Forest Service itself will control how long that process takes.

The Forest Service nevertheless insists that even such a partial vacatur for a relatively short period of time, and a time period entirely under its control, would "have extremely 'disruptive consequences.'" Doc. 81-1 at 15, quoting *California Communities,* and then citing to multiple supporting declarations. Significantly, however, there is one overriding inconsistency in both the Forest Service's overall "disruptive consequences" argument and the numerous assertions supporting that argument in the Forest Service's supporting declarations. Implicit in the Forest Service's argument is the supposed fact that dire consequences would occur even if the Forest Service were prevented from continuing to implement all aspects of the 2010 ROD for only one or two years. *See* Bohnsock Decl. ¶ 7 (expressing concern that "a lapse in even one year of effective treatment" could be devastating). In other words, the Forest Service's argument assumes that time is of the essence in terms of treating invasive species with herbicides.

This urgency however is of fairly recent vintage, and in fact only seems to have arisen after this Court found that the cumulative impacts analysis underlying the 2010 ROD was illegal. The history of the 2010 ROD and the related history of similar Forest Service decision-making for nearby forests, which LOWD will set out below, completely belies such urgency and instead portrays an agency proceeding on a very slow and methodical path towards full implementation of new herbicide use and invasive plant treatment options. Thus there is a very real inconsistency between the Forest Service's asserted urgency to now continue implementing the 2010 ROD and the path taken by the Forest Service to put that ROD, and similar RODs on nearby national forests, into place. Nowhere does the Forest Service or its declarants even attempt to explain this inconsistency.

The regional forester issued his programmatic decision giving eastern Oregon national forests new herbicide options for controlling invasive species in 2005. AR 17249-17313. The WWNF took around five years, until 2010, to finalize a site-specific decision, the 2010 ROD, implementing that regional decision. AR 22620-22671. There is no legal reason under NEPA that such a decision could not have been issued much more quickly. Apparently there was no great urgency to increase herbicide use to treat invasives on the WWNF in 2007, 2008 or 2009. Similarly, the Umatilla National Forest, located just to the northwest of the WWNF, see Exhibit 1, issued its site-specific invasive plants treatment decision a few months after the WWNF in 2010. U.S. Forest Service, *Record of Decision: Umatilla National Forest Invasive Plants Treatment Project*, July 2010, a123.g.akamai.net/7/123/11558/abc123/forestservic.download.akamai.com/11558/www/nepa/23422_FSPLT2_024600.pdf. On the Deschutes and Ochoco National Forests, located to the west of the WWNF, see Exhibit 1, the Forest Service just issued a new invasive plants treatment decision in May of this year. U.S. Forest Service, *Invasive Plant Treatments ROD: Deschutes and Ochoco National Forests, Crooked River National Grassland*, May 2012, www.fs.usda.gov/detail/centraloregon/landmanagement/planning/?cid=stelprdb5302243. Finally, and perhaps most inexplicably, the Malheur National Forest, which shares a common border with the WWNF, only just started the NEPA process for authorizing a new invasive species treatment regime, Malheur National Forest; Oregon; Malheur National Forest Site-Specific Invasive Plants Treatment Project, Notice of Intent to Prepare EIS, 76 Fed. Reg. 18713 (April 5, 2011), and is likely several years away from actually finalizing such a decision. Apparently, voluntarily treating invasives on the Malheur using mostly non-herbicide methods is currently not

"disruptive." But an order from this Court requiring the Forest Service to return to using similar methods on the adjacent WWNF while it corrects its NEPA analysis is "extremely disruptive." That is not a rational argument that this Court should credit it any way. [6]

None of this is meant to criticize the USFS for taking so long to analyze and consider the impacts of its decision to adopt new policies for combating invasive species. LOWD believes such caution is fully warranted by the uncertainty surrounding the impacts of herbicides and such uncertainty likely explains the Forest Service's slow progress in analyzing and issuing such decisions. But acknowledging that uncertainty would directly undercut the Forest Service's repeated assertions that the risks from its use of herbicides is almost non-existent.[7]

In any case, the Forest Service's repeated assertions that its herbicide use is low risk are difficult to reconcile with the fact that one Forest Service Declarant admits, as is also reflected in the record, that the Forest Service was forced to stop using two herbicides because of new information about their safety. Doc. 75, Bautista Decl. para.

[6] Similarly the Forest Service's insistence that preventing it from using herbicides to respond to recent fires and to certain types of invasives would be disruptive, see Doc. 81-1 at 16-20, is difficult to reconcile with the fact that fires are yearly occurrences on the Wallowa and the presence of many of these species on the Wallowa is not new. See Doc. 76, Yates Decl. Para. 2, n.2. At a minimum the Forest Service must explain why it was not disruptive for the Forest Service to use non-herbicide methods to respond to these problems between 2005 and 2010 while it took its time finalizing the 2010 ROD but it would now be disruptive to require the Forest Service to return to those methods while it corrects its NEPA analysis.

