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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. 2:04-cv-2023-MCE-GGH **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT** Date: April 18, 2005 Time: 9:00 a.m. Location: 15th Floor Courtroom No. 3

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INTRODUCTION

This case involves challenges under the National Environmental Policy Act of 1969 ("NEPA"), 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"), and the National Forest Management Act ("NFMA") to the decision by the United States Forest Service to authorize the Meadow Valley Project on the Plumas National Forest. Federal Defendants demonstrated in their opening brief that Plaintiffs did not exhaust their administrative remedies on their claim under NEPA that the Meadow Valley environmental assessment ("EA") failed to evaluate cumulative effects to the owl, and that even if they had exhausted that issue, the Forest Service was not required to analyze the projects identified by Plaintiffs because the projects were outside the analysis area. Plaintiffs acknowledge that the agency's determination of the analysis area boundary deserves deference but argue that it was not reasonably drawn in this case. This argument must fail, because the boundary was drawn along the lines of spotted owl home range core areas ("HRCAs")--a reasonable unit upon which to base an analysis of owl habitat--and included not just the owl habitat directly affected by the project, but additional habitat that demonstrates adequate consideration of effects in an expanded area.

Federal Defendants also demonstrated in their opening brief that the Forest Service reasonably determined the Meadow Valley Project would not result in significant effects requiring preparation of an environmental impact statement ("EIS"). Plaintiffs' argument that beneficial impacts to public health and safety make the action significant is without basis, as the finding of no significant impact was reached after addressing both beneficial and negative effects, and public health and safety is not a project purpose. Nor have Plaintiffs established that the project would be significant due to scientific controversy that existed at the time of the decision--their continued reliance on *post-decisional* declarations further demonstrates this point. Plaintiffs' attempt to characterize their opposition to group selection timber harvest as scientific controversy over fuels reduction confuses the purpose of group selection (establishing an all-age, fire resilient forest and providing a supply of timber), with that of using fuel treatments to reduce

the risk of severe fire. Additionally, Plaintiffs' criticisms of the analysis of effects to the owl amount simply to a disagreement among experts. Because the agency thoroughly addressed the relevant factors cited by Plaintiffs, the Court should defer to the agency's analysis.

Federal Defendants are also entitled to summary judgment on Plaintiffs' claim that the Forest Service failed to demonstrate that the project would contribute to future fire resilient forests under the QLG Act. Plaintiffs' argument that whole-tree yarding would not reduce slash is wrong, because Plaintiffs misread the term "buck" in the contract to mean removal of tree limbs, rather than the conventional definition of sawing felled trees into shorter lengths. Additionally, Plaintiffs' argument that slash would be scattered in the project area does not support their argument, as the scattering method would not be applied to group selection units--the type of harvest that forms the basis for Plaintiffs' claim. Nor would slash remain on the ground for years, as Plaintiffs argue, since the Forest Service determined that slash treatment in group selection units would likely be completed in one year and would not pose a fire hazard in the intervening time.

Finally, Federal Defendants are entitled to summary judgment on the claim that the Forest Service violated NFMA by using contractual descriptions to designate trees to be harvested. Plaintiffs' argument that the Forest Service Manual, which the Ninth Circuit has found is not legally enforceable, restricts the agency's ability to designate by description is inaccurate. The provision upon which Plaintiffs rely specifically contemplates the use of designation by description, without the need for marking, when conducting "understory removal," the type of timber harvest involved here. The Forest Service is therefore entitled to summary judgment on the NFMA claims as well.

ARGUMENT

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

A. Plaintiffs' Argument Regarding Cumulative Effects To the Owl from Specific Projects Was Not Presented in Sufficient Detail During the Administrative Process and Should Not Be Considered by This Court

1. Exhaustion is Required For All of Plaintiffs' Claims

Plaintiffs' argument that exhaustion is not required for NEPA claims against the Forest Service misapprehends the source of the exhaustion requirement. Plaintiffs contend that the requirement is one that is specific to NFMA. See Pls.' Opp. at 14. Actually, the requirement was enacted as part of the Department of Agriculture Reorganization Act of 1994 and applies to the entire Department of Agriculture, not just the Forest Service. The Act contained a provision entitled "Exhaustion of administrative appeals," which states the exhaustion requirement without limitation as to any particular statute:

> Notwithstanding any other provision of law, a person shall exhaust all administrative appeal procedures established by the Secretary or required by law before the person may bring an action in a court of competent jurisdiction against--
>
> (1) the Secretary;
> (2) the Department; or
> (3) an agency, office, officer, or employee of the Department.

Pub. L. No. 103-354, Department of Agriculture Reorganization Act of 1994, 108 Stat. 3178, 3211 § 212(e) (codified as 7 U.S.C. § 6912(e)).[1/]

The Ninth Circuit has found that the Department of Agriculture's exhaustion provision applies except in very limited circumstances not present here. See McBride Cotton & Cattle Corp. v. Veneman, 290 F.3d 973 (9th Cir. 2002) (finding that even though exhaustion requirement in 7 U.S.C. § 6912(e) is not jurisdictional, the court should require exhaustion except for certain types of constitutional claims); see also Kleissler v. U.S. Forest Serv., 183 F.3d

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[1/] The source of this requirement was also recognized when the Forest Service recently revised its regulations regarding appeals of Forest Service projects. In response to comments that the Forest Service should retain a provision that allowed it to waive the exhaustion requirement, the agency stated that "the USDA Reorganization Act of 1993 [sic] details when judicial proceedings can occur." 68 Fed. Reg. 33582, 33594 (June 4, 2003).

196, 201-02 (3rd Cir. 1999) (requiring exhaustion for NEPA claim against the Forest Service); Wilderness Soc'y v. Bosworth, 118 F. Supp. 2d 1082, 1099 (D. Mont. 2000) (same); Pls.' Decl. of George Torgun, Attach. 1, Californians for Alternatives to Toxics v. Dombeck, No. CIV. S-00-605 LKK/PAN (E.D. Cal. June 12, 2001), at 20 (dismissing QLG Act claims not properly presented in administrative appeal). Plaintiffs' claim that the exhaustion requirement varies according to the statute under which its claim is brought therefore must fail.

2. Plaintiffs' Comments and Appeals Do Not Satisfy the Standard for Exhaustion

Plaintiffs do not deny that they failed to identify the specific projects they now claim should have been considered. Rather, they claim that their generalized comments that the Forest Service should have considered future projects in the QLG Act Pilot Project ("Pilot Project") area were sufficient to put the Forest Service on notice that they would bring such claims in the litigation. To satisfy exhaustion, a plaintiff 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). Plaintiffs' general references to cumulative impacts in their appeals were not specific enough to satisfy this standard.

Plaintiffs rely upon comment letters that simply allege in general terms that the agency had not adequately considered "[t]he cumulative impacts of this action . . . along with other past, current and reasonably foreseeable future actions," with respect to the owl. See Pls.' Opp. at 16 (quoting 12 AR 4325-27).[2]/ Plaintiffs also rely upon similar language in their administrative appeal that the agency should consider "past, current and reasonable (sic) foreseeable future actions" at a "scale and intensity know[n] to the [agency]." Id. (quoting 15 AR 5682-83, 5685). These general comments about past, current, and reasonably foreseeable future actions, however, are simply Plaintiffs' restatement of the regulatory definition of cumulative impact, 40 C.F.R. § 1508.7, and as such did not provide any useful notice as to what specifically the agency had not

[2]/ Citations to the administrative record, which is already on file with the Court, appear in the following form: [volume] AR [page].

included that Plaintiffs believed was legally required. See id. (defining cumulative impact as the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . . .").

It is not sufficient for Plaintiffs to allege generally that cumulative impacts to the owl were not adequately considered. See Trout Unlimited v. U.S. Dep't of Agric., 320 F. Supp. 2d 1090, 1099-1100 (D. Colo. 2004) (finding that general references in plaintiffs' administrative appeal to NEPA and NFMA violations were insufficient to provide requisite notice to agency); Headwaters v. Forsgren, 219 F.Supp.2d 1121, 1126 (D. Or. 2002) (environmental group failed to exhaust administrative remedies as to issues relating to impact of timber sale on red-legged frog and gray wolves when group did not address such issues in its administrative appeal). Rather, Plaintiffs must give some meaningful notice to the Forest Service that "afford[s] it the opportunity to rectify the violations that the plaintiffs alleged." Native Ecosystems, 304 F.3d at 899; see Friends of the Earth v. U.S. Forest Serv., 114 F. Supp. 2d 288 (D. Vt. 2000) (environmental groups failed to exhaust administrative remedies where administrative complaints did not specifically mention all opposed logging sites or all allegedly violated statutes).[3]/

The court's decision in Friends of the Earth, 114 F. Supp. 2d 288, provides a useful comparison. In that case, several environmental groups challenged projects involving timber sales on National Forest land, arguing that the agency had violated numerous statutes, including NFMA, NEPA, and the APA, by failing to consider "the full spectrum of social and economic costs and benefits" prior to authorizing timber harvest. Id. at 289. The Forest Service argued that the plaintiffs had not raised the issue in sufficient detail to satisfy the standard for exhaustion. The court agreed and stated as follows:

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[3]/ See also U.S. Dep't of Transp. v. Pub. Citizen, 124 S. Ct. 2204, 2213 (2004); Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council, 435 U.S. 519, 553 (1978) (noting that 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"); 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); cf. Northwest Envtl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1534-35 (9th Cir. 1997) ("NEDC") (finding that Vermont Yankee doctrine did not apply to claims that agency had not followed the public comment process provided by the Northwest Power Act).

> In order for the allegations at the administrative level to have been sufficiently similar to those argued in the federal complaint such that [the Forest Service]was on notice of those claims, [plaintiff] was *required to name, at the administrative level, each project it opposed as well as each statute the project allegedly violated*. Having failed to do this, Friends did not show "how [it] believes the decision violates law, regulation, or policy" as required at the administrative appeal process by 36 C.F.R. § 215.14. Thus, Plaintiffs failed to meet exhaustion requirements before filing suit in federal court . . . .

Id. at 292.

The case upon which Plaintiffs' rely, Sierra Club v. Bosworth, 199 F. Supp. 2d 971 (N.D. Cal. 2002), is inapposite. There, the court declined to require the plaintiffs to name each specific project that it believed should have been included in the cumulative effects analysis, relying upon NEDC, 117 F.3d 1520, as support. See Bosworth, 199 F. Supp 2d at 990. The NEDC case, however, distinguished two leading cases requiring issues to be raised in public comments, Vermont Yankee and Havasupai Tribe, as "involv[ing] the failure to raise a specific factual contention regarding the substantive content of an EIS during the NEPA public comment process." NEDC, 117 F.3d at 1535. By contrast, the court found, the petitioners in NEDC had alleged a "procedural violation of a statute [the Northwest Power Act] that governs the public comment process." Id.

Here, Plaintiffs failed to raise a specific factual contention--the future QLG Act projects they claim should have been included in the EA--about the substantive content of the EA during the NEPA public comment process. Thus, the case is more similar to Havasupai Tribe than NEDC. The reasoning applied in Bosworth, then, does not have a sound basis here. The Court should therefore dismiss Plaintiffs' cumulative effects claims for failure to exhaust the issues in their administrative appeals, a mandatory requirement, or in their administrative comments, a prudential requirement that applies in this case.

B. The Agency Provided Adequate Justification for Not Analyzing the Future Area Treatments Within the Analysis Area and Was Not Required to Analyze Reasonably Foreseeable Future Projects Outside that Area

Even if the Court finds that Plaintiffs raised the issue of cumulative impacts to the owl from future projects in sufficient detail to satisfy the exhaustion requirement, Federal Defendants are still entitled to summary judgment because the projects which Plaintiffs argue in their brief

the Forest Service failed to address fall outside a reasonably drawn analysis area. Plaintiffs "do not dispute that the Forest Service is entitled to deference in selecting the geographic boundaries of its analysis area . . . ." Pls.' Opp. at 18. Nevertheless, they argue that the boundary does not adequately address cumulative effects to the owl. Plaintiffs' argument is without merit.

First, Plaintiffs are incorrect that the agency has not identified any future actions within the analysis area. See Pls.' Opp. at 16-17 (claiming that Meadow Valley EA "fails to mention, let alone consider and evaluate, *any* reasonably foreseeable future actions" regarding the owl) (emphasis in original). Although the projects are too far in the future to have a name or actually to be proposed, the agency did state in the Meadow Valley Biological Assessment and Biological Evaluation ("BA/BE")[4]/ that "[f]oreseeable future projects within this analysis area include the implementation of area treatments as early as 2009." 12 AR 4438. The effects from these future projects were not analyzed in further detail because "[t]he location of area treatments within the analysis area ha[s] not been identified." Id.

