MICHAEL R. SHERWOOD, State Bar No. 63702
GEORGE M. TORGUN, State Bar No. 222085
Earthjustice
426 17th Street, 5th Floor
Oakland, CA 94612
(510) 550-6725

Attorneys for Plaintiffs Sierra Nevada Forest Protection Campaign and Plumas Forest Project

RACHEL M. FAZIO, State Bar No. 187580
John Muir Project
P.O. Box 697
Cedar Ridge, CA 95924
(530) 273-9290

Attorney for Plaintiffs Earth Island Institute and Center for Biological Diversity

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

SIERRA NEVADA FOREST PROTECTION CAMPAIGN, *et al.*, Plaintiffs, vs. UNITED STATES FOREST SERVICE, *et al.*, Defendants, and QUINCY LIBRARY GROUP, an unincorporated citizens group; and PLUMAS COUNTY, Intervenors/Defendants.	Case No. Civ. S-04-2023 LKK/PAN PLAINTIFFS' OPPOSITION TO DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT Date: April 5, 2005 Time: 1:30 p.m. Judge: Hon. Lawrence K. Karlton

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER NOTICES

INTRODUCTION

This case involves a challenge to the decision by defendants United States Forest Service, *et al.* ("Forest Service") to approve a logging project within the Plumas National Forest, California, called the Meadow Valley Defensible Fuel Profile Zone and Group Selection Project ("Meadow Valley Project" or "Project"). This action was brought pursuant to the Herger-Feinstein Quincy Library Group Forest Recovery Act ("QLG Act"), Pub. L. 105-277, Div. A, § 101(e) [Title IV, § 401], Oct. 21, 1998, 112 Stat. 2681-305 (16 U.S.C. § 2104 note), the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*., the National Forest Management Act ("NFMA"), 16 U.S.C. § 472a(g), and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq*. Plaintiffs and the Forest Service have stipulated to the intervention of the Quincy Library Group and Plumas County (collectively, "the QLG") in the remedial phase of this litigation.

The Meadow Valley Project would, over a five-year period, result in the logging of about 40 million board feet of timber from 6,440 acres. Although the Forest Service and the QLG maintain that the Project is needed to protect the community of Meadow Valley from catastrophic wildfire, the proposed logging has not been designed to achieve fire resilient forests and will actually increase the risk of severe fire in the Project area, in violation of the QLG Act. The Meadow Valley Project will also have significant, adverse impacts on the environment, and in particular, the California spotted owl, a declining and imperiled species. The Forest Service has failed to prepare an environmental impact statement ("EIS") to analyze these significant impacts, and has also failed to adequately analyze the cumulative effects of the Project together with other past, present, and reasonably foreseeable future projects, as required by NEPA. Furthermore, the Forest Service has failed to ensure that its own employees mark the trees to be logged, in violation of NFMA.

Plaintiffs filed their Motion for Summary Judgment and Memorandum of Points and Authorities in Support ("Pls.' Br.") on December 17, 2004. On January 28, 2005, the Forest Service filed its Opposition to Plaintiffs' Motion for Summary Judgment and Memorandum in Support of Cross Motion for Summary Judgment ("FS Br."), and the QLG filed its Response to Plaintiffs' Summary Judgment Motion ("QLG Br."). Summary judgment is appropriate in cases such as this involving judicial review of administrative action where review is based on the administrative

record. *National Wildlife Fed'n v. Babbit*, 128 F. Supp. 2d 1274, 1289 (E.D. Cal. 2000).

As discussed below, the Forest Service and the QLG have failed to establish the existence of a genuine issue as to any material facts supporting plaintiffs' claims, and have similarly failed to rebut the legal conclusions that necessarily follow from these facts. Consequently, plaintiffs' Motion for Summary Judgment should be granted in its entirety, and the Forest Service's Cross Motion for Summary Judgment should be denied.

ARGUMENT

I. Group Selection Cuts as Planned in the Meadow Valley Project Fail to Achieve Fire Resilient Forests as Required by the QLG Act.

Plaintiffs allege that the Forest Service violated Section 401(d)(2) of the QLG Act by failing to prescribe group selection cuts that are designed to achieve fire resilient forests. *See* Pls.' Br. at 16-18. Contrary to arguments made by the Forest Service, Section 401(d)(2) creates an enforceable legal standard that is subject to judicial review by this Court under the APA. Furthermore, the group selection cuts authorized by the Meadow Valley Project will actually increase the risk of severe fire in the Project area since they allow the removal of large, fire resistant trees, increase the amount of highly flammable slash, and encourage the growth of surface and ladder fuels. The Forest Service's failure to prescribe group selection units that are effective in their ability to achieve fire resilient forests, as required by Section 401(d)(2), violated the QLG Act and the APA.

A. Section 401(d)(2) of the QLG Act is a Mandatory Legal Requirement and is Subject to Judicial Review under the APA.

As an initial matter, the Forest Service argues that plaintiffs' QLG Act claim must fail because it is based upon "hortatory," not mandatory, language, and expresses a goal statement "[r]ather than saying that all group selection treatments 'must' or 'shall' create fire resilient stands . . . ." FS Br. at 36. However, this interpretation is contrary to the plain language of the statute. Section 401(d) of the QLG Act provides that:

> During the term of the pilot project, the Secretary [of Agriculture] *shall* implement and carry out the following resource management activities . . . :
>
> . . .

> (2) Group selection and individual tree selection. Utilization of group selection and individual tree selection uneven-aged forest management prescriptions described in the Quincy Library Group - Community Stability Proposal to achieve a desired future condition of allage, multistory, fire resilient forests . . . ."

QLG Act § 401(d) (emphasis added). The plain language of this section demonstrates that plaintiffs' claim is not based on a general statement of federal policy, but a legally binding obligation that the Forest Service is required to implement. *See Groten v. California*, 251 F.3d 844, 849 (9th Cir. 2001) (finding that the use of the mandatory term "shall" in a statute "is not merely intended to be hortatory, but places a binding obligation" on an agency). Moreover, nothing in the language of the QLG Act precludes judicial review or provides the Forest Service with complete discretion to carry out its provisions, allowing judicial review under the APA, 5 U.S.C. § 701(a). *See Bennett v. Spear*, 520 U.S. 154, 175 (1997) (finding that "[n]othing in the [Endangered Species Act] citizen-suit provision expressly precludes review under the APA," and "any contention that the relevant provision of 16 U.S.C. § 1536(a)(2) is discretionary would fly in the face of its text, which uses the imperative 'shall'").

This mandatory requirement, that group selection logging be performed for a particular benefit (*i.e.*, the creation of fire resilient forests), is reaffirmed by the language in Section 401(b)(1) of the QLG Act, which provides that "[t]he Secretary of Agriculture . . . *shall* conduct a pilot project on the Federal lands described in paragraph (2) *to implement and demonstrate the effectiveness of the resource management activities described in subsection (d)* and the other requirements of this section . . . ." QLG Act § 401(b)(1) (emphasis added). In addition, the Forest Service has acknowledged in the Meadow Valley Project Environmental Assessment ("EA") that "[t]he HFQLG Act *requires* that the effectiveness of group selection be demonstrated in achieving [a] . . . fire-resilient forest." AR 13 at 04771[1] (EA at 17) (emphasis added).

The Forest Service's argument that the QLG Act only requires *implementation* of the specified resource management activities, and not a particular result, has been heard and rejected by this Court before. In *Californians for Alternatives to Toxics v. Dombeck*, No. Civ. S-00-605

[1] The Administrative Record filed by the Forest Service will be cited as "AR _____ [volume number] at _____ [page number]."

LKK/PAN (E.D. Cal. June 12, 2001) ("*CATS I*"), this Court found that "Congress intended the [QLG Act] pilot project to examine the effectiveness of functional [defensible fuel profile zones ("DFPZs")] and not merely the construction of ineffective DFPZs," and held that the Forest Service's failure to consider the maintenance required to demonstrate the effectiveness of DFPZs violated Section 401(b)(1) of the QLG Act and the APA. *CATS I*, slip op. at 21-22 (Attachment 1 to the Declaration of George M. Torgun in Support of Plaintiffs' Motion for Summary Judgment ("Torgun Dec.")). This same reasoning applies equally to the group selection prescriptions mandated by the QLG Act, allowing judicial review of plaintiffs' claim.

In sum, the Court should reject the Forest Service's argument that Section 401(d)(2) is not an enforceable legal standard and proceed to review plaintiffs' QLG Act claim under the APA.[2]

B. The Meadow Valley Project's Group Selection Logging Will Increase the Potential for Severe Fire.

The Forest Service argues that even if Section 401(d)(2) is mandatory, the group selection cuts proposed by the Meadow Valley Project will not increase the risk of severe fire. FS Br. at 36-39.[3] First, the Forest Service attempts to counter plaintiffs' arguments regarding increased fire severity from the group selection logging by claiming that the Meadow Valley Project requires the clean up of logging slash debris and the whole tree yarding of all trees. *Id.* at 36-37; *see also* QLG Br. at 9. However, the record does not support these assertions.

Whole tree yarding is a logging practice where trees are felled (cut and allowed to fall to the ground) and then removed from the site without being bucked (that is, having all the branches chain sawed off). This can decrease the amount of slash generated from a felled tree, but it does not eliminate slash since branches break off when the tree falls to the ground after being cut and when the felled tree is skidded, or dragged, to the landing. While whole tree yarding will occur in the Meadow Valley Project, it is only required for trees under 20 inches in diameter. *See, e.g.*, AR 16 at

[2] The Forest Service also contends that even if Section 401(d)(2) is mandatory, the agency should be granted "broad discretion" in interpreting and applying it. FS Br. at 36 n. 15. Unlike the "multiple-use" language at issue in *Perkins v. Bergland*, 608 F.2d 803, 806-07 (9th Cir. 1979), however, the requirement to create a "fire resilient forest" is a discernable quality based on physics, ecology, and fire behavior, and not one that requires broad discretion for the agency.

[3] Although the parties have stipulated that intervention by the QLG would be limited to the remedial phase of this case, the QLG has also weighed in on the merits of plaintiffs' QLG Act claim. *See* QLG Br. at 9, 15-17. The Court should disregard the QLG's improper discussion on this claim.

05817, 05973, 06135, 06294; Supplemental Declaration of Dennis C. Odion in Support of Plaintiffs' Motion for Summary Judgment ("Odion Supp. Dec.") ¶ 8. Trees 20-30 inches in diameter, which may be logged in the Project's group selection units, can be cut into pieces with their limbs removed, and only the bucked logs are required to be skidded to landings. *Id.*; *see also* AR 13 at 04755, 04760. These larger trees generate exponentially more slash debris than the smaller trees removed by whole tree yarding, and consequently this method will not alleviate the problem of slash in the group selection units.[4] Odion Supp. Dec. ¶ 8.

Moreover, the record shows that the clean up of slash in group selection units is either not required in a timely manner or not required at all. The Meadow Valley Project EA, issued in February 2004, loosely describes slash treatment but does not provide a timeline or disclose whether funding has been requested and is available for slash removal. AR 13 at 04760 (EA at 6). The subsequent Decision Notice and Finding of No Significant Impact ("Decision Notice"), issued on April 16, 2004, states that slash clean up is "expected to be done within 5-7 years" after "thinning." AR 15 at 05502 (Decision Notice at 10). Neither of these documents requires the immediate removal or treatment of slash. In addition, the above quoted language appears to apply only to the "thinning" in DFPZs, and not to group selection logging, which is never described by the Forest Service as "thinning."[5] In the Forest Service's response to administrative appeals, issued on July 22, 2004, the agency insisted that the "treatment of logging slash would be part of the timber sale contract and would be implemented upon completion of the thinning activity." AR 15 at 05742. However, it is unclear whether this language regarding "thinning" includes group selection units or only pertains to the DFPZs.

In order to investigate whether the Forest Service would actually require slash "treatment" in the timber sale contracts and what the "treatment" would be, plaintiffs insisted that the contracts be part of the administrative record. While the timber sale contracts do require some limited slash

[4] Perhaps more alarmingly, the problem of slash clean up is similarly unresolved in the 950 acres of DFPZs within the defense zone (*i.e.*, closest to communities). AR 13 at 04760-61 (EA at 6-7).

[5] This ambiguity, however, would explain why the Forest Service and the QLG rely on the whole tree yarding argument as their defense regarding the build up of slash, since this type of tree removal will have more of an effect on reducing slash in the DFPZs outside of the defense zone (where whole tree yarding requirements apply to all felled trees) than in the group selection units.

removal within 50 feet of roads and at landings where logs are stacked (*see, e.g.*, AR 16 at 05821-26, 05901, 05977-82, 06065), 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. AR 16 at 05823, 05901, 05979, 06065, 06141, 06300. This type of slash "treatment" does nothing to reduce the risk of severe fire, as it is these small diameter fuels that determine the potential for severe fire. AR 13 at 04884 (Meadow Valley Project Fire/Fuels Report ("Fire/Fuels Report") at 21); Odion Supp. Dec. ¶¶ 7-8. In fact, the contracts exempt the actual removal of slash by "N/A" ("not applicable") notations within the treatment tables. *See* AR 16 at 05825-26, 05981-82.

Consequently, the record demonstrates that the Meadow Valley Project will result in the generation of logging slash, which is not required to be removed from the site and which *will*, in conjunction with other after effects of group selection (*i.e.*, removal of the largest and most fire resistant trees, opening the forest canopy which in turn will create hotter and dryer conditions and accelerate the growth of flammable chaparral and underbrush), *increase the risk of severe fire* in the Project area. Declaration of Dennis C. Odion in Support of Plaintiffs' Motion for Summary Judgment ("Odion Dec.") ¶¶ 2-25; Odion Supp. Dec. ¶¶ 1-14; *see* Defendants' Response to Plaintiffs' Statement of Fact in Support of Motion for Summary Judgment ("FS Response to Facts") ¶ 45.

