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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

SIERRA NEVADA FOREST PROTECTION CAMPAIGN, PLUMAS FOREST PROJECT EARTH ISLAND INSTITUTE; and CENTER FOR BIOLOGICAL DIVERSITY, non-profit organizations,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE; JACK BLACKWELL, in his official capacity as Regional Forester, Region 5, United States Forest Service; and JAMES M. PEÑA,

Federal Defendants,

and

QUINCY LIBRARY GROUP, an unincorporated citizens group; and PLUMAS COUNTY,

Defendant-Intervenors.

Case No. 04-CV-2023

DEFENDANTS' COMBINED OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

Date: April 5, 2005
Time: 1:30 p.m.
Location: 15th Floor
Courtroom No. 4

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Defs.' Ex. B	Excerpts from U.S. Forest Service, Sierra Nevada Forest Plan Management Review and Recommendations, Part 1 (March 2003) ("MRR") *full document available at: http://www.fs.fed.us/r5/snfpa/review/review-report/index.html (last visited Jan. 27, 2005)*
Defs.' Ex. C	Letter from James M. Peña, Forest Supervisor, Plumas NF, to file (Jan. 24, 2005)

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	Name	***Purpose***
1.	Decl. of Rich Bednarski	Responds to Pls.' Decl. of Declaration of George M. Torgun (Doc. No. 35), Attachs. 4-9
2.	Decl. of Peter H. Hochrein	Addresses issues related to remedy
3.	Decl. of James M. Peña	Addresses issues related to remedy; Responds to Pls.' Supp. Decl. of Chad T. Hanson (Doc. No. 30)
4.	Decl. of Carl N. Skinner	Responds to Pls.' Decl. of Dennis C. Odion (Doc. No. 33)

INTRODUCTION

Federal Defendants in the above case hereby submit this memorandum in support of their motion for summary judgment and in opposition to Plaintiffs' motion for summary judgment. This case involves a challenge to the decision by the United States Forest Service to authorize the Meadow Valley Project on the Plumas National Forest, near the community of Meadow Valley in the northern Sierra Nevada. The project authorizes the construction, through commercial timber harvest and forest thinning, of a defensible fuel profile zone ("DFPZ") that is intended to protect the Meadow Valley community in the event of a devastating wildfire. The project also authorizes group selection, a method of harvesting trees on one-half to two-acre patches within the Forest, which is intended to help create a more fire resilient forest and contribute to community stability.

Plaintiffs bring a claim under the National Environmental Policy Act of 1969 ("NEPA") alleging that the Project Environmental Assessment ("EA") did not contain an adequate analysis of potential cumulative effects to the California spotted owl, and that an Environmental Impact Statement ("EIS") should have been prepared on account of several factors, including public health, controversy, uncertainty, and cumulative and other effects to the owl. Plaintiffs also claim that the Forest Service has not demonstrated that the project would create fire-resilient forests under the Herger-Feinstein Quincy Library Group Forest Recovery Act ("QLG Act"), and that the agency has violated the National Forest Management Act ("NFMA") by designating by description in the timber sale contracts which trees to be harvested, rather than marking them.

Plaintiffs' claims lack merit. First, Plaintiffs did not exhaust their claims that cumulative effects to the owl from specific projects should have been considered, because they did not identify-- either in their public comments or administrative appeals--which of approximately 230 projects they believed should have been considered. Even assuming they had exhausted this issue, the Meadow Valley EA adequately analyzes those effects to the owl within an analysis area whose boundary is based upon suitable owl habitat, and none of the specific projects cited fall in that analysis area.

Federal Defendants are also entitled to summary judgment on the claim that they should have prepared an EIS, as the Meadow Valley EA takes a hard look at each of the factors cited by Plaintiffs and reasonably concludes that potential environmental effects would not be significant. The project does not have a purpose of protecting public health or safety, as Plaintiffs argue; nor have Plaintiffs established that a significant scientific controversy existed at the time of the decision, as they cannot rely on post-decisional declarations to show that. Plaintiffs also have not demonstrated that the project would pose highly uncertain and unique risks to owls or fire and fuels. Effects to owls were also analyzed extensively, and the conclusion that significant effects would not result is supported by detailed reasoning which deserves deference.

Plaintiffs' claim that the Meadow Valley Project would violate the QLG Act by not demonstrating that it creates fire resilient forests also must fail. First, the goal of creating fire resilient forests is merely hortatory--not mandatory--and as such is not judicially enforceable. Even if it were enforceable, group selection harvest here will create such forests by providing small forest openings which would result in regeneration of shade intolerant pines--trees which are more fire resistant than the fir which currently thrive in the shady stands. Plaintiffs' allegation that the project would increase the risk of severe fire is rebutted by the fact that the project requires treatment of flammable logging slash, and that any slash generated within harvest units would be minimized because trees would be yarded whole to landings.

Finally, while Plaintiffs are correct that the Meadow Valley contracts would designate by description the size of trees to be harvested, such a designation is not unlawful under NFMA. In particular, NFMA allows designation, and only requires marking trees if necessary. Marking is not required here, because the designation does not leave the timber sale purchaser any discretion to harvest trees which exceed the maximum diameter--and doing so would constitute theft, which even marking cannot prevent. As explained in more detail below, Defendants should be granted summary judgment on all claims, and Plaintiffs' motion should be denied.

FACTUAL BACKGROUND

I. MANAGEMENT OF NATIONAL FOREST LANDS IN THE SIERRA NEVADA

Together with the Modoc Plateau, the Sierra Nevada includes 11.5 million acres of National Forest System land and encompasses "dozens of complex ecosystems each with numerous, inter-connected social, economic and ecological components." SNFPA Management Review & Recommendations ("MRR") ("Fed. Defs.' Ex. B) at 7.[1]/ Approximately 7.37 million acres in the Sierra Nevada province ("the Sierra") is forested, of which 4.12 million acres is considered potentially suitable habitat for the California spotted owl (*Strix occidentalis occidentalis*). 4 AR 1402.

In the late 1980s, the Forest Service began developing a comprehensive strategy for managing the various resources and complex systems in this region. This strategy has included the development of two significant forest plan amendments which amended the forest plans for eleven National Forests, as well as legislatively mandated forest management direction in the Herger-Feinstein Quincy Library Group Forest Recovery Act, Pub. L. No. 105-277, 112 Stat. 2681-231 (codified as 16 U.S.C. § 2104 note) ("QLG Act"). The background for this comprehensive, plan-level approach to managing National Forests in the Sierra is described below. Part II, infra at 8, then describes how the Meadow Valley Project, a site-specific project consisting of vegetative treatments such as commercial timber harvest and service contracts for forest thinning, relates to this comprehensive, plan-level management strategy.

A. The CASPO Interim Guidelines

In January 1993, the Regional Forester amended the Forest Plans for the National Forests in the Sierra--including the Plumas--with direction for timber management in the range of the California spotted owl ("owl" or "CASPO"). See 6 AR 1946-59. This management direction, known as the CASPO Interim Guidelines, was expected to remain in effect until a longer-term strategy to maintain owl viability was adopted. 6 AR 1946. The objectives of the Guidelines

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[1]/ This document is part of the administrative record which was made available to Plaintiffs at their request. See 5 AR 1788.

included protecting known owl nest stands from significant modification, protecting suitable owl habitat, and reducing the threat of stand-destroying wildfires. 6 AR 1947. The Guidelines were intended to achieve these goals in several ways: by maintaining a network of suitable owl habitat areas ("SOHAs"); establishing a 300-acre protected activity center ("PAC") around then-known owl sites; and imposing other restrictions in stands associated with the owl. 6 AR 1947-48.

B. Herger-Feinstein Quincy Library Group Act Pilot Project

In late 1992 and early 1993--around the time the Forest Service was developing the CASPO Interim Guidelines--a group of environmentalists, timber industry representatives, local elected officials, and other community members began holding meetings to overcome long-standing divisions over the management of National Forests in the northern Sierra. See 7 AR 2421. The intent of this group, the Quincy Library Group ("QLG"), was to agree upon a forest management proposal that would "promote forest health, ecological integrity, adequate timber supply and local economic stability." 6 AR 1960. By August 1993, QLG had developed a proposed management plan for three National Forests, including the Plumas (on which the Meadow Valley Project is located). See 6 AR 1960-62. Among other things, QLG's proposal required all timber harvest to consist of uneven-aged management--thus prohibiting even-aged methods like clear-cutting. See 6 AR 1961. Harvest would be include group selection, which occurs on half-acre to two-acre patches of trees. See 7 AR 2450. The goal of such harvest was to restore an "all-age, multi-story, fire-resistant forest approximating pre-settlement conditions," id., while providing economic benefits to local communities. 6 AR 1960.

In October 1998, Congress adopted the QLG Act, which directs the Secretary of Agriculture to conduct a pilot project according to QLG's proposal. See QLG Act § 401(b)(1). Before implementing the Pilot Project, the Forest Service prepared a programmatic Environmental Impact Statement ("EIS"), issued in August 1999, as well as a Biological Assessment and Biological Evaluation ("BA/BE"), which evaluated in detail the direct, indirect, and cumulative effects of the Pilot Project on the owl. 6 AR 2054-2078.

In a supplement to the BA/BE, the Forest Service determined that demographic studies at the time were showing declining owl populations, and that the impacts to owl habitat from

Alternative 2 "could pose a serious risk to viability of the owl in the [Pilot Project] planning area." 6 AR 2210. It was therefore recommended that a mitigation measure be adopted so that timber harvest would not be conducted in suitable owl habitat until a new owl management strategy for the Sierra Nevada was developed. Id.; see 7 AR 2383 (adopting mitigation measure).

C. The 2001 Sierra Nevada Forest Plan Amendment

In 1995 the Regional Forester issued a draft environmental impact statement ("EIS") on a proposal to replace the CASPO Interim Guidelines with a comprehensive management strategy for national forests in the Sierra. 2001 ROD at 1. After extensive public participation and a final EIS, the Regional Forester issued a decision in January 2001 to amend the Forest Plans for ten national forests, including the Plumas. This decision, the 2001 ROD, responded to five main topics, including old forest ecosystems and associated species. See id. at 3-6.

In addressing species associated with old forest ecosystems, the ROD imposed requirements for managing spotted owls. PACs would be established for known and discovered owls, and project activities would only occur during limited operating periods to minimize effects to the owl during nesting seasons. Id. at 4. Fuel treatments would be conducted in PACs only on a limited basis. See id. The ROD also established owl home range core areas ("HRCAs"), which vary in size by National Forest and on the Plumas consist of 1,000 acres,[2]/ typically centered on each PAC. Id. Additional requirements on timber harvest were also imposed, including diameter limits and requirements for snag[3]/ retention and canopy closure. See, e.g., id. at 4.

D. Management Review of the 2001 Sierra Nevada Forest Plan Amendment

Following the issuance of the 2001 ROD, the Chief of the Forest Service ("Chief") "received more than 200 [administrative] appeals of the decision." 4 AR 1159. The Chief affirmed the decision but directed the Regional Forester to review it in light of several concerns,

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[2]/ HRCAs are "designed to encompass the best available spotted owl habitat in the closest proximity to the owl PACs where the most concentrated owl foraging activity is likely to occur." Id. at 39-40. The acreage in the 300-acre PAC counts toward the total 1,000 HRCA. 4 AR 1091.

[3]/ A "snag" is a "dead standing tree." 13 AR 4851.

including increased levels of wildfires, and the relationship between the decision and the Forest Service's responsibilities under the QLG Act. See MRR at 5. Pursuant to the Chief's direction, in December 2001 the Regional Forester chartered the SNFPA Review Team to use an open, public process and identify, among other things, opportunities to "implement the [QLG] Pilot Project *to the fullest extent possible*." 4 AR 1135 (emphasis added); see also MRR at 5. The Team conducted a year-long public review which culminated in the issuance of a set of management recommendations in March 2003.

The Team found that the 2001 ROD "severely limits" implementation of the HFQLG Pilot Project on the Plumas. Id. at 6. Additionally, management direction in the 2001 ROD was found to "preclude[] many of the resource management activities that Congress desired be tested," under the Pilot Project--specifically, DFPZs and group selection. Id. As the Team explained: "In many cases, the timber sales envisioned by the Pilot Project to construct the DFPZs are not possible since the standards and guidelines preclude the removal of enough merchantable trees. Because of this, the community stability, and socio-economic aspects of the Pilot Project are not being implemented." Id. at 56.

The Team also found that the 2001 ROD did not allow full implementation of the group selection contemplated by the Pilot Project and the QLG Act. See id. at 57-58. The 2001 ROD allowed only "accomplishment of 15,400 acres of group selection," just under 36 percent of what the Pilot Project envisioned. Id. This is because the 2001 FEIS found that if group selection occurred in owl habitat, it "would have a moderate to low likelihood of retaining important structural elements" for the owl. Id. The Teamwas told by owl scientists, however, that group selection could be used to manage for owls. See id. It thus concluded that better management direction could allow more thorough testing of group selection under the QLG Act. Id.

The Team also evaluated the owl analysis upon which the 2001 ROD relied and found that a new analysis was warranted. In analyzing the effects to the owl resulting from full implementation of the QLG Act, the 2001 ROD relied upon the analysis in the HFQLG BA/BE, which unnecessarily "took a worst case approach to estimating effects" on the owl. MRR at 55. In particular, the HFQLG BA/BE assumed that "[a]ll group selection and DFPZ construction that

was projected to occur within owl habitat" would render 100 percent of that habitat unsuitable. Id. However, the Team found that the HFQLG BA/BE described past fuel reduction thinnings and DFPZ construction in owl nesting habitat as having "actually reduced that habitat by less than one percent of the acreage treated," not the 100 percent that the analysis assumed. MRR at 55. Thus, the analysis in the BA/BE was determined to be unnecessarily conservative. See id.