Plaintiffs cite Klamath Siskiyou Wildlands Ctr. v. U.S. Bureau of Land Management, 387 F.3d 989, 994-95 (9th Cir. 2004) ("KSWC") and Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998) to support their argument that future effects had to be analyzed in more detail. See Pls.' Opp. at 19. However, those cases found that the agency's analysis of future actions was overly general in light of the fact that there was no "justification regarding why more definitive information could not be provided." KSWC, 387 F.3d at 993; Neighbors of Cuddy Mountain, 137 F.3d at 1380. Here, the agency provided such a justification, namely that the locations of the area treatments expected to be implemented in 2009 "have not been identified." 12 AR 4438.

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[4]/ The Forest Service may prepare (and in some circumstances is required to prepare) a biological assessment ("BA") to evaluate the potential effects of a proposed action on a species listed under the Endangered Species Act. See 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12(b). A biological evaluation ("BE") serves the additional purpose of evaluating potential effects to species like the owl, which although not listed under the ESA, are designated by the Forest Service as "sensitive." See Forest Serv. Manual ("FSM") § 2672.4 (describing purpose of BE) (attached as Fed. Defs.' Ex. D).

Plaintiffs cite to comments by the United States Fish and Wildlife Service ("FWS") on the draft EIS for the Pilot Project to support their argument that owl home ranges are larger than what the Forest Service considered here, and that the agency neither "identified [n]or assessed the home ranges of owls in designating its analysis area for the Project." Pls.' Opp. at 19-20. This argument is without merit. Effects to owl home ranges were adequately considered because the cumulative effects boundary was drawn along the lines of owl home range core areas ("HRCAs"). HRCAs were adopted by the Record of Decision ("ROD") for the 2001 Sierra Nevada Forest Plan Amendment ("2001 ROD"),[5]/ which was issued after the FWS comments cited by Plaintiffs. HRCAs are land use allocations which the 2001 Sierra Nevada Forest Plan Amendment ("SNFPA") required to be designated around owl nest sites--or protected activity centers ("PACs")--as a means of managing owl habitat. See 1 AR 337 (directing HRCAs to be established around each PAC detected after 1986). 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." 1 AR 274-275. While they do not include the entire biological home range, HRCA size is based on the average home range size. See id. (HRCAs equal 20% of the sum of average breeding pair home range plus one standard error).

The fact that home ranges may be larger than actual HRCAs was accounted for by the analysis area boundary. The boundary does not simply fall along the lines of HRCAs in which project activity would occur. Rather, the analysis area occurs along the lines of the next outlying HRCA beyond each HRCA where project activity would occur. See 12 AR 4489 (showing relationship between wildlife analysis area, owl PAC/HRCAs, and defensible fuel profile zone ("DFPZ") and group selection units); see also 12 AR 4467. Because the analysis area allows for the possibility that true home ranges might be larger than actual owl HRCAs, Plaintiffs'

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[5]/ Federal Defendants in their opening brief cited to pages of the Record of Decision for the 2001 Sierra Nevada Forest Plan Amendment as "2001 ROD" without providing the corresponding citations to the bates-numbered pages of the administrative record. The 2001 ROD is found in the administrative record at Volume 1, pages 229 to 356. Federal Defendants regret any inconvenience to the Court or the parties which may have resulted and have included citations to the record in this reply brief.

argument should be rejected. See City of Carmel-by-the-Sea v. U.S. Dep't of Transp., 123 F.3d 1142, 1151 (9th Cir. 1997) (comments by EPA and Corps of Engineers that Federal Highway Administration should have included additional wetland delineations in its analysis did not undermine the validity of the analysis).

Plaintiffs' reliance on a recent unpublished decision, Center for Sierra Nevada Conservation v. Berry, No. Civ. S-02-325 LKK/JFM, slip op. at 39 (E.D. Cal. Feb. 15, 2005) (Pls.' Decl. of Rachel Fazio ("Fazio Decl."), Attach. 5), is misplaced. Plaintiffs quote that case for the proposition that the EAs which "fail to analyze the cumulative impacts of the project at issue in light of other actions outside the main project area are inadequate." Pls.' Opp. at 18. In Berry, the plaintiffs challenged the Forest Service's EIS for a management plan for off-road vehicles ("ORVs"), alleging that the agency had failed to consider cumulative effects to the Pacific Deer Herd from ORV use in the project area and in other parts of the Forest, or the impact of grazing allotments within the range of the herd. See Pls.' Fazio Decl., Attach. 5, at 35. The court found that the Forest Service had admitted that the analysis area for the deer herd "covers only a portion of the herd and a portion of the winter range . . . and, effectively, that the analysis is limited to the [23,610 acre] Rock Creek area itself." Id. at 38-39.

The Berry case is distinguishable on its facts. There, the agency proposed to open approximately 7,500 acres (three-quarters of 10,000 acres) of winter mule deer range to ORV use but had limited its analysis to approximately 9,900 acres of the 41,500 acres of critical winter range for the herd. Id. at 10-11. By contrast, while the agency here proposes activity on about 6,700 acres--comparable in size to the 7,500 acres in Berry, it has expanded its analysis area to over 85,000 acres–more than three and a half times the 23,610 acre analysis area in Berry. See 13 AR 4851 (definition of "wildlife analysis areas"); 12 AR 4351. More importantly, the analysis area here is not just larger in size, but it reasonably addresses the biology of the species' needs by including all of the owl HRCAs that would be directly affected by the project, as well as adjacent HRCAs, for a total of over 44,000 acres of actual owl habitat that was analyzed.

Plaintiffs also rely upon a document entitled "Considering Cumulative Effects Under [NEPA]," published by the Council on Environmental Quality ("CEQ"), to argue that the agency

should expand the cumulative effects analysis area beyond the immediate vicinity of the proposed action. See Pls.' Opp. at 20. However, the agency has already done that here. Project activity for Meadow Valley would occur on approximately 6,400 acres. See 13 AR 4783. The area in the vicinity of the Meadow Valley Project that encircles all of the treatment units consists of about 50,400 acres. See 13 AR 4850 (definition of "landscape area"). The cumulative effects analysis area for the owl expands this more than 50 percent--to a total of about 85,000 acres. See 13 AR 4851 (definition of "wildlife analysis areas" for terrestrial species); 12 AR 4351. Thus, the analysis area has already been expanded consistent with the CEQ document's suggestion.

Additionally, the CEQ document cited by Plaintiffs notes that "[c]hoosing the appropriate scale to use is critical and *will depend on the resources or system*." CEQ, Considering Cumulative Effects Under NEPA at 12 (avail. at http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm) (last visited Mar. 17, 2005). For resident wildlife, the document suggests that a possible cumulative effects analysis area might consist of "[s]pecies habitat or ecosystem." Id. at 15. That is consistent with what was done here. See 12 AR 4351 (wildlife analysis area includes additional area, "determined by spotted owl distribution") (emphasis omitted); 13 AR 4851 (analysis area was "determined by distribution of the California spotted owl").

In sum, the agency had a reasonable basis for drawing its analysis area boundary: it first looked to HRCAs that included habitat directly affected by the proposed project. These HRCAs are already drawn to include the best available owl habitat closest to the PAC where the most concentrated owl foraging activity is likely to occur. See 1 AR 274-275. The agency biologist included one additional HRCA beyond that, in order to better analyze effects, and drew the boundary there. See 12 AR 4489; see also 12 AR 4467. Because this was reasonable, the analysis should be upheld, and the Court should grant summary judgment in favor of Federal Defendants. See Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944, 959-60 (9th Cir. 2003) (deferring to agency's analysis boundary where it was reasonably selected); Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754, 757 (9th Cir. 1996) (Forest Service was not obligated under NEPA to discuss how proposed project would affect populations of sensitive species living adjacent to, but not in, project area).

C. Cumulative Effects from Past and Present Actions Were Adequately Analyzed As Part of the Existing Environmental Baseline

In addition to performing an adequate analysis regarding cumulative effects to owl from future projects, the Forest Service adequately analyzed effects from past projects as part of the environmental baseline. Plaintiffs acknowledge that the Forest Service has disclosed the number of acres for several past and present projects but argue that the agency's analysis is too conclusory to satisfy NEPA. See Pls.' Opp. at 21. In particular, Plaintiffs argue that the Forest Service has merely listed acreage and harvest method, and that it cannot rely upon the analysis of the various vegetation classes expressed in a table in the BA/BE, which displays California Wildlife Habitat Relationship ("CWHR") types. See id.

The BA/BE does not simply list the acreage harvested by past projects, as Plaintiffs contend. Rather, the agency employed a method of analyzing effects from past projects that involves examining the incremental effect of the proposed Meadow Valley Project viewed against the existing environmental baseline. The agency assumes 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 the planned actions in Waters Phase I, whose effects were explained separately at 12 AR 4437).

The agency's method of examining the cumulative effects from past and present projects against the existing baseline consisted of several steps. First the BA/BE discloses the existing vegetative condition by CWHR class for the project area and the larger cumulative effects analysis area. 12 AR 4398; see also 12 AR 4355-4357 (Table 4). Table 7 identifies which of these classes constitute suitable owl habitat--both foraging and nesting habitat. See 12 AR 4367-4368. The agency then disclosed the "cumulative changes in CWHR types" as a result of the alternatives it considered. See 12 AR 4390-4392. Following this, the agency analyzed the effects that would occur within the analysis area as a result of the proposed alternatives and arrived at a six-part conclusion which was described in Federal Defendants' opening brief:

> First, there would not be any project activity in any PACs or [spotted owl habitat areas, 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 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.

Fed. Defs.' Summ. J. Mem. at 19.

After considering the past history of the occupancy of owl nest sites within the project area, and based on the assessment that the vast majority of the combined acreage of PACs and HRCAs in the analysis area would not be treated, and that more than half of the HRCAs in the analysis area (16 of 30) would only be reduced by an average of 7-8%, the Forest Service concluded that owl occupancy should remain the same after treatment. See 13 AR 4824; 12 AR 4430 (approximately 95.8% of all PAC/HRCA combined acres would not be treated under the action alternatives), 4455 (same); 12 AR 4433 (anticipating that owl occupancy of each established PAC should remain the same as pre-treatment); 12 AR 4455 (same). Having taken into account the environmental baseline and after reaching this conclusion about owl occupancy, the agency concluded that cumulative effects would not be significant. See 13 AR 4828 ("As owl occupancy is not expected to diminish with the proposed action, a cumulative population loss is also not anticipated"). This reasoned consideration of incremental effects of the project viewed against the environmental baseline is adequate under NEPA. See 40 C.F.R. § 1508.7 (defining cumulative impact as the impact resulting from the "incremental impact of the *action*" when added to other past, present, and reasonably foreseeable actions).

Plaintiffs' citations to KSWC and Lands Council do not support their argument. See Pls.' Opp. at 21. In Lands Council, various environmental groups raised allegations that the Forest Service had violated NFMA and NEPA by failing to adequately address effects to soils and

sedimentation that had occurred in conjunction with a watershed restoration project. Id. at 1025. As a result of "intense logging" in the project area in the past, all but two of the fourteen watersheds either were "not functioning or are functioning at risk." Id. The project had been designed, in part, to improve aquatic habitat and to restore watersheds in the project area. Id. The plaintiffs' NEPA challenges were arguments based on the analysis of watershed resources, including challenges to the agency's sedimentation model, and the project's calculation of sediment reduction. See id. at 1031-32. The plaintiffs also argued that cumulative effects to several types of watershed resources had not been adequately analyzed, including effects from "rain-on-snow" events, and effects to westslope cutthroat trout, an aquatic species. See id. at 1029, 1030-31. Additionally, plaintiffs argued that the agency's analysis of cumulative effects from past timber harvest violated NEPA because the agency "did not note in detail past timber harvesting projects and the impact of those projects" on the relevant watershed. Id. at 1027. The court agreed and found that a more detailed analysis was required. See id.

The facts in the present case stand in contrast to those in Lands Council. None of the purposes of the Meadow Valley Project involve the goal of watershed restoration. See 13 AR 4764-4774. Additionally, a detailed discussion of the cumulative effects to watershed resources was performed here. See 12 AR 4554-4584. Plaintiffs' allegations regarding cumulative impacts are based on a terrestrial species--the owl--rather than watershed impacts such as sedimentation, soil compaction, or aquatic habitat, which were the basis for the court's conclusions in Lands Council. Nor have Plaintiffs demonstrated that the type of information the Ninth Circuit required in Lands Council on past harvest was "not difficult data to generate." Lands Council, 395 F.3d at 1028 n.6 (noting that information on time, type, place, and scale of past harvest was not difficult to generate, based on agency's response to a request under the Freedom of Information Act).