In a final attempt to avoid this issue, the Forest Service argues that even if group selection increases the risk of severe fire, it is of no legal consequence since the QLG Act merely requires that group selection be used to achieve a "fire resilient" forest. FS Br. at 39. This argument is not persuasive for two reasons. First, as discussed below, there is a direct relationship between fire risk, fire severity, and the fire resiliency of a forest. *See infra* Part I.C. Specifically, an increase in fire severity results in a decrease in fire resiliency, so group selection units that increase the risk of severe fire violate the QLG Act. Second, the Forest Service's actions are of "consequence" to the community of Meadow Valley. The Forest Service has promoted the Meadow Valley Project as a measure to decrease fire severity and protect the Meadow Valley community from wildfire, and members of the community have relied upon these representations. *See* AR 13 at 04772-73 (EA at 18-19); AR 15 at 05458 (Forest Service Response to Comments at 6) ("the ecological reason for the

proposed action is to reduce the threat of large, intense wildfire"); *see also* QLG Br. at 6-7, 11. Thus, the Forest Service's argument runs counter to both the requirements of the QLG Act and the purpose and need of the Meadow Valley Project, and should not be given any weight by this Court.[6]

C. The Meadow Valley Project's Group Selection Logging Will Not Achieve Fire Resilient Forests.

The Forest Service attempts to evade the requirement that group selection logging achieve more fire resilient forests through semantic arguments about the technical definition of "fire resilient." FS Br. at 39-42; Declaration of Carl N. Skinner ("Skinner Dec.") ¶¶ 7-12. However, plaintiffs do not contest the definition of "fire resilient," but rather the interplay between fire resistance and fire resilience. "Fire resistance" is defined by ecologists as the capacity to resist change (*i.e.*, a tree's ability to survive fire), whereas "fire resilience" is typically defined as how quickly a forest system can recover from fire and return to its pre-fire structure and condition. *See* FS Br. at 39; *see also* Odion Dec. ¶ 11; Odion Supp. Dec. ¶ 6. The interplay of these two concepts is as follows: group selection logging will remove from the forest "fire resistant trees" (*i.e.*, mature trees with thicker bark that are less susceptible to being killed by fire (*see* Odion Dec. ¶ 11)); in place of these "fire resistant" trees, group selection logging will, as discussed above, leave behind slash debris which will, upon completion of logging, increase the potential for severe fire. In addition, due to the extreme reduction in canopy cover, which increases the amount of sunlight reaching the forest floor, conditions in these units will become hotter and drier and will facilitate the growth of dense combustible underbrush, increasing the potential for severe fire.

The logged group selection units will tend to act as combustion points. Odion Dec. ¶¶ 5-7. Should a fire burn through the Project area, the size and close proximity of the group selection units will result in positive feedback between the units. *Id.*; *see also* Odion Supp. Dec. ¶¶ 1-14. Consequently, the Meadow Valley Project's group selection units will increase the potential that a high severity fire will spread throughout the forest, causing high mortality of trees across the

[6] Plaintiffs also note that the EA never disclosed or analyzed the impacts associated with the creation of surface fuels from slash and the increased potential for severe fire from the group selection logging. AR 13 at 04865. This is a violation of NEPA. This risk is even more exacerbated by the fact that lightning fires ignite every year in the Project area, as do accidental fires caused by community members.

landscape and greatly increasing the time required for the forest to "recover" (*i.e.*, return to its pre-fire condition and structure), thus resulting in a forest which is less "fire resilient." *See* Odion Dec. ¶¶ 2-13, 25; Odion Supp. Dec. ¶¶ 1-14. A forest that burns severely will take several decades or longer to return to its pre-fire forested condition. Should the Meadow Valley Project area experience a fire after logging, the compounded disturbance effects of the ground-based logging combined with an unnaturally severe fire could reduce soil productivity and facilitate self-reinforcing cycles of shrub growth, which together can exacerbate recovery time and result in a long-term reduction in fire resiliency. Odion Supp Dec. ¶¶ 1-14.

1. The Declaration of Mr. Carl Skinner.

In support of its argument that the group selection treatments will help create a more fire resilient forest, the Forest Service has to resort to the extra-record declaration of Mr. Carl Skinner. FS Br. at 40-41. However, Mr. Skinner's declaration fails on several levels. First, Mr. Skinner assumes that all trees will be whole tree yarded and therefore "little slash" will be generated. Skinner Dec. ¶ 15. As discussed above, this assumption is incorrect for group selection units since whole tree yarding is not required for trees 20-30 inches in diameter, which generate most of the slash debris. *See* AR 16 at 05817, 05821 (stating that slash treatment requirements are listed on the Sale Area Map); *id.* at 05901 (Sale Area Map showing that the contracts only require slash to be scattered to an 18-inch depth and do not require its removal in logging units); *id.* at 05973, 06065, 06135, 06217, 06294, 06379; *see also* Odion Supp. Dec. ¶ 8.

Second, Mr. Skinner claims that group selection can increase fire resiliency by increasing the proportion of fire-resistant ponderosa pine in a given forest stand. Skinner Dec. ¶¶ 7, 11. This rationale appears to be a largely novel argument and a product of this litigation, as there is no mention of increasing pine as a way to achieve "fire resiliency" in the EA's purpose and need statement (AR 13 at 04764-74), the Decision Notice's "Rationale for Decision" (AR 15 at 05496), or the Fire/Fuels Report (AR 13 at 04865-87).[7] Contrary to Mr. Skinner's argument, much of the timber targeted for removal in the Meadow Valley Project is, in fact, mature "fire resistant"

[7] One oblique reference to ingrowth of "shade intolerant" species following group selection is made in the EA. AR 13 at 04792.

ponderosa pine. *See, e.g.*, AR 16 at 05901.e, 06217.e (timber sale contracts indicating that 19% and 15% of sawtimber to be removed is ponderosa pine); *see also* Odion Dec. ¶ 2; Odion Supp. Dec. ¶ 4. Two of the timber sale contracts fail to contain the standard information on how many board feet of each tree species will be sold and removed, despite the fact that one of these sales is located in lower elevation forests dominated by pine. *See* AR 16 at 06065.c-d, 06379.c-d. In fact, nowhere in the record is there specific data on the proportion of each tree species comprising the stands, or any data on size distribution. Thus, there is no actual evidence regarding the current fire resiliency of the stands to be treated. Odion Supp. Dec. ¶¶ 4, 6.

In addition, dozens of group selection units are located in higher elevation forests naturally dominated by white fir (*i.e.*, areas above 5,500 feet in elevation as well as areas somewhat lower in elevation on mesic (moist) north facing slopes), where ponderosa pine does not naturally propagate and has never been a dominant species. AR 12 at 04307; AR 16 at 05901, 06065, 06217, 06379; *see also* Odion Supp. Dec. ¶ 4. Even those who advocate group selection do not recommend it for these higher elevation forests. Skinner Dec., Attachment 2 at 1170-72; *see also* Odion Supp. Dec. ¶ 4; Declaration of Don C. Erman in Support of Plaintiffs' Motion for Summary Judgment ("Erman Dec.") ¶ 7. This is because group selection logging in these areas will merely replace mature, fire resistant fir stands with dense, flammable thickets of shrubs and young fir, not ponderosa pine. Odion Dec. ¶ 7; Odion Supp. Dec. ¶ 4. The Forest Service never addresses this issue for the Meadow Valley Project, although the EA for the adjacent Basin Group Selection Project states that these dense young stands following group selection will increase the potential for severe fire in the subsequent decades. Declaration of Rachel M. Fazio in Support of Plaintiffs' Motion for Summary Judgment ("Fazio Dec."), Attachment 4.

Furthermore, the logic of Mr. Skinner's declaration does not hold in key respects.[8] For example, he states that past "removal of the largest trees" has decreased fire resilience in Sierra

[8] Mr. Skinner misapprehends plaintiffs' argument regarding the ineffectiveness of placing group selection units in fire-treated areas. Skinner states that "[p]rescribed burning under relatively *dense* stands before opening them up with thinning can help to reduce the seed bank of the shrubs . . . ." Skinner Dec. ¶ 19 (emphasis added). However, plaintiffs are criticizing the Forest Service for group selection units (not thinning units) planned for *open* stands and in areas already thinned and/or prescribed burned. Odion Dec. ¶ 12; Odion Supp. Dec. ¶ 9. Plaintiffs do not believe that targeting fire-treated stands that are already fire resistant "demonstrates the effectiveness" of group selection in creating more fire resilient forests. Erman Dec. ¶ 4.

Nevada forests, thus justifying group selection to remedy this condition. Skinner Dec. ¶ 6. The QLG echoes this concern when it discusses the purpose of group selection logging under the QLG Act "to remedy past over-story logging." QLG Br. at 16. Yet, both Skinner and the QLG fail to disclose that trees 20-30 inches in diameter are the largest trees in most of the Meadow Valley Project area, and in many group selection units no trees would remain after logging because there are no trees over 30 inches in diameter. AR 13 at 04791 (EA at 37); AR 15 at 05460 (Forest Service Response to Comments at 8); *see also* Odion Dec. ¶ 3. Rather than remedying past logging of overstory trees, the group selection units will in fact result in the removal of overstory trees across 743 acres in the Project area. Erman Dec. ¶ 6. If the removal of overstory trees equates to a less fire resilient forest, as the Forest Service and the QLG assert, it is unclear how the Meadow Valley Project's group selection units result in a more fire resilient forest.

Mr. Skinner also states that dense growth of montane chaparral following logging is not a fire concern. Skinner Dec. ¶ 18. However, the actual scientific evidence indicates otherwise. Odion Supp. Dec. ¶¶ 12-13. Furthermore, the record contradicts Mr. Skinner, stating that greenleaf manzanita is the most common manzanita in the Sierra Nevada and that it is susceptible to severe fire, due in part to the "presence of volatile materials in its leaves." AR 13 at 04950-51, 04959. Finally, Mr. Skinner's declaration is misleading with regard to the Cone fire, which he cites as proof of the effectiveness of thinning. Skinner Dec. ¶¶ 16-18. As Dr. Odion points out, the areas to which Mr. Skinner refers experienced thinning (not group selection) of generally small trees followed by burning of slash debris prior to the fire, and thus cannot be compared to the potential impacts of a fire that may burn through the Meadow Valley Project's group selection units where the forest overstory would be removed without the benefit of immediate or required slash clean up. Odion Supp. Dec. ¶¶ 10-11.

2. The SNEP Report.

The Forest Service next claims that the Sierra Nevada Ecosystem Project ("SNEP") Report of 1996 "unambiguously" supported group selection, citing an article by Weatherspoon (1996). FS Br. at 40; Skinner Dec., Attachment 2. However, this is a misrepresentation of the SNEP Report. *See* Erman Dec. ¶ 2. The SNEP Report included articles — both policy and scientific — that

covered a range of diverse and opposing viewpoints. *See* Fazio Dec., Attachment 2 (SNEP Report Vol. 1, App. 4 at 200-01). The Weatherspoon article was a policy article, not an empirical scientific study, which suggested that group selection logging could be used to mimic the natural process of fire and facilitate propagation of ponderosa pine in lower elevation forests. *Id.*; *see also* Skinner Dec., Attachment 2. It merely represented one extreme in a continuum of diverse and opposing viewpoints contained in SNEP. The *consensus scientific* findings of SNEP are found under the heading "Critical Findings" at the beginning of each chapter in Volume 1. Among other things, SNEP found that (1) logging has increased fire severity more than any other recent human activity (primarily due to removal of larger overstory trees, creation of slash, and facilitation of dense undergrowth); and (2) there is no scientific evidence that logging mimics the ecological effects of fire. *See* Fazio Dec., Attachment 2 (SNEP Report Vol. 1, Chap. 4 at 62, 65); *see also* Odion Supp. Dec. ¶ 10; Erman Dec. ¶ 2. The SNEP Report did not oppose thinning of small understory trees where forests are excessively dense due to past logging and fire suppression, but to suggest that the SNEP Report recommended group selection as implemented by the Meadow Valley Project is flatly inaccurate. *See* Erman Dec. ¶¶ 6, 2.

Moreover, Weatherspoon (1996) did not recommend group selection for higher elevation mixed conifer forests (*see* Skinner Dec., Attachment 2 at 1169-71; Odion Supp. Dec. ¶ 4; Erman Dec. ¶ 7), and strongly admonished managers not to leave slash debris behind because it will "increase the probability of a more intense, more damaging, and perhaps more extensive wildfire." Skinner Dec., Attachment 2 at 1173. The article also stated that slash from group selection may need to be treated with prescribed burning two or three times in order to "get the fire hazard down to an acceptable level." *Id.* at 1172. The Meadow Valley Project has dozens of group selection units planned for high elevation mixed conifer forests, does not require the removal of slash debris, and at least according to the Forest Service's cost estimates (*see* Declaration of Peter H. Hochrein ("Hochrein Dec."), Attachment 1), only envisions prescribed burning once, not two or three times.

Weatherspoon (1996) also recommended against removal of the larger overstory trees. *Id.* at 1174; *see* Erman Dec. ¶ 7. However, the Meadow Valley Project allows for the removal of practically all large overstory trees in any given group selection unit. *See* Odion Dec. ¶ 3; Erman

Dec. ¶ 6; FS Response to Facts ¶ 45; *see also* AR 13 at 04791; AR 15 at 05460. In addition, the Forest Service cites the Weatherspoon article to support their stated reason for removing larger trees and implementing group selection, *i.e.*, the propagation of pine. *See* FS Br. at 41; *see also* Skinner Dec. ¶¶ 6-7, 10-11. However, Weatherspoon (1996) found that the "need most apparent in many Sierran forests is not the establishment of new regeneration but rather the removal, or thinning, of excessive numbers of small understory trees." Skinner Dec., Attachment 2 at 1169. Neither SNEP nor the Weatherspoon article recommended or supported the type of group selection logging proposed by the Meadow Valley Project, and therefore they cannot be used as a rational basis for the Forest Service's design of the group selection units.