E. Applying the Findings from Management Review To the 2004 Sierra Nevada Forest Plan Amendment

The Regional Forester's office responded to the MRR by developing and considering alternative management strategies to the 2001 ROD. A Final SEIS ("FSEIS") was released to the public in January 2004. See 69 Fed. Reg. 4512 (Jan. 30, 2004). The FSEIS analyzes nine alternatives in detail, including the no action alternative--which would continue management under the 2001 ROD, the proposed action alternative, and seven alternatives which had been previously considered in the 2001 FEIS. In addition to describing the alternatives, the FSEIS discusses the affected environment and analyzes the potential environmental effects of each alternative on a wide range of resources, including sensitive species like the owl. See 4 AR 1276-1281, 1394-1414. In particular, the FSEIS includes and responds to relevant new science, including a new analysis of owl population trends, an assessment of fire effects on PACs since 1993, and drought-related mortality, among other things. 4 AR 1276.

On January 21, 2004, the Regional Forester issued a decision adopting the proposed action from the FSEIS. See 4 AR 1055. The 2004 ROD replaces the 2001 ROD in its entirety and amends the Forest Plans for National Forests in the Sierra, including the Plumas. 4 AR 1067. The ROD relies upon the relevant new science and concludes that the 2001 ROD prevented full implementation of the QLG Act. See The selected alternative allows the Pilot Project to go forward consistent with that Act, and also seeks to improve effectiveness and implementation of the 2001 ROD's fuels strategy while protecting habitat components important to the owl. In November 2004, the Chief issued a decision affirming the 2004 ROD with

direction to submit to him within six months additional details of the ROD's adaptive management strategy.[4]/

II. THE MEADOW VALLEY PROJECT

At the same time the 2004 ROD was being finalized, the Forest Service was also developing the Meadow Valley Defensible Fuel Profile Zone and Group Selection Project ("Meadow Valley Project"), to protect nearby communities from fire, contribute to the area's community stability, and help promote the restoration of presettlement forests. The Meadow Valley Project proposed approximately 743 acres of group selection treatments in 488 units and approximately 5,700 acres of DFPZ construction in 37 units. 13 AR 4783. Group selection would create small openings (½-2 acres) in the stands, which would be regenerated with shade intolerant conifer species. 13 AR 4792. Construction of DFPZs would be both by mechanical and hand thinning of conifers, underburning, and some mastication.[5]/ "Over 82% of the DFPZ, trees larger than 20" dbh would be retained; in all other areas, trees larger than 30" would be retained." 13 AR 4793. Activity under the contracts probably would be completed within about five years of awarding of contracts. 13 AR 4764; see also 13 AR 4884 (anticipating DFPZs underburning would occur within five to seven years).

The purpose and need for the proposed project consisted of five elements. 13 AR 4764. First, the project is intended to implement the QLG Act, which requires DFPZ and group selection, and the provisions of the 2001 ROD, which contemplated group selection to be conducted as part of an administrative study. See 13 AR 4764-4765, 4771. Second, the project would implement group selection as directed by the QLG Act "to achieve an all-aged mosaic of timber stands, while contributing to the local economy through a sustainable output of forest products." 13 AR 4771 (emphasis omitted). Third, the project would also implement the DFPZ as the next step in connecting to a larger, extensive fuel treatment network that is necessary to

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[4]/ Both the 2004 ROD and the 2001 ROD are being challenged in a recently filed case in the District of Columbia, Cal. Forestry Ass'n v. Bosworth, Civ. No. 04-2137-RJL (D.D.C.).

[5]/ Mastication is the "mechanical grinding of harvest residue or thinnings." 13 AR 4850.

reduce the potential size of future wildfires, provide for increased firefighter safety, and protect the Meadow Valley community. See 13 AR 4772. Fourth, the project would "treat the existing fuels on the landscape in a cost-efficient manner" to achieved desired conditions set forth in the Forest Plan, especially for lands close to structures and communities. Id. Finally, the project would also include various road decommissioning, reconstruction, and temporary road construction which would provide necessary access for DFPZ construction and group selection harvest. See 13 AR 4773-4774; 13 AR 4764 (describing road-related activities).

In February 2004, the Forest Service released to the public an environmental assessment ("EA") analyzing a proposed action (Alternative A), a no action alternative, and an alternative intended to increase DFPZ effectiveness (Alternative C). This last alternative was added in response to some commenters who "questioned whether the DFPZ could be effective if more than 75% . . . would retain dense canopies." 13 AR 4778.

After considering and responding to the issues raised by public comments on the EA, the Forest Service issued a decision on April 16, 2004, selecting Alternative C in slightly modified form, and concluding that the action would not result in significant environmental effects. Under the decision, no activity would occur in owl PACs or SOHAs. See 15 AR 5497 ("Alternative C does not enter spotted owl PACs"); see also 13 AR 4824 ("100% of PACs and SOHAs would be avoided"). For the largest part of the DFPZ, trees greater than or equal to 20 inches diameter at breast height ("dbh") will be retained. Id. The Forest Service determined that all action alternatives analyzed "would not threaten current owl distribution or viability." 15 AR 5462.

STANDARD OF REVIEW

In cases such as this one challenging agency decisions, summary judgment is a unique procedure, akin to a motion to dismiss. See Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993). The court's role in such a case "is not to resolve contested fact questions which may exist in the underlying administrative record, but rather the court must determine the legal question of whether the agency's action was arbitrary and capricious." Gilbert Equipment Co., Inc. v. Higgins, 709 F. Supp. 1071, 1077 (S.D. Ala. 1989), aff'd, 894 F.2d 412 (11th Cir. 1990); see also Occidental Eng'g Co. v. INS, 753 F.2d 766, 769 (9th Cir.

1985) (court's role "is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.").

Because neither NFMA, NEPA, nor the QLG Act creates a private right of action, the standard of review in a case such as this one is provided by the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq*. See Marsh v. ONRC, 490 U.S. 360, 377 n.23 (1989); Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922 (9th Cir. 1999). The APA imposes a narrow and highly deferential standard of review limited to a determination of whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A); see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The APA directs the court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Thus, the court's review is limited to the administrative record before the agency at the time of its decision. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985); Camp v. Pitts, 411 U.S. 138, 143 (1973).

ARGUMENT

I. THE MEADOW VALLEY EA ADEQUATELY CONSIDERED CUMULATIVE EFFECTS TO THE OWL UNDER NEPA

Plaintiffs allege that the Forest Service in authorizing the Meadow Valley Project did not adequately consider the cumulative effects to the California spotted owl from other group selection and DFPZ projects that implement the QLG Act. As explained below, Plaintiffs' argument is based upon documents drawn from the other project records, not the administrative record at issue here. For this reason, Defendants are separately moving to strike these documents and the portions of Plaintiffs' brief relying upon them. Additionally, although Plaintiffs name four specific projects they claim should have been considered as part of the analysis of cumulative effects to owls, they did not raise those projects in sufficient detail during the administrative process and should not be allowed to base their claims upon them here. Even if they had, however, the Forest Service's decision not to include those projects in the Meadow Valley cumulative effects analysis was reasonable, because all the projects are outside the cumulative effects analysis boundary, which was reasonably drawn along the lines of owl habitat.

For the reasons described more fully below, the cumulative effects analysis for Meadow Valley satisfies NEPA, and Defendants are entitled to summary judgment.[6]/

A. Plaintiffs' Argument Regarding Cumulative Effects To Owls from Specific Projects Was Not First Presented During the Administrative Process and Should Not Be Considered by this Court

Plaintiffs list specific projects they claim were reasonably foreseeable and should have been considered as part of the analysis of cumulative effects to owls in the Meadow Valley EA. Pls.' Mem. at 27-29. Because Plaintiffs did not mention any of these projects in their comments during the development of the EA, they should not be allowed to raise them in this litigation. Additionally, this Court may not consider the allegations regarding specific future projects, because Plaintiffs did not exhaust their administrative remedies on that issue, as required by statute.

In order to challenge an administrative decision in Federal court, a plaintiff must first exhaust all available remedies required by statute. See Darby v. Cisneros, 509 U.S. 137, 146-47 (1993); Bastek v. Federal Crop Ins. Corp., 145 F.3d 90 (2d Cir. 1998); Portela-Gonzalez v. Sec'y of the Navy, 109 F.3d 74, 77 (1st Cir.1997) ("[E]xhaustion of administrative remedies is absolutely required if explicitly mandated by Congress."). Statutes and regulations governing the Forest Service expressly require exhaustion. See 7 U.S.C. § 6912(e); 36 C.F.R. § 215.21. Courts have consistently found this to impose a mandatory exhaustion requirement upon Plaintiffs challenging forest projects like Meadow Valley. See Kleissler v. U.S. Forest Serv., 183 F.3d 196 (3rd Cir. 1999); Kettle Range Conservation Group v. U.S. Forest Serv., 148 F. Supp. 2d 1107, 1114 (E.D. Wash. 2001). To satisfy exhaustion, it is not enough for a plaintiff to file an

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[6]/ At the outset, it should be noted that Plaintiffs appear to have abandoned the following components of their NEPA claims: (1) the claim that an EIS should have been prepared because the Meadow Valley Project "may establish a precedent for future actions with significant effects" under 40 C.F.R. § 1508.27(b)(6), Pls.' Compl. ¶ 81.d; and (2) the claim that the Meadow Valley Project and other projects constituted "[c]onnected actions" under 40 C.F.R. § 1508.25(a)(1), and "[c]umulative actions" under 40 C.F.R. § 1508.25(a)(2). Pls.' Compl. ¶¶ 76, 77. Because such arguments are completely absent from Plaintiffs' brief, they should be considered abandoned. See, e.g., Am. Lands Alliance v. Kenops, 1999 WL 672213, at *2 (D. Or. Aug. 24, 1999) (granting summary judgment for defendants on claim abandoned by plaintiffs); Mountain States Legal Found. v. Espy, 833 F. Supp. 808, 813 n.5 (D. Idaho 1993) (deeming claims not raised in summary judgment motion abandoned and granting judgment for defendants).

administrative appeal; rather, they must raise the issues in sufficient detail so that the appeal, taken as a whole, "provided sufficient notice to the Forest Service to afford it the opportunity to rectify the violations that the plaintiffs alleged." Native Ecosystems Council v. Dombeck, 304 F.3d 886, 899 (9th Cir. 2002).

In addition to the mandatory requirement to raise issues during a statutorily required administrative appeal, courts in cases involving NEPA have, as prudential matter, required plaintiffs to raise the issues they want to litigate even earlier, during the public comment process. See Havasupai Tribe v. Robertson, 943 F.2d 32, 34 (9th Cir. 1991) (refusing to consider extra-record testimony submitted for the first time in court, when plaintiff could have submitted it during agency proceedings); Methow Forest Watch v. U.S. Forest Serv., No. 04-114-KI, 2005 WL 119590, at *7 (D. Or. Jan. 20, 2005) ("While there is no statutory or regulatory requirement for issue exhaustion here courts have required issue exhaustion during the public comment period, unless some equitable exception applies.") (citation omitted) As the Supreme Court has noted, it is incumbent upon parties "who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to [parties'] position and contentions." Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1978); see Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204, 2213 (2004). Thus, a plaintiff's failure to raise issues in sufficient detail during either the comment process or in an administrative appeal prohibits the plaintiff from litigating those issues for the first time in federal court.

Plaintiffs argue that the Meadow Valley EA should have considered the cumulative impacts from approximately 230 other future projects listed in the HFQLG Annual Report to Congress for fiscal year 2003. See Pls.' Mem. at 26-27. Nowhere in their administrative appeals, however, did Plaintiffs state what projects should be considered. See 15 AR 5654-5660 (no mention of cumulative effects to owls); id. at 5683 (urging that cumulative effects analysis should "encompass[] the total QLG pilot project logging program"). Nor did Plaintiffs mention the projects in their comments during scoping or after publication of the EA. See 11 AR 4202-4203, 4205-4218, 4248-4249, 4325-26 (no mention of cumulative effects to owls); 14 AR 5235 (same); id. at 5247 (alleging only the "H-F QLG plan" was reasonably foreseeable). Rather, they

suggested very broadly that the Forest Service should consider cumulative effects for all of the projects it already evaluated in the 1999 EIS, and other projects across "at least the *entire* Sierra Nevada." Id. at 5260 (emphasis added); see also 15 AR 5689; 14 AR 5247 (urging Forest Service to conduct analysis similar to 1999 EIS). Because Plaintiffs did not specify what projects in the 11.5 million acres of National Forest land throughout the Sierra, or the approximately 1.5 million acres of the HFQLG Pilot Project Area should have been considered, they have not exhausted administrative appeals and are prohibited from raising those arguments here. See Pub. Citizen, 124 S. Ct. at 2213; Vt. Yankee, 435 U.S. at 553-54.

