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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION**

**BARK, CASCADIA WILDLANDS,
OREGON WILD, and
WILDEARTH GUARDIANS**

Case No.: 3:18-cv-01645-MO

Plaintiffs,

v.

U.S. FOREST SERVICE, a federal agency,

Federal Defendant,

and

HIGH CASCADE INC.

Intervenor Defendant.

**FEDERAL DEFENDANT'S
MEMORANDUM IN
SUPPORT OF CROSS
MOTION FOR SUMMARY
JUDGMENT AND
RESPONSE TO
PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

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TABLE OF ACRONYMS

APA	Administrative Procedure Act
BA	Biological Assessment
BiOp	Biological Opinion
BLM	U.S. Bureau of Land Management
CTWSR	Confederated Tribes of the Warm Springs Reservation
DN/FONSI	Decision Notice and Finding of No Significant Impact
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FWS	U.S. Fish and Wildlife Service
HFRA	Healthy Forests Restoration Act
LSR	Late Successional Reserve
LU	Landscape Unit
MA	Management Area
NEPA	National Environmental Policy Act
NFMA	National Forest Management Act
NFS	National Forest System
NRF	Nesting, Roosting, and Foraging
NSO	Northern Spotted Owl
NWFP	Northwest Forest Plan
PBF	Physical or Biological Features
REO	Regional Executive Office
TMR	Travel Management Rule
TSPRF	Timber Sales Pipeline Restoration Fund
VDT	Variable Density Thinning
WUI	Wildland Urban Interface

INTRODUCTION

In June 2018, the Forest Service authorized the Crystal Clear Restoration Project (Project) on the Mt. Hood National Forest (Forest) in a Decision Notice and Finding of No Significant Impact (DN/FONSI). Among other things, the Project provides for the application of well-established silvicultural methods to thin forest stands on approximately one percent of the Forest. This thinning will improve those stands' resiliency to insects, disease, and high-intensity wildfire, and it will not jeopardize the northern spotted owl (NSO) or adversely affect its critical habitat. Indeed, nearly all of the thinning will occur on lands that the Northwest Forest Plan (NWFP) allocates for timber harvest, and it will benefit the NSO in the long term by reducing the risk of stand-replacing disturbances that could destroy NSO habitat.

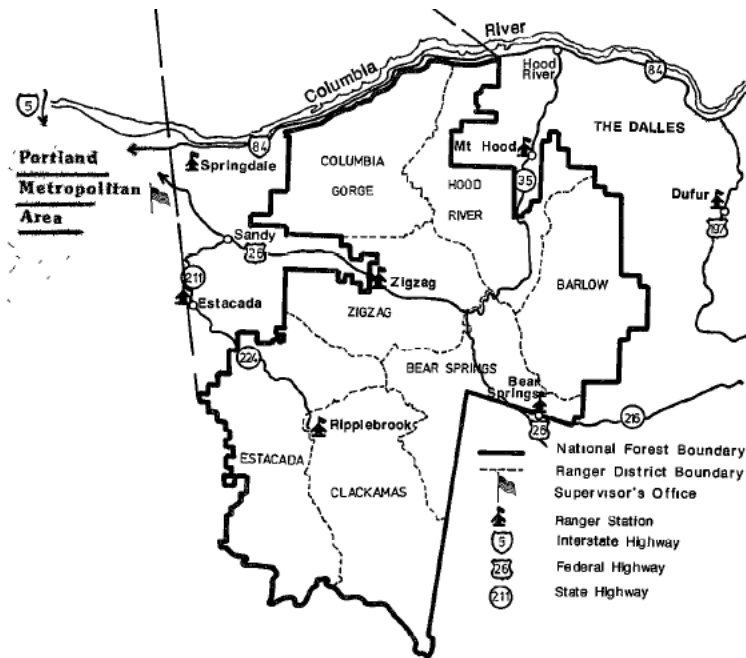
Plaintiffs now challenge the Forest Service's approval of the Project under the National Environmental Policy Act (NEPA), the National Forest Management Act (NFMA), and the Travel Management Rule (TMR). Those claims fail. The Forest Service complied with NEPA by preparing an extensive environmental assessment (EA) that took a hard look at the potential environmental consequences of the Project and supported a finding that the Project would not significantly affect the environment. The Forest Service complied with NFMA because the Project is consistent with the relevant forest plan, as amended by the NWFP. And Plaintiffs' claim under the TMR fails because the DN/FONSI does not identify a minimum road system. As a result, the Court should deny Plaintiffs' motion for summary judgment (ECF No. 18), grant the Forest Service's cross motion, and dismiss Plaintiffs' claims with prejudice.

FACTUAL BACKGROUND

I. Management of the Mt. Hood National Forest

The Forest comprises over one million acres of National Forest System (NFS) lands just east of Portland. AR_00095. Straddling the Cascades, the Forest is bounded by the Columbia

River to the north and the Confederated Tribes of the Warm Springs Reservation (CTWSR) to the southeast. *Id.*



AR_00097. The Forest on the west side of the Cascade crest is characterized by a mild and wet climate where stands of Douglas fir predominate, while the east side is comparatively dry and Ponderosa pine mixed with white oak predominate. AR_00098.

The Forest contains important resources, including timber, recreation, water, and wildlife that the Forest Service must manage for multiple uses under the Multiple Use and Sustained Yield Act and NFMA. AR_00099; 16 U.S.C. § 1604(e). The Forest Service accomplishes such management through a Land and Resource Management Plan (Forest Plan) adopted in 1990 that was amended by the NWFP four years later. AR_01298-925 (Forest Plan); AR_04160-395 (NWFP).

The Forest Plan sets forth broad Forest-wide management goals and desired future conditions of the Forest that are to be achieved through the implementation of Forest management objectives. AR_01349. Activities necessary to achieve these objectives are subject

to Forest-wide standards and guidelines. AR_01350. In addition, the Forest Plan allocates lands to different Management Areas (MA), each of which has specific goals, desired future conditions, and standards and guidelines. *Id.*

Following the listing of the NSO as threatened under the Endangered Species Act (ESA) in 1990, Fed. Reg. 26,114 (June 26, 1990), the NWFP amended then-existing forest plans, including the Forest Plan, throughout the more than 24 million acres of NSO range on federal lands in Washington, Oregon, and northern California. AR_04167; AR_04177. The NWFP was intended to “protect the long-term health of the federal forests” while also providing “for a steady supply of timber sales and nontimber resources” AR04168. To do this, the NWFP allocated lands to one of seven categories, including Late Successional Reserves (LSR) and Matrix lands, and set forth management standards and guidelines for each category.

LSRs are to be managed to “maintain a functional, interactive, late-successional and old-growth forest ecosystem” designed to serve as habitat for species that rely on such ecosystems, including the NSO. AR_04171. Although the NWFP prohibited “programmed timber harvest” in the LSRs, it encouraged “risk management activities” intended to “reduce the probability of . . . major stand-replacing events,” such as fire, which “can eliminate spotted owl habitat on hundreds of thousands of acres.” AR_04304; *see also* AR_04173 (noting “additional management activities are allowed to reduce risks of large-scale disturbance.”). As noted in the NWFP, the LSRs in the eastern Cascades of Oregon face “considerable risk of such events” due to “changes in the characteristics and distribution of the mixed-conifer forests resulting from past fire protection.” AR_04304-05. All lands not allocated to the LSRs or one of the other five categories are allocated to the Matrix where “most timber harvest and other silvicultural activities will be conducted.” AR_04172.