3. The CASPO Technical Report.

Finally, the Forest Service makes the claim that group selection "may benefit" the California spotted owl. FS Br. at 40-41 (citing the 1992 California Spotted Owl Technical Report ("CASPO Technical Report"); Skinner Dec., Attachment 3. This too is highly misleading. The CASPO Technical Report was written thirteen years ago when large-scale clearcutting was still a common practice on federal lands. In this context, and in full awareness that logging of some type would continue on national forests, the authors of the CASPO Technical Report suggested group selection as a potential alternative to traditional clearcutting. They did not say that group selection logging would benefit the owl relative to no logging or less intensive logging. More recently, the Forest Service's own scientists determined that group selection logging as envisioned by the QLG Act "increase[s] the risk of management actions creating larger amounts of unsuitable habitat, increase[s] edge effect, and potentially reduc[es] habitat connectivity." AR 6 at 02066 (QLG BA/BE at 76).

D. The Meadow Valley Project's Group Selection Prescriptions are Not Authorized by the QLG Act.

The Forest Service claims that the type of group selection proposed by the Meadow Valley Project is specifically authorized by the QLG Act, and that if plaintiffs' argument were carried to its logical conclusion, then no group selection would be permissible in the pilot project area. FS Br. at 42-43.

Although group selection is one of the resource management activities expressly authorized

by the QLG Act, Congress also required the Forest Service to "implement and demonstrate the effectiveness" of group selection to achieve "fire resilient forests." QLG Act § 401(b), (d)(2). Plaintiffs are not alleging in this action that *no* group selection is permissible under the QLG Act, but that the group selection cuts specifically proposed for the Meadow Valley Project do not meet the requirements set forth in the Act, since they are ineffective in achieving fire resilient forests. *See* Plaintiffs' Complaint for Declaratory and Injunctive Relief ("Complaint") ¶¶ 23-26, 84-87; Pls.' Br. at 16-18. Specifically, plaintiffs are challenging the design of the Meadow Valley Project's group selection units based on their (1) failure to require the clean up of slash debris; (2) location in recently fire-treated areas; (3) severe reduction in canopy cover; (4) location in ponderosa pine stands, despite the Forest Service's claim that a key purpose of group selection is to increase the forest's proportion of ponderosa pine (FS Br. at 41; Skinner Dec. ¶¶ 10-11); (5) removal of large trees up to 30 inches in diameter, despite the fact that trees of that size comprise the largest 1-2% of the overstory trees (*See* AR 13 at 04791 (EA at 37); AR 15 at 05460 (Forest Service Response to Comments at 8); and (6) unnecessary location in spotted owl home range core areas ("HRCAs") and adjacent to protected activity centers ("PACs"). *Id.*; *see also* AR 15 at 05654-60, 05681-85 (plaintiffs' administrative appeals of the Meadow Valley Project).

The Forest Service's failure to prescribe group selection cuts for the Meadow Valley Project that comply with the requirements of the QLG Act is similar to the situation in *CATS I*, where this Court addressed the Forest Service's implementation of DFPZs and found that "Congress intended the Quincy Library Group Act pilot project to examine the effectiveness of functional DFPZs and not merely the construction of ineffective DFPZs." *CATS I*, slip op. at 21-22. Likewise, the Forest Service's failure to prescribe group selections in the Meadow Valley Project that are effective in their ability to achieve fire resilient forests violates section 401(d)(2) of the QLG Act, and is arbitrary and capricious under the APA, 5 U.S.C. § 706(2).

II. The Forest Service Failed to Adequately Evaluate the Cumulative Impacts of the Meadow Valley Project Together With Other Past, Present, and Reasonably Foreseeable Future Actions as Required by NEPA.

When preparing its environmental assessment for the Meadow Valley Project, the Forest Service was required to consider "whether the action is related to other actions with individually

insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7). A "cumulative impact" is defined 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 regardless of what agency (Federal or non-Federal) or person undertakes such other actions." *Id.* at § 1508.7; *see generally* Pls.' Br. at 22-23. Plaintiffs have repeatedly requested in their public comments and administrative appeals that the Forest Service properly evaluate the cumulative impacts of the Meadow Valley Project and other past, present, and reasonably foreseeable future actions on the California spotted owl. However, the Forest Service presented only generalized conclusory statements regarding the cumulative impacts of past and present actions, and failed to even mention any reasonably foreseeable future actions in its cumulative effects analysis on the owl, in violation of NEPA and the APA.

A. Plaintiffs Have Exhausted Their Administrative Remedies by Adequately Raising the Cumulative Effects Argument During the Administrative Process.

The Forest Service first contends that plaintiffs' claim regarding the cumulative effects from specific *future* projects was not presented during the administrative process and consequently should not be considered by this Court. FS Br. at 11. Specifically, the Forest Service claims that "Plaintiffs argue that the Meadow Valley EA should have considered the cumulative impacts from approximately 230 other future projects listed in the HFQLG Annual Report to Congress for fiscal year 2003," but failed to state in their administrative appeals what projects should be considered. *Id.* at 12. The Forest Service also argues that plaintiffs' failure to raise the projects in their public comments on the Meadow Valley Project prohibits them from litigating the issue in this action. *Id.*

As an initial matter, there is considerable question as to whether exhaustion is required for plaintiffs' NEPA claims. While the Forest Service correctly cites provisions in NFMA requiring the exhaustion of administrative remedies, neither NEPA itself, nor NEPA's implementing regulations, contain an exhaustion requirement. *See Darby v. Cisneros*, 509 U.S. 137, 146-47 (1993) (finding that administrative remedies must be exhausted where required by statute or regulation). Moreover, as the Supreme Court has recently observed, "the agency bears the primary responsibility to ensure that it complies with NEPA . . . and an EA's or an EIS' flaws might be so obvious that there is no

need for a commentator to point them out specifically in order to preserve its ability to challenge a proposed action." *Dep't of Transp. v. Public Citizen*, 124 S.Ct. 2204, 2214 (2004) (citing *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 553 (1978)). *See also Northwest Environmental Defense Center v. Bonneville Power Administration*, 117 F.3d 1520, 1534-35 (9th Cir. 1997) (holding that judicial review of plaintiff's procedural claims under NEPA was proper where plaintiff failed to raise an objection during the public comment process since the agency has a duty to comply with NEPA "regardless of whether participants complain of violations"); *Vermont Public Interest Research Group v. United States Fish & Wildlife Serv.*, 247 F. Supp. 2d 495, 516 (D. Vt. 2002) ("Based on this Court's review, neither NEPA, nor the APA, nor any underlying regulations, specifically requires issue exhaustion").

In *Sierra Club v. Bosworth*, 199 F. Supp. 2d 971 (N.D. Cal. 2002) ("*Bosworth*"), plaintiffs challenged the adequacy of an EIS prepared for a fuels reduction and logging project in Six Rivers National Forest under NEPA and NFMA, including a claim that the Forest Service failed to consider reasonably foreseeable future actions in the adjacent Shasta-Trinity National Forest. 199 F. Supp. 2d at 982. The court rejected the Forest Service's argument that plaintiffs failed to request specific projects be included in its cumulative effects analysis, holding that "the Forest Service has a duty to address cumulative action regardless of whether plaintiffs complain of violations." *Id.* at 988. *See also Duval Ranching Co. v. Glickman*, 965 F. Supp. 1427, 1439 (D. Nev. 1997) (finding that "there appear to be no administrative remedies to exhaust before suing under NEPA"); *California v. Bergland*, 483 F. Supp. 465, 472 n. 5 (E.D. Cal. 1980) (noting that "laches and failure to exhaust administrative remedies are disfavored doctrines in NEPA cases"), *aff'd in pertinent part, California v. Block*, 690 F.2d 753 (9th Cir.1982); *but see Biodiversity Associates v. United States Forest Serv.*, 226 F. Supp. 2d 1270, 1314-15 (D. Wyo. 2002) (finding that plaintiffs failed to exhaust administrate remedies with respect to NEPA claims by failing to raise such claims in their administrative appeals of timber sales); *Utah Environmental Congress v. Zieroth*, 190 F. Supp. 2d 1265, 1272 (D. Utah 2002) (same).

In any event, assuming exhaustion is required, plaintiffs dispute the assertion that they have not done so in this case for several reasons. First, plaintiffs have actively participated in the public

comment and administrative appeals process for the Meadow Valley Project, and their comments and appeals did provide sufficient notice to the Forest Service regarding its failure to consider the cumulative effects of other reasonably foreseeable future actions on the owl. *See Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 899 (9th Cir. 2002) (finding that "plaintiffs have exhausted their administrative appeals if 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"); *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 965 (9th Cir. 2002) (finding that "claimants who bring administrative appeals may try to resolve their difficulties by alerting the decision maker to the problem in general terms, rather than using precise legal formulations").

For example, a November 25, 2003 letter from plaintiffs Sierra Nevada Forest Protection Campaign ("SNFPC") and Plumas Forest Project ("PFP") on the revised Meadow Valley Project proposed action commented that "[t]he cumulative impacts of this action . . . along with other past, current and reasonably foreseeable future actions must now be considered and disclosed" since the proposed units "will not produce trees of the age class used by California spotted owls . . . for nesting." AR 12 at 04325-27; *see* AR 14 at 05251 (plaintiffs' March 19, 2004 comments on the Meadow Valley Project EA requesting "an adequate cumulative impacts analysis at multiple spatial scales (project area, analysis area, and QLG planning area)"). In their administrative appeals, plaintiffs reiterated that they had "raised the issue that the proposed action, along with other projects in the QLG project area, would significantly degrade existing spotted owl habitat and that the Meadow Valley assessment must include an analysis of the cumulative impacts of past, current and reasonable (sic) foreseeable future actions," but the Forest Service had "arbitrarily limited the effects analysis to sweep under the rug the possibility of significant impacts (due to increased logging intensity) to spotted owls . . . ." AR 15 at 05682-83; *see id.* at 05685 (the Forest Service "failed to appropriately respond to SNFPC/PFP comments regarding the cumulative impacts to spotted owls from the Meadow Valley Project plus other reasonably foreseeable future actions at a scale and intensity know[n] to the [agency]").

Moreover, the Forest Service has mischaracterized plaintiffs' claim, which is that the Meadow Valley Project EA "fails to mention, let alone consider and evaluate, *any* reasonably

foreseeable future actions" in its cumulative effects analysis regarding the California spotted owl. Pls.' Br. at 24. In order to demonstrate that the Forest Service failed to comply with this NEPA requirement, plaintiffs cite examples of several reasonably foreseeable future actions in the Project vicinity that will likely have significant cumulative impacts on the owl. *Id.* at 26-29. Plaintiffs are not required to point out every single future project that the Forest Service should have considered, because "'[c]ompliance with NEPA is a primary duty of every federal agency'" and "'fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs.'" *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) (quoting *City of Davis v. Coleman*, 521 F.2d 661, 667 (9th Cir. 1975)); *see City of Carmel-By-The-Sea v. United States Dep't of Transp.*, 123 F.3d 1142, 1161 (9th Cir. 1997) (finding that government agencies have the burden under NEPA to properly describe other area projects and detail the cumulative impacts of those projects); *Bosworth*, 199 F. Supp. 2d at 988 (finding that the Forest Service "cannot shift to plaintiffs the responsibility of proving cumulative impact").

In sum, even if exhaustion was required, plaintiffs provided the Forest Service with sufficient notice of plaintiffs' NEPA claims by their public comments and administrative appeals of the Meadow Valley Project, and plaintiffs should not be prohibited from raising such arguments before this Court.

B. The Forest Service Failed to Consider the Cumulative Impacts of the Meadow Valley Project and Other Reasonably Foreseeable Future Actions on the California Spotted Owl.

The Forest Service does not deny that it failed to evaluate or even consider the specific future projects identified by plaintiffs as part of its cumulative impacts analysis.[9] Instead, the agency asserts that it chose to analyze the cumulative effects of the Meadow Valley Project within a 85,919-acre "wildlife analysis area," determined by "spotted owl distribution," and that the specific projects identified by plaintiffs fall outside of this area and thus were not considered. FS Br. at 13-14. The

[9] The Forest Service also does not dispute that the specific projects identified by plaintiffs were "reasonably foreseeable future actions" within the meaning of 40 C.F.R. § 1508.7. *See* FS Response to Facts ¶¶ 59-65. In their brief, plaintiffs took issue with a recent statement by the Ninth Circuit in *Lands Council v. Powell*, 379 F.3d 738 (9th Cir. 2004), that "[o]ur precedent defines 'reasonably foreseeable' in this context to include only 'proposed actions.'" 379 F.3d at 746; *see* Pls.' Br. at 26 n. 17. On January 24, 2005, this opinion was amended and superceded, and the quoted language was deleted in its entirety. *Lands Council v. Powell*, 395 F.3d 1019, 1022-23 (9th Cir. 2005).

Forest Service also contends that the determination of a cumulative effects analysis boundary is a task assigned to the special competence of the agency and is entitled to deference. *Id.*

Although plaintiffs do not dispute that the Forest Service is entitled to deference in selecting the geographic boundaries of its analysis area, such deference does not excuse the agency from its duty under NEPA to consider the cumulative impacts of reasonably foreseeable future actions, and the Forest Service "must at least have considered cumulative effects in creating the boundaries of its analysis." *Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 958 (9th Cir. 2003); *see also Center for Sierra Nevada Conservation v. Berry*, No. Civ. S-02-325 LKK/JFM, slip op. at 39 (E.D. Cal. Feb. 15, 2005) (Attachment 5 to Fazio Dec.) ("Contrary to the defendants' contention, environmental assessments which fail to analyze the cumulative impacts of the project at issue in light of other actions outside the main project area are inadequate"). As the Ninth Circuit has repeatedly stated, "without a consideration of individually minor but cumulatively significant effects 'it would be easy to underestimate the cumulative impacts of the timber sales . . . and of other reasonably foreseeable future actions, on the [environment].'" *Native Ecosystems Council*, 304 F.3d at 896 (quoting *Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1078 (9th Cir. 2002)). The Meadow Valley Project EA acknowledges that "[i]f future projects employ prescriptions similar to those of the proposed action, the present action can be viewed as initiating a cumulative reduction in available spotted owl habitat," and then summarily concludes, without discussing *any* future actions, that "owl occupancy is not expected to diminish with the proposed action [and] a cumulative population loss is also not anticipated" because such projects must avoid PACs and spotted owl habitat areas ("SOHAs"). AR 13 at 04828 (EA at 74); *see* AR 12 at 04438 (Meadow Valley Project Biological Assessment/Biological Evaluation ("BA/BE") at 96).