[7] As was noted in earlier briefing, the Forest Service often tries to have it both ways, citing low risks and incomplete or uncertain information. See Doc. 21 at 33, Doc. 37 at 26, Doc. 39 at 17.

11.[8] Thus a revised cumulative effects analysis based on the latest scientific information could well provide useful information.

Finally, with regard to the Forest Service's specific examples of supposed "extreme disruption," the Forest Service points to the supposed necessity to protect the McFarlane's Four O'Clock by using herbicides. Doc. 81-1 at 16; Doc. 76, Yates Decl. Para. 16, referencing 2000 Recovery Plan. But the Forest Service's Endangered Species Consultation for the 2010 ROD actually pointed to the proposed herbicide spraying as a threat to this threatened species. AR 21342 Moreover the recovery plan and the down listing of this species in 1996 repeatedly list herbicide spraying as one reason it is threatened.[9] U.S. Fish & Wildlife Serv., *Revised Recovery Plan for Macfarlane's Four-O'clock*, March 1985, http://www.fws.gov/oregonfwo/species/Data/MacFarlanesFourOClock/; Endangered and Threatened Wildlife and Plants; Reclassification of Mirabilis Macfarlanei (MacFarlanes Four-O'Clock) From Endangered and Threatened Status, 61 Fed. Reg. 10,693, 10,696 (Mar. 15, 1996) (to be codified at 50 C.F.R. Part 17).

VII. The Forest Service's request for a stay of vacatur should be denied.

The *Nat'l Cotton Council of Am. v. EPA,* 553 F. 3d 927 (6th Cir. 2009) opinion cited in the Forest Service's brief, Doc. 81-1 at 25, does not include any discussion of a stay or why a stay would have been granted in that case. In *Center for Food Safety*, however, there is a discussion of that defendant's request that the partial vacatur ordered

[8] The Forest Service's own regulations, 36 C.F.R. §220.5(a)(1) require the preparation of an EIS for any aerial spraying of herbicides, which is a tacit acknowledgement that such spraying, including the spraying that the Forest Service apparently wants to conduct on remand, see Doc. 76, Yates Decl. ¶ 3, can in fact have significant impacts.

[9] The Forest Service apparently was able to protect this species without using herbicides for many years, so why only now would not allowing such spraying be disruptive?

by that court be stayed. 734 F. Supp. 2d at 953. The district court denied that request noting that if the agency had moved expeditiously it would not have needed to ask for a stay. Similarly here if the Forest Service had put as much effort into revising its cumulative effects analysis as it apparently has put into opposing LOWD's request for partial vacatur, the Forest Service likely would be well on its way to completing that analysis. The Forest Service's requested stay is not necessary and, in any case, would be inconsistent with NEPA's basic purpose of requiring a complete NEPA analysis before an agency implements its actions.

VIII. LOWD's alternative request for a targeted injunction satisfied all four of the required elements for obtaining such relief.

The Forest Service offers no specific argument in opposition to LOWD's alternative request for an injunction. The Forest Service only argues, in general terms, that LOWD's support for its request is insufficient without pointing to any specific problem with LOWD's request. The Forest Service suggests that LOWD somehow has waived its right to seek injunctive relief by not supporting its request with a sufficiently long explanation or argument. See Doc. 81-1 at 27. But if any waiver has occurred here, it is the Forest Service who has waived its arguments. The only specific attack on LOWD's request is the Forest Service's odd claim that the Court's finding of a "procedural" cumulative effects violation cannot support an injunction against herbicide spraying. Doc. 81-1 at 28. Perhaps the Forest Service should look at the cases cited earlier in LOWD's opening brief, Doc. 68 at 8, where LOWD cited multiple decisions enjoining herbicide or pesticide spraying based on NEPA violations. As LOWD noted

earlier, relevant case law does not disappear simply because the Forest Service chooses to ignore it.

LOWD's request in the alternative for an injunction only becomes relevant if this Court were to deny its request of partial vacatur. If that were to happen this Court should then at a minimum give LOWD the same injunctive remedy for its proven NEPA violation that numerous courts have provided under similar circumstances. See cases cited in Doc. 68 at 8.

CONCLUSION

For all the reasons set forth above and in LOWD's Motion and Supporting Memorandum, LOWD respectfully requests that this Court grant its motion for a partial vacatur of the Forest Service's 2010 ROD and remand this matter to the Forest Service so that the Forest Service can prepare a proper NEPA analysis that corrects the violations identified in this Court's prior opinion, Doc. 60, and then reconsider its vacated decision in light of that revised analysis.[10]

[10] The Forest Service's opposing brief, Doc. 81-1, does not contain the certification required by LR 7-2(b).

Certificate of Compliance

This brief complies with the applicable word count under LR 7-2(b) because it contains 7,726 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of authorities, signature block, and any certificate of counsel.

DATED: this 8th day of November, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 8, 2012, I electronically filed the foregoing document, with the Clerk of the Court for the United States District Court for the District of Oregon, Portland Division and I served a true copy on the following parties through their attorneys via the Court's CM/ECF filing system:

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