II. The Crystal Clear Restoration Project

A preliminary scoping letter dated November 4, 2016, informed the public that the Forest Service was in the early stages of planning the Project to “improve the health and vigor of forested stands while reducing the risk of human-caused fires spreading from high risk areas onto non-federal lands” as well as “provide a location for fire personnel to actively engage a fire safely.” AR_12514. The goals of the Project included improving forest stand resiliency to insects and disease, reducing hazardous fuels, creating defensible spaces in the wildland urban interface (WUI), moving the landscape toward historic conditions, shifting the composition of the Forest toward fire-tolerant species, and providing forest products.¹ AR_12514-15.

After receiving feedback, the Forest Service issued a formal scoping letter on March 1, 2017, identifying a proposed action in a 24,000-acre planning area on the southeast of the Forest bordering the CTWSR and bisected by U.S. Highway 26. AR_13317. The scoping letter noted that the vegetation in the planning area deviated from its historical condition due to past management and fire suppression activities that resulted “in the accumulation of dead fuel [and] highly dense and homogeneous stand conditions throughout much of the planning area.” *Id.* This condition decreases the Forest’s resilience to insects and disease while increasing the risk of high-intensity stand replacing wildfire that could affect local communities and destroy timber. AR_13317-18.

To address the risks created by the current state of the planning area and to work toward the NWFP’s purpose of maintaining a “sustainable supply of timber and other forest products

¹ The Project was partially funded by the Timber Sales Pipeline Restoration Fund (TSPRF), which provides special funding for efficient, timely, and cost-effective preparation of non-salvage timber sales and to promote recreation projects. AR_20786. Funds generated by the Project are intended to be used “for recreation projects to address deferred maintenance needs in developed recreation sites and trails in and around the project area.” *Id.*

that would help maintain the stability of local and regional economies on a predictable and long-term basis,” the Forest Service developed a proposed action that would “provide forest products where there is an opportunity to restore resiliency to forested areas and reduce the risk of uncharacteristic wildfires.” AR_13319. Among other things, the proposed action provided for the thinning of 13,271 acres in the planning area, ninety-seven percent (12,818 acres) of which are allocated to Matrix lands with the remaining three percent (453 acres) allocated to the White River LSR. AR_13321.

The proposed treatments adjoin the WUI along the boundary between the Forest and the CTWSR. Most of the thinning in the dry mixed conifer borders part of that WUI with a “high” wildfire risk rating and that includes “communities, individual homes, logging, high traffic volumes, campgrounds, wood cutting areas, hunting areas, and power lines.” AR_13318. And most of the thinning in the moist mixed conifer is next to a section of the WUI with a “moderate” wildfire risk rating. *Id.* In addition, the Juniper Flats WUI in the eastern portion of the planning area includes the Pine Grove community that, under the Wasco County Community Wildfire Protection Plan, has the second highest hazard rating of communities in the area due to the fuel types and potential for crown fires. *Id.*

The Forest Service issued a draft EA examining the potential environmental effects of the proposed action in August 2017. AR_16113. The proposed action in the draft EA removed 547 acres of thinning from the Matrix lands, resulting in a total of 12,725 acres prescribed for thinning. AR_16137; AR_16149. It also contemplated construction or maintenance of approximately 39 miles of temporary roads, 5.5 miles of which would be new temporary roads with the remainder on existing disturbances. AR_16168.

In February 2018, after receiving comments on the draft EA, the Forest Service issued the final EA and a draft DN/FONSI that reduced the thinning in the proposed action by 605 acres to address Recovery Action 32 of the 2011 Revised Recovery Plan for the NSO. AR_20789-90. Recovery Action 32 recommends that the Forest Service work with the U.S. Fish and Wildlife Service (FWS) to maintain the most suitable NSO habitat while reducing the threat of losing such habitat to wildfires. AR_20789. In addition, 50 acres were removed due to an intervening wildfire in the planning area. AR_20779 n.2. The temporary road construction remained the same. AR_20812; AR_18702.

Following an objection period, the Forest Service issued a final DN/FONSI approving the Project on June 27, 2018. AR_21069-125. The final DN/FONSI modified the proposed action by removing an additional 327 acres from thinning, resulting in a total of 11,742 acres (only three percent of which are allocated to the White River LSR). AR_21070; AR_21097-122 (Appendix 3 detailing unit descriptions). It also reduced the total temporary roads to 35.8 miles, with only 3.7 miles of new roads and the remainder on already disturbed areas, and dictates that all temporary roads “will be rehabilitated, decompacted and closed after use.” AR_21071; AR_21074. Finally, the final DN/FONSI decommissioned or closed 6.3 miles of existing roads within the Project area. AR_21071.

The thinning approved by the final DN/FONSI will be accomplished using variable density thinning (VDT), which allows “for flexible local density levels to achieve overall treatment objectives,” AR_20792, and focuses on “leaving the most vigorous, healthiest trees, and favoring shade-intolerant, more fire-tolerant species,” AR_20835. The specific thinning treatments will vary based on three factors: (1) forest type (*i.e.*, dry or wet mixed conifer);

(2) primary purpose of the thinning (*i.e.*, strategic fuel or forest health);² and (3) existing stand condition (*i.e.*, sapling, plantation, or non-plantation). AR_20792-97. In total, the Project provides for thinning 4,244 acres of sapling stands, 4,004 acres of plantations, and 3,494 acres of non-plantation areas.³ AR_21071.

Although the specific thinning treatments vary, VDT will generally move forest stands from being dense and overstocked toward their desired condition of more open, less dense conditions that “have moderate to low canopy cover with openings large enough to stimulate natural regeneration of shade-intolerant tree and shrub species within” both moist and dry mixed-conifer plant communities. AR_20835; AR_18690; AR_20837 (identifying desired condition for dry and moist mixed conifer). Some young trees of desired species will be retained to achieve a healthy age structure, but the average stand diameters will increase or remain the same because the majority of large overstory trees will be retained.⁴ AR_20835; *see* AR_20836-37 (Tables 14 and 15 noting increase in average diameter (QMD)). And because the VDT will retain the majority of large overstory trees, the “acres of late seral and mature stand classes would remain very similar after treatment.” AR_20835. This approach will (1) maintain forest productivity by reducing inter-tree competition for sunlight, moisture, and nutrients in stands that

² “The Mt. Hood Strategic Fuel Treatment Placement Plan (2012) spatially identified areas where fuel treatments, such as buffers and fuelbreaks, could be most effective.” AR_20785. The areas categorized for “strategic fuel treatment” are those areas “identified as needed for strategic fuel treatment in the Strategic Fuel Treatment Placement Plan.” AR_20793 (dry mixed conifer); *see also* AR_20795 (moist mixed conifer).

³ Plaintiffs challenge the non-plantation thinning only. Pls.’ Br. 3, ECF No. 18.

⁴ Although thinning will have minimal effect at the landscape scale because the Project treats only seven percent of the White River watershed, it will “move[] the overall landscape vegetation towards a condition that would have occurred under natural small and large scale disturbance regimes,” which reduces the probability of epidemic level insect infestation or disease outbreak. AR_20835.

Forest Service personnel have examined and determined to be overstocked; (2) restore resiliency by changing the horizontal and vertical structure of the forest stands and introducing more diversity of species; and (3) promote safe fire suppression by removing fuels so that wildfires burn at lower intensity, especially within the Juniper Flats WUI and in areas that may affect the CTWSR. AR_21071-72.

The Project will also promote the long-term interests of the NSO. The Project “was developed in coordination with [FWS] with the goal of maintaining most suitable habitat while reducing the threat of losing habitat from wildfires.” AR_18208. Because the Project “places an emphasis on reducing fuel-loading, and maintaining and enhancing suitable habitat within the action area to support spotted owl foraging, roosting, breeding, and dispersal activities,” FWS’ Biological Opinion (BiOp) found the Project “is not likely to jeopardize the continued existence of the spotted owl or destroy or adversely modify spotted owl critical habitat.”⁵ AR_21768.