While the Forest Service argues that plaintiffs' reliance on the Ninth Circuit's decision in *Klamath-Siskiyou Wildlands Center v. Bureau of Land Management*, 387 F.3d 989 (9th Cir. 2004) ("*Klamath-Siskiyou v. BLM*") is misplaced, that decision further supports plaintiffs' argument that an adequate cumulative effects analysis under NEPA requires more than just "generalized conclusory statements" regarding the impacts from foreseeable future actions. 387 F.3d at 994-96; s*ee also Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998)

(finding that "[g]eneral statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided"). The Forest Service's failure to take a "hard look" in this case is evident from the agency's recent discovery that several units of the proposed Basin Group Selection Project ("Basin Project"), which is also likely to affect a significant amount of suitable owl nesting and foraging habitat, "were laid out within the wildlife analysis area" of the Meadow Valley Project. *See* FS Br., Exhibit C.[10]

The Forest Service also argues that "the wildlife analysis area boundary was rationally based on the habitat boundaries for the species being analyzed," and that the agency need not consider future projects that are outside of this boundary. FS Br. at 14. In this regard, however, the Forest Service has failed to explain how the boundaries of its wildlife analysis area are actually based on "spotted owl distribution." *See* AR 12 at 04351 (BA/BE at 13). Plaintiffs note that at least fifteen owl PACs/HRCAs are located just beyond the boundaries of the analysis area. AR 12 at 04487-89 (BA/BE at Attachment 9A-C); FS Response to Facts ¶ 52. Moreover, HRCAs by definition are only 20% of the biological home range of owls, and 30-40% of an owl's activity occurs in the portion of the home range outside of the HRCA. *See* AR 1 at 00337 (2001 Sierra Nevada Forest Plan Amendment Record of Decision ("SNFPA 2001 ROD") at Appendix A, 43); Declaration of Monica L. Bond in Support of Plaintiffs' Motion for Summary Judgment ("Bond Dec.") ¶ 21. In its comments on the 1999 QLG draft EIS, the U.S. Fish & Wildlife Service ("FWS") noted that:

> Home ranges of spotted owls may be 1,400-10,000 acres (Verner et al. 1992) therefore the protection of only 300 acres (PAC) or even 1000 acres may result in the loss of suitable habitat in a significant portion of an owl's home range and in dispersal habitat outside and between home ranges. The [FWS] agrees that management actions that reduce habitat suitability within home ranges can accelerate population declines.

AR 6 at 01975. Despite this documented concern about the inadequacy of owl conservation measures and the anticipated degradation of suitable habitat within and between home ranges resulting from the QLG Act pilot project, there is no indication that the Forest Service identified or

[10] The Forest Service admits that some units of the Basin Project "overlapped with the Meadow Valley analysis area." FS Br. at 13 n.7. The Basin Project was one of the specific projects identified by plaintiffs in challenging the Forest Service's cumulative impacts analysis. Pls.' Br. at 28. On January 24, 2005, defendant Peña withdrew his authorization for the Basin Project group selection units that "were laid out within the wildlife analysis area" of the Meadow Valley Project. FS Br., Exhibit C.

assessed the home ranges of owls in designating its analysis area for the Project.

Furthermore, the Council on Environmental Quality, which is charged with promulgating regulations to implement NEPA, has stated that "[f]or a project-specific analysis, it is often sufficient to analyze effects within the immediate area of the proposed action. When analyzing the contribution of this proposed action to cumulative effects, however, *the geographic boundaries of the analysis almost always should be expanded*." Council on Environmental Quality, Considering Cumulative Effects Under the National Environmental Policy Act at 12, January 1997 (available at http://ceq.eh.doe.gov/nepa/ccenepa/ccenepa.htm) (last visited February 28, 2005) (emphasis added). While the analysis area selected by the Forest Service is larger than the project area (i.e., the acres actually being logged), the cumulative impacts analysis for the California spotted owl does not even consider the impacts of other reasonably foreseeable future actions beyond the immediate area of the Meadow Valley Project, and fails to provide any justification for this omission. AR 13 at 04828 (EA at 74); AR 12 at 04438 (BA/BE at 96). *See Kern*, 284 F.3d at 1075 (finding that an EA prepared for the Sandy-Remote timber sales is inadequate under NEPA since "it performs no cumulative impact analysis of 'reasonably foreseeable future actions' outside the [analysis area] that, in combination with the Sandy-Remote timber sales, could constitute 'collectively significant actions . . . over a period of time'") (quoting 40 C.F.R. § 1508.7); *Selkirk*, 336 F.3d at 958-60 (holding that the Forest Service complied with NEPA where it provided "articulable reasons" for its decision not to consider cumulative impacts outside of the analysis area).

In sum, the Forest Service's failure to adequately consider any reasonably foreseeable future actions or determine whether they may have cumulatively significant impacts on the California spotted owl violated NEPA, 42 U.S.C. § 4332(2)(C), and was arbitrary and capricious under the APA, 5 U.S.C. § 706(2).

C. The Forest Service Failed to Adequately Evaluate the Cumulative Impacts of the Meadow Valley Project and Other Past and Present Actions on the California Spotted Owl.

Unlike its failure to consider any reasonably foreseeable future actions, the Forest Service did at least identify several past and present actions as part of its cumulative impacts analysis regarding the California spotted owl. *See* AR 13 at 04827-28 (EA at 73-74); AR 12 at 04434-38 (BA/BE at

92-96). As the Forest Service notes, the Meadow Valley Project BA/BE does generally list the numbers of acres treated and the silvicultural method used for these projects, and provides a table listing the "Cumulative changes in Nesting Spotted Owl Habitat within [the] Analysis Area." FS Br. at 15; *see* AR 12 at 04397-402, 04434-38 (BA/BE at 57-62, 92-96). However, after providing this information, the Forest Service simply concludes that past and present projects "have not diminished nesting habitat for spotted owls," without providing any *analysis* of the cumulative impacts of these projects and the Meadow Valley Project on the owl. AR 13 at 04828 (EA at 74); AR 12 at 04438 (BA/BE at 96). As the Ninth Circuit has stated repeatedly, a conclusory presentation that does not offer any more than "general statements about possible effects and some risk" is insufficient to constitute the "hard look" required by NEPA. *Klamath-Siskiyou v. BLM*, 387 F.3d at 994-95.

The Forest Service asserts that it analyzed the cumulative effects of past timber harvests in Table 4 in the Meadow Valley Project BA/BE, which lists the current vegetative condition of the analysis area expressed in California Wildlife Habitat Relationship vegetation codes. FS Br. at 15-16; *see* AR 12 at 04355-57 (BA/BE at 17-19, Table 4). While this vegetation information may reflect the loss of suitable habitat from past timber harvesting in the analysis area, it remains unclear how these past activities have actually impacted the California spotted owl. For example, the Forest Service estimates that 26,320 acres of suitable owl foraging habitat remain in the analysis area, but there is no discussion of how past activities have impacted this figure or what effect they have had on the owl. *See* AR 12 at 04367-68 (BA/BE at 29-30). In fact, the only assessment offered by the Forest Service on the cumulative impacts of past and present actions is that recent projects "have not diminished nesting habitat for spotted owls." AR 13 at 04828 (EA at 74); AR 12 at 04438 (BA/BE at 96). This analysis is not sufficient. *See Klamath-Siskiyou v. BLM*, 387 F.3d at 995 (finding that "[a] calculation of the total number of acres to be harvested in the watershed is a necessary component of a cumulative effects analysis, but it is not a sufficient description of the actual environmental effects that can be expected from logging those acres"); *Lands Council*, 395 F.3d at 1028 (holding that the cumulative effects analysis of past timber harvests "should have provided adequate data of the time, type, place, and scale of past timber harvests and should have explained in sufficient detail how different project plans and harvest methods affected the environment").

Finally, the Forest Service argues that its analysis of cumulative effects from past actions satisfies NEPA because it meets the standard set forth in *Dep't of Transp. v. Public Citizen*, 541 U.S. 752, 124 S.Ct. 2204 (2004). FS Br. at 16. In that case, however, the Supreme Court was considering the adequacy of an EA prepared by the Federal Motor Carrier Safety Administration for proposed rules regarding safety regulations for Mexican trucks, which did not account for the environmental effects from an increase in cross-border traffic. 124 S.Ct. at 2210-12. The Court found that the agency was not responsible for considering these environmental effects because it had no authority to prevent the entry of Mexican trucks and thus was not a legally relevant cause of these effects. *Id.* at 2217. That case is wholly inapposite from the situation here, where the Forest Service was directly responsible for past and present actions in the analysis area and was therefore required by NEPA to consider "the incremental impact" of the Meadow Valley Project when added to other past and present actions.[11] *See* 40 C.F.R. § 1508.7.

Thus, the Forest Service's failure in the Meadow Valley Project EA to adequately evaluate the cumulative impacts of other past and present actions on the California spotted owl violated NEPA, 42 U.S.C. § 4332(2)(C), and was arbitrary and capricious under the APA, 5 U.S.C. § 706(2).

III. The Forest Service was Required by NEPA to Prepare an EIS for the Meadow Valley Project.

NEPA requires the preparation of an EIS for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).[12] In determining whether a project may have a significant effect on the environment, the Forest Service is required to evaluate the "intensity" of the action by considering the factors in 40 C.F.R. § 1508.27(b). The presence of any one of these factors may be sufficient to deem the action significant. *Ocean Advocates v. United*

[11] In fact, the Forest Service's reading of *Public Citizen* - - that "the cumulative impact regulation does not require an agency to analyze the 'incremental' impact of other past, present and reasonably foreseeable future actions that are not *proximately caused by the agency's proposed action*" - - would essentially discard the NEPA requirement to consider cumulative impacts in its entirety. FS Br. at 16 (emphasis added); *see* 40 C.F.R. § 1508.7.

[12] Plaintiffs note that the Forest Service has recently issued notices of intent to prepare EISs for three other QLG Act projects in the Plumas National Forest, and one in the neighboring Lassen National Forest. 70 Fed. Reg. 6830 (Feb. 9, 2005) (Empire Vegetation Management Project); 70 Fed. Reg. 7074 (Feb. 10, 2005) (Bald Mountain Project); 70 Fed. Reg. 7075 (Feb. 10, 2005) (Watdog Defensible Fuel Profile Zone/Group Selection Project); 70 Fed. Reg. 9609 (Feb. 28, 2005) (Creeks Forest Health Recovery Project). The Empire, Watdog, and Creeks Projects are similar in size and scope to the Meadow Valley Project, while the Bald Mountain Project is much smaller, involving approximately 90 acres of group selection and 100 acres of individual tree selection.

States Army Corps of Eng'rs, 361 F.3d 1108, 1125 (9th Cir. 2004). Furthermore, plaintiffs need only "raise substantial questions whether a project *may* have a significant effect on the environment" in order to prevail on their claim that the Forest Service was required to prepare an EIS. *Save the Yaak Committee v. Block*, 840 F.2d 714, 717 (9th Cir. 1988) (emphasis added). As explained below, the Forest Service has failed to take a "hard look" at the substantial questions raised by plaintiffs regarding the significant environmental impacts of the Meadow Valley Project that unequivocally mandate the preparation of an EIS.[13]

A. The Forest Service Failed to Take a Hard Look at Whether the Meadow Valley Project Significantly Affects Public Health or Safety.

In determining whether an action is "significant" and requires the preparation of an EIS, an agency must consider "[t]he degree to which the proposed action affects public health or safety." 40 C.F.R. § 1508.27(b)(2).

The Forest Service first claims that plaintiffs misconstrue this standard by arguing that an EIS is required "simply because a proposed action will affect public health and safety." FS Br. at 17. Yet plaintiffs specifically argue in their brief that "the impacts from the Project, whether beneficial or adverse, are likely to *significantly* affect public health or safety and therefore require the preparation of an EIS in accordance with 40 C.F.R. § 1508.27(b)(2)." Pls.' Br. at 31-32 (emphasis added).

The Forest Service then argues that plaintiffs' suggestion that "the Project's main justification is 'public health or safety'" is wrong because "public health or safety" is not one of the five stated purposes and needs of the Project. FS Br. at 17; *see* AR 13 at 04764-74 (EA at 10-20). While the specific phrase "public health or safety" may not appear as one of the Meadow Valley Project's stated purposes, the objectives of reducing fuels and the risk of high intensity wildfire to

[13] Again improperly addressing the merits of this case, the QLG argues that requiring the preparation of an EIS for the Meadow Valley Project would not serve the purposes of NEPA since the Forest Service has already provided "several hundred pages" of environmental analyses, and plaintiffs "had ample notice and access to the project planning and decision-making process." QLG Br. at 3-4. However, the number of pages of the EA and supporting documents alone does not support a finding that the Forest Service has taken a "hard look" at the impacts of the Meadow Valley Project. *See Klamath-Siskiyou v. BLM*, 387 F.3d at 994 ("Although each of the EAs contains a section of more than a dozen pages under the heading 'Cumulative Effects,' a close read reveals that those sections do not adequately discuss the subject"). Moreover, plaintiffs are not requesting that an EIS be prepared because of deficiencies in the public participation process, but because substantial questions have been raised regarding whether the Project may have significant effects on the environment. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998); *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001).

local communities is evident throughout the Project's purpose and need statement. *See* AR 13 at 04764-65, 04771-73 (EA at 10-11, 17-19). In fact, the Forest Service itself characterizes the Project activities as "intended to protect the Meadow Valley community in the event of a devastating wildfire" and "to help create a more fire resilient forest and contribute to community stability." FS Br. at 1; *see id.* at 48 ("One important purpose of the Meadow Valley DFPZ is to 'provide protection for the Meadow Valley community by treating fuels in the defense and threat zones,' so as to inhibit the spread of fires that approach the community") (quoting AR 13 at 04772 (EA at 18)). These concerns clearly relate to "public health or safety," even if that exact phase is not used.