B. Cumulative Impacts to Owls From Reasonably Foreseeable Activities Were Adequately Analyzed

Even if Plaintiffs' cumulative impact allegations are properly before the Court, they are without merit. In particular, Plaintiffs' argument that the EA should have considered cumulative effects to owls from roughly 230 other projects is flawed, because the projects identified by Plaintiffs do not occur within the wildlife analysis area for the Meadow Valley EA.[7]/ See Decl. of Rich Bednarski ("Bednarski Decl."), Attach. 1. Defining the geographic area where effects occur is "a task assigned to the special competency of the appropriate agencies," and such decisions are given deference. Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976); see Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 959-60 (9th Cir. 2003). Although the project area is approximately 6,400 acres, the Forest Service chose to analyze cumulative effects within a much larger area, approximately 85,919 acres. 12 AR 4351 (defining the analysis area as "the project area plus an additional larger land base, determined by spotted owl distribution, that may be affected by cumulative effects, totaling approximately 85,919 acres") (emphasis omitted). The boundary for this larger wildlife analysis area was "determined by spotted owl distribution," id., and drawn along the lines of PAC/HRCA borders, which can be seen by examining the maps

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[7]/ At the time of the EA, the Forest Service believed that there were "no other projects being proposed" in Meadow Valley landscape area. 13 AR 4734. Subsequently, it was determined that some units of the Basin project overlapped the Meadow Valley analysis area. See Fed. Defs.' Ex. C. These units were dropped by the Forest Supervisor in an amendment to the Basin decision on January 24, 2005. See id. (letter "withdrawing authorization for those particular units").

attached to the Meadow Valley BA/BE. See 12 AR 4467 (displaying wildlife analysis boundary); 12 AR 4489 (displaying relationship between wildlife analysis and owl PACs and HRCAs).

Of the 230 projects that Plaintiffs allege should have been considered, they only identify four that are anywhere near the Meadow Valley Project: Empire, Basin, Watdog, and Slapjack,. However, as shown in a map attached to the Bednarski Declaration, all those nearby projects are outside the Meadow Valley wildlife analysis area. See Bednarski Decl., Attach. 1. Moreover, the wildlife analysis area boundary was rationally based on the habitat boundaries for the species being analyzed. See Selkirk, 336 F.3d at 959-60 (upholding Forest Service's decision to limit cumulative effects to bear management unit rather than larger area encompassing nearby project); Communities Against Runway Expansion, Inc. v. Fed. Aviation Admin., 355 F.3d 678, 689 (D.C. Cir. 2004) ("CARE") (rejecting claim that effects of noise from airport expansion should have been analyzed in greater metropolitan area, rather than smaller area where effects would occur).

Plaintiffs' reliance on the Ninth Circuit's decision in Klamath Siskiyou Wildlands Center v. U.S. Bureau of Land Management, 387 F.3d 989 (9th Cir. 2004) ("KSWC") is misplaced. In that case, the BLM prepared separate environmental assessments ("EAs") for two projects located in the same watershed which were "originally conceived as a single project," but later divided into two, then four separate timber sales. Id. at 992. The Ninth Circuit found the cumulative effects analysis deficient because it did not "provide any objective quantification of the impacts" of the other future projects planned in the same watershed. Id. at 994.

By contrast with KSWC, the future projects Plaintiffs claim should have been analyzed are outside the cumulative effects analysis area. See Bednarski Decl., Attach. 1. The ruling in KSWC did not alter the general rule that the Forest Service need not analyze future projects that are outside a cumulative effects analysis boundary, and that the agency is entitled to deference in drawing such a boundary. See Kleppe, 427 U.S. at 414 (defining geographic area where effects occur is "a task assigned to the special competency" of agency); CARE, 355 F.3d at 689 (D.C. Cir. 2004); Selkirk, 336 F.3d at 960. Federal Defendants are thus entitled to summary judgment.

C. Cumulative Impacts to Owls From Past Activities Were Adequately Analyzed

In addition to relying upon an adequate analysis cumulative impacts to owls from reasonably forseeable future projects, the Meadow Valley EA also relies upon an adequate cumulative effects analysis for past projects. For past and ongoing projects, the BA/BE identified numerous timber sale projects within the analysis area, described the silvicultural system used, and the extent of their effects. See 12 AR 4397-4402, 4434-4438, 4439. For example, the BE identifies numerous projects, including: Grizzly Timber Sale, Hungarian Timber Sale, Stanley/Slate MP Salvage/Thin, several thinning projects (McFarland, Ridge, Spanish, Camp), Fireline Salvage project, and the Waters DFPZ project. See 12 AR 4434-4437. For each of these projects, the EA described the type of harvest involved (generally thinning or salvaging prescriptions), and effects that likely resulted. 12 AR 4398-4401, 4434-4437.

Plaintiffs incorrectly state that no useful quantified information is presented about past timber harvest. See Pls.' Mem. at 24. The BE lists the number of acres treated or otherwise affected for approximately 14 past and ongoing projects. See 12 AR 4398-4399. For the Waters project, the BE lists the number of acres in four different owl HRCAs where handthinning and underburning treatments were prescribed as part of the first phase of Waters. 12 AR 4437. The BE then lists the number of acres in each of those same HRCAs where the Meadow Valley Project would authorize treatment, the type of treatment that would occur (DFPZ or group selection), and--for DFPZs--the land use allocation involved. Id. In this way, the BE arrives at a cumulative total potential reduction in spotted owl habitat.

The cumulative effects from other past timber harvest projects were analyzed through Table 4 in the BA/BE, which "displays the existing vegetative condition, expressed in [California Wildlife Habitat Relationship ("CWHR")] types"[8]/ for both the project area as well as the larger

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[8]/ Owl habitat is classified according to the CWHR system, which assigns categories based on tree size and canopy closure. Numbers from 1 to 6 are assigned based on diameter, with higher numbers indicating larger size classes. See 12 AR 4469. Letters are assigned based on whether canopy closure is sparse (10-19%, "S"), open (20-39%, "P"), moderate (40-59%, "M"), or dense (60-100% "D"). See id. Suitable owl habitat is includes classes 4M, 4D, 5M, 5D and 6 in specified forest types. 4 AR 1401. Nesting habitat includes classes 5M, 5D, and 6. Id.

cumulative effects analysis area. 12 AR 4398; see also 12 AR 4355-4357 (Table 4). Based on the CWHR classes in Table 4, the BA/BE notes that within the larger analysis area there are 26,320 acres of foraging habitat. 12 AR 4368. The Forest Service assumed that by examining effects to this environmental baseline of vegetation classes within the larger analysis area, it would take into account the cumulative effects from past harvest that were reflected in that baseline. See 12 AR 4398 (noting that the listed vegetation classes "reflect[] past occurrences and management activities that have resulted in vegetative change," except for Waters Phase I).

The Forest Service's analysis of cumulative effects from past actions satisfies NEPA because it meets the standard recently set forth by the Supreme Court in Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204 (2004). In that case, the Court held that an agency is only required to analyze the "incremental impact" of its proposed action "in the context" of other past, present, and reasonably foreseeable future actions by private and other public actors, and that the cumulative impact regulation does not require an agency to analyze the "incremental" impact of other past, present and reasonably foreseeable future actions that are not proximately caused by the agency's proposed action. Id. at 2216-17. Because the Meadow Valley EA satisfies this by adequately relying on the environmental baseline of vegetation classes which were determined to reflect the effects of past harvest in the larger analysis area, it has satisfied NEPA in analyzing past actions. See id.

II. THE FOREST SERVICE TOOK A HARD LOOK AT POTENTIAL IMPACTS FROM THE MEADOW VALLEY PROJECT AND REASONABLY DETERMINED THEY WOULD NOT BE SIGNIFICANT

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NEPA requires the preparation of an EIS only for "major Federal actions *significantly* affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C) (emphasis added). The term "significantly" requires consideration of two broad factors: context and intensity. See 40 C.F.R. § 1508.27. The term "intensity" refers to the severity of the impact. 40 C.F.R. § 1508.27(b). In evaluating intensity, agencies should consider ten criteria, including:

> (2) The degree to which the proposed action affects public health or safety
> . . .
> (4) The degree to which the effects on the quality of the human environment are likely to be highly controversial.

> (5) The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.
> . . .
> (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts.
> . . .
> (9) The degree to which the action may adversely affect an endangered or threatened species or its habitat.

Id. It is not merely the "presence" of one of these factors that triggers the requirement to prepare an EIS, but a determination under at least one factor that the proposed action may have significant effects. See 42 U.S.C. § 4332(2)(C); Pub. Citizen v. Dep't of Transp., 316 F.3d 1002, 1023 (9th Cir. 2003), rev'd on other grounds, 541 U.S. 752 (2004) (EIS is required if an agency's "action is environmentally 'significant' according to any of these criteria") (emphasis omitted); Nat' Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001) (noting that each factor "*may* be sufficient to require preparation of an EIS *in appropriate circumstances*") (emphasis added). Because the Forest Service reasonably concluded that these factors would not result in significant effects, it did not need to prepare an EIS for the Meadow Valley Project and is thus entitled to summary judgment.

A. The Forest Service Reasonably Determined that Potential Effects To Public Health And Safety Would Not be Significant.

Plaintiffs argue that an EIS is required because the Meadow Valley Project affects public health and safety. Pls.' Mem. at 31. Plaintiffs' argument misconstrues the NEPA standard. The Forest Service is not required to prepare an EIS simply because a proposed action will affect public health and safety. Rather, the agency need only "*consider*[] . . . [*t*]*he degree to which* the proposed action affects public health or safety" in order to determine whether an action "*significantly* affect[s] the quality of the human environment." 40 C.F.R. § 1508.27(b) (emphasis added); 42 U.S.C. § 4332(2)(C) (emphasis added). Plaintiffs' argument must be rejected, as the Meadow Valley EA adequately considered impacts of the project on public health and safety and concluded that any risks associated with the project were not significant. 13 AR 4812.

Plaintiffs' suggestion that "the Project's main justification is 'public health or safety,'" is simply wrong. Pls.' Mem. at 31. There are five stated purposes and needs for the Meadow Valley Project, none of which is "public health or safety." See 13 AR 4764-4774. Only one of

the Project's five objectives even includes a safety element: One purpose for the Project is "to implement a DFPZ as part of an extensive fuel treatment network that is effective in reducing the potential size of wildfires, providing fire suppression personnel safe locations for taking actions against a wildfire, and providing protection for the community of Meadow Valley in the event of a wildfire." 13 AR 4772. Accordingly, the Forest Service fully considered the health and safety risks related to wildfire and vegetation management operations. 13 AR 4812; 15 AR 5494.

The EA explained that use of mechanical equipment, falling of trees, hauling of harvest products, and the use of prescribed fire would pose risks to workers and the public. 13 AR 4812. However, the Forest Service concluded that "[s]uch risks would remain at acceptable levels" because, among other reasons, "OSHA safety regulations would be met during all harvesting operations" and Forest Service inspectors will monitor all aspects of implementation to ensure public safety. Id. In addition, the Project's "activities (logging, hauling, burning) have historically occurred on roads and near developed properties in the Meadow Valley area without creating public safety or health problems." 15 AR 5503.

Contrary to Plaintiffs' assertion, Pls.' Mem. at 32, the Forest Service also evaluated the beneficial impacts of the Project and reasonably concluded they did not make the action significant. See 40 C.F.R. § 1508.27(b)(1) ("A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial."). The EA presented the beneficial effects of the Project as part of the Purpose and Need. 13 AR 4764-4774. For example, the Forest Service stated that the "Meadow Valley DFPZ is designed to be part of a larger strategic system of DFPZs that provides fire suppression personnel relatively safe locations from which to take action against wildfires." 13 AR 4743. The Forest Supervisor also expressly noted in his decision that the "finding of no significant environmental effects is not biased by the beneficial effects of the action. Project benefits include reducing the threat of a catastrophic fire adjacent to and within the Meadow Valley community," among many others. 15 AR 5502. In sum, the Forest Service reasonably determined that the Meadow Valley Project would not significantly affect public health or safety and that no EIS was required.

B. The Meadow Valley EA Took a Hard Look at Impacts to the Owl within the Analysis Area and Reasonably Determined They Would Not Be Significant

Another factor that an agency should consider in determining significance is the "degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973 ["ESA"]" 40 C.F.R. § 1508.27(b)(9). The owl is classified by the Forest Service as both a "sensitive species" and a management indicator species ("MIS") on the PNF.[9]/ See 12 AR 4341; 13 AR 4799. It is not, however, listed under the ESA as either threatened or endangered. See 68 Fed. Reg. 7580, 7608 (Feb. 14, 2003) (denying petition to list the owl). Section 1508.27(b)(9), therefore, is not applicable. See Fund for Animals v. Williams, 246 F.Supp.2d 27, 47 (D.D.C. 2003) (not requiring EIS for hunting quota for species that "did not qualify as either threatened or endangered"). The Meadow Valley EA nevertheless addressed effects to owl as part of the obligation to take a hard look at environmental impacts of its actions under NEPA.

The Meadow Valley EA takes a hard look at potential impacts to the owl and reasonably concludes they would not be significant for six reasons. First, there would not be any project activity in any PACs or SOHAs. See 13 AR 4824 ("100% of PACs and SOHAs would be avoided"); see also 12 AR 4428 (no PACs or SOHAs would be entered), 4455 (relying on PAC avoidance). Second, the vast majority of existing foraging habitat (87%) and nesting habitat (95%) would be retained within the analysis area. 13 AR 4824; see also 12 AR 4455. Third, "96% of the combined acreage of PACs and HRCAs would not be treated." Id.; see also 12 AR 4430 (approximately 95.8% of all PAC/HRCA combined acres would not be treated under the action alternatives), 4455 (same). Fourth, of the 30 HRCAs within the analysis area, 16 would be reduced only by an average of 7-8% (50-63 acres of their average size of 750 acres). 13 AR 4824. This led the Forest Service to conclude that owl occupancy should not be reduced in the

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[9]/ Senstive species are identified as "[t]hose plant and animal species . . . for which population viability is a concern, as evidenced by" either "[s]ignificant current or predicted downward trends in population numbers or density" or "[s]ignificant current or predicted downward trends in habitat capability that would reduce a species' existing distribution." Forest Serv. Manual § 2670.5(19). MIS are defined as species which are "selected because their population changes are believed to indicate the effects of management activities." 40 C.F.R. § 219.19 (2000).