Plaintiffs also misperceive Federal Defendants' reliance upon Public Citizen, 124 S. Ct. 2204. See Pls.' Opp. at 22. Defendants are not focusing their argument here on whether other actions were proximately caused by the proposed action. Rather, the point of Public Citizen is that the Supreme Court found that NEPA did not require a cumulative effects analysis to discuss the incremental effect of each *past* action, but only the incremental effect of the *proposed* action

against the background of environmental consequences. This is consistent with the plain language of the CEQ regulation which defines cumulative impacts. See 40 C.F.R. § 1508.7.

In this case, the "proposed action" is the Meadow Valley Project. Plaintiffs' argument that the effects of each of the timber sales that occurred in the past should be individually analyzed is at odds with the notion in Public Citizen that incremental effects of each of the past actions are not required to be considered. Instead of analyzing the incremental effect of every past action, as Plaintiffs seek, the agency analyzed the incremental effect of the proposed Meadow Valley alternative against the environmental baseline demonstrated in the table of vegetation classes. Such a method has been upheld as reasonable by other courts, is consistent with the obligation to analyze cumulative effects under Public Citizen, and should be given deference here. See, e.g., Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60, 70 (D.C. Cir. 1987) ("It makes sense to consider the 'incremental impact' of a project for possible cumulative effects by incorporating the effects of other projects into the background 'data base' of the project at issue, rather than by restating the results of the prior studies."). The Forest Service is therefore entitled to summary judgment on this issue.

II. THE FOREST SERVICE TOOK A HARD LOOK AT EFFECTS TO THE ENVIRONMENT IN THE MEADOW VALLEY EA AND REASONABLY CONCLUDED THAT AN EIS WAS NOT REQUIRED

While an agency must determine that an EIS is required if one or more of the factors might result in significant effects, the mere "presence" of one factor--as Plaintiffs argue--is not sufficient. See Pls.' Opp. at 22. The case that Plaintiffs cite for this proposition, Ocean Advocates v. U.S. Army Corps of Eng'rs, 361 F.3d 1108 (9th Cir. 2004), stated that the Ninth Circuit had previously held that "one of these factors *may* be sufficient to require preparation of an EIS *in appropriate circumstances*." Id. at 1125 (citing Nat'l Parks & Conservation Ass'n v. Babbitt, 241 F.3d 722, 731 (9th Cir. 2001)) (emphasis added). In both Ocean Advocates and National Parks, the Ninth Circuit actually found that environmental impacts might be significant as a result of *two* factors. See id. at 1129-30 (finding that plaintiff had raised substantial questions as to whether cumulatively significant impacts would result, and had not provided convincing explanation regarding uncertainty); Nat'l Parks, 737 ("Here, preparation of an EIS is

mandated by the 'controversy,' as well as by the 'uncertainty,' factor of the intensity provision"). It is not the mere presence of one or even two of these factors that triggers the requirement for an EIS; rather, it is the degree to which the consideration of those factors leads to the conclusion that the environmental effects would be significant. See Greenpeace Action v. Franklin, 14 F.3d 1324, 1333 (9th Cir.1993) ("The existence of a public controversy over the effect of an agency action is *one factor* in determining whether the agency should prepare [an EIS].") (emphasis added). Here, the agency's finding that the effects would not be significant is reasonable and should be upheld. See Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985) (an "agency's decision not to prepare an [EIS] should be upheld if reasonable").

Additionally, even if the Court were to conclude that the Forest Service failed to provide a well-reasoned explanation that impacts would not be significant, that does not compel a conclusion that the impacts *will* be significant or that an EIS is required. The appropriate remedy is for the Court to remand to the agency to cure the explanation the Court found lacking. See Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985) (if the record does not support the agency's action or the agency has not considered all relevant factors, then "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation"). After further assessment, the agency may still determine that the effects are not significant, or it may change its determination and conclude that an EIS is necessary. That determination, however, is for the agency to make in the first instance. See, e.g., Metcalf v. Daley, 214 F.3d 1135, 1146 (9th Cir. 2000) (concluding that "in recognition of our limited role in this process, we have decided that it is appropriate only to require a new EA"); Jones v. Gordon, 792 F.2d 821, 829 (9th Cir. 1986) (holding that although the federal agency "has unreasonably decided not to prepare an [EIS]," the district court erred in ordering the agency to prepare one).

A. The Forest Service Reasonably Determined That Potential Effects to Public Health and Safety Would Not Be Significant.

Plaintiffs repeat their argument that the Forest Service failed to take a hard look at whether the Meadow Valley Project significantly affects public health or safety. Pls.' Opp. at 23. Plaintiffs' argument must fail. The Forest Service thoroughly evaluated all potential public

health and safety risks associated with the Meadow Valley Project and reasonably determined that they were not significant.

As explained in Federal Defendants' opening brief, there are five purposes for the Meadow Valley Project, none of which is "public health or safety." See 13 AR 4764-4774. Plaintiffs point out that the Meadow Valley Project's objectives include "reducing fuels and the risk of high intensity wildfire to local communities," and argue that this objective relates to public health and safety. Pls.' Opp. at 23-24. As Defendants have explained, the Meadow Valley Project DFPZ is designed to reduce surface fuels and be part of a larger strategic system of DFPZs authorized by the QLG Act. 13 AR 04772. Accordingly, the Meadow Valley EA considered the potential public health and safety risks associated with wildfire and vegetation management operations. 13 AR 04812 (summarizing this analysis). The Forest Service evaluated the risks posed by harvesting operations and the use of prescribed fire and reasonably concluded that those risks would "remain at acceptable levels" because, among other reasons, "OSHA safety regulations would be met," "prescribed fire would only be ignited when fuel moisture, air humidity, wind, and staff and equipment availability are favorable to control of fire," and Forest Service inspectors would monitor all aspects of the project's implementation. 13 AR 04812. The EA's "Fire and Fuels" section specifically considered the project's potential impacts on fuels, the Meadow Valley community, and firefighter safety. See, e.g., 13 AR 04793-04795; 13 AR 04794 ("Crown fire entering the DFPZ would lower in intensity and may drop to the ground . . . allowing suppression forces to more safely take action and be successful); id. ("The community of Meadow Valley would be better protected from fire coming from the Middle Fork Feather River and Bear Creek drainages. . . ."); id. ("Reduction in snags would decrease risk of injury to firefighters.") In addition, the fire and fuels report, which was incorporated by reference as part of the EA, evaluated these impacts in even greater detail. See 13 AR 04864-04887. Finally, because the Meadow Valley Project DFPZ is part of the large fuel treatment network authorized by the QLG Act, the more general public health and safety impacts related to "reducing fuels and the risk of high intensity wildfire" were already analyzed in an EIS. See generally 7 AR 2510-2527.

Plaintiffs challenge Defendants' reference to the Purpose and Need section to show that the Forest Service considered the beneficial effects of the Meadow Valley Project. Pls.' Opp. at 24. However, the format of an EA is not as rigid as Plaintiffs suggest. See generally 40 C.F.R. § 1508.9; Pub. Citizen, 124 S. Ct. at 2209-2210. While the benefits of the action alternatives were presented as part of the Purpose and Need section, they were also considered in other parts of the environmental assessment. See, e.g., 13 AR 04793-04795. The Meadow Valley EA contains a section that is specifically dedicated to summarizing the Forest Service's analysis regarding the project's potential impacts to public health or safety. See 13 AR 04812. This section references the EA's Fire and Fuels section, which–as described above–discusses many of the project's potential health and safety effects, including beneficial ones. Id.; 13 AR 04793-04795. In sum, the Meadow Valley EA satisfies NEPA by including sufficient analysis of the projects' potential effects on public health and safety.

B. The Effects to the Owl Were Reasonably Considered and Determined Not to Require An EIS

1. Section 1508.27(b)(9) of the NEPA Regulations Does Not Apply to the Owl, Because the Owl is Not Listed as Threatened or Endangered Under the ESA

Plaintiffs argue that the agency should have prepared an EIS based on the effects to the California spotted owl, citing 40 C.F.R. § 1508.27(b)(9). The cited regulation does not weigh in favor of preparing an EIS, since by its own plain language it only applies to "an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973." 40 C.F.R. § 1508.27(b)(9). Plaintiffs acknowledge that the owl is not listed as a species under the ESA. See Pls.' Opp. at 34 (agreeing "that the owl is not yet a listed species under the ESA"); see also 68 Fed. Reg. 7580 (Feb. 14, 2003) (declining to list the owl under the ESA). Their argument seeks, however, to expand the scope of Section 1508.27(b)(9) to include species that are designated by the Forest Service under its guidance and regulations as "sensitive" or "management indicator species," respectively. The Court should reject Plaintiffs' argument.

The plain text of 40 C.F.R. § 1508.27(b)(9) only requires consideration of the impacts to species listed under the ESA and their critical habitat. By contrast, the category of "sensitive" species is created solely based on the Forest Service Manual, which the Ninth Circuit has held is not legally enforceable. See FSM § 2670.5(19)(Fed. Defs.' Ex. D) (defining "sensitive" species); W. Radio Servs. Co., Inc. v. Espy, 79 F.3d 896, 902 (9th Cir.), cert. denied 519 U.S. 822 (1996) ("We . . . have no authority to bind the Service to the guidelines in the Manual or the Handbook."). The Forest Service acknowledges that it has committed to analyze under NEPA the effects to sensitive species like the owl. See FSM § 2670.32 (Fed. Defs.' Ex. D); see also 13 AR 4821. Because the Manual is not legally enforceable, however, the Court should not adopt sensitive species as a category which requires an EIS under 40 C.F.R. § 1508.27(b)(9).[6]/

Nor is there any basis to expand the scope of the CEQ regulation to include the owl on the basis of its being a management indicator species ("MIS"). The category of MIS was created by the Forest Service's planning rule, which has since been amended. See 36 C.F.R. § 219.19 (2000); 70 Fed. Reg. 1022 (Jan. 5, 2005) (amending 36 C.F.R. pt. 219). The new planning rule does not retain any requirements for MIS, except to explain in a transition provision how the agency may comply with any requirements for MIS that are found in existing forest plans developed under the former rule. See id. at 1048 ("The concept of MIS was not included in the 2002 proposed rule and is not in the final rule, except for transition provisions at § 219.14 . . . .").

The Plumas Forest Plan, at issue here, does designate the owl as an MIS. See 13 AR 4799. However, the reasons for designating a species as MIS are not the same as for designating it under the ESA. According to the former planning regulation, MIS are selected "because their population changes are believed to indicate the effects of management activities." 36 C.F.R. § 219.19 (2000). While MIS may include endangered and threatened species "where appropriate,"

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[6]/ The Ninth Circuit's decision in Friends of the Clearwater v. Dombeck, 222 F.3d 552 (9th Cir. 2000), does not compel a holding to the contrary. See Pls.' Opp. at 34. Although the court there found that the failure to consider whether the designation of seven new sensitive species would be significant new information requiring a supplemental EIS, it did not find that the effects made the action significant, or that a supplemental EIS was required. See id. at 559 (holding that the "failure to evaluate in a timely manner the need to supplement the original EIS in light of that new information violated NEPA").

the former regulation also contemplated that other types of species would be selected, including among other categories, "species commonly hunted, fished, or trapped." Expanding the CEQ regulation to cover the owl on the basis that it is an MIS could result in the Forest Service having to prepare an EIS for species designated as MIS because they are "commonly hunted, fished, or trapped." Id. This is a very different purpose from that behind the CEQ regulation, which requires consideration of species because they are *not* common--indeed, because they are threatened or endangered under the ESA. The Court should therefore reject the argument that the scope of 40 C.F.R. § 1508.27(b)(9) should be extended to include MIS.

At least one court has expressly declined to extend 40 C.F.R. § 1508.27(b)(9) to species that are not listed under the ESA. In Fund for Animals v. Williams, 246 F. Supp. 2d 27 (D.D.C. 2003), animal advocacy groups challenged an EA prepared by the United States Fish and Wildlife Service ("FWS") which restructured the hunting season for trumpeter swan in several states that comprised the species' flyway. See id. at 31. Although the swan had not been listed as either threatened or endangered under the ESA, the plaintiffs had petitioned FWS for such a listing. See id. The groups argued that an EIS should have been prepared in part because the hunting quota established by FWS "adversely affected a threatened species." Id. at 42.