Indeed, FWS determined that the Project’s application of VDT will likely enhance NSO habitat and maintain and enhance habitat connectivity by reducing “the risk of stand-replacing fires, tree disease, and insect infestations.” *Id.* FWS also concluded that the Project is consistent with the 2011 Revised Recovery Plan because it uses “active forest management to maintain or improve ecological conditions that provide long-term benefits to forest resiliency and that restore natural dynamic processes using carefully applied prescriptions that promote long-term forest health,” and because it avoids “any adverse effects to older and more structurally complex, multi-layered conifer forest” in the planning area. *Id.*

⁵ Because the Forest Service developed its biological assessment (BA) with “extensive technical assistance from [FWS] in assessing the status and environmental baseline of potentially affected listed species and critical habitat, and in analyzing the biological impacts of the proposed project on those listed species and protected habitat,” FWS originally issued a truncated BiOp in January 2018. AR_18125 (BA cover letter); *see also* AR_18389 (BiOp noting BA “jointly developed”). FWS later issued a revised BiOp further articulating its findings and conclusions. AR_21726-76.

LEGAL BACKGROUND

I. National Environmental Policy Act

NEPA is a procedural statute that requires federal agencies to consider the impacts of, and alternatives to, federal actions significantly affecting the environment. 42 U.S.C. §§ 4321, 4331. It ensures that federal agencies take a “hard look” at the environmental consequences of their proposed actions before deciding to proceed. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350-51 (1989). “A court generally must be ‘at its most deferential’ when reviewing scientific judgments and technical analyses within the agency’s expertise under NEPA.” *Native Ecosys. Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) (citation omitted). NEPA requires the preparation of an environmental impact statement (EIS) for “major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). An agency may prepare an EA to determine if an EIS is required. 40 C.F.R. §§ 1501.4(b), 1508.9. An EA is a concise public document that briefly describes the proposal, examines alternatives, considers environmental impacts, and lists individuals and agencies consulted. 40 C.F.R. § 1508.9. If an agency concludes the proposed action has no significant effect, “it may issue a FONSI in lieu of preparing an EIS.” *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1009 (9th Cir. 2006); *see* 40 C.F.R. § 1508.9(a)(1).

II. National Forest Management Act

“NFMA and its implementing regulations provide for forest planning and management by the Forest Service on two levels: (1) forest level and (2) individual project level.” *Native Ecosys. Council*, 697 F.3d at 1056. First, the Forest Service develops a Land and Resource Management Plan (forest plan), containing “broad, long-term plans and objectives for the entire

forest.” *Id.* It then implements the forest plan through site-specific projects that must comply with the forest plan.⁶ *Id.*

Forest plans must “provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained Yield Act of 1960 [16 U.S.C. §528-431], and, in particular, include coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.” 16 U.S.C. § 1604(e); *see also id.* § 528 (establishing multiple use policy); *Lands Council v. McNair*, 537 F.3d 981, 990 (9th Cir. 2008) (en banc) (“Congress has consistently acknowledged that the Forest Service must balance competing demands in managing National Forest System lands.”). The Forest Service has broad discretion to determine how to balance these uses to “best meet the needs of the American people.” 16 U.S.C. § 531(a) (defining “multiple use”); *see Perkins v. Bergland*, 608 F.2d 803, 806 (9th Cir. 1979) (noting this statutory language “breathes discretion at every pore.”).

III. Travel Management Rule

“The [TMR] sets forth rules for travel and transportation systems in national forests.” *All. for Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1117 (9th Cir. 2018) (citing subpart A codified at 36 C.F.R. §§ 212.1-212.21). Under subpart A of the TMR, the Forest Service “must identify the minimum road system needed for safe and efficient travel and for administration, utilization, and protection of [NFS] lands.” 36 C.F.R. § 212.5(b)(1).

The minimum system is the road system determined to be needed to meet resource and other management objectives adopted in the relevant [forest plan], to meet applicable statutory and regulatory requirements, to reflect long-term funding expectations, to ensure that the identified system minimizes adverse environmental impacts associated with road construction, reconstruction, decommissioning, and maintenance.

⁶ Plaintiffs cite 36 C.F.R. § 219.15(d). Pls.’ Br. 28, 30. But that regulation does not apply to this case because the Forest Plan was developed under a prior planning rule. *See* 36 C.F.R. § 219.17.

Id. The Forest Service must also identify roads “that are no longer needed to meet forest resource management objectives and that, therefore, should be decommissioned or considered for other uses, such as for trails.” *Id.* § 212.5(b)(2).

IV. Administrative Procedure Act

Agency decisions are reviewed under the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-06. *See Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008). Under the APA, agency decisions may be set aside if they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). In accordance with that standard, an agency’s decision will be overturned

only if the agency relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation for its decision that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

McFarland v. Kempthorne, 545 F.3d 1106, 1110 (9th Cir. 2008) (citations and quotations omitted). The standard of review is “highly deferential, presuming the agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.” *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007) (citation omitted). The APA “does not allow the court to overturn an agency decision because it disagrees with the decision or with the agency’s conclusions about environmental impacts.” *River Runners for Wilderness v. Martin*, 593 F.3d 1064, 1070 (9th Cir. 2010) (per curiam) (citation omitted).

ARGUMENT

I. The Forest Service Did Not Violate NEPA.

The Forest Service extensively examined the potential effects of the Project in the final EA and supporting specialist reports. Based on those analyses, the Forest Service reasonably

found that preparation of an EIS was not necessary because the Project will not significantly affect the environment. This finding was fully supported by the record and was not arbitrary or capricious. Moreover, the final EA took a hard look at the potential cumulative impacts of the Project, relied on appropriate baseline data, and sufficiently addressed the issue of climate change. Finally, the EA reasonably considered two alternatives and explained why other alternatives were not considered in detail. As a result, the final EA fully complied with NEPA.

A. The Forest Service’s finding that the Project would not significantly affect the quality of the human environment was not arbitrary or capricious.

Under NEPA, “an agency may prepare an EA to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir. 1998). “Whether an action ‘significantly’ affects the environment requires analyzing both ‘context’ and ‘intensity.’” *Wild Wilderness v. Allen*, 871 F.3d 719, 727 (9th Cir. 2017) (citing 40 C.F.R. § 1508.27). “Context refers to the setting in which the proposed action takes place,” *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 865 (9th Cir. 2005) (citing 40 C.F.R. § 1508.27(a)). “Intensity means ‘the severity of the impact.’” *Id.* “[T]he regulations identify ten factors that agencies should consider in evaluating intensity.” *In Def. of Animals, Dreamcatcher Wildhorse & Burro Sanctuary v. U.S. Dep’t of Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014) (citing 40 C.F.R. § 1508.27(b)(1)-(10)). An agency’s finding of no significant impact “may be overturned only if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” *Anderson v. Evans*, 371 F.3d 475, 486 (9th Cir. 2004) (quoting *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 891 (9th Cir. 2002)).

Examining the context and intensity of the Project in light of the extensive analyses contained in the EA and various specialist reports, the Forest Service reasonably found that

preparation of an EIS was not necessary because the Project would not have a significant effect on the environment. AR_21077-79; *see BARK v. Northrop*, 607 F. App'x 652, 655 (9th Cir. 2015) (Forest Service “reasonably relied on its own expert reports and technical expertise in concluding that the impact of the project would be insignificant.”). The Project provides for the application of silvicultural techniques with non-controversial and well-established effects on approximately one percent of the Forest, nearly all of which is in Matrix lands. The thinning will enhance the resiliency of forest stands and reduce the risk of insect infestations, disease outbreaks, and high-intensity wildfires. In so doing, despite minimal potential short-term adverse effects, the Project will benefit the NSO in the long term and is not likely to jeopardize the species or destroy or adversely modify NSO critical habitat.