Finally, the Forest Service claims that it did account for the *beneficial* effects of the Project since they were discussed in the purpose and need statement, and that the Forest Supervisor noted in his Decision Notice that the beneficial effects of reducing the threat of catastrophic wildfire did not bias his finding of no significant environmental effects.[14] FS Br. at 18; *see* AR 15 at 05502 (Decision Notice at 10). However, the purpose and need statement of an EA is only intended to "briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action," and not to provide an analysis of whether the project significantly affects public health or safety. *See* 40 C.F.R. § 1502.13. Moreover, the Forest Service's belief that the effects on public health or safety will be primarily beneficial does not allow it to conclude, as it does (s*ee* AR 13 at 04812 (EA at 58) ("[e]ffects may be significant if they *adversely affect* public health or safety") (emphasis added); AR 15 at 05503 (Decision Notice at 11) ("No significant *adverse effects* on public health or safety will result from this project") (emphasis added)), that the impact is not significant for purposes of NEPA. 40 C.F.R. § 1508.27(b)(1) ("A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial");

Consequently, the Forest Service failed to take a "hard look" at whether the proposed action significantly affects public health or safety as required by NEPA.

[14] As discussed above, the record demonstrates that the Meadow Valley Project will actually increase the risk of severe fire to the local communities. *See supra* Part I.B.

B. The Potential Effects of the Meadow Valley Project on the California Spotted Owl and Fire Risk to Local Communities are Highly Controversial.

In determining significance under NEPA, an agency must evaluate "[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4).

The Forest Service argues that "[p]laintiffs' effort to establish a controversy based on extra-record declarations must be rejected" since controversy must exist at the time of the agency's decision. FS Br. at 25-26. While plaintiffs agree that controversy cannot be established after the fact by evidence that was not before the agency at the time of its decision, *see Cold Mountain v. Garber*, 375 F.3d 884, 893 (9th Cir. 2004), plaintiffs' claim is based on substantial questions raised about the controversial effects of the Meadow Valley Project in the administrative record and the Forest Service's failure to provide a convincing explanation as to why no controversy exists. Pls.' Br. at 33-35; *see National Parks*, 241 F.3d at 736. For example, the Meadow Valley Project EA itself states that the proposed action "involves a higher risk of adversely affecting spotted owls because it deviates more from the owl management strategy in [the 2001 Sierra Nevada Forest Plan Amendment Record of Decision ("SNFPA 2001 ROD")]." Pls.' Br. at 33; AR 13 at 04824 (EA at 70). Furthermore, plaintiffs' comments on the EA and their administrative appeals of the Decision Notice and FONSI reiterated their concerns regarding the Project's controversial effects on owls and fire risk to the local communities. Pls.' Br. at 35; *see, e.g.*, AR 14 at 05246-52, 05262-66 (Plaintiffs' Comments on Meadow Valley Project EA at 5-11, 21-25); AR 15 at 05682-99 (Plaintiffs' Notice of Appeal and Statement of Reasons at 2-19).

Plaintiffs' references to the declarations of Dr. Jennifer Blakesley ("Blakesley Dec.") and Dr. Dennis Odion are appropriate to support their claim that the Forest Service failed to adequately consider this factor under NEPA, because they show that the agency ignored the substantial and well-documented controversy surrounding these environmental effects. Pls.' Br. at 34; Blakesley Dec. ¶¶ 16, 18; Odion Dec. ¶ 3. *See also National Audubon Soc'y v. United States Forest Serv.*, 46 F.3d 1437, 1447-48 (9th Cir. 1994) (district court properly considered an affidavit outside the administrative record where plaintiffs alleged that the Forest Service neglected to mention a serious

environmental consequence in preparing environmental assessments under NEPA on four challenged timber sales). Despite the substantial questions raised by plaintiffs about the controversial effects of the Meadow Valley Project, the Forest Service summarily concluded in the EA and Decision Notice that "[n]o anticipated project-specific effects are likely to be considered highly controversial." AR 13 at 04815 (EA at 61); AR 15 at 05503-04 (Decision Notice at 11-12).

The Forest Service also claims that plaintiffs have failed to demonstrate a dispute that "casts serious doubt upon the reasonableness" of its conclusions, since the agency's own scientists analyzed the potential effects of the Project on the owl and fully considered the risks of vegetation treatments such as group selection. FS Br. at 26. In support of this assertion, the Forest Service cites the cumulative effects section of the EA and the 2001 Sierra Nevada Forest Plan Amendment Final Environmental Impact Statement ("SNFPA 2001 FEIS"). *Id.* However, the EA does not discuss the controversial nature of the Meadow Valley Project's proposed logging on the owl. *See* AR 13 at 04827-28 (EA at 73-74). Moreover, the SNFPA 2001 FEIS failed to resolve the substantial controversy regarding the effects of the Meadow Valley Project's proposed logging on the California spotted owl, finding that "[t]he high rates of vegetation treatments occurring over a short time period [by fully implementing the QLG Act] would result in substantial risk to the distribution and abundance of California spotted owls and owl habitat in the northern Sierra Nevada." SNFPA 2001 FEIS Volume 3, Chapter 3, part 4.4 at 99 (FS Br., Exhibit A). As a result, the SNFPA 2001 ROD adopted a "California Spotted Owl Conservation Strategy" that provided substantial protections for owl habitat and limited the implementation of the QLG Act. AR 1 at 00272-76, 00285-86 (SNFPA 2001 ROD at 37-41, 50-51).[15]

The Forest Service also argues that it "reasonably concluded" that the effectiveness of the Meadow Valley Project's group selection cuts as a fire management tool is not controversial among experts. FS Br. at 26-27. However, this assertion is contradicted by the substantial dispute between

[15] Unfortunately, these protections were discarded by the 2004 Sierra Nevada Forest Plan Amendment Record of Decision ("SNFPA 2004 ROD"), which allows for the full implementation of the QLG Act even though defendant Blackwell admitted that "there is still much more to learn and understand about the linkages between management activities, and their effects on owl habitat and population dynamics." AR 4 at 01058 (SNFPA 2004 ROD at 6); *see* AR 4 at 01404 (2004 Sierra Nevada Forest Plan Amendment Final Supplemental Environmental Impact Statement ("SNFPA 2004 FSEIS") at 270) ("There is conflicting science about the effects of canopy cover reductions from fuels treatments on the California spotted owl").

the agency's own Fire/Fuels Report and its Skinner declaration regarding the impacts of group selection logging. *Compare* AR 13 at 04869, 04884 (Fire/Fuels Report at 6, 21), *with* Skinner Dec. ¶¶ 11-14. While the Forest Service concluded in the Fire/Fuels Report that the group selection cuts "are not actions designed to meet the purpose and need for hazardous fuels reduction" and that "larger standing live trees are not significant contributors to wildland fire behavior," Skinner asserts that the Meadow Valley Project's proposed group selection cuts will reduce fire risk. *Id. See also* H.R. Rep. No. 105-136(I) at 19 (June 18, 1997) ("As Don Erman, team leader of the Congressionally sponsored Sierra Nevada Ecosystem Project noted 'the [QLG Act] provides little support for scientific evaluation of the proposed new management[;] yet in many ways the ideas are untested'").

The Forest Service also claims that to the extent any controversy exists, it was already evaluated at the programmatic level. FS Br. at 26-28. However, the 1999 QLG ROD, SNFPA 2001 ROD, and SNFPA 2004 ROD all stated that they do not authorize any site-specific actions, which may only be implemented after further NEPA review. AR 7 at 02383 (1999 QLG ROD at 6); AR 1 at 00270 (SNFPA 2001 ROD at 35); AR 4 at 01072 (SNFPA 2004 ROD at 20). Where the Forest Service represents in a programmatic EIS that it will fully comply with NEPA in evaluating future site-specific impacts, "judicial estoppel will preclude the Service from later arguing that it has no further duty to consider the [impacts] of site-specific programs." *Salmon River Concerned Citizens v. Robertson*, 32 F.3d 1346, 1357-58 (9th Cir. 1994). Furthermore, the Ninth Circuit has held that NEPA requires that an agency take a "hard look" at the environmental consequences of its actions and determine the need to prepare an EIS at both the programmatic and site-specific levels. *See* Pls.' Br. at 29 n. 29; *Blue Mountains*, 161 F.3d at 1214 ("[n]othing in the tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future project-specific EIS, without regard to the nature or magnitude of a project").

In sum, there are several controversial aspects of the Meadow Valley Project which require the preparation of an EIS, including the destruction of 4,281 acres of suitable owl habitat, the creation of slash adjacent to homes and the failure to require slash clean up, the logging of recently fire-treated stands, and the removal of the largest 1-2% of the overstory trees in the Project area. *See* Pls.' Br. at 33-35. The Forest Service has failed to meet its burden "to come forward with a well-

reasoned explanation" demonstrating why plaintiffs' and others comments "do not suffice to create a public controversy based on potential environmental impacts." *National Parks*, 241 F.3d at 736.

C. The Potential Effects of the Meadow Valley Project are Highly Uncertain and Involve Unique or Unknown Risks.

In deciding whether the impacts of the Meadow Valley Project require the preparation of an EIS, the Forest Service must consider "[t]he degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5).

The Forest Service contends that it "reasonably concluded" that the Project would not result in significant uncertain, unique, or unknown effects. FS Br. at 29-30; *see* AR 13 at 04816 (EA at 62). Specifically, the Forest Service argues that the Meadow Valley Project's impacts on the California spotted owl would likely not lead to changes in owl occupancy or viability, would be analyzed as part of an administrative study, and had previously been disclosed in the SNFPA 2001 FEIS. FS Br. at 30-32. The Forest Service also claims that uncertainty related to fire and fuels was already evaluated in the SNFPA 2001 FEIS and did not require the preparation of an EIS for the Meadow Valley Project. *Id.* at 32.

However, the record does not support the Forest Service's conclusions that the loss of 4,281 acres of suitable owl habitat will likely not lead to changes in owl occupancy, and the assertion that owl viability may not be threatened by a single project does not resolve the uncertainties that the proposed activities will have on the owl, especially from the cumulative impacts of other actions. *See infra* Part III.D-E. In fact, the Forest Service admits that the Meadow Valley Project:

> would introduce elements of uncertainty about future owl activity in the project area. Alternative C [the selected alternative] involves a higher risk of adversely affecting spotted owls because it deviates more from the owl management strategy in [the SNFPA 2001 ROD], and the more intensive treatments would create more structurally unsuitable habitat across the project area and within HRCAs (e.g. reducing canopy closure to 40% in certain units in threat zones, general forest, and old forest emphasis areas at least temporarily eliminates a key element of suitable owl habitat).

AR 13 at 04824 (EA at 70). These highly uncertain effects and unknown risks to the owl are further evident from the Forest Service's assertion that the Meadow Valley Project would be accompanied by an administrative study that would be "focused on resolving uncertainties about the effects of

vegetation management actions on spotted owl behavior and population dynamics."[16] FS Br. at 30-31; AR 13 at 04816, 04824 (EA at 62, 70). The Forest Service cannot avoid its duty to prepare an EIS by simply acknowledging such uncertainty and unknown risks and proposing to study the potential effects after they happen. As the Ninth Circuit has recently stated, "[p]reparation of an EIS is mandated where uncertainty may be resolved by further collection of data . . . or where the collection of such data may prevent 'speculation on potential . . . effects. The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed *prior to the implementation of the proposed action*.'" *National Parks*, 241 F.3d at 732 (quoting *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988)) (emphasis added). In this case, the Forest Service "proposes to increase the risk of harm to the environment and then perform its studies . . . . This approach has the [NEPA] process exactly backwards. Before one brings about a potentially significant and irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effects it acknowledges." *Id.* at 733 (citation omitted).

The Forest Service's reliance on *Greater Yellowstone Coalition v. Flowers*, 359 F.3d 1257 (10th Cir. 2004) is misplaced. FS Br. at 31-32. In *Greater Yellowstone Coalition*, the U.S. Army Corps of Engineers issued a dredge-and-fill permit under the federal Clean Water Act to authorize construction of a housing development and golf course in the vicinity of bald eagle nesting territory. 359 F.3d at 1262. The Tenth Circuit found that the agency was not required to prepare an EIS based on impacts to the eagles for several reasons, including conditions imposed by the FWS that "greatly

[16] In the SNFPA 2001 ROD, the Forest Service proposed an administrative study to "investigate the response of the California spotted owl and its habitat, particularly populations of prey species and features of their habitats, to various silvicultural treatments," and anticipated that the study would involve group selection cuts in "4,000 acres of owl habitat per year in the HFQLG pilot area." AR 1 at 00250-51, 00285-86 (SNFPA 2001 ROD at 15-16, 50-51). A notice of intent to prepare an EIS for the study was published on December 4, 2002 (67 Fed. Reg. 72136), but this notice was subsequently cancelled and the original study abandoned. 68 Fed. Reg. 20366 (Apr. 25, 2003). The Forest Service claims that it "has initiated a narrower study that will examine projects proposed as part of the HFQLG pilot implementation," and that the Meadow Valley Project's group selection cuts were never "justified" by the study. FS Br. at 31. However, both the EA and the Decision Notice for the Meadow Valley Project state that the proposed group selection cuts would constitute "18.6% of the annual average group selection in spotted owl habitat anticipated in the SNFPA [2001] ROD as part of an administrative study (4,000 acres/yr)." AR 13 at 04787 (EA at 33); AR 15 at 05502 (Decision Notice at 10). Moreover, the 2001 administrative study is specifically referenced as the first element of the Meadow Valley Project's purpose and need statement. AR 13 at 04764-65, 04771 (EA at 10-11, 17) ("The proposed action is intended to implement the [QLG Act] and the SNFPA [2001] ROD, which anticipates that group selection timber harvest will be conducted as part of an administrative study").

reduced" the chance that any eagles would in fact be taken, 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." *Id.* at 1276.