The court found that FWS' authorization of a hunting quota did not trigger the need for an EIS. See id. at 47-48. Regarding the possibility that the quota might adversely affect a threatened or endangered species, the court dismissed that argument by noting that "at the time the Service issued the . . . EA (and as is the case today), the Trumpeter swan did not qualify as either threatened or endangered." Id. at 47 (citing 40 C.F.R. § 1508.27(b)(9)). The court further rejected the plaintiffs' argument that the regulation required consideration of the swan because it had been classified in other management categories:

> The plaintiffs point out that the [Fish and Wildlife] Service classifies the Trumpeter swan as a "Bird of Management Concern" (defined as a species that may become a candidate for threatened or endangered species listing) and contend that Canada considers Trumpeter swans endangered. Whether or not the plaintiffs' arguments are accurate, *neither pre-listing status nor foreign regulation of a species is a "significance" factor under the NEPA regulations*.

Id. (internal citations omitted) (emphasis added).

As in Fund for Animals, Plaintiffs here are invoking 40 C.F.R. § 1508.27(b)(9) to argue that effects would be significant for a species that is neither threatened nor endangered. The Court should reject Plaintiffs' argument and decline to expand the scope of the CEQ regulation beyond its plain meaning.

2. Even if 40 C.F.R. § 1508.27(b)(9) Applies to the Owl, the Agency Took a Hard Look at the Effects to that Species and Reasonably Concluded They Were Not Significant

Despite the fact that 40 C.F.R. § 1508.27(b)(9) does not apply to the owl, the Forest Service nevertheless took a hard look at the effects to this species under NEPA and reasonably concluded that they would not be significant. Importantly, the mere presence of a threatened or endangered species in the project area does not necessarily mean that the action would be significant under Section 1508.27(b)(9). Cf. Southwest Ctr. for Bioligical Diversity v. U.S. Forest Serv., 100 F.3d 1443, 1450 (9th Cir. 1996) (presence of endangered species does not constitute extraordinary circumstance which prevents use of categorical exclusion[7]/ where project will not negatively impact such species).

As explained in Federal Defendants' opening brief, the agency's consideration of the effects to owl was supported by six factors already described in the EA, in Federal Defendants' opening brief, and supra at 11-12. See 13 AR 4824. Plaintiffs attack the first of these points, that 100% of SOHAs and PACs are avoided, by arguing that SOHAs are not as important as HRCAs. See Pls.' Opp. at 35. At the same time as they argue that SOHAs are not that important, Plaintiffs also argue that the EA should have included more discussion of them. See id. Plaintiffs' argument is internally inconsistent and also misses the point. The reason the Forest Service refers to SOHAs is to demonstrate that it is complying with the QLG Act, which requires that all SOHAs be "deferred from . . . timber harvesting during the term of the pilot project." 6 AR 1963 (QLG Act § 401(c)(1)). The Forest Service's analysis, however, does not rely solely on the fact that harvest is not occurring in SOHAs. See supra at 11-12; 13 AR 4824.

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[7]/ A categorical exclusion describes a situation where, under the agency's procedures implementing NEPA, neither an EA nor an EIS is typically required, unless there are "extraordinary circumstances." See 40 C.F.R. § 1508.4.

Plaintiffs attack the second point, that the vast majority of existing foraging habitat and nesting habitat would be retained within the analysis area, by arguing that the loss of the specific number of acres of suitable owl habitat involved "would be significant for purposes of NEPA." Pls.' Opp. at 35. Plaintiffs' reliance upon the absolute number of acres involved, however, does not provide any context for evaluating significance. See 40 C.F.R. § 1508.27 (requiring consideration of context). The Court's task here is not to make a *de novo* determination whether a reduction of a certain number of acres of suitable habitat is significant; rather, it must "simply . . . 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." Jantzen, 760 F.2d at 986. Because the agency's analysis contains a reasonable explanation of why the number of acres involved both overall and in HRCAs would not lead to a change in owl occupancy, it should be upheld. See NEDC, 117 F.3d at 1536 (in reviewing agency's decision not to prepare EIS, court considers only whether agency's decision is "based on a 'reasoned evaluation of the relevant factors.'") (quoting Greenpeace Action, 14 F.3d at 1332).

Plaintiffs are incorrect that the analysis "ignores" science demonstrating that activity centers may be vacant for several years when owl populations are in decline, only to be reoccupied later. Pls.' Opp. at 36. The BA/BE specifically acknowledges that low occupancy or vacant activity centers may play a role in providing habitat and explains those effects as follows:

> 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* . . . .

12 AR 4432 (emphasis added).

Plaintiffs also argue that the Forest Service is unlawfully relying upon an administrative study as a substitute for adequate analysis under NEPA. See Pls.' Opp. at 36; see also id. at 28-29 (arguing that the agency cannot rely upon administrative study to resolve uncertainty). This is a straw man argument, as the Forest Service specifically acknowledged in its response to comments that the "administrative study . . . is not referenced as if it were mitigation," and that it "is not and cannot be mitigation" for environmental effects to the owl. 15 AR 5478; see also 12

AR 4433 (administrative study would provide "*additional* insight" into potential effects upon owl) (emphasis added). Rather, the administrative study is part of the general strategy of adaptive management, which the Forest Service explains is the "process of continually adjusting management in response to new information, knowledge, or technologies." 15 AR 5477 (quoting final EIS for the 2001 SNFPA ("2001 FEIS") Vol. 4 at E-1). This is important because the Pilot Project, which the Meadow Valley Project implements, has been viewed from its inception as "an adaptive management experiment" in which treatments such as DFPZs and group selection "would be rigorously monitored to determine their effectiveness." Id. (noting also that baseline information has been collected from 2002 and 2003 and "[m]onitoring under the administrative study is to continue after HFQLG implementation is completed").[8]/

Plaintiffs also argue that the Meadow Valley EA's analysis of effects to owl was inadequate because it failed to consider impacts to the "biological home ranges" for owls living in and immediately outside the analysis area. Pls.' Opp. at 36 (emphasis in original). This argument is without merit. The Meadow Valley BA/BE considered effects to owl home ranges by analyzing both directly affected and indirectly affected HRCAs. In order to analyze effects within owl home ranges, the BA/BE included two types of HRCAs: those directly affected by the project activity (i.e., those in which timber harvest would occur), as well as neighboring HRCAs where timber harvest would not occur. See 12 AR 4433. The BA/BE specifically acknowledged that owl home ranges that are adjacent to HRCAs directly affected by the project might also be affected. See id. (noting that displaced owls could enter another pair's home range which "has the same overall impact to owl pairs that direct habitat modification can have"). After reviewing potential habitat changes within this analysis area, the BA/BE concluded that

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[8]/ Additionally, monitoring and evaluation is important for other species, where it is "conducted to determine how well objectives established in Forest Plans have been met and how closely standards and guidelines have been applied." 15 AR 5477. Besides the administrative study, the Forest Service also keeps track of the cumulative total acreage of suitable habitat for old forest-dependent species like the owl. See 9 AR 3570. This is not, as Plaintiffs argue, a surrogate for adequately analyzing cumulative effects, but rather serves to ensure that the agency complies with the HFQLG ROD, which requires that such habitat "shall not be reduced by more than 10% below 1999 levels." Id.

effects would not be significant for six main reasons, including the conclusion that owl occupancy would likely remain the same in HRCAs throughout the analysis area. 13 AR 4824; see also 12 AR 4433, 4455. Because the analysis area reflects both the directly affected HRCAs as well as the next outlying HRCAs, it adequately considered effects to owl home ranges, and the analysis must be upheld. See Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir.1993) (deferring to agency's cumulative effects analysis because plaintiff "did not demonstrate the omission of any factor necessary to an informed decision").

Plaintiffs' argument that the Forest Service has failed to address impacts to owl home ranges outside the analysis area or discuss projects outside the analysis area misses the point. See Pls.' Opp. at 36-37. Whenever the agency draws an analysis area boundary, there will always be owl home ranges that occur outside that boundary. That is why the courts are required to uphold reasonably drawn boundaries. As the D.C. Circuit Court of Appeals has explained:

> The NEPA process involves an almost endless series of judgment calls. Here we consider ones relating to the detail in which specific items should be discussed and the agencies' treatment of the project's relation to other government activities. It is of course always possible to explore a subject more deeply and to discuss it more thoroughly. *The line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts.* The latters' "role ... is simply to ensure that the agency has adequately considered and disclosed the environmental impact of its actions and that its decision is not arbitrary or capricious."

Coalition on Sensible Transp., Inc. v. Dole, 826 F.2d 60, 66 (D.C. Cir. 1987) (citation omitted) (emphasis added). The important point is that the analysis area was specifically drawn in order to capture direct, indirect, and cumulative effects to owls from the project activity, and so should be upheld. See Kleppe v. Sierra Club, 427 U.S. 390, 414 (1976); Selkirk, 336 F.3d at 959-60; Inland Empire, 88 F.3d at 757.

Contrary to Plaintiffs' argument, the agency also adequately considered effects to habitat connectivity. Within DFPZs,"dense canopy closure would be reduced . . .but would maintain a continuity of large trees within treated stands and across the landscape." 12 AR 4432. The agency provided several reasons why this increased low-contrast fragmentation would not be a significant concern: "1) historical understory densities were discontinuous; 2) this habitat component [i.e., understory] 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." Id. As for group selection, the agency acknowledged that while it would create some gaps in habitat, the size of those gaps would still maintain continuous forest cover. See 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 within the stand"); 15 AR 5466 (same). The biologist found this would not be significant because any openings created would be low to moderate density, and other structural elements that reduce fragmentation could still be retained. See 12 AR 4432 (concluding that the action alternatives "do not create habitat barriers (fragmentation) that would prevent owls from interacting or dispersing"). Id.

Effects to owl competition and reproduction were also adequately addressed. Although Plaintiffs argue that the agency did not consider the effects of degrading habitat between PACs and SOHAs, Pls.' Opp. at 37, the agency took that into consideration by analyzing effects to owl habitat that is adjacent to the area where project activity would occur. See 12 AR 4333 (discussing indirect effects to owls). The BA/BE specifically acknowledges the possibility that increased competition could occur and concludes that it would not be significant. See id. (finding 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).

As for effects to spotted owl prey, Plaintiffs argue that the Forest Service has ignored "previous findings" that the Pilot Project would result in reductions or loss of available prey, including northern flying squirrel. Pls.' Opp. at 37. Plaintiffs' argument is flawed because it takes the cited statement from the HFQLG BA/BE out of context. The full passage reads:

> Indirect effects also include habitat modifications that can lead to a reduction or loss of available prey base. *The biggest impact on the prey base includes the reduction of decadence within the stand, including reductions in snag and log densities.*

6 AR 2059 (emphasis added). The Meadow Valley analysis addresses this factor by explaining how snags would be retained and down logs would be created in the project area:

> 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.

12 AR 4434. The record contains additional evidence that snags and large logs would be 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); 12 AR 4347 (where present, two of the largest snags per acre would be retained in group selection units, as would 10-20 tons per acre of largest down logs with diameters greater than 12"), 4388 (same), 4432 (same). Having addressed the factors regarding the prey base, the agency's analysis must be upheld as reasonable. See Alaska Ctr. for Env't v. U.S. Forest Serv., 189 F.3d 851, 859 (9th Cir. 1999) ("Once the agency considers the proper factors and makes a factual determination on whether the impacts are significant or not, that decision implicates substantial agency expertise and is entitled to deference.").

Throughout their argument, Plaintiffs cite to statements in programmatic documents like the HFQLG BA/BE and the BiOp for the 2001 FEIS that talk about the implementation of the Pilot Project generally. See Pls.' Opp. at 37-38. Plaintiffs, however, cannot escape the fact that the agency included sufficiently site-specific analysis regarding the Meadow Valley Project. See, e.g., 12 AR 4432, 4438, 4458, 4494-4495; 15 AR 5462, 5465. The Meadow Valley BA/BE's discussion is surely site-specific enough to satisfy NEPA, without having to address every statement in programmatic level documents that speak about the Pilot Project generally. See Alaska Ctr. for Env't, 189 F.3d at 859; cf. KSWC, 387 F.3d at 997 (agency was required to provide "specific information" about environmental effects to satisfy NEPA); Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 803 (9th Cir.1999) (agency should "account for the specific impacts" of a land exchange decision). Because the cumulative effects analysis addressed the relevant factors regarding the owl, the Forest Service's conclusion that effects would not be significant should be upheld.

C. The Forest Service Reasonably Determined that Potential Project Effects Are Not Highly Controversial.

Plaintiffs argue that the potential effects of the Meadow Valley Project on the owl and fire risk to local communities are highly controversial. Pls.' Opp'n at 25. However, while

Plaintiffs may oppose the Meadow Valley Project, they have failed to demonstrate that there is a "substantial dispute [about] the size, nature, or effect" of the project. Nat'l Parks, 241 F.3d at 736. The Forest Service is therefore entitled to summary judgment on this issue.