Courts routinely uphold the Forest Service’s finding of no significant impact in similar circumstances. *See, e.g., Env'tl. Prot. Info. Ctr. v. U.S. Forest Serv. (“EPIC”)*, 451 F.3d 1005, 1009-13 (9th Cir. 2006) (upholding FONSI for project removing NSO nesting habitat); *Conservation Cong. v. U.S. Forest Serv. (“Smokey Project”)*, 235 F. Supp. 3d 1189, 1198, 1201-09 (E.D. Cal. 2017) (upholding FONSI where eighty percent of 6,400-acre project in LSR and likely adverse effects to NSO); *Conservation Cong. v. U.S. Forest Serv. (“Lava Project”)*, No. 2:16-cv-864-MCE-AC, 2018 WL 2427640, at *3-5, 13-16 (upholding FONSI for project with over 3,000 acres of thinning and that would likely have short-term adverse effects but long-term benefits to NSO); *BARK v. Northrop*, No. 3:13-cv-1267, 2014 WL 1414310, at *1, 15-17 (D. Or. April 11, 2014), *aff’d*, 607 F. App'x 652 (9th Cir. 2015) (upholding FONSI for project on Forest that thinned over 2,000 acres). Nevertheless, ignoring the context of the Project, Plaintiffs insist that several of the intensity factors render the Forest Service’s FONSI arbitrary or capricious. Neither the record nor the law support Plaintiffs’ arguments.

1. The effects of the Project are not highly controversial or uncertain.

Agencies must consider “[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). Effects are likely to be highly controversial only if there is “a substantial dispute [about] the size, nature, or effect of the major Federal action rather than the existence of opposition to a use.” *Barnes v. FAA*, 865 F.3d 1266, 1275 (9th Cir. 2017) (quoting *Blue Mountains Biodiversity Project*, 161 F.3d at 1212) (alteration in original) (internal quotation marks omitted). “A substantial dispute exists when evidence . . . casts serious doubt upon the reasonableness of an agency’s conclusions.” *In Def. of Animals*, 751 F.3d at 1069 (quotation omitted). Agencies must also 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). This does not mean that an EIS is required “anytime there is some uncertainty, but only if the effects of the project are ‘highly’ uncertain.” *In Def. of Animals*, 751 F.3d at 1070 (quotation omitted).

Plaintiffs argue that forest thinning to reduce fuel loads and increase a forest’s resiliency to insect, disease, and wildfire has highly controversial and uncertain effects. Pls.’ Br. 10-13. This is not the case. As the DN/FONSI noted, “the science behind thinning and other vegetation management techniques is not highly controversial” and “sound scientific research and previous experience implementing thinning and fuel treatment projects across the Forest” show that the possible effects of the Project are not highly uncertain. AR_21078; *see also* AR_20835-37 (EA analysis of effects to vegetation); AR_20845-49 (EA analysis of effects to fire canopy structure and fire intensity); AR_18685-95 (silviculture specialist report analyzing effects and providing supporting references); AR_18650-64 (fuels specialist report analyzing effects and providing supporting references). In short, by reducing stand density and inter-tree competition, the Project

will result in greater access to resources for the remaining trees, which will make them “more vigorous and less susceptible to large scale insect outbreaks.” AR_18689. And because the thinning would focus on leaving the healthiest and most vigorous trees, mortality from insects, disease, and wildfire should also decrease. AR_18689.

The effects of the Project’s well-established approach to improving the resiliency of forest stands is not highly controversial and does not have highly uncertain effects. Indeed, courts consistently find that disagreement over the potential effects of active forest management does not establish that the effects of such management are highly controversial or uncertain. *See, e.g., Hapner v. Tidwell*, 621 F.3d 1239, 1244 (9th Cir. 2010); *Conservation Cong. (Smokey Project)*, 235 F. Supp. 3d at 1202. To find otherwise would seemingly always require an EIS for forest thinning projects. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1335 (9th Cir. 1992) (“If this type of disagreement were all that was necessary to mandate an EIS, the environmental assessment process would be meaningless.”); *Conservation Cong. (Lava Project)*, 2018 WL: 2427640, at *16 (noting “nothing about this standard forest management project is uncertain or presents unique or unknown risks,” and to find otherwise would require an EIS for all forest management projects). But that is not what NEPA requires.

The principal case relied on by Plaintiffs does not support a different conclusion. Pls.’ Br. 14-16. *Oregon Wild* involved a challenge to a pilot project on lands managed by the U.S. Bureau of Land Management (BLM) within the range of the NSO. *Or. Wild v. Bureau of Land Mgmt.*, No. 6:14-cv-0110-AA, 2015 WL 1190131, at *1-2 (D. Or. Mar. 14, 2015). The pilot project did not apply the type of well-established VDT approved by the Project. Instead, the pilot project in *Oregon Wild* was intended to test a new technique called “variable retention harvesting” that reflected a shift in forest management by the BLM district, which had “relied

almost exclusively on *less intensive thinning and density management strategies* for timber production since 2000.” *Id.* at *2 (emphasis added). The court found that the record in that case “provide[d] ample evidence of controversy, including observations from the project’s own guiding scientists.” *Id.* at *7. The court also found the pilot project was, by definition, testing “something new and uncertain,” and that the uncertain effects of the project were increased because the new techniques would be applied to older trees in NSO critical habitat. *Id.* at *8.

By contrast, the Project does not propose to apply “variable retention harvesting” or any other type of novel silvicultural technique. Instead, the Project uses the same “thinning and density management strategies” that the BLM in *Oregon Wild* had used in the past and that have been previously used on the Forest. *See Conservation Cong. (Smokey Project)*, 235 F. Supp. 3d at 1204 (distinguishing *Oregon Wild* because project’s forest management techniques not “new, unique to the region, or experimental such that the results are unpredictable.”). And while the Project involves thinning trees in mature forest stands, the VDT will retain the most vigorous, healthiest trees while focusing on the removal of smaller, less-healthy trees. *See AR_21052* (noting Project will employ a “thinning from below” approach that removes “smallest trees first.”). Under this approach, the forest stands will remain intact but with less density and less canopy cover, which will establish the structural and compositional heterogeneity that characterizes healthy, resilient forests.

Plaintiffs also maintain that the Project’s thinning in mature moist mixed conifer forest that does not depart from its natural range of variability is particularly controversial or uncertain. Pls.’ Br. 12-13. But Plaintiffs are wrong to suggest that the forest stands that will be treated are within the natural range of variability. As explained in the silviculture specialist report, “European settlement of the area, large wildfires and salvage activities, and other timber harvest

activities beginning in the earliest years of the 20th century” caused “marked changes in the nature and condition of the vegetation across the landscape from historical conditions.”

AR_18667. Moreover, the analysis of the fire regime condition class in the fuels specialist report shows that eighty-five to ninety percent of the moist forest in the Project area departs from reference conditions by at least seventeen percent. AR_18635 (Table 3). In short, the moist mixed conifer stands are not in their historic conditions, and there is nothing about the Project’s approach to thinning those stands that creates highly controversial or uncertain effects.⁷

Finally, Plaintiffs suggest that because a fire may not occur within the Project area within the next ten to twenty years the effects of the Project are highly controversial or uncertain. Pls.’ Br. 11-12. But the Project’s effects will improve the resiliency of the forest stands within the Project area. Whether a fire ultimately burns through the area is irrelevant to those effects. Moreover, to the extent that it is relevant, Plaintiffs ignore the fact that 514 fires have occurred in and around the project area over a twenty-year period. AR_21019. And if and when a fire burns through the area, the Project will ensure it burns at a lower, non-stand-replacing intensity.