PAC/HRCAs. Id.; see also 12 AR 4433 (anticipating that owl occupancy of each established PAC should remain the same as pre-treatment); 12 AR 4455 (same). Fifth, the three PAC/HRCAs where suitable habitat reduction would be greatest have not been occupied by owls in the last two years. 13 AR 4824; see also 12 AR 4433; 12 AR 4455.

Finally, the project DFPZ is designed to reduce the possibility that a catastrophic crown fire would cause the loss of forest cover and, consequently, owl habitat. Id.; see also 12 AR 4433; 12 AR 4455. Under the no action alternative, future fires would be expected to "burn more intensely and over larger areas," and could "eliminate suitable habitat or make its distribution more patchy, leading to lower abundance" of owls in the analysis area. 13 AR 4824. This detailed, six-fold reasoning provides a reasonable basis for the agency to conclude that potential effects to owls would not be significant. See Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985) ("Our task [in reviewing NEPA claims] is simply to ensure that the procedure followed by the [agency] resulted in a reasoned analysis of the evidence before it, and that the [agency] made the evidence available to all concerned."); Methow Forest Watch v. U.S. Forest Service, No. 04-114-KI, 2005 WL 119590, at *11 (D. Or. Jan. 20, 2005) ("The Forest Service was not arbitrary and capricious in relying on the fact that because eighty-four percent of mule deer range would be unaffected by existing and proposed uses, the effects on mule deer are not significant enough to warrant an EIS.").

Plaintiffs rely upon extra-record declarations to argue that the Forest Service did not provide scientific support for its conclusions about owl occupancy, and that the agency overlooked the effects that reduced habitat would have upon forest connectivity, owl reproduction and survival, owl competition, and owl prey. See Pls.' Mem. at 34, 39. As explained in Federal Defendants' separately filed motion to strike, the Court should not consider Plaintiffs' declarations because they do not fit an exception to the rule that review in a case like this one, reviewed under the APA, is limited to the administrative record. In the event the Court does consider the declarations, however, Plaintiffs' contentions are still without merit for several reasons. First, the conclusion in the Meadow Valley EA that owl occupancy would not be reduced and effects would not be significant was reasonable. The fact that Plaintiffs may find

their own scientists who disagree with the agency's conclusions is not a permissible reason for a court to find those conclusions invalid. See City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1151-52 (9th Cir. 1997) ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."). Second, the Forest Service considered effects upon forest connectivity and fragmentation of owl habitat. Third, effects upon owl reproduction and competition in relation to owl survival were also considered. Finally, indirect effects upon the owl related to its prey base were also analyzed. Plaintiffs' criticisms thus must be rejected.

First, the Forest Service provided reasonable scientific support for its conclusions that owl occupancy would not be reduced. The Forest Service biologist examined 16 HRCAs which would be directly affected by the project. See 12 AR 4431 For each HRCA, the biologist analyzed the likelihood of occupancy based on past data on reproduction and pair occupancy in the associated PAC.[10]/ Id. The biologist also examined the percent of the HRCA (as well as the combined PAC/HRCA) that would be treated, and the number of acres of suitable habitat that would be harvested. Id. Based on this, the biologist assigned a rating of low, moderate, or high, as to the potential risk to PAC viability. See id.

To arrive at this rating, the biologist assumed that owl viability in a PAC/HRCA 1000 acres in size or smaller and treated on more than 10% of its area, would be at higher risk than a larger PAC/HRCA on which a smaller percent area was treated. Id. The biologist explained that this assumption was "based on the premise that removing suitable habitat within an owl[']s home range tends to reduce the productivity and survivorship of resident owls." Id. (citing Bart 1995, Hunsaker 2002); see also 15 AR 5464. Because these assumptions were adequately disclosed and supported with scientific references, they satisfy NEPA. See 40 C.F.R. § 1502.24 (requiring agencies to "identify any methodologies used and . . . make explicit reference by footnote to the scientific and other sources relied upon for conclusions" in an EIS); City of Sausalito v. O'Neill,

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[10]/ A detailed history of the occupancy of owl PACs was attached to the BE. See 15 AR 4475.

386 F.3d 1186 (9th Cir. 2004) (upholding analysis for plan to redevelop former military base against challenge that agency "fail[ed] to support its conclusions with scientific evidence").

Second, the effects of the project on habitat fragmentation and connectivity are also adequately addressed. Although canopy closure would be reduced, it was determined that forest continuity would still be maintained across the landscape. The BE discusses these effects on fragmentation from both DFPZs and group selection units. See 12 AR 4432, 4438, 4458, 4494-4495 (map displaying habitat connectivity); 15 AR 5462, 5465. For DFPZs, the biologist explained that low contrast fragmentation would increase--that is, "dense canopy closure would be reduced within DFPZ[s] but would maintain a continuity of large trees within treated stands and across the landscape." The biologist explained, however, why this would not be significant:

> According to the 1993 CASPO IG EA (Page IV-81), within stand fragmentation of the small tree canopy (trees <20 to 30 feet) is less of a concern than large tree or old forest attribute removal because 1) historical understory densities were discontinuous; 2) this habitat component can return relatively quickly (versus large overstory layer) and 3) creating this type of fragmentation can help avoid larger scale, high contrast fragmentation of forested stands due to wildfire.

12 AR 4432. The BE further explained that the "key to lessening impacts of fragmentation within DFPZs is to maintain forest cover composed of the largest, fire resistant conifer species, while also providing structural attributes needed for prey species (snag/large logs)." Id. The project does this by retaining trees larger than 20" dbh in approximately 82% of the DFPZ units, and by retaining trees larger than 30" in all units. See 13 AR 4793 (describing effects from Alternative C); 15 AR 5462 (trees between 20" and 30" dbh would be removed only on approximately 17% of DFPZ acres). Snags and large logs are also retained. See 15 AR 5498 ("Alternative C as modified is designed to retain approximately 10-15 tons of large down wood within the DFPZ"); 12 AR 4348, 4349 (describing number of retained snags in DFPZs). Thus, effects of DFPZs upon forest connectivity and fragmentation were reasonably determined not to be significant.

Effects of fragmentation from group selection were also considered. First, the Forest Service candidly acknowledged that group selection would create some gaps in habitat. See 12 AR 4432 (noting that group selection would create "low-moderate density openings within

stands"); 15 AR 5465. However, it was determined that size of these gaps--approximately ½ to 2 acres--would still "meet the definition of continuous forest cover" under the CASPO Interim Guidelines. 12 AR 4432, 4438; 15 AR 5465 (group selection units would be "dispersed within a stand so as to maintain attributes constituting continuous forest cover with the stand"); 15 AR 5466 (same). The biologist found this would not result in significant effects because although some openings would be created, they would be low to moderate density, and other structural elements that reduce fragmentation could still be retained. See 12 AR 4432 ("each group would retain structural elements (if present) such as conifers over 30" dbh, all black oaks, down logs up to 10-15 tons/acre, and up to 2 snags/acre, that would reduce within stand fragmentation"). This led the agency to reasonably conclude that the action alternatives "do not create habitat barriers (fragmentation) that would prevent owls from interacting or dispersing." Id.

Third, Plaintiffs argue that the Forest Service did not consider the possibility that reducing owl habitat might affect survival of individual owls by increasing competition or affecting the likelihood they would reproduce. The Forest Service acknowledged this possibility, however, and analyzed it as an indirect effect upon owls. See 12 AR 4433 ("The increased competition associated with defending and using the same habitat area can lead to two or more pairs of owls not reproducing until a competing pair is eliminated from the area. This has the same overall impact to owl pairs that direct habitat modifications can have."). The agency biologist further explained why any potential increased competition would not be significant, noting that HRCAs were "well distributed across the analysis area" and would only be reduced on average by 63 acres each. Id. The biologist thus reasonably concluded that while "it is anticipated that owl behavioral and competitive interactions may increase slightly," effects would not be significant because owl occupancy would not change. Id. Plaintiffs' argument that owl competition was not considered, then, is without merit.

Effects upon owl reproduction were also adequately considered, as the BE also explained in detail the role that low occupancy PAC/HRCAs play in providing habitat for successful population expansion and dispersal of juvenile owls:

> The loss of available nest sites due to catastrophic events or as a result of habitat disturbance may preclude population expansion following breeding pulses. It is possible that owl use of these vacant PAC/HRCA[s] may be "transitory" in nature; that is they are used by owls during periods of peak owl populations, and possibly are empty during lower owl population periods *or may provide areas for occupation by dispersing juveniles and sub-adults*.

12 AR 4432 (emphasis added). The consideration of effects on reproduction is also shown by the mention that frequently vacant sites "had records of successful reproduction, and . . . supported high survival and reproduction when they were occupied." Id. (discussing 2001 scientific paper).

Finally, Plaintiffs' allegations that the Forest Service did not adequately consider the effects of the project on the prey base for the owl are also without merit. See Bond Decl. ¶¶ 24-27. The BE discusses two prey species, woodrats and flying squirrels, and explains that with reforestation and as certain habitat types mature, "woodrats may recolonize sooner as they are known to utilize earlier successional habitats." 12 AR 4434 (citing Mayer and Laudenslayer, 1990 and the Forest Service biologist's personal observations). The BE further explains:

> Downed logs created by the retention of snags would provide down woody structures that would provide habitat for prey species. Flying squirrels would likely be absent within the group selection openings but could possibly utilize the edges to their advantage, and would eventually inhabit these areas as the forest matures.

Id. The BE also notes that modeling has been conducted in the 2001 FEIS and 2004 FSEIS to evaluate the effects of group selection and fuels reduction activities on woodrat and flying squirrel habitat, and that the results "indicated that populations of both species would apparently increase slightly over current conditions" to a very small degree. Id. In sum, the Forest Service adequately evaluated effects to the owl, addressed the factors Plaintiffs claim were not considered, and reasonably concluded that they would not result in significant effects. See Greenpeace Action v. Franklin, 14 F.3d 1324, 1333 (9th Cir. 1992) (refusing to invalidate agency's scientific analysis in EA, because doing so "would require us to decide that the views of [plaintiff's] experts have more merit than those of the Service's experts, a position we are unqualified to take.").

C. Potential Effects Of The Meadow Valley Project Were Reasonably Found Not To Be Highly Controversial.

Plaintiffs argue that an EIS is required because a substantial controversy exists about the Meadow Valley Project's potential impacts. Pls.' Mem. at 32. Plaintiffs disagree with the Forest Service over the potential impacts of the Meadow Valley Project on the owl and on fire risk in the project area. Id. at 32-35. However, they have not demonstrated that the effects of the project are likely to be so controversial as to require an EIS. See 40 C.F.R. § 1508.27(b)(4).

Although "[t]he existence of a public controversy over the effect of an agency action is one factor in determining whether the agency should prepare [an EIS]," Greenpeace Action v. Franklin, 14 F.3d at1333, mere opposition to a particular land use does not create public controversy. See Cold Mountain v. Garber, 375 F.3d 884, 893 (9th Cir. 2004) ("The existence of opposition does not automatically render a project controversial."); see also Soc'y Hill Towers Owners' Ass'n v. Rendell, 210 F.3d 168, 184 (3d Cir. 2000) ("[I]t is important to note that the existence of a controversy is only one of the ten factors listed [in 40 C.F.R. § 1508.27(b)] for determining if an EIS is necessary"). Public controversy is insufficient to require an EIS unless "'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor,' or there is a 'substantial dispute [about] the size, nature, or effect of the major Federal action.'" Nat'l Parks, 241 F.3d at 736 (internal citations and quotations omitted) (alterations in original). "A substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI . . . casts *serious doubt* upon the reasonableness of an agency's conclusions." Id. (emphasis added). If Plaintiffs satisfy this twofold showing, the burden then shifts to Defendants to provide a "well-reasoned explanation" demonstrating why those responses disputing the EA's conclusions "do not suffice to create a public controversy based on potential environmental consequences." Id. (citation omitted).

Plaintiffs attempt to demonstrate a controversy over the effects of the Meadow Valley Project by citing extra-record declarations. E.g., Pls.' Mem. at 34 (citing only declarations to argue that the Project poses a risk to owl survival and/or reproduction and that it includes a "highly controversial" fire risk reduction measure). However, Plaintiffs cannot rely on post-

decisional declarations to establish controversy, as controversy must exist at the time of the decision. Garber, 375 F.3d at 893. "If this type of disagreement were all that was necessary to mandate an EIS, the [EA] process would be meaningless." Greenpeace Action, 14 F.3d at 1335; see also Northwest Envtl. Def. Ctr. v. Wood, 947 F. Supp. 1371 (D. Or. 1996) (holding "declarations [submitted with plaintiffs' motion for summary judgment] are not relevant to the issue of whether a controversy existed to a sufficient degree to require an EIS"). Therefore, Plaintiffs' effort to establish a controversy based on extra-record declarations must be rejected.