Furthermore, the fact that the Forest Service discussed the high degree of uncertainty and unknown risks to the California spotted owl and fire and fuels management in the SNFPA 2001 FEIS 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. *See Blue Mountains*, 161 F.3d at 1214. The high degree of uncertainty and unknown risks to the California spotted owl addressed in the SNFPA 2001 FEIS resulted in the substantial protections for owl habitat and restrictions on the implementation of the QLG Act pilot project in the SNFPA 2001 ROD. AR 1 at 00272-76, 00285-86 (SNFPA 2001 ROD at 37-41, 50-51); *see* 68 Fed. Reg. 7580, 7601 (Feb. 14, 2003) ("Substantial scientific uncertainty remains regarding the effects of fuel treatments in PACs and foraging areas"). However, the SNFPA 2004 ROD eliminated most of those protections for the owl and restrictions on QLG Act pilot project activities, including the Meadow Valley Project. AR 4 at 01058 (SNFPA 2004 ROD at 6); *see* AR 4 at 01404 (SNFPA 2004 FSEIS at 270) ("vegetation treatment over the short term (20 years) may introduce some unknown level of risk to the California spotted owl population"). Thus, the continuing uncertainty and unknown risks posed by the Meadow Valley Project required the preparation of an EIS.

D. The Forest Service Failed to Take a Hard Look at the Cumulatively Significant Impacts of the Meadow Valley Project and Other Past, Present, and Reasonably Foreseeable Future Actions on the California Spotted Owl.

In determining whether to prepare an EIS for the Meadow Valley Project, the Forest Service was required to consider "[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts." 40 C.F.R. § 1508.27(b)(7).

The Forest Service first argues that it adequately identified and discussed future activity that would occur within the analysis area and determined that the cumulative effects would not be significant. FS Br. at 33. While the Meadow Valley Project BA/BE does generally note a few future projects within the analysis area, this section fails to provide any useful analysis of cumulative

impacts and makes no mention whatsoever of impacts on the California spotted owl. AR 12 at 04401-02 (BA/BE at 61-62); *see Neighbors of Cuddy Mountain*, 137 F.3d at 1380 ("General statements about 'possible' effects and 'some risk' do not constitute a 'hard look' absent a justification regarding why more definitive information could not be provided"). As discussed above, the Forest Service failed to even mention, let alone consider and evaluate, several reasonably foreseeable future actions that are likely to have cumulatively significant impacts on the owl.

The Forest Service claims that the 1999 QLG FEIS, which determined that full implementation of the QLG Act pilot project would threaten owl viability and result in a trend toward federal listing for the owl under the Endangered Species Act, "took a worst case approach to estimating effects" on the owl because it assumed that "[a]ll group selection and DFPZ construction that was projected to occur within owl habitat" would render 100 percent of that habitat unsuitable. FS Br. at 33; *see* AR 7 at 02581, 02884 (1999 QLG FEIS at 3-103, 6-19). Instead, the Forest Service argues that the 1999 QLG Biological Assessment/Biological Evaluation ("1999 QLG BA/BE") found that *past* fuel reduction activities and DFPZ construction in owl nesting habitat actually reduced that habitat by less than one percent of the acreage treated. FS Br. at 33-34.

However, the record is unclear regarding the location of these past pre-QLG Act projects and the treatments involved. According to the 1999 QLG BA/BE, past projects employed a much greater variety of area fuels treatments which allowed "for retention of key structural features (large trees, large snags, large down material) better than linear DFPZ type areas," and were often conducted in areas that did not provide suitable habitat for the California spotted owl. AR 6 at 02060-61, 02070 (1999 QLG BA/BE at 70-71, 80). Furthermore, the Forest Service has noted that past projects in the Meadow Valley Project area were subject to the CASPO interim guidelines or the standards in the SNFPA 2001 ROD, which provided substantial protections for suitable owl habitat. *Id.* at 02060 (1999 QLG BA/BE at 70); AR 13 at 04828 (EA at 74). In this case, by contrast, it is undisputed that the Project area contains 4,281 acres of suitable owl nesting and foraging habitat, and that the proposed DFPZs and group selection cuts are expected to render unsuitable *all 4,281 acres*. AR 12 at 04367-68, 04439-40 (BA/BE at 29-30, 97-98); FS Response to Facts ¶¶ 49-50. Thus, it appears that the 1999 QLG FEIS's "worst case approach" is applicable to the resource

management activities proposed by the Meadow Valley Project and other reasonably foreseeable future QLG Act pilot project actions.

The Forest Service also contends that the SNFPA 2004 FSEIS contains a revised analysis of effects on the owl from the full implementation of the QLG Act pilot project, and that the BE for the SNFPA 2004 FSEIS found that owl viability would not be threatened and there would not likely be a trend toward listing the owl. FS Br. at 34. However, these documents provide minimal insight regarding the short term and cumulative impacts on the owl from site-specific QLG Act pilot project activities, and actually emphasize the uncertainty regarding environmental effects to the owl from the proposed activities and the need for further analysis. *See*, *e.g.*, AR 4 at 01404 (SNFPA 2004 FSEIS at 270) ("vegetation treatment over the short term (20 years) may introduce some unknown level of risk to the California spotted owl population"); *id.* at 01414 (SNFPA 2004 FSEIS at 280) ("These risks to habitat are tempered by the adaptive management and monitoring strategy included in Alternative S2 and described in Chapter 2"). According to the Science Consistency Review for the SNFPA 2004 FSEIS, full implementation of the QLG Act pilot project "likely incurs greater risk to owl persistence" and "makes it critical that a defensible adaptive management program is an integral part of implementation in order to address key uncertainties." AR 3 at 00693 (SNFPA 2004 FSEIS Science Consistency Review at 9).

Furthermore, as stated above, NEPA requires that an agency take a "hard look" at the environmental consequences of its actions at both the programmatic and site-specific stages, and the SNFPA 2004 ROD specifically noted that "[s]ite-specific decisions will be made on projects in compliance with NEPA, ESA, and other environmental laws following applicable public involvement and administrative appeal procedures." AR 4 at 01072 (SNFPA 2004 ROD at 20); *see also* AR 3 at 00745 (SNFPA 2004 FSEIS Biological Evaluation for Sensitive Species at 2) ("The programmatic Biological Evaluation will provide a baseline to consider bioregional cumulative effects in these project-level analyses. These project-level Biological Evaluations will be able to consider the spatial and temporal direct, indirect, and cumulative effects at the local scale and will make independent determinations for each affected sensitive species").

The Forest Service next argues that although the EA found that "the present action can be

viewed as initiating a cumulative reduction in available spotted owl habitat," the BA/BE explained that "any potential cumulative impacts from the Meadow Valley Project would not be significant because it was not expected that owl occupancy would change." FS Br. at 34; *see* AR 13 at 04828 (EA at 74); AR 12 at 04438 (BA/BE at 96). The Forest Service also claims that the BA/BE included a discussion of the potential effects of habitat reduction on owl reproduction. FS Br. at 34-35; AR 12 at 04432 (BA/BE at 90). While the Forest Service does offer conclusory statements regarding the *direct effects* of the Meadow Valley Project on owl occupancy and reproduction, it appears to assume that the conclusions drawn from this inadequate analysis are generally applicable to the *cumulative effects* of the Project and other reasonably foreseeable future projects. *See, e.g.*, AR 12 at 04438 (BA/BE at 96) ("owl occupancy is not expected to diminish *with the action alternatives*") (emphasis added). As discussed above, the Forest Service did not consider any reasonably foreseeable future actions in discussing cumulative impacts on the California spotted owl, and thus did not evaluate how owl occupancy and reproduction would be impacted by these projects.

Finally, the Forest Service claims that cumulative effects outside of the analysis area would not go unanalyzed, since cumulative reductions in old forest habitat and spotted owl nesting habitat will be tracked to ensure that habitat for old-forest dependent species is not reduced by more than 10% below 1999 levels. FS Br. at 35. However, the Forest Service has already taken the position that it does not need to consider cumulative effects outside of its self-designated analysis area, and the Meadow Valley Project BA/BE does not consider the cumulative impacts of any reasonably foreseeable future actions on the California spotted owl. FS Br. at 13; AR 12 at 04458-59 (BA/BE at 116-17, Tables 40-41). Even assuming that these future projects are later included in the Tables, the Forest Service has once again demonstrated that it has the NEPA process "exactly backwards" by proposing to "increase the risk of harm to the environment and then perform its studies." *National Parks*, 241 F.3d at 733.

E. The Forest Service Failed to Take a Hard Look at Whether the Meadow Valley Project Would Adversely Affect the California Spotted Owl, a Sensitive and Imperiled Species.

In determining whether a proposed action will significantly affect the environment, the NEPA regulations also require that an agency consider "[t]he degree to which the action may

adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973." 40 C.F.R. § 1508.27(b)(9).

The Forest Service asserts that this provision "is not applicable" to the California spotted owl since it is not listed under the ESA as either a threatened or endangered species. FS Br. at 19. While plaintiffs agree that the owl is not yet a listed species under the ESA,[17] it has been designated by the Forest Service as a "sensitive" species. The Forest Service itself has extended Section 1508.27(b)(9) to cover sensitive species, "which may require conservation actions to avoid future population declines and the need for federal listing as endangered or threatened."[18] AR 13 at 04821 (EA at 67); *see also* AR 15 at 5504 (Decision Notice at 12) ("The action may have some effect on a threatened species (bald eagle), would have no effect on any endangered species, and may affect fourteen sensitive wildlife species and eight sensitive plant species"); Forest Service Manual § 2670.32(2)[19] ("As part of the National Environmental Policy Act process, review programs and activities, through a biological evaluation, to determine their potential effect on sensitive species"). The Ninth Circuit has also found that the designation of sensitive species may constitute significant new circumstances regarding environmental impacts that requires the preparation of a supplemental EIS. *Friends of the Clearwater*, 222 F.3d at 558-59.

The Forest Service further argues that, in any event, it addressed effects to the California spotted owl "as part of the obligation to take a hard look at environmental impacts of its actions under NEPA," and reasonably concluded that potential impacts to the owl would not be significant for several reasons. FS Br. at 19-24[20]; *see also* QLG Br. at 6, 9-11. First, the Forest Service claims

---

[17] In its 12-month finding on a previous petition to list the California spotted owl, the FWS explicitly based its "not warranted" finding on the protections for the owl in the SNFPA 2001 ROD, but acknowledged the need to monitor both the management review of the SNFPA 2001 ROD and a proposed administrative study "because the outcome of each of these efforts could substantially affect California spotted owls." 68 Fed. Reg. 7580, 7598-604 (Feb. 14, 2003). Several of the plaintiff organizations have repetitioned the FWS to designate the owl as a threatened or endangered species under the ESA after these protections were significantly weakened by the SNFPA 2004 ROD. *See* Answer ¶ 33; AR 4 at 01058 (SNFPA 2004 ROD at 6). Furthermore, the FWS's decision not to list the owl is being challenged in *Center for Biological Diversity v. Norton*, Case No. C 04-1861 VRW (N.D. Cal.).

[18] The owl has also been selected by the Forest Service as a "management indicator species" for the Plumas National Forest. *See* AR 13 at 04799, 04822 (EA at 45, 68). Management indicator species are those whose populations are believed to respond to management activities and are chosen to represent specific habitat types. *See* 36 C.F.R. § 219.19 (2000).

[19] Forest Service Manuals and Forest Service Handbooks are available at http://www.fs.fed.us/im/directives/ (last visited February 28, 2005).

[20] The Forest Service argues that plaintiffs' extra-record declarations regarding the owl should not be considered. FS Br.

that "there would not be any activity in any PACs or SOHAs." *Id*. at 19. Although Section 401(c)(1) of the QLG Act specifically prohibits resource management activities required by the pilot project from being conducted in owl PACs and SOHAs, the Forest Service replaced the concept of SOHAs with HRCAs[21] in its recent forest management plan amendments and site-specific environmental analyses, including its analysis for the Meadow Valley Project. *See, e.g.*, AR 12 at 04428 (BA/BE at 86). The Forest Service determined that protecting HRCAs would be more effective than SOHAs because HRCAs "concentrate high quality habitat within a core area closest to an activity center." *See* SNFPA 2001 FEIS, Volume 3, Chapter 3, part 4.4 at 93. As a result, while the Forest Service is legally obligated to completely avoid SOHAs in implementing the Meadow Valley Project, no specific information on the SOHAs within the analysis area was provided, nor was any analysis or determination of the Project's indirect impacts on SOHAs actually conducted. *See* AR 13 at 04824, 04828 (EA at 70, 74). However, the Forest Service did find that the proposed logging activities are expected to render unsuitable approximately 1,000 acres of habitat within owl HRCAs. AR 13 at 04824 (EA at 70); AR 12 at 04430 (BA/BE at 88).

The Forest Service next claims that "the vast majority of existing foraging habitat (87%) and nesting habitat (95%) would be retained within the analysis area," and the reduction in suitable owl habitat from logging in HRCAs is not expected to reduce owl occupancy. FS Br. at 19-20, 21. However, the record demonstrates that the loss of 4,281 acres of suitable owl habitat, including at least 1,000 acres in 16 HRCAs and more than 10% of suitable habitat in at least seven of those HRCAs, would be significant for purposes of NEPA. *See* AR 12 at 04428-31 (BA/BE at 86-89). *See also* Declaration of Monica L. Bond in Support of Plaintiffs' Motion for Summary Judgment ("Bond Dec.") ¶¶ 18-23. Given the studies cited by the Forest Service finding that "removing suitable habitat within an owls home range tends to reduce the productivity and survivorship of resident owls," there is no basis for the Forest Service to conclude that this amount of habitat loss

---

at 20. This argument is addressed in Plaintiffs' Memorandum in Opposition to Defendants' Motion to Strike Plaintiffs' Extra-Record Declarations, filed herewith.