In short, this is not the kind of situation in which courts have set aside an agency’s decision because the record revealed “numerous responses from conservationists, biologists, and other knowledgeable individuals, all highly critical of the EA and all disputing the EA’s conclusion.” *Found. for N. Am. Wild Sheep v. U.S. Dep’t of Agric.*, 681 F.2d 1172, 1182 (9th Cir. 1982). Rather, the Project applies well-established forest management techniques that will improve the resilience of forest stands to insects, disease, and high-intensity wildfire. Simply put, there is nothing highly controversial or uncertain about the potential effects of the Project.

⁷ As explained in section I.B.2. below, to the extent Plaintiffs disagree with the Forest Service’s analysis of current Forest conditions, the record reflects substantial data supporting the agency’s assessment, and the Forest Service’s determination of baseline conditions is subject to deference.

2. The Project will not significantly impact the northern spotted owl.

An agency must also consider the “degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the [ESA].” 40 C.F.R. § 1508.27(b)(9). Plaintiffs argue that this factor supports preparation of an EIS because the Project will “adversely affect” the NSO and its critical habitat.⁸ Pls.’ Br. 16. This argument, however, conflates the separate inquiries under the ESA and NEPA. An action agency, such as the Forest Service, must formally consult with FWS if it determines that a proposed action will adversely affect a *member* of a listed species or adversely modify designated critical habitat. *See* 16 U.S.C. § 1536(a)(2). But the inquiry under NEPA is different.

The NEPA inquiry asks whether the *degree* of any potential adverse effects of the proposed action rises to the level of significance requiring preparation of an EIS. *EPIC*, 451 F.3d at 1010 (“NEPA regulations direct the agency to consider the degree of adverse effect”). A finding that a proposed action is likely to adversely affect a member of a listed species or adversely modify critical habitat does not inexorably require the preparation of an EIS. Rather, NEPA requires an agency to assess potential effects to the species as a whole, not individuals of that species, and courts regularly determine that an action that is likely to adversely affect an individual of a listed species or its critical habitat does not require preparation of an EIS where the record shows that any effects are not significant to the species or its habitat as a whole. *See, e.g., EPIC*, 451 F.3d at 1010-11; *Conservation Cong. (Smokey Project)*, 235 F. Supp. 3d at 1207

⁸ Plaintiffs also argue that the effects of the Project on the NSO are highly controversial or uncertain. Pls.’ Br. 14-16. For the reasons discussed above, the effects of the thinning on NSO habitat are not highly controversial or uncertain. Moreover, Plaintiffs have not cast serious doubt on the reasonableness of the Forest Service’s extensive analyses and conclusions as to the effect of the Project on the NSO and its critical habitat. Indeed, Plaintiffs do not specifically challenge any of the analyses of the Project’s effects to the NSO and its habitat set forth in the BA, BiOp, Wildlife Report, or EA. As discussed below, those analyses show that the Project’s potential effects on the NSO and its critical habitat are not highly controversial or uncertain.

(“It is therefore not the case that any impact to a listed species requires an EIS.” (citation omitted)). That is precisely what the record shows in this case.

The Forest Service prepared a biological assessment (BA) that extensively analyzed the potential effects of the Project on the NSO and its designated critical habitat. AR_18135-220. As detailed in the BA, the 2012 final rule for NSO critical habitat designated approximately 9.5 million acres of critical habitat in eleven units and sixty subunits in California, Oregon, and Washington. AR_18169. The Project falls within a 140,000-acre subunit of the 1.3-million acre East Cascades North Unit. AR_18182-83. The Project planning area contains 19,050 acres of suitable habitat and 8,771 acres of dispersal habitat.⁹ Of the areas that will be thinned, 1,946 acres provide suitable NSO habitat and 2,148 acres provide dispersal habitat. The remainder of the areas within the planning area and that will be thinned do not provide NSO habitat.¹⁰ AR_18172. Although there are one known spotted owl site and seven potential spotted owl sites, there are no known spotted owls occupying the Project area. AR_18172-74; AR_18176 (Figure 3); AR_18195; AR_18147 (defining known and potential sites).

The Project would remove 895 acres of dispersal habitat and downgrade 1,059 acres of suitable habitat to dispersal habitat. AR_18192; AR_18148 (defining downgrade and remove). The Forest Service determined that removal of the dispersal habitat would not likely adversely

⁹ NSO critical habitat is characterized by its physical or biological features (PBFs), which were previously called primary constituent elements. AR_18170. “The PBFs are the forested areas that are used or likely to be used by the spotted owl for nesting, roosting, foraging, or dispersing.” AR_18170. Suitable habitat “[c]onsists of forested stands used by spotted owls for nesting, roosting and foraging (NRF).” AR_18145. Dispersal habitat is habitat that is not suitable habitat but that may be used by spotted owls on a short-term basis to move across the landscape to suitable habitat in which to establish a nest territory. AR_18146.

¹⁰ The BA assessed the proposed action from the final EA that contemplated thinning on 12,072 acres. AR_18137.

affect the NSO because “[w]hen combined with the amount of suitable habitat that will also provide for dispersal (19,050 acres), 55 percent of the analysis area is currently providing dispersal habitat,” and that amount will be reduced by only one percent.¹¹ AR_18194. Such a reduction “would not prevent spotted owls from being able to disperse between blocks of suitable habitat within the analysis area and to adjacent suitable habitat outside the analysis area.” AR_18194. The Forest Service, however, determined that downgrading the suitable habitat to dispersal habitat would likely adversely affect the NSO at the stand scale because it will further reduce suitable habitat that is already below threshold levels of home range habitat at two of the potential nest sites. AR_18193; AR_18197. But because no spotted owls occupy the Project planning area, “[n]o habitat occupied by territorial spotted owls will be impacted.” AR_18197. Instead, any adverse effects are indirect and result from “preclud[ing] future spotted owl occupancy for a period of time.” AR_18156.

Moreover, the Forest Service determined that the thinning will adversely affect NSO critical habitat at the subunit scale because it will downgrade some suitable habitat and remove some dispersal habitat. AR_18201. But “[n]o adverse impacts are expected at the scale of spotted owl [critical habitat] units, as only very minimal adverse effects are expected at the subunit scale.” AR_18205. Indeed, the thinning is expected to affect only one potential nest site in such a way so as to “affect its ability to support the life history needs of territorial spotted owls.”¹² AR_18202-03; *see also* AR_18207. Moreover, the effects to the PBFs “should be

¹¹ Plaintiffs incorrectly state that the “Project area will lose over half of its” suitable habitat and forty-two percent of its dispersal habitat. Pls. Br. 17. These percentages look at the areas that will be thinned only, not the Project planning area.

¹² And even the post-Project characteristics of the potential nest site would still likely support NSO occupancy. AR_18203 (noting “post treatment levels of site #7 are within values being used by reproducing spotted owls on the [Forest] in the dry forest areas.”).

mostly short-term,” and “[l]ong-term benefits would be expected through the release of remaining trees within the treated stands, and through increased resilience against fire effects into the future.” AR_18203.