Plaintiffs argue that the Project's impacts on the owl are "controversial and highly risky." Pls.' Mem. at 33. Plaintiffs specifically allege that "the loss of suitable owl nesting and foraging habitat caused by the Meadow Valley Project 'would create a risk of decreased spotted owl survival and/or reproduction.'" Id. at 34 (citing Blakesley Dec. ¶ 18). However, Plaintiffs have failed to demonstrate a dispute that "casts serious doubt upon the reasonableness" of the Forest Service's conclusions. Nat'l Parks, 241 F.3d at 736. As explained supra at 19-24, the Forest Service's resource specialists analyzed in detail the potential effects of the project on the owl and concluded that they would not be significant. 13 AR 4847-4828. In addition, as described infra at 29-32, the Forest Service fully considered the risks and uncertainties related to the owl's habitat and likely response to vegetation treatments, such as group selection, in the 2001 FEIS. See generally 2001 FEIS, Pt. 4.4 at 69-112. In sum, while Plaintiffs have cited declarations of individuals who disagree with the Forest Service's conclusions related to the Project's impacts on the owl, Plaintiffs have failed to demonstrate that a controversy exists requiring a project-level EIS.

Plaintiffs also allege that substantial controversy exists as to whether the Meadow Valley Project's group selection units will increase or decrease the risk of severe fire in the Project area. Pls.' Mem. at 34. However, the Forest Service reasonably concluded that potential effects of the Project's group selection timber harvest are not expected to be highly controversial. 13 AR 4815. The Forest Service explained that although some "groups are expected to continue opposing vegetation management authorized by the HFQLG ROD and SNFPA ROD . . . the analysis and finding for environmental effects are not scientifically controversial." Id.

As discussed infra at 39-42, the Forest Service reasonably concluded that the group selection units would contribute to the QLG Act's goal of demonstrating the "effectiveness of group selection . . . in achieving an all-age, multistory, fire-resilient forest." 13 AR 4771, 4869; 15 AR 5480. Plaintiffs' argument that group selection is "highly controversial as a fire risk reduction measure," Pls.' Mem. at 34, misrepresents the purpose of the group selection units. The Meadow Valley Project proposes group selection units not to meet the need for hazardous fuels reduction, but rather to achieve an all-aged mosaic of timber stands while contributing to the local economy. See 13 AR 4771, 4795, 4815. The EA adequately evaluated the potential effects of the Meadow Valley Project alternatives on fire and fuels and reasonably concluded that an EIS was not required. See 13 AR 4795 (discussing effects of group selection on fire and fuels); 13 AR 4864-4887 (Fire/Fuels Report).

In response to public comments, the Forest Service explained the potential hazard posed by the Meadow Valley group selection units. The 743 acres of group selection units are "widely scattered across the 50,000-acre project area." 15 AR 5480. Based on recent experiences with wildfires on the Plumas National Forest, the Forest Service explained that "it will take 20-30 years of brush growth" in group selection units after tree removal "to achieve enough of a dead component to make the brush stand highly flammable." 15 AR 5480. In addition, "[e]ven if some of the units were dominated by highly flammable brush, saplings, or poles, so few units spread over such a large project area would have little or no effect on the overall fire behavior of a large wildfire moving across the landscape." Id. Finally, "if a wildland fire ignited inside or immediately adjacent to a group select unit it could have the effect of slowing the fires initial spread from its point of origin, giving firefighters a little more time to implement effective suppression action." 13 AR 4869; see also 13 AR 4795. In sum, the Forest Service reasonably evaluated the potential effects of the Meadow Valley Project and reasonably concluded that group selection units are not highly controversial.

To the extent that any controversy exists surrounding the impacts of the Meadow Valley Project, it was already evaluated in an EIS at the programmatic level "in the SNFPA FEIS, the SNFPA FSEIS, the HFQLG FEIS, and the Sierra Nevada Ecosystem Project report." 13 AR

4815. NEPA's implementing regulations encourage agencies to "tier" their NEPA documents so that prior analysis of environmental issues do not have to be repeated.[11]/ 40 C.F.R. § 1502.20. Where, as here, the EA tiers to a programmatic EIS, the Court must consider only whether the EA discloses significant new information which was not discussed in the EIS. See ONRC v. Lyng, 882 F.2d 1417, 1421-24 (9th Cir. 1989) (EA was adequate where timber project was encompassed by the National Recreation Area's comprehensive management plan, for which an EIS was prepared); see also Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1356 (9th Cir. 1994) ("A comprehensive programmatic impact statement generally obviates the need for a subsequent site-specific or project-specific impact statement, unless new and significant environmental impacts arise that were not previously considered.")

Group selection is contemplated at specified levels by Congress under the QLG Act § 401(d). The Meadow Valley Project group selection units are proposed as part of the larger HFQLG Pilot Project, for which an EIS was prepared. 13 AR 4771; see 15 AR 5741 ("Monitoring and evaluating performance of Group Selection units is one of the purposes of the QLG Act.") The 1999 HFQLG FEIS analyzed effects of group selection on fire and fuels and found that these treatments could increase the efficiency of DFPZs by reducing outside fuels. For example, the Forest Service used the FARSITE model simulation "to evaluate how fuel treatment patterns could influence fire spread across the landscape." 7 AR 2518; see also 9 AR 3463-3485 (FARSITE Report and Fire Behavior Predictions and Modeling). The HFQLG EIS specifically considered the uncertainty associated with implementation of DFPZ and group selection units, 8 AR 2517-2518, and the potential effects of DFPZ and group selection units on owl habitat, 8 AR 2579-2583. In sum, any indication of a controversy over the potential environmental effects of group selection under the HFQLG Pilot Project was adequately addressed in the HFQLG EIS.

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[11]/ Tiering refers to the coverage of general matters in broader EISs, with subsequently narrow statements or EAs which "incorporat[e] by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared." Id. at § 1508.28.

Finally, even if Plaintiffs could establish that a controversy existed surrounding the Meadow Valley Project's effects on the owl or fire risk, the Forest Service provided a reasonable explanation of why it was not significant in response to public comments. See 15 AR 5461-5467. Of the 19 comments submitted on the Meadow Valley EA, two comments--submitted by Plaintiffs--argued that the Project would have negative impacts on the owl. See 15 AR 5453-5481. The receipt of comments opposing a proposal does not render a proposal controversial under NEPA. See Tri-Valley Cares v. United States Dep't of Energy, No. C 03-3926-SBA, 2004 WL 2043034, at *14-*15 (N.D. Cal. Sept. 10, 2004) (controversy may exist "not because the majority of public comments opposed the project, but because the comments . . . created substantial dispute over the scientific conclusions" of the agency); Fund for Animals, 246 F. Supp. 2d at 45 (controvery under NEPA "does not exist merely because some are highly agitated about, vigorously oppose or have raised questions about the action.") With citation to scientific literature, expert opinion, and analytical tools, the Forest Service explained how it reached its conclusions related to the Meadow Valley Project's potential impacts on owl habitat and occupancy. See, e.g., 15 AR 5467 (explaining how the Forest Service determined the owl population in the analysis area would not be likely to decline). The Forest Service also addressed Plaintiffs' concerns related to fire risk. For example, as explained infra at 36-39, the Forest Service would treat logging slash, and would reduce the amount of slash that would be created by yarding trees whole from group selection units to the landings. 15 AR 5480; see also 13 AR 4869. In sum, Plaintiffs have not shown that public controversy requires an EIS.

D. The Forest Service Reasonably Determined that the Meadow Valley Project Would Not Result in Uncertain, Unique, or Unknown Effects that are Significant.

Plaintiffs argue that the Meadow Valley Project would pose highly uncertain and unique risks to owls. Pls.' Mem. at 36. Plaintiffs specifically assert that the Meadow Valley Project's group selection units "will create a high risk of wildfire in the Project area" and that "[t]he increased fire risk from group selection units adjacent to spotted owl PACs and within HRCAs will potentially result in further adverse effects and from unknown risks to owl habitat." Id. at 37. Plaintiffs' argument must fail because the Forest Service reasonably concluded that the

effects of the Meadow Valley Project would not result in significant uncertain, unique, or unknown effects. 13 AR 4816. Moreover, any "unknown risks to owl habitat" posed by the Meadow Valley Project were already evaluated in an EIS at the programmatic level.

The Meadow Valley EA reasonably concluded that "[a]lthough some risks to sensitive wildlife species are associated with project actions . . . these risks are not highly uncertain, unique, or unknown." 13 AR 4816; see also 12 AR 4440 (noting uncertainty associated with group selection units). To reach this conclusion, the Forest Service specifically analyzed the direct effects on owl habitat and sixteen PACs/HRCAs, the indirect effects on thirty owl PACs/HRCAs, and the percent of each HRCA impacted and the reduction of suitable habitat. 12 AR 4427-4432; see also 15 AR 5462; supra at 21. The EA explained that Project provisions to avoid PACs[12]/ and SOHAs and the degree and distribution of changes to other owl habitat, would likely not lead to changes in owl occupancy or threaten viability. 13 AR 4824; 12 AR 4427-4440; see also 15 AR 5460. To make this determination, the Forest Service analyzed the latest scientific information and "concluded that the number of occupied owl PACs would not be likely to change, and thus the owl population in the analysis area would not be likely to decline."[13]/ 15 AR 5467. The Forest Service also relied on its recent experience with "[s]imilar silvicultural and fuel treatments and road improvements [that] have been implemented on the Mt. Hough Ranger District in recent years. Based on the results of these previous activities, anticipated project effects are not unknown, unique, or uncertain." 13 AR 4816. Finally, the Meadow Valley Project group selection units represent "18.6% of the annual average group selection in spotted owl habitat anticipated in the [2001] SNFPA ROD as part of an administrative study (4,000 acres/yr)." 13 AR 4787. Therefore, "vegetation management in spotted owl habitat would be

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[12]/ PACs are well distributed across the analysis area and will remain untreated. 15 AR 5748.

[13]/ The Forest Service explained that while "changes in habitat on brought on by group selection . . . result in some openings and gaps within stands," the group selection units will be "dispersed within a stand so as to maintain attributes constituting continuous forest cover within a stand." 15 AR 5465. The Forest Service explained that "habitat connectivity would be maintained (minimum of 40% canopy closure) to allow for movement of old forest species between areas of suitable habitat . . . and suitable habitat for old forest species will not be reduced by more than 10% below 1999 levels, as identified in the QLG FEIS." 15 AR 5748.

accompanied by monitoring and evaluation under the auspices of [the Forest Service's] administrative study." 13 AR 4816. The study will be "focused on resolving uncertainties about the effects of vegetation management actions on spotted owl behavior and population dynamics." 13 AR 4824; see also 11 AR 4138 (study design); 14 AR 5124 (2003 annual report).

Plaintiff is incorrect in its statement that "the Forest Service justified the proposed logging of owl habitat in the Meadow Valley Project, as well as its finding that the Project did not involve unique or unknown risks to the owl, as part of the cancelled SNFPA administrative study." Pls.' Mem. at 37. The Meadow Valley Project's vegetation treatments, including those in owl habitat, were proposed to meet the five purposes and needs set forth in the EA. 13 AR 4764-4774. Plaintiff is correct that the Meadow Valley Project group selection units would be part of the SNFPA administrative study; however, the Forest Service never suggested that the study "justified" the proposed actions. 13 AR 4765; see 15 AR 5478 (noting that the administrative study "is not referenced as if it were mitigation"). Finally, the administrative study is underway.[14]/ See, e.g., 14 AR 5124 (2003 annual report).

Finally, because the Forest Service has disclosed the potential significance of uncertainty at the programmatic level, NEPA is satisfied and a project-level EIS is unnecessary. The 2001 FEIS adequately considered the unknown, unique, or uncertain effects posed by group selection units and specifically acknowledged uncertainty related to impacts on owl habitat. NEPA does not require the Forest Service prepare a project-level EIS where the agency has disclosed the potential significance of any uncertainty at the programmatic level and further assessment of impacts in an EIS is unlikely to be productive. See Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1276 (10th Cir. 2004) (Corps was not required to prepare project-level EIS even

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[14]/ The Plumas and Lassen National Forests did cancel a notice of intent to publish an EIS for an earlier, more expansive, administrative study. 68 Fed. Reg. 20366 (Apr. 25, 2003). However, contrary to Plaintiffs' assertions, the notice was not canceled because it "generated so much controversy regarding owl impacts." Pls.' Mem. at 36 n.30. The notice itself explained that the it was cancelled "because of the need to configure a different study proposal that accommodates the Forests' implementation of the HFQLG legislation and the National Fire Plan while simultaneously addressing concerns with the scientific design of the originally-proposed study." 68 Fed. Reg. at 20366. Since that time, the Forest Service has initiated a narrower study that will examine projects proposed as part of the HFQLG pilot implementation. See 13 AR 4735.

though EA and BiOp "could not predict with certainty how the resident bald eagles would react to" proposed activities). In the 2001 FEIS, the Forest Service acknowledged and evaluated the "disagreement over how to best protect and restore habitat for wildlife," including the owl. SNFPA EIS Summary at 8. The EIS includes over 40 pages of analysis of the environmental consequences related to the owl. 2001 FEIS, Pt. 4.4 at 69-112. The EIS fully considers risks and uncertainties related to the owl's population status and trend, id. at 72, 112, habitat and prey, id. at 76-79, 92-95, 100-102, 111-112, and response to vegetation treatments, id. at 83, 95-100, as well as uncertainties related to management within the PACs and the PACs' adequacy to maintain owl territory, id. at 85-86, 111. The Forest Service also addressed uncertainty related to species assessment. Id., Pt. 4.1 at 7-8.