While Plaintiffs acknowledge that "controversy cannot be established after the fact by evidence that was not before the agency at the time of its decision," they nonetheless attempt to defend their reliance on post-decisional declarations. Pls.' Opp. at 25. Plaintiffs suggest that the declarations show that the Forest Service "ignored" controversy surrounding the project. Id. Plaintiffs' argument is illogical; had the agency truly ignored scientific evidence presented during the administrative process, that evidence would be in the record and Plaintiffs would not need to resort to extra-record declarations. Even if Plaintiffs' declarations were admissible for other purposes, which they are not, Plaintiffs cannot use post-decisional declarations to establish controversy, which "must exist at the time the agency renders its decision." Northwest Envtl. Def. Ctr. v. Wood, 947 F. Supp. 1371, 1384 (D. Or. 1996) (holding "declarations . . . are not relevant to the issue of whether a controversy existed to a sufficient degree to require an EIS"); Greenpeace Action, 14 F.3d at 1334 (plaintiffs "may not establish a scientific controversy post hoc, through the affidavits of its own scientists and the experts it has hired"); Tri-Valley Cares v. U.S. Dep't of Energy, No. C 03-3926-SBA, 2004 WL 2043034, at *15 (N.D. Cal. Sept. 10, 2004) ("the expert declarations submitted as part of Plaintiffs' motion for summary judgment–which were filed after the EA was issued–cannot be taken to demonstrate controversy."). Therefore, Plaintiffs cannot rely on post-decisional declarations to establish controversy.

Moreover, the portions of the declarations cited by Plaintiffs do not demonstrate controversy because they do not present evidence that "cast[s] serious doubt upon the reasonableness of [the] agency's conclusions." Nat'l Parks, 241 F.3d at 736. Rather, Dr. Blakesley's declaration describes her opinion regarding data *already considered* by the Forest Service. See Pls.' Decl. of Jennifer A. Blakesley ("Blakesley Decl.") ¶¶ 16, 18 (explaining that she would reach different conclusion than the agency with regard to the potential reductions in owl habitat) (cited in Pls.' Opp. at 25). The fact that Plaintiffs' expert disagrees with the conclusion of federal agency experts does *not* establish controversy. Greenpeace Action, 14 F.3d

at 1335 (noting that there is no "merit to the contention that an EIS must be prepared whenever qualified experts disagree"); Fund For Animals, 246 F. Supp. 2d at 45("NEPA controversy" does not exist "simply because there are conflicting views among experts"). Dr. Odion's declaration suggests that there is "much controversy over the efficacy and effects of forest manipulations that attempt to control fire." See Pls.' Decl. of Dennis C. Odion ("Odion Decl.") ¶ 3 (cited in Pls.' Opp. at 25). Not only is Dr. Odion's declaration post-decisional, he supports his statement that there is "much controversy" by citing a Letter to the Editor that he co-authored, which was published *after* the Meadow Valley decision notice. See id. Plaintiffs must do more than show that their scientists dispute the Forest Service's analysis and conclusions because "such a showing is not a sufficient basis for [the Court] to conclude that the Service's action was arbitrary or capricious." Greenpeace Action, 14 F.3d at 1336. "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." Marsh v. Or. Natural Res. Council, 490 U.S. 360, 378 (1989). In sum, the Court should not consider Plaintiffs' declarations on the issue of controversy because they are post-decisional and merely provide Plaintiffs' experts' opinion about science already evaluated by the Forest Service.

Plaintiffs assert that their "claim is based on substantial questions raised about the controversial effects of the Meadow Valley Project in the administrative record." Pls.' Opp. at 25. This argument must be rejected. While Plaintiffs may have voiced their opposition to the Meadow Valley Project during the administrative process, they did not show that the project's "effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). The existence of public opposition to a project "does not automatically render a project controversial" for purposes of NEPA. Cold Mountain v. Garber, 375 F.3d 884, 893 (9th Cir. 2004). The Northern District of California recently explained that:

> if the environmental effects of a proposed action must be treated as "controversial" merely because the action is opposed, "opposition, and not the reasoned analysis set forth in an environmental assessment would determine whether an environmental impact statement would have to be prepared. The outcome would be governed by a 'heckler's veto.'"

Tri-Valley Cares, 2004 WL 2043034, at *15 (citing North Carolina v. FAA, 957 F.2d 1125, 1133-34 (4th Cir. 1992)). As demonstrated in Federal Defendants' opening brief, to the extent that there was any "controversy" presented to the agency, the Forest Service satisfied NEPA by taking a hard look at the potential effects of the project and considering disparate scientific opinions. Fed. Defs.' Summ. J. Mem. at 27-28. The Forest Service specifically considered Plaintiffs' opposition to the Meadow Valley Project, and explained–with reference to scientific literature, expert opinion, and analytical tools–why the agency reached its determinations with regards to impacts on the owl. See 15 AR 05453-05481.

Contrary to Plaintiffs' assertion, there is no "substantial dispute between the agency's own Fire/Fuels Report and its Skinner declaration regarding the impacts of group selection logging." Pls.' Opp. at 26-27. The Fire and Fuels Report is clear that group selection units "are not actions designed to meet the purpose and need for hazardous fuels reduction." 13 AR 04869. Nothing in Mr. Skinner's declaration conflicts with this point. Mr. Skinner explained that "[g]roup selection, *as a component of a broader fuels management program*, is designed to help develop the *long-term* resilience of forested landscapes." Decl. of Carl N. Skinner ("Skinner Decl.") at ¶ 11 (emphasis added). Mr. Skinner's comment, which focused on the long-term goals of full implementation of the QLG Act, does not contradict the Forest Service's statement about the Meadow Valley Project and therefore cannot be used by Plaintiffs to establish controversy.

Finally, Plaintiffs attempt to discredit the analysis of controversy completed at the programmatic level in the EIS for the Pilot Project, the 2001 FEIS, and the final supplemental EIS for the 2004 Sierra Nevada Forest Plan Amendment ("2004 FSEIS"), by arguing that "[w]here the Forest Service represents in a programmatic EIS that it will fully comply with NEPA in evaluating future site-specific impacts," judicial estoppel precludes the agency from arguing it has no further duty to consider the impacts of site-specific projects. Pls.' Opp. at 27 (citation omitted). Plaintiffs' argument is misplaced. Defendants have never suggested that they had no duty to consider the site-specific impacts of the Meadow Valley Project; there are volumes of record materials that show the Forest Service specifically considered the potential environmental consequences of the proposed action by preparing a site-specific EA based on,

among other things, a site-specific BA/BE, a site-specific Fire/Fuels Report, and public comments. See generally 12 AR 4339-4495 (project BA/BE); 13 AR 04726-04744 (Forest Service responses to scoping comments); 13 AR 04747-04859 (project EA); 13 AR 04864-04885 (project Fire/Fuels Report); 15 AR 05453-05481 (Forest Service responses to comments on EA). However, the Forest Service's duty to comply with NEPA in proposing and evaluating major federal actions, like the Meadow Valley Project, does not mean that the agency cannot tier to prior environmental analysis, where applicable. As Federal Defendants demonstrated in their opening brief, NEPA's implementing regulations encourage agencies to tier their NEPA documents so that prior analysis of environmental issues do not have to be repeated. Fed. Defs.' Summ. J. Mem. at 28 (citing 40 C.F.R. § 1502.20).

In sum, while Plaintiffs oppose the Meadow Valley Project, they have failed to show that the project has been "highly controversial" within the meaning of NEPA.

D. The Meadow Valley Project Will Not Pose Any Highly Uncertain, Unique, or Unknown Risks.

Plaintiffs' opposition brief repeats their contention that the Meadow Valley Project will result in "highly uncertain effects and unknown risks to the owl." Pls.' Opp. at 28. However, the Forest Service conducted a reasonable analysis and 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 04816.

Plaintiffs emphasize that the Forest Service "admits" that the Meadow Valley Project "would introduce elements of uncertainty about future owl activity in the project area." Pls.' Opp. at 28 (citing 13 AR at 04824). However, "NEPA regulations do not require a reviewing agency to eliminate all uncertainty prior to issuing a [finding of no significant impact]." Wood, 947 F. Supp. at 1385 (citation omitted). The Ninth Circuit pointed out that the case law "do[es] not stand for the proposition that the existence of uncertainty mandates the preparation of an [EIS]." Greenpeace Action, 14 F.3d at 1334 n.11. As Defendants have demonstrated, to the extent that there is any uncertainty surrounding the project's potential impacts on the owl, the Forest Service took a hard look at the most recent science, conducted a thorough analysis that

considered disparate views (including Plaintiffs'), and adopted measures to mitigate potential adverse effects to the owl. See Fed. Defs.' Summ. J. Mem. at 29-32.

Plaintiffs question Defendants' reliance on Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257 (10th Cir. 2004). In that case, the agency was not required to prepare a project-level EIS even though the EA and associated BiOp "could not predict with certainty how the resident bald eagles would react" to proposed activities. Id. at 1276. Plaintiffs emphasize that in Greater Yellowstone Coalition the agency adopted "mitigation measures designed to reduce the potential impact on eagles, and the fact that any uncertainty regarding how bald eagles would react to development stemmed from varied eagle responses to human disturbances and 'not from a lack of thoroughness in investigating potential impacts.'" Pls.' Opp. at 29-30 (citing id.). The Forest Service has similarly adopted measures designed to mitigate the project's potential impacts on the owl. For example, no project activity will occur in owl PACs or SOHAs, 15 AR 5497, group selection units will be widely dispersed to help maintain attributes of continuous forest cover, 15 AR 5465, and trees greater than 30" in diameter at breast height ("dbh") will be retained in all DFPZ units in the Defense Zone, while trees greater than 20" dbh will be retained in DFPZs in the Threat Zone/General Forest and Old Forest Emphasis Areas. See 13 AR 4791 (listing maximum size of harvested trees in each land use allocation); see also 15 AR 5462 (trees between 20" and 30" dbh would be removed on only 950 acres of the 5,700 acre DFPZ). In addition, any uncertainty that exists with regards to how owls might react to the Meadow Valley Project is not from lack of effort and analysis on the part of the agency. The Forest Service grounded its decision on the most up-to-date scientific information that was available, including the results of a 2003 meta analysis. 15 AR 05467.

Finally, Plaintiffs acknowledge that Defendants discussed the uncertainty and unknown risks to the owl and fire and fuels management in the 2001 FEIS, but argue that this "does not relieve the agency of its duty to take a 'hard look' at the environmental consequences of its actions and determine the need to prepare an EIS at the site-specific level." Pls.' Opp. at 30. While Defendants agree that NEPA required the agency to take a hard look at the potential impacts of the Meadow Valley Project, the Forest Service did exactly that, preparing a site-

specific EA that reasonably determined an EIS was not necessary. See generally 13 AR 04747-04859. In sum, the Forest Service satisfied NEPA in assessing any uncertainty related to the Meadow Valley Project.

E. Cumulative Effects to the Owl Were Reasonably Considered and Determined Not to Require An EIS Under 40 C.F.R. § 1508.27(b)(7)

Plaintiffs also contend that an EIS should have been prepared because the project's cumulative effects to the owl made the action significant within the meaning of 40 C.F.R. § 1508.27(b)(7). As explained in Federal Defendants opening brief and supra at 4-6, Plaintiffs failed to present their cumulative impacts claims in sufficient detail either in their administrative appeal or their comment letters as to put the agency on notice of the violations they now allege. For those same reasons, the Court should dismiss Plaintiffs claims that the action requires an EIS under 40 C.F.R. § 1508.27(b)(7).

Even if the Court finds that Plaintiffs properly presented their claims to the agency, those claims must fail as a substantive matter because the Forest Service took a hard look at cumulative impacts to the owl and reasonably concluded they would not be significant. Federal Defendants have responded to Plaintiffs' arguments regarding cumulative effects analyses in other parts of this brief and their opening brief, and instead of repeating those arguments here, incorporate them by reference. See supra at 6-14.

In a footnote to their reply brief, Plaintiffs seek to compare the Meadow Valley Project to other projects on the Plumas and Lassen National Forests for which the Forest Service has issued notices of intent to prepare EISs. See Pls.' Opp. at 22 n.12. The Court should reject this attempt to compare the impacts of the Meadow Valley Project to those of other projects based on the acreage of timber harvest involved. As the Ninth Circuit recently found, the scope of environmental effects for a given project is not necessarily determined by the amount or type of harvest involved. See KSWC, 387 F.3d at 995 (finding that the calculation of the number of acres to be harvested "is not a sufficient description of the actual environmental effects that can be expected from logging those acres"). The implication that an EIS should have been prepared

for Meadow Valley simply because the Forest Service is preparing EISs for projects involving timber harvest on a similar or smaller number of acres should therefore be rejected.