[21] SOHAs are designated stands of owl habitat comprising at least 1,000 acres of suitable habitat within a 1.5 mile radius of a nest site. AR 7 at 02579 (1999 QLG FEIS at 3-101). In Plumas National Forest, HRCAs are characterized as approximately 1,000 acres of the best available habitat (including the 300-acre PAC) where the most concentrated owl foraging activity is likely to occur. Answer ¶ 35; AR 1 at 00337 (SNFPA 2001 ROD at Appendix A, 43).

would not be associated with a potential loss of owl occupancy and is insignificant for purposes of NEPA. *See* AR 12 at 04431 (BA/BE at 89); AR 13 at 04828 (EA at 74). *See also Klamath-Siskiyou Wildlands Center v. United States Forest Serv.*, No. Civ. S 03-1334 FCD DAD, slip op. at 23 (E.D. Cal. Oct. 15, 2004) ("*Klamath-Siskiyou v. Forest Service*") (Attachment 3 to Torgun Dec.) (finding that a timber sale resulting in "the destruction of a significant percentage of the suitable habitat" in a critical habitat unit for the federally-listed northern spotted owl was an important factor supporting the need for an EIS under 40 C.F.R. § 1508.27(b)(9)).

Additionally, the Forest Service's analysis ignores well-established science contained in the record demonstrating that "[i]t is not unusual for owls in an established activity center to skip several years between one nesting and the next. Sites may be vacant for several consecutive years when the population is in decline, but then be reoccupied to support breeding pairs during a population upswing." AR 2 at 00419 (SNFPA 2001 FEIS, FWS Biological Opinion at 64). On the other hand, the Forest Service itself admits that the Project "involves a higher risk of adversely affecting spotted owls" because it deviates more from the owl management strategy in the SNFPA 2001 ROD, "and the more intensive treatments would create more structurally unsuitable habitat across the project area and within HRCAs . . . ." AR 13 at 04824 (EA at 70). Rather than acknowledging that substantial questions have been raised regarding the Project's effects on the owl, the Forest Service instead relies on an "administrative study focused on resolving uncertainties about the effects of vegetation management actions on spotted owl behavior and population dynamics." AR 13 at 04824 (EA at 70); AR 12 at 04432-33 (BA/BE at 90-91). However, the adverse effects of the Meadow Valley Project on the California spotted owl, a sensitive and imperiled species, required the Forest Service to prepare an EIS, and it was arbitrary and capricious for it to refuse to do so.

The Forest Service also contends that it adequately addressed the effects of the Meadow Valley Project on habitat fragmentation and connectivity, owl competition and reproduction, and owl prey base. FS Br. at 20, 22-24. However, plaintiffs have demonstrated the numerous flaws in these conclusory assertions, namely, that the Forest Service has failed to provide sufficient information regarding the Project's direct impacts on the biological home ranges of owls living in and immediately outside of the analysis area, and failed to discuss or even reference the numerous other

foreseeable QLG Act projects adjacent to and near the analysis area that are also likely to result in significant reductions in suitable owl habitat. Pls.' Br. at 34, 38-40; Bond Dec. ¶¶ 16-35; Blakesley Dec. ¶¶ 8, 16, 18.

For example, the Forest Service claims that it adequately addressed the effects of the Project on habitat fragmentation and connectivity, and reasonably concluded that reductions in canopy cover and the loss of other old forest attributes from the DFPZ and group selection units would not be significant. FS Br. at 22-23. However, the agency had previously found that the intensity of DFPZ construction and group selection under the QLG Act pilot project rates "low" in minimizing fragmentation, and that such activities "increas[e] the risk of management actions creating large amounts of unsuitable habitat, increas[e] edge effect, and potentially reduc[e] habitat connectivity." AR 6 at 02066 (1999 QLG BA/BE at 76); *see also* AR 2 at 00494 (SNFPA 2001 FEIS, FWS Biological Opinion at 140) (the "risk to spotted owls is relatively higher due to the linear nature of DFPZs . . . and the disproportionately higher use of mechanical treatment projected to occur in forests comprising the QLG area"); Bond Dec. ¶¶ 28-35.

The Forest Service also claims that it adequately considered the effects of habitat loss on owl competition and reproduction, and determined that such impacts would not be significant because HRCAs would only be reduced by an average of 63 acres and owls could make use of low occupancy PACs/HRCAs. FS Br. at 23-24. However, this assertion ignores the Forest Service's own previous finding that degrading habitat *between* PACs and SOHAs also threatens mate finding and dispersal (AR 6 at 02064 (1999 QLG BA/BE at 74)), and the FWS's warning that the degradation of habitat within HRCAs requires owls to "travel further to reach quality habitats and therefore potentially reduces their fitness by increased energetic demands and exposure to potential predators." AR 2 at 00483 (SNFPA 2001 FEIS, FWS Biological Opinion at 129). *See also* Bond Dec. ¶¶ 33, 36-37. Similarly, the Forest Service argues that it adequately evaluated the effects of the Project on the owl's prey base and reasonably concluded that such impacts would not be significant. FS Br. at 24. Once again, however, the Forest Service's conclusory assertions ignore its own previous findings that the QLG Act pilot project will result in "habitat modifications that can lead to a reduction or loss of available prey base" (AR 6 at 02059 (1999 QLG BA/BE at 69)), especially

given that the owl's primary prey, the northern flying squirrel, requires "dense forest stands with tall trees for locomotion." AR 2 at 00490 (SNFPA 2001 FEIS, FWS Biological Opinion at 136). *See also* Bond Dec. ¶¶ 24-27.

In sum, the conclusory analysis in the Meadow Valley Project BA/BE lacks both the requisite detail and scope to support its conclusions that habitat connectivity, owl survival and reproduction, and owl prey base will not be significantly affected. A more thorough analysis of these issues is especially important given the well-documented and repeated assertions of Forest Service and other scientists that the treatment prescriptions employed by the QLG Act, including the Meadow Valley Project, carry considerable and/or unknown risks to owls. These substantial questions regarding whether the Project may have significant impacts on the California spotted owl required the preparation of an EIS.[22]

IV. The Forest Service was Required by NFMA to Mark Trees to be Removed in DFPZs and Group Selection Units for the Meadow Valley Project.

Plaintiffs contend that the Forest Service violated Section 472a(g) of NMFA, 16 U.S.C. § 472a(g), by failing to mark the trees to be removed in the Meadow Valley Project's group selection and DFPZ units. Pls.' Br. at 41-43.

The Forest Service responds by first claiming that it was not required to mark trees for the Project because its designation by description of trees to be harvested made marking unnecessary under NFMA. FS Br. at 43-44. The Forest Service argues that plaintiffs are incorrect that designation is only permissible "where all trees or forest products in a given area are to be removed or where all trees or forest products in a given area are to be retained," since there is no support in NFMA or its legislative history "that designating something less than an entire area would be

[22] The Forest Service also asserts that the Meadow Valley Project's DFPZs are "designed to reduce the possibility that a catastrophic crown fire would cause the loss of forest cover and, consequently, owl habitat." FS Br. at 21. The Forest Service notes that under the no action alternative, future fires are expected to be larger and more intense and could "eliminate suitable habitat or make its distribution more patchy." *Id.*; *see also* QLG Br. at 4, 8 ("Plaintiffs have also made it plain that it is not NEPA's 'excellent action' that they seek, but no action"). The implication of this is that plaintiffs' position would actually cause harm to the owl. However, plaintiffs do not support the no action alternative for the Meadow Valley Project, and have stated repeatedly that they do not object to legitimate fire risk reduction activities such as prescribed burning and undergrowth thinning of small trees and brush, which are the biggest contributors to fire behavior. *See* Complaint at 20; Pls.' Br. at 48. More importantly, as discussed above and in plaintiffs' brief, the resource management activities proposed by the Meadow Valley Project will actually increase the risk of severe fire in the Project area due to the removal of large, fire resistant trees, the creation of flammable slash, and the increased growth and accumulation of surface and ladder fuels. *See* Pls.' Br. at 9-11, 16-18.

inconsistent with the statute." *Id.* at 45. However, the legislative history of Section 472a(g) demonstrates that the Forest Service is mistaken.

Section 472a(g) of NFMA provides that:

> Designation, marking when necessary, and supervision of harvesting of trees, portions of trees, or forest products shall be conducted by persons employed by the Secretary of Agriculture. Such persons shall have no personal interest in the purchase or harvest of such products and shall not be directly or indirectly in the employment of the purchaser thereof.

16 U.S.C. § 472a(g). This provision was added by Congress in 1976 in response to the Fourth Circuit's decision in *Izaak Walton League of America, Inc. v. Butz*, 522 F.2d 945 (4th Cir. 1975), which found that the previous statutory language requiring that all timber sold "shall be marked and designated" obligated the Forest Service "to mark each individual tree which was authorized to be cut." 522 F.2d at 949; *see* S. Rep. No. 94-893 at 8 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6662, 6669.

According to the legislative history, Section 472a(g) provides the Forest Service "with sufficient flexibility to indicate the timber to be harvested by designating an area in which all timber will be cut, where trees to be cut will be marked, or where trees to be left will be marked." S. Rep. No. 94-893 at 21, *reprinted in* 1976 U.S.C.C.A.N. at 6681; *see also id.* at 42, *reprinted in* 1976 U.S.C.C.A.N. at 6701 ("There are other techniques for controlling the trees to be cut. For example, an area can be designated and the trees to be left would be marked; or if all the trees are to be cut in an area, the boundary around the cutting area can be marked at intervals"). Congress remained concerned, however, that "designation and supervision of harvesting be done by Government employees and not delegated to persons directly or indirectly employed by the timber purchaser," and did not give the Forest Service authority to simply *designate by description* an area to be cut when some trees in that area must be retained.[23] *Id.* at 42, *reprinted in* 1976 U.S.C.C.A.N. at 6701.

[23] The Forest Service may be authorized to use designation by description for "Stewardship End Result Contracting Projects," but Section 347(c)(4) of that program specifically exempts these projects from the requirements of 16 U.S.C. § 472a(g). Pub. L. 105-277, Div. A., § 101(e) [Title III, § 347], Oct. 21, 1998, 112 Stat. 2681-298 (16 U.S.C. § 2104 note). According to the interim directive implementing the Stewardship Contracting program, "Title 16 U.S.C. 2104 note (c)(4) (sec. 60.1, para. 4) allows for the use of designation of trees by description and designation of trees by prescription without marking." Forest Service Handbook 2409.19, Chapter 60, § 61.3. Otherwise, the Forest Service's policy manual requires that "[e]xcept when one of the designation by description special contract provisions approved by the Director of Forest Management is used, all designation of trees containing commercial products to be removed from

See Siskiyou Regional Education Project v. Goodman, ___ F. Supp. 2d ___, 2004 WL 1737738 at *12-13 (D. Or. Aug. 3, 2004) (finding that the legislative history of Section 472a(g) "casts doubt on whether such a description can be sufficiently specific to permit the Service to verify that the purchaser does not cut the wrong trees").

V. Injunctive Relief is Appropriate In This Case.

Plaintiffs contend that they would be irreparably harmed if the Forest Service is allowed to proceed with the Meadow Valley Project in violation of NEPA, NFMA, and the QLG Act due to the environmental harm from the loss and degradation of old forest areas, including suitable spotted owl habitat, and the immediate and near-term risk of severe wildfire in the Project area. *See* Pls.' Br. at 44-46. Defendants do not dispute that such harm, if it occurs, would be irreparable and favors the issuance of an injunction to protect the environment.[24] Instead, the QLG contends that "[t]he Forest Service has balanced the needs of the owl with the need to protect the people and the other species of the forest from catastrophic wildfire," and that the public interest favors the Meadow Valley Project going forward to carry out Congress' intent in passing the QLG Act. QLG Br. at 6-7, 11-15. In addition, the Forest Service argues that an injunction would not be in the public interest because the Project implements the QLG Act's goals of providing community stability and cost-effectiveness, and because DFPZ construction would protect nearby communities from wildfire. FS Br. at 46-50. As discussed below, defendants have failed to demonstrate that the balance of hardships weighs against an injunction in this case or that the public interest favors allowing the Meadow Valley Project to proceed in violation of federal law.

A. The Balance of Hardships in this Case Favors the Issuance of an Injunction to Protect the Environment.

When balancing the hardships in a case where environmental harm is likely, the balance will usually favor the issuance of an injunction to protect the environment. *See Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987); *Idaho Sporting Congress, Inc. v. Alexander*,

---

the sale area must be designated by area (FSM 2441.2) or by individually marking with tracer paint each cut or leave tree." Forest Service Manual § 2441.03. Section 2441.2 states that "[e]xamples of area designation include clearcut units, overstory or understory removal, or similar designations." Forest Service Manual § 2441.2.

[24] The QLG's brief contains a section on irreparable harm, but its arguments improperly address the merits of plaintiffs' claims regarding the Meadow Valley Project's effects on the California spotted owl and fire risk to local communities. QLG Br. at 7-11. These arguments have been addressed above.

222 F.3d 562, 569 (9th Cir. 2000); Pls.' Br. at 46. Where plaintiffs demonstrate the possibility of irreparable harm to the environment and request an injunction to prevent such harm, an opposing party then bears the burden of demonstrating that "unusual circumstances" weigh against the request. *See Forest Conservation Council v. United States Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995). The QLG contends that the balance of hardships tips in favor of the intervenors because "an injunction could cause harm to both the people living in Meadow Valley and also the environment surrounding Meadow Valley" due to catastrophic wildfire and the habitat losses those fires could cause. QLG Br. at 11-12. The QLG also argues that "there are 'unusual circumstances' that lie in the fact that the larger risk of environmental harm is associated with taking no action." QLG Br. at 8-9.