Uncertainties related to fire and fuels was also evaluated in the 2001 FEIS. The Forest Service noted that "[t]here are differing views regarding the type, rate, and intensity of actions that should be taken to reduce fuel hazards. Among those that believe management actions should be taken, there is disagreement over the method . . . and strategy . . . [and] treatment priorities, and where to emphasize treatments." Id., Summary at 8. The programmatic document reviewed recent findings about fire and fuel management, analyzed the causes, effects, and distribution of twentieth century fire regimes, and evaluated various fuel treatment prescriptions. Id., Pt. 3.5. The Forest Service discussed "[t]he uncertainty associated with future fire trends" and related "uncertainty in modeling landscape vegetation patterns" as well as the "risk and uncertainty" associated with implementation of each proposed alternative. Id. at 281, 303-306. The EIS also identifies the "uncertainty about how different treatments or combinations of treatments affect fire risk and severity within PACs or in areas surrounding PACs." Id. Pt. 4.4 at 85. Overall, because the Forest Service had already evaluated the potential significance of uncertainty in the 2001 FEIS, an EIS was unnecessary for the Meadow Valley Project.

In sum, the Forest Service adequately explained why risks to the owl associated with the Meadow Valley Project were not highly uncertain, unique or unknown.

E. The Forest Service Took a Hard Look at Impacts to the Owl and Reasonably Determined They Would Not Be Significant

Plaintiffs also argue that an EIS should have been prepared because the Meadow Valley Project, when combined with other future DFPZ and group selection projects, would result in cumulatively significant impacts upon the owl. See Pls.' Mem. at 37-38. Plaintiffs' argument is without merit, because cumulative effects were adequately disclosed within the analysis area and reasonably determined not to be significant. The BA/BE identifies and discusses future activity that would occur within the analysis area, including: underburning (Stanley/Slate projects, McFarland project); stream restoration (Bottle Springs stream restoration, Schneider Creek Restoration, 3rd Water/4th Water/ Miller Fork fish passage project); and other issues such as hazard tree removal, DFPZ maintenance, firewood removal, and local area treatments. 12 AR 4401-4402. The BA/BE also identified past and present private timber harvest within the analysis area, as well as impacts from an active rock pit, several watershed restoration projects, recreation, a grazing allotment, and a past wildfire. See 12 AR 4397-4402, 4434-4437 (discussing numerous projects, including timber sales, thinning, salvage, and DFPZs).

Plaintiffs argue that the Forest Service cannot rely upon the cumulative effects analysis in the 1999 HFQLG EIS because it relied upon the implementation of a mitigation measure which the Meadow Valley Project does not follow--namely, avoiding activity in owl habitat on the Westside--to avoid threatening owl viability. Pls.' Mem. at 38. Although the Forest Service did avoid suitable owl habitat under the 1999 HFQLG ROD, the agency has since reviewed the analysis supporting the 1999 HFQLG ROD and found that it unnecessarily "took a worst case approach to estimating effects" on the owl. MRR at 55; see also 4 AR 1402 (analysis was "based on a worst-case scenario"). In particular, the HFQLG BA/BE assumed that "[a]ll group selection and DFPZ construction that was projected to occur within owl habitat" would render 100 percent of that habitat unsuitable. Id. However, the HFQLG BA/BE also found that past fuel reduction and DFPZ construction in owl nesting habitat "actually reduced that habitat by less than one percent of the acreage treated," not 100 percent as the BA/BE assumed. MRR at 55. The Team that reviewed the 1999 HFQLG BA/BE further explained:

> Considering all timber strata used by owls for nesting, past projects reduced only six percent of the acres of habitat treated to lower quality habitat strata [citing HFQLG BA/BE at 71 (Table 9)]. Even assuming the Pilot Project would double the highest percentage of reductions in habitat within treated areas previously experienced (six percent); the projected reductions in owl habitat *would only be 12 percent instead of the 100 percent used in the analysis*.

Id. Other factors were also found that indicated the 1999 BA/BE had taken an unnecessarily conservative approach to estimating effects to the owl. See 4 AR 1403 ("Vegetation growth outside of DFPZs and the associated contribution to potentially suitable owl habitat was not explicitly considered.").

For this and other reasons, including the possibility that management direction could be better harmonized with the QLG Act, the Regional Forester issued a supplemental EIS and forest plan amendment in January 2004. The 2004 FSEIS contains a revised analysis of effects to the owl, based upon full implementation of the QLG Act. See 4 AR 1412-1414. The BE for the 2004 FSEIS reached a finding, based on a variety of new scientific information on owls, that there would not likely be a trend toward listing the owl, and accordingly, that viability would not be threatened. See 15 AR 5466 (analysis in 2004 FSEIS "show[s] that the models project an increase in habitat suitability in the HFQLG area in 20 years over current conditions").

Plaintiffs rely upon a statement in the EA that if future projects employ similar treatments as Meadow Valley, the "present action can be viewed as initiating a cumulative reduction in available spotted owl habitat," to argue that cumulative effects would be significant. Pls.' Mem. at 39 (quoting 13 AR 4828). The Forest Service explained in the BE, however, that any potential cumulative impacts from the Meadow Valley Project would not be significant because it was not expected that owl occupancy would change. See 12 AR 4438 ("[A]s owl occupancy is not expected to diminish with the action alternatives, a cumulative population loss is also not anticipated"). Plaintiffs are incorrect that this amounts to an "unsupported, conclusory statement," as the Forest Service adequately explained the assumptions behind the conclusion that owl occupancy would not likely change.

Plaintiffs' suggestion that the Forest Service ignores the relationship between owl survival and reproduction is similarly unfounded, as the BE includes a discussion of potential

effects of habitat reduction on owl reproduction. See 12 AR 4432 (PAC/HRCAs which may become vacant might "provide areas for occupation by dispersing juveniles and sub-adults"); id. (according to a 2001 scientific paper, "frequently vacant sites had records of successful reproduction, and . . . supported high survival and reproduction when they were occupied."). The mere fact that Plaintiff may be able to produce affidavits from scientists who disagree with the conclusions reached by the agency does not allow the Court to invalidate the agency's decision. See Marsh, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive"); City of Carmel-by-the-Sea, 123 F.3d at 1151-52.

Furthermore, even outside the cumulative effects analysis area for the project, future effects of the QLG Act Pilot Project would not go unanalyzed. The BE presents the cumulative acres of old forest habitat and spotted owl nesting habitat that would be reduced as a result of projects on the Mount Hough Ranger District. See 12 AR 4458-4459 (Tables 40, 41). These figures allow the three National Forests which comprise the Pilot Project to track changes in old forest habitat and ensure they are not reducing habitat for old-forest dependent species in the Pilot Project area by more than 10% below 1999 levels. See 15 AR 5462. The Forest Service determined that so long as "this threshold is not exceeded, trends toward federal listing or loss of species viability are not likely to occur." Id. This monitoring and tracking program will allow other ranger districts in the pilot project area to "assess cumulative effects of impacts to owl habitat in future project planning," thus ensuring that such impacts would be considered. See Northwest Envtl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1538 (9th Cir. 1997) (finding that cumulative impacts did not require preparation of EIS, in part because proposed expansion of hydroelectric project "will not escape NEPA review").

III. THE MEADOW VALLEY PROJECT GROUP SELECTION TREATMENTS COMPLY WITH THE QLG ACT

Plaintiffs allege that the group selection treatments described in the Meadow Valley EA will dramatically increase fire risk and severity, in violation of the QLG Act. Pls.' Mem. at 16-

17. This claim is without merit for several reasons. First, the portion of the QLG Act upon which Plaintiffs base their claim does not establish any mandatory legal requirements. Second, the group selection treatments will not increase the risk of severe fire. Third, the QLG Act does not require that group selection treatments reduce fire risk or severity. Finally, the QLG Act specifically authorizes group selection in the manner proposed by the MV project, such that granting Plaintiffs' claim would frustrate rather than facilitate the purposes of the Act.

A. The QLG Act's Goal of Creating Fire Resilient Forests Is Not a Mandatory Legal Standard

Plaintiffs' QLG Act claim must fail because it is based upon hortatory, not mandatory, language in the Act. Supreme Court precedent makes clear that only mandatory statutory or regulatory provisions are enforceable. See, e.g., Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, 22-24 (1981) (general statements of federal policy do not constitute mandatory legal requirements). Statutory provisions that merely state goals, enunciate statutory purposes, or accomplish other hortatory purposes are not legally binding on federal agencies or enforceable in court. See id. at 24. Here, the section of the QLG Act to which Plaintiffs cite is nothing more than a goal statement; it is not a binding norm. Rather than saying that all group selection treatments "must" or "shall" create fire resilient stands, the Act simply states that the ultimate goal of group selection is "to achieve a desired future condition of all-age, multistory, fire resilient forests." QLG Act § 401(d)(2). This general and aspirational language cannot fairly be read as a binding legal norm that must be accomplished on project-by-project basis. Therefore, Plaintiffs' QLG Act claim should be denied outright.[15]/

B. The Meadow Valley Group Selection Treatments Will Not Increase the Risk of Severe Fire

Even if the QLG Act's desired condition language were mandatory, Plaintiffs ' arguments are founded upon incorrect factual assertions. Plaintiffs allege that the Meadow Valley group

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[15]/ Even if the desired condition language were mandatory, the Forest Service should be granted broad discretion in interpreting and applying it. See, e.g., Perkins v. Bergland, 608 F.2d 803, 806-07 (9th Cir. 1979) (granting broad discretion to Forest Service in interpreting and applying vague "multiple use" language).

selection treatments "will *increase* the potential for, and risk of, severe fire in the project area." Pls.' Mem. at 10 (emphasis in original); see also id. at 16-17. To support this allegation, Plaintiffs state that flammable logging debris--"slash"--will be left on site, and that opening the canopy will facilitate the growth of highly flammable vegetation and create conditions favorable to fire. These allegations are rebutted in several places in the EA and supporting documentation.

The most concise response to Plaintiffs' allegations is given in the EA's Response to Comments. See 15 AR 5480-5481. First, the Forest Service stated that there would be little logging slash in the group selection units because the trees to be cut will be removed in their entirety from the site – branches, tops, and all. 15 AR 5480 ("Trees from group selection units would be yarded whole to landings."); see also 15 AR 5470 ("In group selection units, trees would be yarded whole to landings, where tops and limbs would be removed."); 13 AR 4869. Therefore, the dramatic build-up of fuels to which Plaintiffs refer simply will not occur. Second, all the logging slash that is created--both in the group selection units and at the landings--will be treated; it will not be left to burn as Plaintiffs assert.[16]/ As stated in the Response to Comments:

> [A]fter tree removal in group selection units, activity-created fuels in the unit would be treated by one or more of the following methods: piling and burning, underburning, mastication, or by no treatment at all where residual surface fuels are at an acceptable level ... Excessive surface fuels on landings not chipped and removed as biomass would be treated with prescribed fire. Excessive surface fuels created in group selection units would not go untreated.

15 AR 5480; see also 13 AR 4794 ("Residue from group selection and DFPZ construction would be burned, so that surface fuels would be decreased."); 13 AR 4760 (bullets 5, 8); 15 AR 5470; 13 AR 4869, 4871, 4879 (Fire and Fuels Report). Despite Plaintiffs' assertions to the contrary, the timber sale contracts *do* have provisions requiring the treatment of slash.[17]/ See, e.g., 16 AR

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[16]/ By treating the slash created by the group selection treatments, the Forest Service will also incidentally treat any slash and small fuels that existed prior to the treatments, thereby reducing the fuel loading to a level lower than what existed prior to the treatments.

[17]/ In addition to the slash treatment requirements imposed on the timber sale contractors, there are further slash treatments implemented by the Forest Service through their Knutson-Vandenberg and Brush Disposal programs. To implement these programs the Forest Service collects specially designated funds from the contractors. See 16 AR 5901e, 5905, 6065d, 6069.

5781, 5935 (Provision B6.7); 16 AR 5821-23, 5977-79 (Provision C6.7#). Plaintiffs' allegations of tinderboxes remaining in group selection units are thus unsupported.[18]/

Plaintiffs' allegations about the rapid regrowth of flammable vegetation are also rebutted by the record. While the Forest Service conceded that "brush would sprout in many group selection units after tree removal," the Forest Service made clear that the mere growth of vegetation does not create a high risk of severe fire. 15 AR 5480; see also Skinner Decl. ¶¶ 17-18. The Forest Service stated, "On the [Plumas National Forest], brush species do not exhibit severe or extreme fire behavior, especially when the brush is young, succulent, and growing." Id. Some fires in brush fields have even failed to stay alight. Id. The Forest Service recognizes that the flammability of brush increases as it grows and dies, but notes that it will take approximately "20-30 years of brush growth to achieve enough of a dead component to make the brush stand highly flammable." Id. Reaching this stage is unlikely in the Meadow Valley group selection units, because conifers will "overtop and begin to shade the brush before the high flammability condition of the mature brush develops." Id.; see also 13 AR 4760 ("if necessary, competing brush and grass would be controlled by grubbing or mastication to assure survival and growth of young conifers.")

The EA and supporting documentation also indicate that group selection units burn at a low intensity or slow the advance of fire, contrary to Plaintiffs' assertions. 15 AR 5480-5481. (discussing low intensity of fires that would burn in group selection units due to lack of fuels); 13 AR 4869 ("If a wildland fire ignited inside or immediately adjacent to a group select unit it could have the effect of slowing the fires [sic] initial spread ...."); 13 AR 4795; 7 AR 2517; see also Skinner Decl. ¶¶ 14-16. The Forest Service acknowledges that group selection can increase fire hazard, but only when slash is left untreated, which is not the case here. See 7 AR 2517.