Plaintiffs also argue that the 2004 FSEIS and its accompanying BA/BE provide "minimal insight" about short-term and cumulative effects to the owl from site-specific projects. Plaintiffs cite the Science Consistency Review ("SCR") for the 2004 FSEIS for the proposition that full implementation of the Pilot Project incurs risks to owl persistence and makes it critical to include a "defensible adaptive management program" to address uncertainties. Pls.' Opp. at 32. The Court need not resolve this issue in the context of this case, however, as Plaintiffs do not directly challenge the 2004 FSEIS or accompanying BA/BE here.[9]/ Federal Defendants' explanation of those documents' findings in their opening brief was intended as background information for the Court, and to explain what led the agency to adopt a new forest plan amendment.

Nonetheless, Plaintiffs' criticisms of the 2004 FSEIS are unfounded. First, Plaintiffs argue that the 2004 FSEIS and accompanying analysis provides "minimal insight" regarding the short term and cumulative impacts of Pilot Project activities. The FSEIS, however, analyzes and displays the short-term and cumulative impacts on owl habitat by CWHR class throughout the Pilot Project area. See 4 AR 1402-1404 (analyzing projected cumulative changes in owl habitat at current compared to 20 years). For example, the FSEIS discloses that "vegetation treatment over the *short term (20 years*) may introduce some unknown level of risk" to the owl population, but that the decline of specified vegetation types in the early decades would still occur under both the 2004 management direction as well as the prior 2001 direction (Alternative S1). 4 AR 1404 (emphasis added). Contrary to Plaintiffs' argument, this disclosure does not "emphasize the uncertainty" regarding effects to owl; rather, it simply explains that there is a trade-off involving a short-term reduction in foraging habitat (CWHR types 4M and 4D) that results in a long term increase in nesting habitat (CWHR types 5M, 5D, and 6). See id.

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[9]/ The 2004 decision is being directly challenged in three separate cases, including one brought by the lead Plaintiff here. See Sierra Nevada Forest Protection Campaign v. Rey, Case No. 2:05-cv-205-MCE-GGH (E.D. Cal.); Calif. ex rel. Lockyer v. U.S. Dep't of Agric., Case No. 2:05-cv-211-MCE-GGH (E.D. Cal.); Calif. Forestry Ass'n v. Bosworth, Case No. 1:04-cv-2137 (D.D.C.).

Nor does Plaintiffs' citation to the SCR help their case. Although the SCR recommended an adaptive management program, the Regional Forester adopted such a program in the Record of Decision for the 2004 Sierra Nevada Forest Plan Amendment ("2004 ROD"). See 4 AR 1056 ("adopt[ing] an active and focused adaptive management and monitoring strategy"). The adaptive management program and ongoing research studies and other projects specifically related to the owl are described in detail in the 2004 FSEIS. See, e.g., 4 AR 1207-1208, 1213-1214, 1217-1218. As explained supra at 21-22, the Meadow Valley EA does not, as Plaintiffs argue, rely upon adaptive management or post-project monitoring as a substitute for adequate analysis under NEPA. See 15 AR 5478 (acknowledging that the administrative study is not mitigation for effects upon owl); see also 12 AR 4433 (administrative study would provide "*additional* insight" into potential effects upon owl) (emphasis added). Because the administrative study and adaptive management strategy are simply methods for monitoring the effects of QLG Act treatments to determine their effectiveness, the mere description of those methods in the Meadow Valley EA does not invalidate the analysis. See id. (noting that the Pilot Project has long been viewed as "an adaptive management experiment"). In sum, the agency took a hard look at the relevant factors related to the owl, adequately considered cumulative effects to that species, and is entitled to summary judgment on that issue.

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

A. The Group Selection Treatments Will Not Increase the Potential for Severe Fire

Plaintiffs renew their allegations that the Meadow Valley group selection will cause severe fires due to the creation of large amounts of untreated slash. However, Plaintiffs base their arguments, again, on a mistaken reading of the record. Plaintiffs allege that whole tree yarding will not be used for trees greater than 20" in diameter, such that large amounts of flammable slash will be created and left in the forest to burn. Pls.' Opp. at 4-5. However, Plaintiffs misapprehend certain forestry terminology, and therefore cite to evidence that actually supports Federal Defendants' position instead of their own.

Specifically, Plaintiffs point to contract provision C6.417#, entitled "Whole Tree Yarding," which states that trees greater than 20" in diameter "shall be bucked into two or more pieces" before being taken out of the forest. See, e.g., 16 AR 5817. Plaintiffs define "bucking" as "having all the branches chain sawed off." Pls.' Opp. at 4. They therefore interpret provision C6.417# as requiring that all the branches from larger trees be removed when the tree is felled, and left in the forest as slash. However, bucking does not mean what Plaintiffs say. Rather, bucking means "to saw felled trees into shorter lengths." See Fed. Defs.' Ex. E at 21. "Limbing" refers to the process of removing a tree's branches (or limbs). Provision C6.417# makes clear that all trees--including trees greater than 20" in diameter--will be whole tree harvested, and that only the butt log sections of trees greater than 20" will be limbed in the treatment units.[10]/ See 16 AR 5817. On trees greater than 20" in diameter, the butt log generally has few if any branches. Therefore, very little slash will be generated by the group selection harvest, and Plaintiffs' forecast of huge piles of flammable logging debris being left in the forest to burn is simply unfounded.[11]/

Plaintiffs next argue that the slash treatment for the group selection units will not be done fast enough, thereby impeding the achievement of fire resilient forests. Pls.' Opp. at 5. Plaintiffs' argument is not supported by the record. First, the absence of a specific time commitment in the EA for completing slash treatment cannot reasonably be read as an indication that the slash will be left on site for years to create a fire hazard and prevent the attainment of fire resilient forests. Plaintiffs make an inferential leap that is simply not supportable. Second, the record provides several indications that slash will be treated in a prompt manner. The contract

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[10]/ The butt log is "the first log cut above the stump." See Fed. Defs.' Ex. E at 22. Consequently, if a 60 foot tree were felled and bucked in half, the butt log would be the first 30 feet of the tree's standing height.

[11]/ In addition to citing provision C6.417# to support their position, Plaintiffs also cite to pages 1 and 6 of the EA. 13 AR 4755, 4760. However, the only thing said about slash on these pages supports Federal Defendants' position, where the EA states that any slash that is created would be treated by underburning or piling and burning. See 13 AR 4760. This cite, and various others, make clear that even the minimal slash that is created in the group selection units--from branch breakage or from the butt logs--will be treated by underburning or piling and burning. See, e.g., 15 AR 5480; 13 AR 4794; 15 AR 5470; 13 AR 4869, 4871, 487; 16 AR 5821-23.

states, "Forest Service and Purchaser shall jointly develop a schedule for completion of slash treatment on the various portions of the Sale Area prior to purchaser's operations." 16 AR 5821. While this does not commit to a specific time period, it makes clear that slash treatment is a priority and will be scheduled before timber harvesting even begins. See also 16 AR 5781 (Provision B6.7: "Purchaser's timing of product removal and preparatory work shall not unnecessarily delay slash disposal.") Additionally, in the Response to Comments on the EA, the Forest Service explained that slash treatment in the groups would likely be completed within *one year* and that the slash would not create a fire hazard in the intervening time:

> In group selection units, trees would be yarded whole to landings, where tops and limbs would be removed. Much of this material would be chipped and hauled out of the forest. However, depending upon economic and other factors, slash may be piled and burned at the landing. *We anticipate that these burn piles would be burned within one year, and during the intervening time, by their nature as piles, they would not be considered to be hazardous fuels.*

15 AR 5470 (emphasis added). Therefore, Plaintiffs allegations that slash will stay untreated for years is flatly rebutted by the record.[12]/

Plaintiffs are incorrect in stating that "slash will be 'treated' in the great majority of the project area by simply scattering it to as much as an 18" depth in the given logging unit." Pls.' Opp. at 6. While it is true that this method will be used for treatment along roads and in DFPZ units prior to underburning, the scattering method is not slated for the group selection units. See, e.g., 16 AR 5823, 5901 (map legend). Additionally, given that all of Plaintiffs' arguments about slash are meant to support their argument that *group selection* will not create fire resilient forests

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[12]/ Plaintiffs are correct that the 5-7 years slated for slash treatment in the thinning units applies to the DFPZs, not the group selection units. See Pls.' Opp. at 5. Therefore, that figure should not be used as the schedule for group selection slash treatment. While not relevant to Plaintiffs' QLG Act claim, the 5-7 years for DFPZ slash treatment needs to be properly understood. A timber sale contract is approximately 5 years long and allows the contractor to schedule its operations on its own. See, e.g., 16 AR 5901b (noting contract termination date of 3/31/2009); 13 AR 10 (project schedule). Therefore, the Forest Service could not commit to finishing the slash treatment – which involves burning the slash after all the timber harvest is complete – in less than 5 years, given that completing the thinning, which is a prerequisite to burning, may not be achieved for 5 years. See, e.g., 13 AR 4869 ("*Subsequent to thinning*, excessive surface fuels remaining on the ground will be either hand piled and burned, machine piled and burned or underburned. ... Pile burning and/or underburning are the *final treatments* for most units.") (emphasis added).

according to the QLG Act, their criticism of slash treatment methods in the DFPZ units is not even relevant to their legal claim.[13]/ The logging slash from the *group selection* will be treated by "piling and burning, underburning, mastication, or by no treatment at all where residual surface fuels are at an acceptable level." 15 AR 5480; see also 13 AR 4794; 13 AR 4760 (bullets 5, 8); 15 AR 5470; 13 AR 4869, 4871, 487; 16 AR 5821-23 (Table B indicates MACH and DECK treatments, which are defined on 16 AR 5821). The slash will not be left out in the logging units for years to burn, as Plaintiffs claim.

Given that minimal slash will be created in the group selection units due to whole-tree harvesting and that all the slash that is created will be fully treated, the Meadow Valley group selection will not create the fire hazards that Plaintiffs claim.

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

Plaintiffs argue that group selection logging will decrease the fire-resilience of the forests by removing large trees, leaving slash untreated, and promoting the growth of flammable shrubs. Pls.' Opp. at 7. Beyond the fact that Plaintiffs' factual allegations are flawed, Plaintiffs fail to consider the fire-resilience issue at the proper scale. See Fed. Defs.' Summ. J. Mem. at 42. Even if the short-term fire-resilience of a particular group selection unit were negatively affected by implementing the Meadow Valley Project (something Defendants do not concede), this does not mean that the *long-term* fire resilience of *the forest* would be negatively affected. These two key aspects of fire resilience – temporal and geographic scale – are entirely ignored by Plaintiffs. However, the long-term and the forest level are the scales with which the QLG Act is concerned. See 6 AR 1964 (QLG Act § 401(d)(2)) ("a desired *future* condition of all-age, multistory, fire

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[13]/ Plaintiffs are also wrong that scattering logging slash to an 18" depth "does nothing to reduce the risk of severe fire." Pls.' Opp. at 6. The contract makes clear that scattering the slash "reduce[s] slash concentrations," which can burn hotter and carry a fire better than scattered material, and that the slash is "scattered into openings away from ... residual trees," which helps protect the residual trees when the area is underburned, and also reduces the likelihood that the slash will set fire to residual trees and carry a ground fire into the tree crowns. See, e.g., 16 AR 5821. Scattering slash to a depth of 18" away from trees safely prepares the landscape for burning, which is the final step in the construction of a DFPZ, and certainly an effective means of treating slash. See, e.g., 13 AR 4869.

resilient *forests* ....") (emphasis added); see Fed. Defs.' Summ. J. Mem. at 42. When the relevant scales are considered, it is apparent that the Meadow Valley Project will contribute to the achievement of fire resilient forests.