As a result of the BA’s findings, the Forest Service formally consulted with FWS under Section 7 of the ESA. As FWS noted in its BiOp, the Project strategically placed vegetation thinning and fuel treatments “to maintain and enhance . . . connectivity between large blocks of older forest,” and “to reduce risk of older forest habitat loss and degradation due to stand replacing fires, disease, and stand-scale insect infestation.” AR_21760. The Forest Service further “used vegetation models, site-specific knowledge of existing conditions and specific types of treatments, such as variable density thinning to achieve [these] objectives.” *Id.* In so doing, FWS found that the Forest Service designed the Project “with the general principles, ideas, and concepts presented in the literature including the [2011 Revised Recovery Plan].” *Id.* FWS determined (1) “that the impacts to spotted owl habitat caused by the [Project] are likely minimized by [the] placement of treatment units on the landscape in a manner that is designed to retain existing habitat conditions that support breeding and dispersal spotted owls post-treatments;” (2) the Project will reduce “fuel loadings within the project area and two WUIs (Warm Springs and Juniper Flats);” and (3) the Project will “maintain or enhance spotted owl habitat” by protecting it from high severity fires. *Id.*

The BiOp concluded that the Project was “not likely to jeopardize the continued existence of the spotted owl,” and that no incidental take statement was required because “no take of spotted owls is reasonably certain to occur.” AR_21768-70. Moreover, FWS determined that the Project would not “destroy or adversely modify spotted owl critical habitat.” AR_21768. In particular, FWS found that the critical habitat subunit would “continue to provide for the life

history needs of spotted owls,” and the Project would not “appreciably diminish[]” the subunit’s conservation value because “adverse impacts at the stand scale will occur on only a very small portion (2.4 percent)” and will affect “only one potential territory.” AR_21766. And even that one affected potential territory (*i.e.*, potential nest site) “is likely to retain habitat values post-treatment that have been known to support successfully reproducing spotted owls in this dry forest area.” *Id.* FWS further found “[n]o adverse impacts are expected at the scale of spotted owl [critical habitat] units” because the “relatively minimal, temporary adverse effects” at the subunit scale “are more than offset by the benefits of reducing the risk of stand-replacing fires, insect damage, and disease outbreaks within the action area.” *Id.*

In short, although the Forest Service determined that the Project is likely to adversely affect the NSO and its critical habitat, the extent of that effect would be minimal. No NSO would be directly affected, and only one *potential* nest site would be altered in such a manner as to potentially prevent it from future occupancy. In light of these findings, the Forest Service reasonably found the Project’s minimal indirect effects do not warrant preparation of an EIS.¹³

3. The Project does not have significant cumulative effects.

An agency must 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). Relying entirely on their argument that the final EA failed to take a hard look at the potential cumulative impacts of the Project, Plaintiffs maintain that this factor requires preparation of an EIS. Pls.’ Br. 18-19. As explained in section I.B.1, however, the final EA contains extensive

¹³ Plaintiffs also confusingly refer to the potential effects of the barred owl on the NSO population. Pls.’ Br. 17-18. It is unclear how this relates to Plaintiffs’ argument that the Project’s potential effects to the NSO required preparation of an EIS. Regardless, however, the record contains extensive discussions about the potential effect of barred owls. *See, e.g.*, AR_18165-69 (BA); AR_18546-47 (wildlife specialist report).

discussions of cumulative impacts on numerous Forest resources and finds that any such impacts will not be significant. *See* AR_20829-943. For example, the Forest Service determined that the Project would have “no direct or indirect effects” on vegetation at the landscape scale, and thus no cumulative effects, because the Project has a “minimal amount of connectivity with past treatments, in regards to plant communities.” AR_20838. Similarly, the Forest Service considered several past activities to assess cumulative impacts on fisheries and aquatic fauna. AR_20884–85. The Forest Service determined that because the Project will have only short-term and unquantifiable impacts, any potential cumulative effects will not be significant, especially since the Project will “maintain the overall riparian conditions” and “improv[e] other resource uses in the watershed.” AR_20885. Based on the EA’s analyses, the Forest Service reasonably found the Project would have “no significant cumulative effects.” AR_21078.

4. The Project does not significantly affect ecologically critical areas.

An agency must also consider any “[u]nique characteristics of the geographic area [in which the proposed action would occur] such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.” 40 C.F.R. § 1508.27(b)(3). The DN/FONSI found that “[t]here will be no significant effects on unique characteristics of the area” because, among other things, the Project is not in a designated wilderness area, wild and scenic river corridor, potential wilderness area, or inventoried roadless area. AR_21078. Plaintiffs maintain that this conclusion was arbitrary or capricious because of the Project’s thinning activities in the White River LSR. But the mere presence of an ecologically critical area does not require preparation of an EIS. *See Conservation Cong. (Smokey Project)*, 235 F. Supp. 3d at 1202. Rather, the inquiry is whether any effects of the action to the area are significant. And as discussed in section II.B. below, the Project is in a

small portion of the LSR and will benefit it by reducing the risk of a stand-replacing disturbance event. As such, the Forest Service's finding that any effects to ecologically critical areas are not significant is supported by the record and not arbitrary or capricious.

5. The Project does not violate other legal requirements.

Finally, Plaintiffs maintain that the Project violates NEPA and NFMA. Pls.' Br. 20 (citing 40 C.F.R. § 1508.27(b)(10)). For the reasons stated below, the Forest Service fully complied with NEPA and NFMA, and this factor does not support the preparation of an EIS.

In sum, the Forest Service reasonably determined that the context and intensity of the Project does not rise to the level of significance that warrants the preparation of an EIS. This finding was fully supported by the record and was not arbitrary or capricious.

B. The EA took a hard look at the potential environmental effects of the Project.

1. The EA took a hard look at potential cumulative impacts.

To establish a NEPA violation based on cumulative impacts, a plaintiff must show that the agency did not provide "a useful analysis" of the cumulative effects. *See N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1076 (9th Cir. 2011) (quotations omitted). A useful analysis includes "some quantified or detailed information." *Id.* However, "general statements about possible effects and some risk" may suffice when "more definitive information" is unavailable. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir.2005); *see also Kleppe*, 427 U.S. 390, 414 (1976) ("[P]ractical considerations of feasibility might well necessitate restricting the scope of comprehensive statements."). "Courts accord substantial deference to an agency's determination of the scope of its 'cumulative effects' review." *Cascadia Wildlands Project v. U.S. Forest Serv.*, 386 F. Supp. 2d 1149, 1167 (D. Or. 2005) (citing *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1071 (9th Cir. 2002)); *see also Kleppe*, 427 U.S. at 414 ("[D]etermination of the extent and effect of [cumulative

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environmental impacts], and particularly identification of the geographic area within which they may occur, is a task assigned to the special competency of the appropriate agencies.”); *Blue Mountains Biodiversity Project*, 161 F.3d at 1211 (noting courts defer to agency’s “fully informed and well considered” determination of “reasonably foreseeable future actions”).

Plaintiffs argue that the final EA “merely listed” past, present, and future projects without providing “useful information” in the analyses. Pls.’ Br. 21. This is not the case. The final EA identifies a list of projects that it considered in its cumulative effects analysis. AR_20830 (Table 11). But far from merely listing those projects, the EA then assessed the potential cumulative impacts of those projects on thirteen different Forest resources, incorporating substantial information and analyses contained in various specialist reports. AR_20829-30. Moreover, the EA considered other types of projects or activities where appropriate depending on the resource being assessed. AR_20830. These resource-by-resource cumulative-effects analyses satisfy NEPA by providing a useful analysis of the potential cumulative effects of the Project.

Ignoring these analyses, Plaintiffs suggest that NEPA requires the Forest Service to list the “date, size, acreage, road mileage, beneficial or adverse impacts” for every past, present, and future management activity on the Forest. Pls.’ Br. 21. To the contrary, “NEPA does not mandate that the effects be presented in a particular form; an agency has discretion in deciding how to organize and present information.” *Conservation Cong. (Smokey Project)*, 235 F. Supp. 3d at 1205 (citing *Mont. Wilderness Ass’n v. Connell*, 725 F.3d 988, 1002 (9th Cir. 2013)); see also *League of Wilderness Defenders–Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1217 (9th Cir.2008) (“[A]gencies are not required to list or analyze the effects of individual past actions unless such information is necessary to describe the cumulative effects of

all past actions combined.”). Because the record includes useful information regarding cumulative effects, Plaintiffs’ claim fails.

Plaintiffs also maintain that the EA improperly considered the cumulative impacts of past management actions, including the Bear Springs timber sale. Pls.’ Br. 22. But this ignores the fact that in examining the cumulative effects of past actions, an agency can “aggregate[e] the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project is measured.” *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d 1105, 1111 (9th Cir. 2015). And as discussed in section I.B.2., that is exactly what the Forest Service did. The Forest Service gathered extensive data on the stand conditions within the Project area that serves as a baseline against which to address the Project’s potential environmental effects. Such an approach is entirely consistent with NEPA.