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[18]/ Plaintiffs' reliance upon Sierra Club v. Eubanks, 335 F.Supp.2d 1070 (E.D. Cal. 2004) is misplaced. Unlike the Meadow Valley Project, the salvage logging in Eubanks did not include the requirement to yard trees whole or treat the slash after logging had been completed. Id. at 1074 ("slash left by logging activities would not be treated or removed.") There, large amounts of fuel were created and left on site with the potential for a serious fire. No such risk exists here, due to the low amount of slash to be created and the commitment that all slash will be treated.

Finally, the Forest Service emphasizes the small size and low density of group selection units within the project area, such that "[e]ven if some of the units were dominated by highly flammable brush, saplings, or poles, so few units spread over such a large project area would have little or no effect on the overall fire behavior or a large wildfire moving across the landscape." Id. In sum, the EA and supporting documentation clearly rebut Plaintiffs' dire allegations about effect of group selection silviculture on the risk of severe fire.[19]/

C. The Meadow Valley Group Selection Treatments Will Help Achieve Fire Resilient Forests

Even if Plaintiffs were correct that the Meadow Valley group selection could increase the risk of severe fire, that would not be a violation of the QLG Act. Nowhere does the Act require that group selection reduce the risk of a severe fire. Instead, the QLG Act states that group selection should be used "to achieve a desired future condition of all-age, multistory, fire *resilient* forests ...." QLG Act § 401(d)(2) (emphasis added). Because fire resilience is different from fire risk or severity, it is of no legal consequence that the Meadow Valley group selection treatments might increase short term fire risk or severity. See Skinner Decl. at ¶ 12 (explaining difference between fire resilience, fire risk, and fire severity). Fire resilience refers to a long-term potential of the landscape to maintain a forested condition and recover quickly from a fire. Id. at ¶¶ 9-10, 12. Fire risk is simply the potential or likelihood of having a fire of any intensity. Id. at ¶ 12. Fire severity refers to the degree of effects of a fire.[5]/ Id. While the concepts of fire risk and severity are surely important in forest and fire management, they are not particularly relevant in ascertaining whether the Forest Service has complied with the QLG Act. What is important under the QLG Act is that the Meadow Valley group selection will help achieve the goal of creating a fire *resilient* forest.

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[19]/ Plaintiffs' allegations about the Forest Service's treatment of stands that have previously been treated are beside the point. See Pls.' Mem. at 10, 17. First, there is nothing in the QLG Act or any other law that precludes the FS from treating an area more than once in a given period. Second, Plaintiffs' claims of increased risk for severe fire are based on a misunderstanding of the effects of group selection, as discussed above. Finally, there are several good reasons for the overlap of Meadow Valley Project boundaries with areas that have been previously treated. See Decl. of James M. Peña ("Peña Decl.") ¶¶ 17-22; Skinner Decl. ¶ 19.

The record and scientific literature make clear that group selection silviculture, as proposed in the Meadow Valley Project, helps achieve fire resilient forests. The clearest way to show this is to describe the type of fire-resilient forest to which the QLG Act refers, and then show how group selection reaches that end. As to the first point, the record indicates that the type of forest envisioned by the Act is the Sierra Nevada forest that existed prior to European settlement and forest management in the twentieth century. The 1999 HFQLG EIS describes the goal as an "'all-age, multistory, fire resistant forest approximating pre-settlement conditions' of open forest stands dominated by large, fire tolerant trees with crowns sufficiently spaced to limit the spread of crown fire." 7 AR 2449 (citing QLG Community Stability Proposal, incorporated by reference in the QLG Act, § 401(b)(1)). The Meadow Valley EA also describes the desired condition as "a forest that will closely mimic the historical natural landscapes of the Sierra Nevada." 13 AR at 4771; see also 6 AR 1961 (QLG Community Stability Proposal) ("The Desired Future Condition is an all-age, multi-story, fire-resistant forest approximating pre-settlement conditions. This will be achieved by utilizing individual tree selection such as the system used by Collins Pine and/or group selection . . . ."); Skinner Decl. ¶¶ 3-5.

The record and scientific literature consistently state that group selection silviculture, as applied in the Meadow Valley Project, is an effective method of achieving the pre-settlement conditions toward which the QLG project is striving. The Sierra Nevada Ecosystem Project report unambiguously states, "[the pre-settlement] stand structure is approximated with the group selection cutting method." See Skinner Decl., Attach. 2 at 1172.[20]/ The California Spotted Owl Technical Report ("CASPO Report") reinforces that group selection helps achieve the "all age, multistory, fire resilient forest" referred to in the Act, and indicates that group selection treatments may benefit the owl. The CASPO Report states,

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[20]/ See also Skinner Decl., Attach. 2 at 1170 ("fire type 2 [] corresponds to the presettlement fire regime that evidently dominated most Sierra Nevada forests, especially those low- to middle-elevation forests now in greatest need of restorative management. The corresponding stand structure type (a mosaic of small, even-sized groups) and its silvicultural counterpart (the group selection cutting method) are therefore of special interest ....")

> One kind of structure that may have promise for production and long-term maintenance of owl habitat is a multi-aged mosaic of small, even-aged groups or aggregations. Groups would generally range in size from about 2 acres down to a quarter-acre, or possibly less. Probably this type of structure best approximates presettlement stand structures, thus warranting serious consideration. Openings would be sufficiently large to permit regeneration of shade-intolerant as well as shade-tolerant species.

Skinner Decl., Attach. 3 at 271-72.

One of the important ways in which group selection helps achieve a fire resilient forest is by promoting the recruitment and growth of fire resistant pine trees. See Skinner Decl. ¶¶ 10-11. During the last hundred years, when forest fires have been largely suppressed in the Sierra Nevada, the forests have tended to include a higher and higher proportion of wh te fir, which are less fire resistant than the pines. Id. at ¶¶ 6-7. As a result, Sierra Nevada forests have become less fire resilient. Id. One of the goals of group selection silviculture is to create conditions that allow pine trees to grow and prosper, and thereby increase the fire resilience of the forests. Id. at ¶ 10-11. Unlike the fir and cedar species, which can regenerate and thrive in shady conditions, the pines require much more sunlight. Id. 6. By creating ½ to 2 acre openings in the forest, group selection provides the conditions necessary for the recruitment of pines, and the creation of a more fire resilient forest.[21]/ Id. 6, 11. The Meadow Valley group selection treatments are typical of the group selection method and will promote the recruitment of pines and the achievement of more fire resilient forests, as called for in the Act.[22]/ See, e.g., 13 AR 4760 (bullets 3 and 6, stating intent of recruiting shade intolerant species, such as pines); 12 AR 4311.

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[21]/ The Forest Service also envisions the reintroduction of fire to the ecosystem, adding another key element of fire resilient forests from the pre-settlement era. See, e.g., 13 AR 4795, 4871-73.

[22]/ Group selection silviculture is not "a euphemism for clear cut[ting]," despite Plaintiffs' assertion to the contrary. Group selection is an uneven-aged method of silviculture that seeks to create a well-distributed range of age classes within a forest stand, while clearcutting is an even-aged method that seeks to create a uniform age class across a forest stand. See Skinner Decl. ¶ 18; 12 AR 4311; 7 AR 2449-50. Additionally, the Meadow Valley EA makes clear that within the group selection units, many trees will remain after the treatments are complete. See, e.g., 13 AR 4760. Specifically, the following trees will not be harvested: blister rust resistant sugar pines, black oaks, desirable conifer regeneration, trees greater than 30" dbh that do not interfere with operability, and two of the largest snags per acre. Id. From the 30" dbh rule alone, approximately seven trees per acre will remain after harvest. 12 AR 4312. All the other requirements will result in even more trees remaining on site, with an expected 13% canopy cover remaining (as compared to 61% canopy cover prior to harvest). 12 AR 4312, 4315.

Despite their allegations of increased fire risk and severity, Plaintiffs have not provided any evidence on fire resilience itself. Because fire risk and severity do not equate with fire resilience, Plaintiffs' arguments and expert input on the subject are tangential, at best. Additionally, Plaintiffs' arguments address the potential risks at the level of an individual group selection unit; they do not address the issues of fire risk, severity, and resilience at the *forest* level, which is the relevant scale for purposes of the QLG Act. See QLG Act § 401(d)(2) ("a desired future condition of all-age, multistory, fire resilient *forests* ....") (emphasis added). Similarly, Plaintiffs' arguments all address short-term risks, rather than look at the long-term, which is necessary for the conversion of a fire-prone forest to a fire-resilient one. The language in the QLG Act that addresses the "desired future condition" of a fire resilient forest is aspirational and cannot be achieved by one project or in just a couple of years. In sum, Plaintiffs focus on the wrong issues (fire risk/severity rather than fire resilience), the wrong scale (group selection unit rather than forest), and the wrong time frame (short term rather than long term).

D. Meadow Valley Group Selection Is Specifically Authorized by the QLG Act.

Implementing group selection is expressly authorized by the QLG Act. The Act states, "the Secretary shall implement and carry out ... [g]roup selection on an average acreage of .57 percent of the pilot project land area each year . . . ." QLG Act § 401(d). While Plaintiffs argue that group selection would violate the QLG Act, in actuality the Act specifically contemplates that the Forest Service should carry out the type of group selection harvest authorized here. Reaching the desired condition of an "all-age, multistory, fire resilient forest" is clearly a goal of the QLG Act. But, it does not have the mandatory language of Section 401(d), which contemplates that the Forest Service implement a certain amount of group selection every year.

It would be one thing if Plaintiffs alleged that the particular type of group selection being implemented in the Meadow Valley Project were unusual and, unlike standard group selection treatments, impeded the achievement of a fire resilient forest. But they do not. They simply attack group selection silviculture in general, and argue that it will create hot, dry, and windy conditions and therefore violate the QLG Act. If their argument were successful and carried to

its logical conclusion, then no group selection would be permissible in the pilot project area, thereby frustrating the purpose of the QLG Act. Clearly this is not what Congress intended.

With this project, the Forest Service is implementing group selection in a standard manner, and implementing it on lands specifically designated in the QLG Act as "Available for Group Selection." See QLG Act § 401(b)(2). In fact, the Forest Service even took extra effort in locating the Meadow Valley group selection units so as to avoid environmentally sensitive. 13 AR 4771 ("lands supporting important environmental and social resources . . . were excluded from the placement of groups"). Given the clear terms of the Act and the fact that the Forest Service is implementing group selection in a reasonable manner, Plaintiffs' allegations under the QLG Act should be rejected, and Defendant should be granted summary judgment.

IV. THE FOREST SERVICE WAS NOT REQUIRED TO MARK TREES IN THIS CASE BECAUSE ITS DESIGNATION BY DESCRIPTION OF TREES TO BE HARVESTED MAKES MARKING UNNECESSARY

Plaintiffs allege that the Forest Service violated NFMA by failing to mark all the trees to be harvested in the group selection and DFPZ units of the Meadow Valley Project. Plaintiffs claim that the Forest Service has illegally left the designation and marking to private timber sale purchasers. Pls.' Mem. at 41-42. Under NFMA, employees of the Department of Agriculture, not private parties with a financial stake in the harvesting of the trees, are required to mark or designate the trees to be harvested on National Forest System lands. 16 U.S.C. § 472a(g). However, NFMA makes perfectly clear that not all trees to be harvested must be marked. Rather, marking is only required "when necessary." Id. When marking is not necessary, "designation" of trees without individual marking is permissible. Id. ("Designation [and] marking *when necessary* ... shall be conducted by persons employed by the Secretary of Agriculture.") (emphasis added). For the three timber sales here, Forest Service employees designated all the trees to be harvested; the timber purchasers will have no hand in designating or marking trees to be cut. Therefore, the Forest Service has fully complied with NFMA.

Plaintiffs first allege that the Forest Service has violated NFMA by "fail[ing] to mark the trees to be removed in the group selection units." Pls.' Mem. at 42. Plaintiffs note that instead of individual trees being marked, "trees to be logged in group selection units have been designated

by description." Id. This is entirely correct. However, it is not a violation of NFMA. Plaintiffs correctly point out that the trees to be cut and those to be removed have, in fact, been "designated" in the contracts, which is exactly what NFMA requires. See 16 U.S.C. § 472a(g) (allowing "marking" *or* "designation" of trees). The contract provisions to which Plaintiffs cite designate which trees may be cut and which may not. The provision addressing the diameter-at-breast-height requirement states, "no tree larger than 29.9 inches in diameter at breast height (DBH) is designated for cutting under this contract ...." See, e.g., 16 AR 5793, 5948 (Provision C2.0#). The provision addressing the stump diameter requirement states, "All live hardwoods; [sic] and all live conifer trees 34.0 inches or larger in diameter at stump height shall be left as leave trees." See, e.g., 16 AR 5798, 5953 (Provision C2.352#). Both of these provisions unambiguously "designate" which trees may be cut and which may. There is no room for discretion by the timber purchaser. If there is a 31" dbh tree or a 35" stump diameter tree, the purchaser has no legal right to cut them. If the purchaser did so, it would not only be breaching the timber sale contract, but also violating federal civil and criminal regulations. See, e.g., 36 CFR § 261(b). Given that the two contract provisions that Plaintiffs challenge clearly designate which trees may be harvested, the Forest Service has complied with its legal duties under NFMA.