As explained in Federal Defendant's opening brief, group selection is intended to help restore pre-settlement forests, which had a far greater proportion of fire-resistant pine trees, which contribute to fire resilience, than do current Sierran forests. See, e.g., 13 AR 4771 (citing purpose of Meadow Valley group selection to "create[] a forest that will closely mimic the historic[] natural landscapes of the Sierra Nevada . . . ."); Fed. Defs.' Summ. J. Mem. at 40-41. As pointed out by Plaintiffs, ponderosa pine trees make up less than 20% of the timber to be harvested in the Meadow Valley contracts, while white fir--the least fire resistant of the mixed conifer species--makes up the highest proportion of the timber to be harvested. Pls.' Opp. at 9; see 16 AR 5901e, 6217e; see also Skinner Decl. ¶¶ 6-7. The current species composition and distribution in the Sierra Nevada is quite different from the pine-dominated stands of pre-settlement conditions. Skinner Decl. ¶¶ 4, 6. Because ponderosa pine trees require open conditions to regenerate, group selection is effective in promoting the regeneration of those species, rather than the continued recruitment of white fir, which will continue to dominate the understory if openings are not made in the forest canopy. Fed. Defs.' Summ. J. Mem. at 41; see also 7 AR 2510 (fire suppression in the twentieth century, "coupled with selective harvest of large pine, generated a dense forest of smaller trees having a higher proportion of white fir and incense cedar than existed before fire was suppressed"); 13 AR 4792 ("Group selection harvests would create small openings . . . which would be regenerated with shade intolerant conifers . . . . The openings in the canopy would bring additional light . . . to the forest floor . . . .);. While some fire resistant pine trees will obviously be cut as part of the Meadow Valley Project, group selection treatments will collectively promote the recruitment of pines and the increased fire-resilience of the *forest* over the *long term*.

In addition to Plaintiffs' general failure to consider the proper scale, Plaintiffs also make several specific errors. For example, Plaintiffs incorrectly assert that the group selection units will "tend to act as combustion points" and "increase the potential that a high severity fire will

spread throughout the forest." Pls.' Opp. at 7. The EA and supporting documentation indicate that group selection units burn at a low intensity or slow the advance of fire. 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[ion] unit it could have the effect of slowing the fires [sic] initial spread ...."); 13 AR 4795; 7 AR 2517; see also Skinner Decl. ¶¶ 14-18. While Plaintiffs' expert disagrees with the Forest Service's conclusions on many of these matters, the record makes clear that the Forest Service took a hard look at the issues, disclosed relevant information, reasonably involved the public, and made conclusions supported by its own highly qualified experts. This is a quintessential case where an agency's conclusions are entitled to deference. See, e.g., Marsh, 490 U.S. at 378 ("Because analysis of the relevant documents 'requires a high level of expertise,' we must defer to the 'informed discretion of the responsible federal agencies.'") (quoting Kleppe, 427 U.S. at 412).

Plaintiffs also allege that "the size and close proximity of the group selection units ... will increase the potential that a high severity fire will spread throughout the forest." Pls.' Opp. at 7. However, the group selection units are neither large nor closely spaced. The groups average ½-2 acres in size, and their total acreage – 743 acres – makes up *less than 2%* of the Meadow Valley landscape area, which is 50,380 acres.[14]/ 13 AR 4788. A quick glance at the project map shows that the group selection units are scattered across the landscape at a very low density, with various square-mile sections containing zero or only one group selection unit. See 13 AR 4767; see also 7 AR 2517 ("[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.") The picture Plaintiffs attempt to paint of densely packed large group selection treatments full of untreated slash is simply not supported.

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[14]/ Plaintiffs' declarant, Dr. Erman, mistakenly states that the "743 acres of group selection [are] interspersed in 4,000 to 5,000 acres of thinning units." Pls.' Decl. of Don C. Erman ("Erman Decl.") ¶ 3. Actually, only some of the 743 acres of groups are within the DFPZ thinning units; the majority of the group selection units are outside the DPFZ units, scattered throughout the 50,380-acre Meadow Valley landscape area. See 16 AR 5901, 6065, 6217, 6379 (folded maps).

Plaintiffs next try to prove that the Meadow Valley group selection treatments are not genuinely intended to promote the regeneration of pines--and thereby increase fire-resilience--by arguing that many group selection units are located above 5500 feet, where ponderosa pine does not naturally propagate. Pls.' Opp. at 9. This argument is without merit for several reasons. First, as part of the QLG Act, Congress specifically designated which areas were "Available for Group Selection." 6 AR 1963 (QLG Act § 401(b)(2)). All of the Meadow Valley group selection units are within the designated area, so their location can hardly be evidence of non-compliance with the QLG Act. Second, the overwhelming majority of group selection units are located below 5500 feet, and the vast majority of groups located above 5500 feet are located on south facing exposures, which are hotter and drier, and therefore more able to support ponderosa pine. See 16 AR 5091, 6065, 6217, 6379; 12 AR 4311 (noting that "groups would be regenerated with shade intolerant native conifers indicative of the ecological habitat type in which the group is located"); 7 AR 2515 ("The majority of large fires occur below 6,500 feet. The highest severity fires are often associated with high southwest and north winds and fire risk is the greatest on south and southwest slopes").

Finally, the recruitment of ponderosa pine, while important, is not the sole purpose of group selection treatments. One of the key aspects of the Quincy Library Group Community Stability Proposal, the QLG Act, and the Meadow Valley Project is to promote community stability and local economic health. See, e.g., 6 AR 1960 ("in order to provide an adequate timber supply for community stability . . . a management system using group selection . . . must be implemented . . . ."); 6 AR 1963 (QLG Act § 401(a)) (referring to the Pilot Project as "a resource management program that promotes ecologic and economic health . . . ."; 13 AR 4771 ("The proposed action is intended to implement group selection as directed in the HFQLG Act to achieve an all-aged mosaic of timber stands, while contributing to the local economy through a sustainable output of forest products"). Group selection treatments help achieve this economic goal, even though they may be less effective in contributing to fire-resiliency in particular stands. Finally, implementing group selection in stands that are naturally dominated by fir would contribute to achieving the desired condition of an "all-age, multistory" forest, even if the natural

tendency for white fir to grow in those units does not promote fire-resiliency. 6 AR 1964 (QLG Act § 401(d)(2)); see also 13 AR 4771. Therefore, complying with the QLG Act and placing group selection units above 5500 feet are not incompatible.

Plaintiffs suggest that Defendants' argument about the ability of group selection to promote fire resilient forests is internally inconsistent because Defendants' declarant says that historic logging of large trees negatively affected fire resilience, and the Meadow Valley group selection treatments propose the same sort of logging. Pls.' Opp. at 9-10 This argument is flawed in several regards. The historic logging that played a part in the decreased fire resilience of current forests is quite different than the group selection treatments proposed in the Meadow Valley Project. Historic logging, generally referred to as "high-grading," involved the selective harvest of the largest trees on the landscape, leaving behind the smaller trees and logging slash, which both constituted severe fire hazards. See 12 AR 4308; Skinner Decl., Attach. 2 at 1174; Fed. Defs.' Ex. E at 88 (definition of "high grading"). Group selection in the Meadow Valley Project, by contrast, requires the *retention* of the largest trees--those greater than 30" in diameter--and includes the removal of all smaller trees and treatment of logging slash. 13 AR 4760.

Additionally, the context for current harvesting is quite different from the harvesting at the turn of the twentieth century. A major cause of the decline in fire resilience of Sierran forests over the last century is the suppression of fire and the resultant increase in surface and ladder fuels and the decrease in prevalence of fire resistant and shade-intolerant pines. Skinner Decl. ¶¶ 6-7. As part of the process of restoring the fire resilient forests of the past, the forest canopy must be opened to allow the regeneration of fire resistant pine. Skinner Decl. ¶¶ 6-7, 11. Therefore, while the Meadow Valley group selection will harvest some larger fire resistant trees, doing so is part and parcel of opening up the canopy to favor the recruitment of pine in stands that have been increasingly taken over by white fir and other shade-tolerant and less fire-resistant

species. Therefore, the forests within the Meadow Valley area can, and will, be made more fire resilient over the long term, even though trees 20-30" in diameter will be harvested.[15]/

Plaintiffs next assert that "the actual scientific evidence" indicates that the Forest Service was incorrect in asserting that the post-treatment growth of shrubs in the group selection units would not create a serious fire hazard. Pls.' Opp. at 10. However, Plaintiffs' position presents a simple difference in opinion, not a definitive statement of scientific truth. Plaintiffs and their expert cite to evidence supporting their position; the Forest Service and its expert cite to evidence supporting their position. In such a situation of competing scientific opinions, deference is due to the agency. See Marsh, 490 U.S. at 378 ("When specialists express conflicting views, an agency must have discretion to rely on the reasonable opinion of its own qualified experts, even if, as an original matter, a court might find contrary views more persuasive."). Given that the Forest Service explicitly addressed the issue of brush growth in its Response to Comments (see 15 AR 28) and reached reasonable and scientifically supported conclusions (see Skinner Decl. ¶ 18), the Forest Service has fully complied with NEPA.

Plaintiffs' subsequent arguments about the Government's reliance on the Sierra Nevada Ecosystem Project ("SNEP") report amount to little more than differences in semantics. Plaintiffs neither question the credibility of the SNEP report nor claim that the Government misstated the contents of the Weatherspoon article. Instead, Plaintiffs simply state that the Weatherspoon article contained conclusions that were not shared by all those who worked on the SNEP team. Pls.' Opp. at 10-12. This very well may be true. But, that in no way undermines the legitimacy of the policy *and science* within that article, which clearly demonstrate that group selection silviculture helps to attain "all-age, multistory, fire resilient forests." 6 AR 1964 (QLG

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[15]/ Plaintiffs state that "Weatherspoon (1996) also recommended against removal of the larger overstory trees." This is not correct. Weatherspoon stated that "removing most of the large trees from a stand, leaving most of the understory in place, and doing little or no slash treatment ... will certainly increase the overall hazard." Skinner Decl., Attach. 2 at 1174. Of course, this is not what the Meadow Valley group selection is proposing at all. While many of the larger trees may be removed, *all* of the understory will be treated, as will all the logging slash. The treatments that Weatherspoon does recommend – "heavily thinning an overstocked stand from below and using whole-tree removal ..., followed by a prescribed understory burn ..." – are exactly the things the Forest Service is doing on the Meadow Valley Project. Id.

Act § 401(d)(2)). As succinctly stated by Weatherspoon, "[the pre-settlement] stand structure is approximated with the group selection cutting method." Skinner Decl., Attach. 2 at 1172; see also Skinner Decl., Attach. 3 at 271-72 (CASPO Report).[16]/ As with other chapters in the SNEP report, Weatherspoon's article was peer reviewed, so Plaintiffs cannot dismiss Weatherspoon's conclusions as unsupported. While Plaintiffs and their declarant may not agree with the article's conclusions, Congress apparently did, and enacted a law that explicitly contemplated the use of group selection silviculture to help achieve fire-resilient forests. The Forest Service is simply carrying out the terms of the Act as the Quincy Library Group itself and Congress intended.

In attempting to rebut Weatherspoon's findings and make the case that timber harvest increases fire danger, Plaintiffs cite to the "Critical Findings" sections of the SNEP report, which state that historic logging increased fire danger and that logging may not mimic the ecological effects of fire. While Defendants do not dispute either of these allegations, they do not undermine the Meadow Valley decision. As discussed above, the Meadow Valley group selection differs markedly from historic logging. Additionally, the Meadow Valley EA makes no claims that logging mimics the ecological effects of fire. Therefore, neither of the conclusions Plaintiffs raise from SNEP affect the legitimacy of the Meadow Valley Project.

More importantly, in citing to SNEP's "Critical Findings," Plaintiffs fail to set forth the complete "*consensus scientific* findings of SNEP." Pls.' Opp. at 11 (emphasis in original). The following is the complete "Critical Finding" in SNEP on the effects of logging:

> *Effects of Logging* Timber harvest, through its effects on forest structure, local microclimate, and fuel accumulation, has increased fire severity more than any other recent human activity. *If not accompanied by adequate reduction of fuels*, logging (including salvage of dead and dying trees) increases fire hazard by increasing surface dead fuels and changing the local microclimate. Fire intensity and expected fire spread rates thus increase locally and in areas adjacent to harvest. *However, logging can serve as a tool to help reduce fire hazard when slash is adequately treated and treatments are maintained*.

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[16]/ Plaintiffs' complaints about Federal Defendants' reliance on the CASPO Technical Report must also be rejected. Pls.' Opp. at 12. The CASPO report flatly stated that group selection silviculture "may have promise for production and long-term maintenance of owl habitat." Skinner Decl., Attach. 3 at 271-72. There is nothing in the report to suggest that its conclusions and recommendations were only relevant thirteen years ago, or that group selection only benefits the owl when compared to clear cutting, as Plaintiffs argue.

Fed. Defs.' Ex. F at 4. When the full Critical Finding is read, it is clear that logging and fire hazard reduction are not antithetical concepts. So long as there is "adequate reduction of fuels, ... slash is adequately treated and treatments are maintained" – all of which are occurring with the Meadow Valley DFPZ and group selection – logging is an appropriate tool. Id. And while the group selection treatments are not specifically intended to serve as a fire hazard reduction measure in the way that DFPZs are, the Forest Service has taken care to insure that the group selection treatments will not increase fire hazards, and at the same time will promote the achievement of fire resilient forests.