Finally, Plaintiffs identify two past projects and one future project outside of the Project planning area but within the same NSO critical habitat subunit as the Project that they claim the Forest Service failed to consider. Pls.’ Br. 21. But the wildlife specialist report defined the NSO analysis area as the Project boundary and the eight potential spotted owl territories that overlap and extend beyond that boundary. AR_18539; AR_18551. The geographic scope of the analysis area is subject to deference. *Kleppe*, 427 U.S. at 414. Moreover, the EA incorporated the BA, which assessed the potential effects of the Project across the critical habitat subunit and beyond. *See* discussion *supra* § I.A.2; AR_18204-05; AR-18209. In so doing, the EA took a hard look at the potential cumulative effects of the Project, and this claim fails.

2. The EA’s consideration of baseline data was proper.

Plaintiffs also maintain that the Forest Service failed to establish an accurate environmental baseline from which to assess the environmental impacts of the Project. Pls.’ Br.

22-24. To be clear, Plaintiffs do not argue that the Forest Service did not have baseline data or improperly relied on data that was “too vague or stale to support the conclusions drawn from it.” *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Connaughton*, 752 F.3d 755 (9th Cir. 2014). Any such argument is precluded by the extensive field work conducted by Forest Service personnel to establish the baseline conditions of the Project area.

Forest Service personnel determined current stand conditions “using stand data collected during extensive stand evaluations, walk through, and comparison of similar stand conditions.” AR_21216. They then developed the “silvicultural prescriptions” based on the methodologies and assumptions detailed in the silviculture specialist report. AR_21215; AR_18665-67 (assumptions and methodologies). Appendix 1 of the EA and Appendix 3 of the DN/FONSI detail the Forest Service’s results. AR_20973-99; AR_21097-123. For each unit, the appendices identify the number of acres, age, treatment type, stand type, vegetation treatment, trees per acre, major tree species, minor tree species, current canopy cover, average target canopy cover, snags and down logs per acre, NWFP designation, and Forest Plan land use allocation. AR_21097.

Despite this robust baseline data, Plaintiffs now argue that the Forest Service’s collection and review of data was somehow arbitrary or capricious because their members conducted their own field work and came to different conclusions as to stand conditions. Pls.’ Br. 23 (arguing Forest Service data “inaccurate and heavily disputed” based on “evidence provided by Plaintiffs” from “field checking the proposed units”). When presented with this type of disagreement, however, a court “must defer to the informed discretion of the responsible federal agencies.” *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1020 (9th Cir. 2012); *see also Bahr v. United States EPA*, 836 F.3d 1218, 1229 (9th Cir. 2016) (“Where the question presented for review is a factual dispute which implicates ‘a high level of technical expertise’ we defer to the

‘informed discretion of the responsible federal agencies.’” (quoting *Kleppe*, 427 U.S. at 412)). Indeed, it is in these circumstances that the APA’s “highly deferential standard” of review “is highest.” *League of Wilderness Defs./Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). As a result, Plaintiffs’ mere disagreement with the Forest Service’s gathering and review of baseline data does not establish a NEPA violation, and this claim fails.

3. The EA took a hard look at climate change.

Plaintiffs next contend that the EA failed to take a hard look at climate change. Pls.’ Br. 24. But the EA contains an entire section devoted to climate change that meets NEPA’s hard look mandate. AR_20938-39. The EA first noted that climate change is a “global phenomenon” and that any direct or indirect effects from the Project “would be negligible.” AR_20938. Nevertheless, the EA acknowledged that “[f]orestry and other land uses” contribute to greenhouse gas emissions largely due to deforestation that removes all trees and converts forest and grassland into agricultural land or developed landscapes. AR_20938. Far from contributing to deforestation, however, the Project retains and thins forest stands so that they will “maintain a vigorous condition that supports trees, and sequesters carbon long term.” AR_20938. As such, the Project is consistent with “the suggested practice of reducing forest disturbance effects found in the National Climate Assessment for public and private forests,” and the “types of options presented by the [International Panel on Climate Change] for minimizing the impacts of climate change on forest carbon.” AR_20939.

This level of analysis more than satisfies NEPA’s hard-look requirement. Indeed, the Ninth Circuit upheld an EA that contained no discussion of climate change because the project “involve[d] a relatively small amount of land and it will thin rather than clear cut trees.” *Hapner*, 621 F.3d at 1245. Similarly, the court in *League of Wilderness Defenders-Blue*

Mountains Biodiversity Project v. Martin found no NEPA violation where an EA did not assess the potential effects to climate change of a timber sale on 25,540 acres that included thinning almost 6,000 acres and the construction of temporary roads. No. 2:10-cv-1346-BR, 2011 WL 2493765, at *4, 7-8 (D. Or. June 23, 2011). There is no basis for reaching a different conclusion here where the EA actually addressed climate change.

C. The EA considered a reasonable range of alternatives.

“NEPA requires federal agencies to ‘study, develop, and describe appropriate alternatives to recommended courses of action.’” *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012) (quoting 42 U.S.C. § 4332(2)(E)). The range of alternatives an agency must consider is “dictated by the nature and scope of the proposed action.” *Alaska Wilderness Recreation & Tourism Ass’n v. Morrison*, 67 F.3d 723, 729 (9th Cir. 1995) (quotations and citations omitted). “Alternatives that do not advance the purpose of [a project] will not be considered reasonable or appropriate.” *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005) (citation omitted).

Importantly, “an agency’s obligation to consider alternatives under an EA is a lesser one than under an EIS.” *Id.* This is because “whereas with an EIS, an agency is required to ‘[r]igorously explore and objectively evaluate all reasonable alternatives,’ with an EA, an agency only is required to include a brief discussion of reasonable alternatives.” *N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008) (citation omitted). An EA must consider a “no action” alternative and a “preferred alternative.” *See Native Ecosystems Council*, 428 F.3d at 1245-46. But beyond that, there is no “numerical floor on the alternatives to be considered,” *id.* at 246, and consideration of only these two alternatives “is generally sufficient,” *Idaho Conservation League v. Bonneville Power Admin.*, 667 F. App’x 214, 215 (9th

Cir. 2016) (per curiam) (citation omitted). *See also Earth Island Inst.*, 697 F.3d at 1021-22 (noting since *Native Ecosystems Council*, “we are aware of no Ninth Circuit case where an EA was found arbitrary and capricious when it considered both a no-action and preferred action alternative.”); 36 C.F.R. § 220.7 (no particular number of alternative required).

The final EA considered the potential environmental effects of a no-action alternative and a proposed action alternative that was designed to meet the stated purpose “to provide forest products from specific locations within the planning area where there is a need to improve stand conditions, reduce the risk of high-intensity wildfires, and promote safe fire suppression activities.” AR_20779. The EA also acknowledged other alternatives that were considered and explained why those alternatives were not considered in detail. AR_20824-26.

In particular, the EA first acknowledged commenters who promoted an alternative that would have thinned more acres than the proposed action. AR_20824. The Forest Service explained that it identified a potential alternative that would have thinned over 15,000 acres, but that it did not consider the alternative in detail because it would have been inconsistent with the Forest Service’s “desire to address the recommendations of the Revised Recovery Plan of Northern Spotted Owl.” *Id.* The EA also acknowledged commenters who wanted the Forest Service to consider an alternative of thinning fewer acres to lessen potential effects to the NSO and its critical habitat. *Id.* The Forest Service explained that the proposed action was consistent with the 2011 Revised Recovery Plan and “[a]n alternative that treated fewer acres was not considered in detail because it did not provide any additional assurance that the spotted owl habitat would be retained on the landscape” and would not address the Revised Recovery Plan’s recommendation that land managers work “to actively restore forest ecological structure and alter fire behavior and severity.” AR_20825.