Plaintiffs next assert that the timber purchaser will have unfettered discretion in harvesting "trees over 30 inches in diameter to be removed from group selection units and DFPZs because of disease or for the purposes of 'operability.'" Pls.' Mem. at 43. However, this is incorrect for two reasons. First, the Meadow Valley Decision Notice makes clear that the project does not include the harvest of diseased trees greater than 30". 15 AR 5494. Second, for trees greater than 30" to be removed for operability, each and every such tree will be designated and approved by the Forest Service contract administrator before its harvest. See 15 AR 5461 (Removal of trees for operability "must be approved by the [Forest Service] contract administrator in advance."); see also 15 AR 5497 ("as required by contract specifications, a Forest Service contract administrator is required to approve in advance the location of all roads, skid trails, landings, or other components of operability."); 13 AR 4776 (location of roads, skid trails, landings, etc. "are not left to operator choice."). The contract specifically provides, "Trees

designated after contract award for cutting that are larger than 29.9 DBH shall be by agreement and in writing." See, e.g., 16 AR 5793, 5948 (Provision C2.0#). Therefore, every tree greater than 30" to be removed for operability requires designation or marking by the Forest Service; the purchaser has no discretion to select and harvest trees for operability. Again, given that the Forest Service must designate and approve every tree to be harvested greater than 30", the Forest Service has met its legal obligation under NFMA to mark or designate the trees to be cut.

Plaintiffs allegations appear to be based on the theory that when NFMA permits tree designation, it only allows the practice "where all trees or forest products in a given area are to be removed or where all trees or forest products in a given area are to be retained." Pls.' Mem. at 42. There is absolutely no support for this theory in NFMA, its implementing regulations, or any case law. Even the Senate Report cited by Plaintiffs indicates only that designating an entire area is permissible under the revised law; it never states, or even implies, that designating something less than an entire area would be inconsistent with the statute. Given the lack of textual support for Plaintiffs' theory, Plaintiffs read far too much into a single sentence from a Senate Report. NFMA clearly states that the Forest Service may designate trees to be cut by means other than marking, and that is exactly what the Forest Service did here.

Plaintiffs' reliance upon Siskiyou Regional Education Project v. Goodman is also misplaced, as the contract provisions at issue in that case markedly differ from those here. See Pls.' Mem. at 43. In Goodman, the court found that elements of two contract provisions violated NFMA because they appeared to give the timber sale contractor "a hand in designating" which trees would be cut. Siskiyou Reg. Educ. Project v. Goodman, 2004 WL 1737738 at *12 (D. Or. Aug. 3, 2004). The court reached this conclusion because the contract provisions assigned the contractor the role of identifying trees to be cut or retained in the first instance. One of the provisions stated, "*Purchaser shall identify*, and Forest Service shall designate, prior to cutting the Subdivision, standing dead trees to be left for resource management needs ...." Id. at 11 (citing additional contract provision that refers to "trees selected by the Purchaser"). These provisions gave the contractor the initial role in choosing which trees would be cut and which would not, thereby making it difficult for the Forest Service to determine if the proper trees had,

in fact, been designated. There is no such role for the contractor in the Meadow Valley contracts. The contract provisions here strictly designate which trees may be cut and which must remain. The contractor has no discretion in choosing which trees should be selected; it merely has the role of harvesting those trees that have already been specifically designated by the contract. In sum, designation by description as a general concept and as applied in the Meadow Valley contracts is fully consistent with NFMA, and Defendants are entitled to summary judgment on this claim.

V. A PERMANENT INJUNCTION IS NOT WARRANTED BECAUSE PLAINTIFFS HAVE NOT SHOWN THAT THE BALANCE OF HARMS FAVORS THEM, OR THAT AN INJUNCTION IS IN THE PUBLIC INTEREST

An injunction is an "extraordinary remedy" that "should issue only where the intervention of a court of equity 'is essential in order effectually to protect . . . against injuries otherwise irremediable.'" Weinberger v. Romero-Barcelo, 456 U.S. 305, 312 (1982) (citations omitted). In deciding whether to issue an injunction in a case like this one where the public interest is affected, courts "must expressly consider the public interest on the record." N. Cheyenne Tribe v. Hodel, 851 F.2d 1152, 1157 (9th Cir. 1988); see also Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 541, 545-46 (1987) (remanding case for court to consider public interest); Am. Motorcyclist Ass'n v. Watt, 714 F.2d 962, 967 (9th Cir. 1983); Wis. v. Weinberger, 745 F.2d 412, 427-428 (7th Cir. 1984) (NEPA's goal of forcing agencies to consider environmental impacts "is not to be achieved at the expense of a total disregard for countervailing public interests"). Failure to do so is reversible error. Id.

Even if the Court finds a violation of law in this case, it should not enjoin the Meadow Valley Project, because such an injunction is not in the public interest for three reasons. First, the project implements the QLG Act's goal of providing community stability by contributing to the economic health of surrounding communities. Second, the DFPZ construction component of the project is in the public interest because it would protect the nearby communities from wildfire and result in safer and more effective fire suppression. Finally, allowing the DFPZ to be constructed would better serve the QLG Act's goal of cost-effectiveness than would occur under Plaintiffs' proposed limitation of allowing thinning only to 10-12" dbh.

A. An Injunction Is Not in the Public Interest Because the Meadow Valley Project Furthers the QLG Act's Goal of Community Stability

The Meadow Valley Project is in the public interest because it implements the goal of community stability in the QLG Act by providing communities with merchantable timber and other forest products. This goal is recognized by the QLG Act, which recognizes that the QLG Community Stability Proposal was an agreement "to develop a resource management program that promotes ecologic *and economic health*" in the Sierra Nevada. See QLGA § 401(a) (emphasis added). This goal is also expressed in the Proposal itself, which is formed on a belief that "in order to provide an adequate timber supply for community stability and to maintain a relatively continuous forest cover, a management system using group selection . . . and/or individual tree selection . . . *must be implemented immediately*." 6 AR 1960 (emphasis added).

The Meadow Valley Project seeks to achieve this goal of community stability by creating an estimated 683 full-time jobs and $29.3 million in employee-related income. See 13 AR 4811. The selected alternative was chosen in part because it would "result in a higher estimated net value [from timber sale revenue] and would contribute more to jobs and job-related income in the local economy than Alternative A." 15 AR 5496. The anticipated timber sale revenue also "could increase the overall extent of future [Forest Service] fuels treatments." 13 AR 4811; see 13 AR 4779 (selected alternative would entail harvesting more trees in upper diameter classes, thereby "generating more revenues that could be used for further fuel treatments").

The project also serves the goal of increased economic stability for local communities by providing forest products in the form of about 2.63 million cubic feet of biomass and 36 million board feet of gross sawtimber volume. 13 AR 4792; 15 AR 5496. Because allowing the Forest Service to fulfill the QLG Act's goal of providing community stability is consistent with the public interest, the equities do not favor Plaintiffs, and an injunction should not be issued. Cf. Amoco Prod. Co., 480 U.S. at 545-46 (Court of Appeals improperly determined federal environmental statutory goals superseded other developmental uses authorized by law).

B. Enjoining DFPZ Construction Is Not In The Public Interest Because The DFPZ Is Necessary to Protect Nearby Communities from Wildfire and Would Result in Safer and More Effective Fire Suppression

One important purpose of the Meadow Valley DFPZ is to "provide protection for the Meadow Valley community by treating fuels in the defense and threat zones," so as to inhibit the spread of fires that approach the community. 13 AR 4772. The DFPZ is also designed to inhibit the spread of fire originating near Meadow Valley toward the smaller communities of Butterfly Valley and Blackhawk Creek to the northeast. Id. The EA explained that the project was necessary based on the occurrence of several recent fires in the area which threatened Meadow Valley by burning close to the community. See id. (discussing the 34,175-acre Bucks Fire and 55,261-acre Storrie Fire, as well large lightning fires from 1999 during which "[b]urning embers falling out of the smoke column landed in Meadow Valley around residential structures").

The Meadow Valley Project was designed to respond to this known threat to the community. The DFPZ would connect to past fuel treatment projects to "increase the network of DFPZ that will help reduce the potential for a large, damaging wildfire to move across the landscape surrounding Meadow Valley." 13 AR 4884; see also 13 AR 4772 (noting connection to other existing DFPZs and fuel projects). The completed DFPZ will protect both firefighter safety and nearby communities by modifying fire behavior within DFPZs. See 13 AR 4818 ("Firefighter safety inside the DFPZ will be increased over that outside the DFPZ"); see also 13 AR 4774 ("Assuring firefighter safety in WUIs is paramount to providing protection of private property and the public from wildland fire"); 13 AR 4794; see also Peña Decl. ¶¶ 7, 8 (improved firefigher safety thinning to 20-30" rather than 10-12"). The rate of fireline contruction and firefighter efficiency would be increased inside the DFPZ, compared to outside. 13 AR 4818. It is also expected that fire behavior, including "flame lengths, rate-of-spread, fireline intensities and resistance to control of wildfire inside the DFPZ will be reduced" compared to outside. Id.

These benefits of a fully effective DFPZ cannot come from harvesting only trees under 10-12" dbh, as Plaintiffs suggest. See Peña Decl. ¶¶ 6, 7, 8, 12, 13. In particular, areas treated to 20-30" dbh "have tolerated under-burning better than stands treated to a 10-12" would," id. ¶ 13, and based on recent studies, have been more effective at reducing fire spread and stand damage.

See id. ¶¶ 9, 10, 11. The Fire/Fuels Specialist report also found that treating a larger size class of trees "could increase the likelihood that a true crown fire entering the DFPZ will fall to the ground, reducing its intensity and making more direct attack by firefighters possible." 13 AR 4884-4885. This removal of trees was specifically found to make the DFPZ "more effective by improving firefighter efficiency and safety" in each of the land allocations where the DFPZ would be constructed. 13 AR 4879, 4880.[23]/

Plaintiffs' suggestion that this Court should restructure the Meadow Valley Project by allowing harvest of trees under a diameter limit of 10-12" dbh should be rejected. Rather, it is in the public interest to allow the Forest Service to complete harvest within the entire DFPZ in order to protect the Meadow Valley and surrounding communities, improve firefighter safety and efficiency, increase the likelihood that dangerous crown fires originating outside a DFPZ would fall to the ground and be more effectively controlled once they enter the DFPZ, and reduce the possibility that fires originating inside the DFPZ would turn into crown fires at all. Under Plaintiffs' proposed limitation, the Forest Service would not be able to construct an effective DFPZ, as even leaving small portions of the DFPZ untreated (10% in the defense zone and 15% in the threat zone) would "conflict[] with the intent of the [QLGA] of providing the safest suppression environment possible throughout DFPZs." 13 AR 4775. Rather, to "provide the most functional DFPZ possible, which provides a safe firefighting environment and the suppression environment allowing a high possibility of successful suppression action, all of the proposed DFPZ treatment units, including those in defense zone and threat zones, need to be treated." Id. Even if the Court finds a violation of law, then, it is in the public interest that any injunction should still allow the Meadow Valley DFPZ to be constructed in full.

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[23]/ Indeed, the selected alternative was developed in response to comments from the public expressing concern about the minimal amount of crown-fuel reduction in the DFPZ proposed under Alternative A, and questioned if such a DFPZ, which retained dense canopies across most of its acreage, could still be effective. See 13 AR 4778. The Forest Supervisor specifically selected Alternative C because it "would be more effective overall as a fuel break than Alternative A" by treating 100% of the DFPZ and reducing the density of crown fuels. 15 AR 5496; see also 13 AR 4779 (noting that canopy reductions under Alternative C would "ensure crown separation necessary to achieve a more effective DFPZ"); see also Peña Decl. ¶ 12 .

C. Allowing DFPZ Construction to Proceed Is In the Public Interest Because It Would Better Serve the QLG Act's Goal of Cost-Effectiveness

Finally, allowing the DFPZ to be constructed would better serve the QLG Act's goal of cost-effectiveness than would occur if thinning were allowed only to 10-12" dbh, as Plaintiffs suggest. Section 401(e) of the QLG Act provides that in conducting the pilot project, the Secretary of Agriculture "shall use the most cost-effective means available, as determined by the Secretary, to implement resource management activities," including DFPZ construction. QLG Act § 401(e). The monetary net value of the selected alternative is approximately $1.26 million. Decl. of Peter H. Hochrein ("Hochrein Decl.") ¶ 4; Peña Decl. ¶ 14. If the group selection is enjoined and the DFPZ proceeds as in the selected alternative, the net value declines to negative $1.28 million. Allowing DFPZ construction under the 12" dbh limit proposed by Plaintiffs, the monetary net value declines *further* to approximately negative $1.77 million. Hochrein Decl. ¶ 6; Peña Decl. ¶ 14. Therefore, there is an approximately $500,000 difference between creating the DFPZ under Alternative C (with a 20-30" dbh limit) and creating the DFPZs under Plaintiff's proposed limit. Peña Decl. ¶ 14. Allowing the DFPZ to proceed then at the 20-30" dbh limit would further the QLG Act's goal of choosing cost-effective treatments. Id. It is in the public interest, then, for DFPZ construction to proceed at the 20-30" dbh limit.

CONCLUSION

For all the above reasons, Plaintiffs' Motion for Summary Judgment should be denied, and the Court should grant summary judgment in favor of Federal Defendants.

Respectfully submitted this 28th day of January 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on January 28, 2005, I electronically filed the foregoing Federal Defendants' COMBINED OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

Michael R. Sherwood
msherwood@earthjustice.org

Michael B. Jackson
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I further certify that I caused to be served a copy of Federal Defendants' PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT, by Federal Express overnight delivery, upon the following individual:

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/s/ Brian C. Toth
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