As discussed above, the record demonstrates that the resource management activities proposed by the Meadow Valley Project will not protect local communities and the surrounding environment from catastrophic wildfire, but will actually increase the risk of severe fire in the Project area. Moreover, plaintiffs do not support the no action alternative for the Meadow Valley Project, and have stated repeatedly that they do not object to legitimate fire risk reduction activities. *See* Complaint at 20; Pls.' Br. at 48. Plaintiffs' Complaint for Declaratory and Injunctive Relief specifically asks the Court to allow prescribed burning and undergrowth thinning activities, such as the removal of brush and small trees under 10-12 inches in diameter, which are the main contributors to wildlife behavior. Complaint at 20; *see* AR 13 at 04884 (Fire/Fuels Report at 21). Assuming that plaintiffs prevail on their claims that the Forest Service violated NEPA, NFMA, and the QLG Act in approving the Meadow Valley Project, and the Court addresses injunctive relief, the QLG has failed to show why the irreparable harm demonstrated by plaintiffs would not favor the issuance of an injunction to protect the environment, or that any unusual circumstances exist that would weigh against the requested injunction. *See National Parks*, 241 F.3d at 737 ("Where an EIS is required, allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purpose of the statutory requirement").

B. The Public Interest Favors the Issuance of an Injunction.

The Forest Service argues that even if the Court finds a violation of law in this case, allowing

the Meadow Valley Project to proceed is in the public interest because it implements the goals of community stability and cost-effectiveness in the QLG Act. FS Br. at 47, 50. In regard to community stability, the Forest Service claims that the Project achieves this goal by creating an estimated 683 full-time jobs and $29.3 million in employee-related income, and the anticipated timber sale revenue "could increase the overall extent of future [Forest Service] fuels treatments." *Id.* at 47.

However, there is no evidence in the record to demonstrate that a QLG Act project consisting of cutting small trees and reducing brush through a service contract would not create just as many (if not more) jobs and generate millions of dollars in employee-related income. Contrary to the Forest Service's assertions, the QLG Act does not require that a specific commercial product be removed from the pilot project area. FS Br. at 47. For purposes of community stability, there is no need for intensive logging projects which remove the overstory of the forest (*i.e.*, the largest 1-2% of the trees), significantly harm the environment, and make fire conditions worse.[25] In any event, whether it is a service contract or a timber sale, the taxpayers will be the ones to subsidize this community stability. As established by Section 401(f), funding for the Meadow Valley Project is through Congressional Appropriations (i.e., taxpayer dollars). QLG Act § 401(f). The Forest Service's assertion that money from timber sales will be used for further fuels reduction is unsupported by the record, and as discussed below, the amount of money used to plan, implement, and clean-up after an intensive logging project far outweighs any revenue received by the agency.

The Forest Service also argues that the Meadow Valley Project implements the QLG Act's goal of cost-effectiveness because the monetary net value of the Project is approximately $1.26 million, but would decline to negative $1.77 million if the proposed group selection cuts were enjoined and a 12" diameter limit were imposed in DFPZs. FS Br. at 50; Hochrein Dec. ¶¶ 4-6. However, the Forest Service completely fails to address in its brief and cursory one-page economic summary in the Meadow Valley EA (AR 13 at 04811) the cost-effectiveness of this Project to the

[25] Plaintiffs note that the local mill in the town of Quincy has been designed to process small logs. To the extent that management activities in compliance with the QLG Act include the removal of small trees in dense stands, there is a local business which will be supported by this activity.

agency and by extension, to the taxpayers.

Because Mr. Hochrein's declaration is written from the perspective of the timber industry, it fails to include the $1,638,175 in "total non-harvest cost" that he identifies for slash removal, road decommissioning, and other post-logging clean up expenses for the Project. Hochrein Dec., Attachment 1. These non-harvest costs increase with the intensity of the logging planned, are not borne by the timber purchaser, and are severely underestimated. *Id.* at Attachment 1-3. For example, Mr. Hochrein only tabulates slash clean up costs for 479 out of the total 743 acres of group selection planned for the Project, and he assumes that slash will only need to be burned once, despite evidence submitted by the Forest Service suggesting that two or three repetitions of burning may be necessary to reduce slash to non-hazardous levels. *Id.*; *see also* Skinner Dec., Attachment 2 at 1172. Mr. Hochrein also fails to include the necessary "maintenance" costs of reducing flammable brush in group selection units and DFPZs in the years after the project is complete. See AR 13 at 04828 (EA at 74) ("Anticipated future actions related to the proposed action include . . . DFPZ maintenance within the project area"); *see also id.* at 04760 (EA at 6). Furthermore, the Forest Service fails to provide any data indicating the total agency expense incurred through the preparation, planning, analysis, and administration of the Meadow Valley Project, which could foreseeably run into the hundreds of thousands of dollars. When these numbers are factored in to the "net value" figure, the Meadow Valley Project as planned would lose money. The record does not support Defendants' argument that the proposed Project is cost-effective or more cost-effective than other alternatives which would actually comply with the QLG Act.[26]

Plaintiffs agree that community stability and cost-effectiveness are laudable goals of the

[26] Plaintiffs also note that potential monetary damage either to the Forest Service or local communities weighs only lightly, if at all, on the scales of equity in environmental cases. Pls.' Br. at 47 n. 37. *See, e.g.*, *Idaho Sporting Congress, Inc. v. Alexander*, 222 F.3d at 569 (finding that although "a preliminary injunction could present a financial hardship to the Forest Service, the appellee-intervenors, and the communities in and around the [Payette National Forest], this possible financial hardship is outweighed by the fact that '[t]he old growth forests plaintiffs seek to protect would, if cut, take hundreds of years to reproduce'") (quoting *Portland Audubon Soc'y v. Lujan*, 884 F.2d 1233, 1241 (9th Cir. 1989)); *National Parks*, 241 F.3d at 738 (loss of anticipated revenues to tour boat operator "does not outweigh the potential irreparable damage to the environment"); *Environmental Protection Information Center v. Blackwel*l, 2004 WL 2324190 at *40 (N.D. Cal. Oct. 13, 2004) (finding that the value of timber to the Forest Service and the economic benefit to surrounding communities are not "unusual circumstances" that warrant denial of an injunction to prevent a timber sale); *Bergland*, 483 F. Supp. at 499 n. 43 ("The irreparable injury defendants claim consists primarily in the loss of prospective profit they will suffer and the consequent adverse impact on the economy if they cannot immediately exploit the resources in the RARE II areas . . . . This claim is certainly not the type of 'unusual circumstances' that might justify denial or limitation of injunctive relief").

QLG Act, but those goals must be balanced with the other objectives and requirements of the Act, such as promoting the ecologic health of the pilot project area and implementing group selection units designed to achieve fire resilient forests. QLG Act § 401(a), (d)(2); s*ee also Neighbors of Cuddy Mountain*, 137 F.3d at 1382 (noting that the old growth forests plaintiffs seek to protect "will be enjoyed not principally by plaintiffs and their members but by many generations of the public"); *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1083 (E.D. Cal. 2004) ("To the extent Plaintiffs have demonstrated that implementation of the . . . Project may increase the likelihood of severe fire, such an increased risk is clearly not in the public interest"). Furthermore, the QLG Act mandates that "[a]ll resource management activities required by subsection (d) [of this note] shall be implemented to the extent consistent with applicable Federal law . . . ." QLG Act § 401(c)(3). As the court stated in *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081 (W.D. Wash. 1991), *aff'd* 952 F.2d 297 (9th Cir. 1991), "[t]he problem here has not been any shortcoming in the laws, but simply a refusal of administrative agencies to comply with them . . . . This invokes a public interest of the highest order: the interest in having government officials act in accordance with the law." 771 F. Supp. at 1096.

The Forest Service and the QLG also claim that enjoining the construction of DFPZs as proposed by the Project (*i.e.*, removing trees up to 20-30" dbh) is not in the public interest because they are necessary to protect nearby communities from wildfire. FS Br. at 48-49; QLG Br. at 11-13. However, the Forest Service's own Fire and Fuels Report states that:

> [U]nder Alternative C [the chosen alternative], fire behavior for a fire occurring on a 90th percentile or lower day in the DFPZ is not expected to be different than under Alternative A [providing a 12" dbh limit for most DFPZs]. Again, this is because the fuels that are the biggest contributors to fire behavior (surface fuels <3" diameter and ladder fuels <10-12" dbh) are treated the same under both alternatives. *The larger standing live trees are not significant contributors to wildland fire behavior . . . .*

AR 13 at 04884 (Fire/Fuels Report at 21) (emphasis added).[27] In addition, the DFPZ construction as planned for the Meadow Valley Project has the potential to exacerbate the risk of severe fire in the Project area by opening up the forest canopy, creating logging slash debris, and increasing the

[27] This determination was based upon the Forest Service's own fuel models. Defendants' arguments, however, center on the mere speculation (beyond the conclusions of the fuel model) that a higher diameter limit might assist firefighters.

potential for growth of flammable chaparral and shrubs. *See* Pls.' Br. at 9-11, 16-18; *see also* Odion Dec. ¶¶ 14-23, 25. Again, plaintiffs emphasize that they are not arguing that properly designed DFPZs cannot be constructed. In fact, the utilization of a 10-12" diameter limit may well be a way to construct effective DFPZs that do not have significant impacts on the California spotted owl and actually reduce the risk of severe wildfire.

The Forest Service also attempts to support their wildfire argument with the Declaration of James M. Peña ("Peña Dec."). FS Br. at 48. However, Mr. Peña's declaration is replete with inconsistencies and is unhelpful to the court in understanding the agency's course of conduct. Citing no scientific or evidentiary support, Mr. Peña claims that an upper diameter limit of 10-12" is inadequate to reduce fire risk, which directly contradicts the Forest Service's own Fire/Fuels Report for the Project. *Compare* Peña Dec. ¶¶ 6-8, *with* AR 13 at 04884 (Fire/Fuels Report at 21). Numerous paragraphs of his declaration merely restate the record or other extra-record evidence submitted by the Forest Service. Peña Dec. ¶¶ 4, 6, 14, 21. Furthermore, Mr. Peña cites to, but does not provide, documents that are not part of the administrative record or readily available for either the Court or plaintiffs to review. Peña Dec. ¶¶ 9-11. As such, this declaration should be given little persuasive value in the Courts' determination of whether the Project is in the public interest.

Finally, the QLG argues that the public interest favors the Meadow Valley Project going forward in order to carry out Congress' intent in passing the QLG Act. QLG Br. at 14-15. In support of this argument, the QLG cites legislative history which it claims "reflects how the HFQLG Act embodies the public interest," and contends that these findings "represent the public interest far better than Plaintiffs' vague fears of unsubstantiated effects upon the environment." *Id.* However, Congress clearly did not intend for the QLG Act to be implemented contrary to the requirements of that Act or other federal laws, such as NEPA and NFMA. *See* QLG Act § 401(c)(3) ("All resource management activities required by subsection (d) [of this note] shall be implemented to the extent consistent with applicable Federal law").

Moreover, the QLG Act's legislative history itself is ambiguous at best as to whether the Act embodies the "public interest" in managing the federal lands in the pilot project area. Senator Dale Bumpers, ranking member of the Energy and Natural Resources Committee, found that:

> Legislating a management plan for a few specific forests is a dramatic departure from current law and practice. Our national forests are currently managed through provisions set forth in the National Forest Management Act (NFMA) that require full public participation and ensure the application of all environmental laws. *Individual national forests should not be managed by specialized statute as this bill requires*. Similarly, *the benefits thought by the proponents of this bill to be derived from some of the forest management activities directed by [the QLG Act] are neither generally accepted nor supported by the scientific community*.

S. Rep. No. 105-138 at 20 (Nov. 4, 1997) (emphasis added). Furthermore, several Congressmen in the U.S. House of Representatives stated that:

> We are troubled by the majority's rush to report this legislation, especially in light of the efforts by Under Secretary [of Agriculture] Jim Lyons to meet with all interested parties in an attempt to address the serious problems that exist with this legislation. As Michael Jackson of the QLG stated in testimony before the Committee 'This bill is not yet bipartisan. It does not reflect our local agreement, nor the emerging national consensus.' That was true then and it is still true today. Although some changes have been made to the bill, there are still serious shortcomings to this legislation that are troubling to the Administration, Members of Congress, environmental organizations, and other interested parties.

H.R. Rep. No. 105-136(I) at 18 (June 18, 1997). The Congressmen identified several problems with the QLG Act, including "the size of the 'pilot' project (three national forests covering 2.5 million acres); the use of other forest accounts to pay for the project; lack of definition of key terms; and the scientific basis for the forest management procedures called for in the bill." *Id.* at 18-19. While noting their support for public participation in the management of national forests, the Congressmen concluded that:

> the issues addressed by [the QLG Act] go far beyond the interests of the 25 individuals and organizations who are part of the Quincy Library Group. Setting up in statutory language management of national forests by committee, especially one made up of only local individuals, is a troubling precedent. People across California, indeed, across this country have a stake in the management of the Plumas, Lassen and Tahoe National Forests. Proponents of [the QLG Act] have taken to dismissing opposition to [the QLG Act] as only coming from what they term as 'national' environmental organizations. These groups are made up of millions of Americans who have an interest in our national forests. More important, we are unaware of a single environmental organization in the Quincy area or the rest of the State of California that supports [the QLG Act]. Combined with the concerns of the Administration, Members of Congress, and others, the problems with [the QLG Act] are indeed national in scope. [The QLG

> Act] does not represent a consensus proposal. In fact, the bill does not even represent the QLG proposal.

Id. at 20.

In sum, the Forest Service and the QLG have failed to demonstrate that the public interest favors allowing the Meadow Valley Project to proceed in violation of federal law.

CONCLUSION

For the reasons stated above, the Forest Service's Cross Motion for Summary Judgment should be denied in its entirety, and the Court should grant summary judgment in favor of plaintiffs.

DATED: February 28, 2005

Respectfully submitted,

/s/ George M. Torgun
MICHAEL R. SHERWOOD
GEORGE M. TORGUN
Earthjustice
426 17th Street, 5th Floor
Oakland, CA 94612

Attorneys for Plaintiffs Sierra Nevada Forest Protection Campaign and Plumas Forest Project

/s/ Rachel M. Fazio (as authorized on February 28, 2005)
RACHEL M. FAZIO
John Muir Project
P.O. Box 697
Cedar Ridge, CA 95924

Attorney for Plaintiffs Earth Island Institute and Center for Biological Diversity