C. The Meadow Valley Project's Group Selection Prescriptions are Authorized and Contemplated by the QLG Act

Plaintiffs argue that the Forest Service is violating the QLG Act because the Meadow Valley Project does not "implement and demonstrate the effectiveness" of group selection treatments in achieving fire resilient forests. Pls.' Opp. at 13. While the EA, supporting documentation, and scientific literature indicate that the Meadow Valley group selection will be effective in achieving more fire resilient forests, only time will tell if the treatments are truly effective in meeting this end. Congress enacted a law to implement a *pilot project*, to test various land management methods at a large scale. Many of the goals of the Act, such as creating fire resilient forests, are long term in nature and expansive in geographic scope. It is unrealistic to expect the Meadow Valley EA to "demonstrate the effectiveness" of a land management strategy that may take several years or decades to fully evaluate. Indeed, if the Forest Service could prove the efficacy of all the land management strategies set forth in the QLG Act before those actions were taken, a pilot project to test such land management techniques would hardly have been necessary. Nor would any of the ecological monitoring and reporting that are strictly required by the QLG Act. See 6 AR 1966-68. In this case, the Forest Service is seeking to implement group selection treatments that are required by the QLG Act and supported by the scientific literature and extensive analysis in the EA and supporting documentation. The efficacy of the treatments in helping to achieve "all-age, multistory, fire resilient forests" can only be demonstrated after the FS is given the chance to implement them and monitor the effects.

The six specific reasons Plaintiffs list to support their argument that the Meadow Valley group selection violates the QLG Act are without merit. Pls.' Opp. at 13. As to their first allegation – that logging slash will not be cleaned up – the record amply demonstrates that this is simply inaccurate. As to their second allegation – that some group selection treatments are located in previously treated areas – this has no bearing on whether group selection will help achieve fire resilient forests. As to their third allegation – that group selection will reduce canopy cover – this is an essential element in providing sufficient sunlight for the recruitment of pine trees in an effort to promote more fire resilient forests. As to their fourth allegation – that group selection units are "locat[ed] in ponderosa pine stands" – there is no evidence provided that this is the case; the most Plaintiffs show is that less than 20% of the timber to be removed from the timber sales is ponderosa pine, which is hardly an indication that groups are being placed in stands that are dominated by ponderosa pine. As to their fifth allegation – that trees up to 30" in diameter are being removed – opening the canopy is essential for the recruitment of ponderosa pines, and trees greater than 30" are being retained. Finally, as to their sixth allegation – the location of groups within spotted owl habitat – this has absolutely no relevance to whether group selection will help achieve fire resilient forests. Despite Plaintiffs' list of reasons why they do not *like* group selection, Plaintiffs have provided insufficient evidence to present any violation of the QLG Act.

IV. THE FOREST SERVICE WAS NOT REQUIRED TO MARK TREES BECAUSE ITS DESIGNATION BY DESCRIPTION MAKES MARKING UNNECESSARY

In responding to the Federal Defendants' argument that the timber designation method used in the Meadow Valley contracts is fully consistent with NFMA, Plaintiffs essentially restate their original arguments. Rather than restate its responses to these arguments, Federal Defendants refer the Court to pages 43-46 of their opening brief. The one new argument that Plaintiffs add on this subject is found in footnote 23, and suggests that Forest Service internal policy prohibits the type of designation by description used in the Meadow Valley contracts. Pls.' Opp. at 39-40 n.23. This is simply incorrect. The provision cited by Plaintiffs states:

> Designating Without Marking: Use area designation to reduce sale layout costs when such methods would accomplish the silvicultural objectives. *Examples of area*

> *designation include* clearcut units, overstory or *understory removal*, or similar designations.

See FSM § 2441.2 (Fed. Defs.' Ex. D) (emphasis added). Both the DFPZ and group selection treatments are understory removal treatments, in that they generally remove all trees less than a specified diameter. See, e.g., 16 AR 5764 (Contract Provision B2.34: "Live trees ... are designated for cutting when they ... are smaller than the d.b.h. limits shown on Sale Area Map.") Indeed, the very contract provisions that Plaintiffs criticize are those that set the diameter limits below which trees are to be cut. See Pls.' Opp. at 42. Therefore, the designation without marking as used in the Meadow Valley contracts is fully consistent with Forest Service policy, as well as NFMA. Even if the Court were to conclude that the Meadow Valley designation method was inconsistent with the Forest Service Manual, the Ninth Circuit has held that the Manual does not have the force and effect of law and therefore is not judicially enforceable. Western Radio Servs., 79 F.3d at 900-902; see also Southwest Ctr., 100 F.3d at 1450. Federal Defendants are therefore entitled to summary judgment on Plaintiffs' NFMA claim.

V. EVEN IF THE COURT SHOULD FIND A VIOLATION OF LAW, AN INJUNCTION AGAINST THE MEADOW VALLEY PROJECT IS NOT IN THE PUBLIC INTEREST

Defendants in their opening brief provided three main reasons why an injunction against the Meadow Valley Project would not be in the public interest: (1) the project implements the QLG Act's goal of providing community stability by contributing to the economic health of surrounding communities; (2) 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; and (3) 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.

Plaintiffs argue that the QLG Act does not represent the public interest in managing the national forest land in the Pilot Project area, relying upon quotations from the legislative history of the QLG Act. See Pls.' Opp. at 45-47. This argument is without merit. The QLG Act is a duly enacted public law which Plaintiffs are not challenging. The Court should not look to the

views of individual legislators who might have expressed skepticism about the Act or ultimately voted against its passage. Debate and dissenting views may accompany the passage of any legislative act, not just the QLG Act. "Going behind the plain language of a statute in search of a possibly contrary congressional intent is a step to be taken cautiously even under the best of circumstances," and the Court should decline to do so here. United States v. Locke, 471 U.S. 84, 95-96 (1985).

Even if the Court should find that it is appropriate to examine the legislative history, it will find views of other legislators that the QLG Act would benefit the public because it is based on a local consensus-building process that might serve as a model for groups nationwide.[17]/ As one of the Act's sponsors, Representative Wally Herger from California, stated:

> This is indeed landmark legislation which sets a precedent for cooperation and proactive agreement *on both local and national levels*. [The proposed legislation] launches a forest health and economic stability management plan for three of California's national forests that I believe will set an example for other consensus-based groups *around the nation*.

See Hearing before the Subcommittee on Forest and Forest Health of the Committee on Resources, House of Representatives, 105th Cong., 1st Session, on H.R. 858, tr. at 4 (Mar. 5, 1997) (emphasis added) (attached as Fed. Defs.' Ex. G).

While Plaintiffs quote from the additional views of Senator Bumpers appearing at the end of the Senate Report, the actual body of that report describes the legislation as:

> based on the QLG Community Stability Proposal of 1993, which was developed by a coalition of representative from environmental organizations, the wood products industry, citizens, elected officials, and local communities in northern California. *The proposal is intended to represent a locally-developed, consensus-based resources management program . . .*

S. Rep. No. 105-138, at 5 (1997) (attached as Fed. Defs.' Ex. H).

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[17]/ The QLG began developing its community stability proposal after then-President Clinton called for cooperative solutions to forest management problems in the context of managing certain national forests in the Pacific Northwest. See Hearing before the Subcommittee on Forest and Forest Health of the Committee on Resources, House of Representatives, 105th Cong., 1st Session, on H.R. 858, tr. at 50 (Mar. 5, 1997) (statement of then-Under Secretary of Agriculture James R. Lyons, noting that the President had "challenged natural resource-dependent communities to develop collaborative and locally based solutions to controversies around public land management," and that the QLG "was up to the challenge").

Additionally, Plaintiffs' reliance on the dissenting views of various congressional representatives is weakened by the remarks by some of those same representatives elsewhere in the legislative history. For example, Representative Hinchey, who was a signatory to the dissenting views that Plaintiffs quote, elsewhere acknowledged the merits of the local, consensus-based process that had resulted in the QLG Community Stability Proposal:

> . . . I think that it is a laudatory thing at the local level to come together and deal with problems that affect them locally, even when those problems affect national resources. To a certain extent, the point can be made that even though it is a national resource, people who are located right in that community are the ones who are most directly affected by it to one extent or another.

Fed. Defs.' Ex. G at 15-16.

Plaintiffs also argue that the construction of the DFPZ would not be in the public interest because the fire behavior under a DFPZ constructed with a 12" dbh limit would not be different than a DFPZ constructed under the selected alternative, because "larger standing live trees are not significant contributors to wildland fire behavior." Pls.' Opp. at 44 (quoting 13 AR 4884). Plaintiffs take the quoted passage from the project's fire and fuels report out of context. The remainder of the passage explains why a DFPZ constructed under Alternative C, the selected alternative, would allow for more effective fire suppression than one conducted under Alternative A, which removes fewer trees between 12 and 20" dbh:

> Under Alternative C, removal of these live trees and reducing the canopy closure to 35% to 45%, averaging 40%, 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. This has the effect of making the effectiveness of the DFPZ under Alternative C greater than under Alternative A. The overall difference in effects between Alternative A and Alternative C is expected to be improved overall DFPZ effectiveness by improving firefighter efficiency under Alternative C . . . .

13 AR 4884-4885. The Court should defer to the agency's interpretation of what makes a DFPZ "effective" and reject Plaintiffs' reading of the passage.

In determining whether the public interest weighs in favor of an injunction in this case, the Supreme Court's decision in Amoco Production Company v. Village of Gambell, 480 U.S. 531 (1987) is instructive. There, several Alaskan native villages sought to enjoin the Secretary of Interior's sale of oil and gas leases for federal lands in the outer continental shelf ("OCS") of

Alaska as violating a provision of the Alaska National Interest Lands Conservation Act ("ANILCA") which was designed to protect subsistence resources from unnecessary destruction. See id. at 539. Although the District Court denied the villages' request for a preliminary injunction, the Ninth Circuit reversed and, after finding that the district court had not properly balanced irreparable harm and had not properly evaluated the public interest, directed the entry of an injunction. See id. at 539-541. The Ninth Circuit concluded that the policy declared in the OCS Lands Act ("OCSLA") to expedite exploration of the OCS had been superseded by ANILCA's policy to preserve subsistence cultures of Alaska Natives. Id. at 541.

The Supreme Court, however, reversed and remanded the Ninth Circuit's decision, explaining that the public interest does not necessarily favor injunctive relief merely because environmental statutes are involved. See id. at 545-46. Rather, competing public interests had to be considered, including those found in other statutes favoring natural resources development:

> The District Court concluded that the public interest in this case favored continued oil exploration, given OCSLA's stated policy and the fact that such exploration will not cause the type of harm, a restriction in subsistence uses or resources, that ANILCA was designed to prevent. The Court of Appeals concluded, however, that the public interest favored injunctive relief because the interests served by federal environmental statutes, such as ANILCA, supersede all other interests that might be at stake. We do not read ANILCA to have repealed OCSLA. Congress clearly did not state in ANILCA that subsistence uses are always more important than development of energy resources, or other uses of federal lands; rather, it expressly declared that preservation of subsistence resources is a public interest and established a framework for reconciliation, where possible, of competing public interests.

Id. at 545-46 (footnotes and internal quotations and citations omitted).

Like the competing public interests in Amoco, this case involves a statute, the QLG Act, which embodies both environmental and economic goals. The Act is based on a community stability proposal which is recognized as an agreement "to develop a resource management program that promotes ecologic *and economic* health" in the Sierra Nevada. 6 AR 1963 (QLG Act § 401(a)). Additionally, the Act gives the Secretary of Agriculture, acting here through the Forest Service, the discretion to determine the most cost-effective means to conduct the Pilot Project. See id. § 401(e) ("In conducting the pilot project, Secretary shall use the most cost-effective means available, *as determined by the Secretary*, to implement resource management

activities described in subsection (d).") (emphasis added). These considerations of promoting economic health and cost-effectiveness should be taken into account in determining whether any injunction is in the public interest and should be issued. See F & M Schaefer Corp. v. Elec. Data Sys. Corp., 430 F.Supp. 988, 993 (S.D.N.Y. 1977) ("The scope and form of the injunction should suit the circumstances of the case and the needs of the public interest.").

CONCLUSION

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

Respectfully submitted this 18th day of March 2005.

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CERTIFICATE OF SERVICE

I hereby certify that on March 18, 2005, I electronically filed the foregoing Federal Defendants' REPLY 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:

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