In other words, the Forest Service declined to consider in detail alternatives of thinning more or less acres because the proposed alternative better met the goal of “provid[ing] forest products where there is an ecological need to restore and enhance resiliency.” AR_20824. The EA’s explanation for not considering other alternatives, along with its detailed consideration of two alternatives, satisfy NEPA.¹⁴ See *Earth Island Inst.*, 697 F.3d at 1022 (two alternatives suffice where “Forest Service explained that its proposed alternative was better at accomplishing its goals than Plaintiffs’ proposed alternative was.”); see also *BARK*, 607 F. App’x at 654 (consideration of two alternatives for thinning project on Forest satisfied NEPA); *Conservation Cong. (Lava Project)*, 2018 WL 2427640, at *16 (two alternatives satisfied NEPA).¹⁵

II. The Forest Service Did Not Violate NFMA.

NFMA requires the Forest Service to comply with the Forest Plan (as amended by the NWFP) when implementing projects on the Forest. As discussed below, the Project complies with the NWFP because it will reduce the risk of stand-replacing disturbance events in the White River LSR and it satisfies the Forest Plan’s forest-wide snag retention standard.

¹⁴ The EA also considered an alternative of eliminating temporary roads within riparian reserves but did not consider it in detail because “the measurable effects to water quality and aquatic resources would be similar” to the proposed action. AR_20825.

¹⁵ Neither case cited by Plaintiffs supports a different conclusion. Pls.’ Br. 27. The court in *Oregon Wild* faulted the agency for failing to even acknowledge an alternative and explain its reasons for rejecting it. 2015 WL 1190131, at *6. And the project at issue in *Conservation Congress (Smokey Project)* was approved under the Healthy Forests Restoration Act (HFRA), which requires consideration of a third alternative if enumerated criteria are present. 235 F. Supp. 3d at 1210. The court faulted the agency for not explaining why comments received during the administrative process did not “trigger[] the HFRA requirement to prepare a single additional alternative.” *Id.* at 1213. In contrast, as discussed above, the Forest Service acknowledged and explained why it did not consider additional alternatives, and there was no separate statutory requirement for the Forest Service to consider a third alternative.

A. The Project complies with the NWFP.

Stands in the Project area are over-stocked, which decreases their resiliency and increases their risk to insects, disease, and wildfire. This is as true for stands allocated to Matrix lands (where ninety-seven percent of the thinning will occur) as it is for the White River LSR (where three percent will occur). AR_20783 (LSR stand condition). As a result, the Project will thin fourteen stands totaling 358 acres in the 34,500-acre LSR. AR_21097-122; AR_04770. These are all dry mixed conifer stands in the Mustang Landscape Unit (LU) of the LSR. AR_20783; AR_18842; *see* AR_04813 (noting dominant plant series in Mustang Unit is dry); AR_21097 (column labeled “Treatment Type” refers to “DMC,” which stands for dry mixed conifer).

The proposed thinning will “open stands up and move them toward historical density conditions while providing for new age classes and openings large enough to support the natural regeneration of fire-resistant species.” AR_20783. In addition, “individual stand prescriptions for units in the LSR would use appropriate diameter limits,” and large coarse woody debris would be maintained. AR_20783. Indeed, the sample stand prescription attached to the Regional Ecosystem Office (REO) consistency review provides for thinning from below in the LSR and includes a diameter limit of twenty-one inches for ponderosa pine and Western larch and twenty-four inches for all conifer. AR_17676. This approach and its beneficial effects satisfy the NWFP by “accelerat[ing] development of late-successional conditions while making the future stand less susceptible to natural disturbances.” AR_04305; AR_20909; AR_21080-81.

Plaintiffs assert that the Project fails to comply with the NWFP’s standards and guidelines because (1) it will maintain inadequate canopy cover; and (2) it improperly provides for risk-reduction activities in older stands.¹⁶ Pls.’ Br. 28. These arguments fail.

¹⁶ Plaintiffs also charge that the Forest Service failed to consult the REO in developing the Project. *See* Pls.’ Br. 29. But the NWFP does not require such consultation in *developing* a

First, Plaintiffs refer to inapplicable canopy-cover guidelines from the White River LSR Assessment. Pls.’ Br. 29. The guidelines referenced by Plaintiffs apply to Stem Exclusion stands. AR_04888. But the Project provides for thinning in Mature Stem Exclusion and Fire Exclusion Multi-Story stands only. AR_04814 (map of White River LSR identifying Mustang LU); AR_04886 (map of White River LSR showing Mustang LU consists of Mature Stem Exclusion and Fire Exclusion Multi-Story stands); AR_04888-90 (description of recommended thinning in those stands). Moreover, the LSR Assessment provides for a desired condition of “Open Park-Like,” among others. AR_04797 (desired condition for “Transition and Eastside Zone”). And the desired total canopy closure for “Open Park-Like” stands is twenty-five to forty percent. AR_04776. As such, thinning stands in the LSR for a desired canopy cover of thirty-five percent is entirely consistent with the LSR Assessment.

Second, the NWFP does not require the Forest Service to conduct thinning activities *only* in younger stands. AR_04305. Instead, the NWFP states that when conducting risk-reduction activities in LSRs, the focus should be on treating younger stands but that “activities in older stands may be appropriate.” AR_04305. Here, the Project focuses on younger stands in the LSR. Of the fourteen units to be treated, only five (totaling 156 acres) consist of stands older than 80 years. AR_21097 (units 3, 5, 7, 8L, 9L); *see* AR_04260 (“mature phase of stand development begins around 80 years”).¹⁷ This is consistent with the Project as a whole, in which the vast majority of the thinning occurs in stands at the stand initiation or stem exclusion stage. AR_18673; AR_18666 (defining such stand types as young or relatively young).

project in a LSR. Instead, silvicultural treatments are subject to REO review after development unless they are otherwise exempt from review. AR_04304.

¹⁷ Plaintiffs’ incorrectly cite Appendix 1 of the EA to identify six stands. The DN/FONSI approved thinning in only five of the stands highlighted by Plaintiffs, dropping unit 457.

Moreover, the Project satisfies the NWFP's guidelines for thinning in older stands because "(1) the proposed management activities will clearly result in greater assurance of long-term maintenance of habitat, (2) the activities are clearly needed to reduce risks, and (3) the activities will not prevent the Late-Successional Reserves from playing an effective role in the objectives for which they were established." AR_04305. The White River LSR Assessment identified the Mustang LU as an area with "[l]ow [r]esiliency" and suggested thinning there to improve resiliency. AR_04878. It further noted that the risk of stand-replacing wildfire in the LU is moderate to high due to "in-growth of shade tolerant species and widespread insect and disease related mortality," resulting in a "strong possibility" of "lethal underburning." AR_04893. The Project will apply well-established silvicultural techniques to thin the stands in the LSR to promote overall resiliency. This will improve the long-term maintenance of the habitat and reduce the risk of stand-replacing disturbance events. These effects will benefit the NSO in the long-term and will not adversely affect its critical habitat. *See supra* § I.A.2. As such, the Project will not prevent the LSR from playing an effective role in "maintain[ing] a functional, interactive, late-successional and old-growth forest ecosystem." AR_04171.

B. The Project complies with the Forest Plan's snag retention standards.

The Forest Plan provides standards and guidelines for Forest-wide management activities. *See* AR_01393. Plaintiffs contend that the Project violates standard FW-215, which states that snags "should be maintained in sufficient quantity and quality to support over time at least 60 percent of the maximum biological potential of primary cavity nesting species" AR_01422. To support their contention, Plaintiffs improperly refer to the draft EA, in which the Forest Service initially determined an exception to FW-215 was warranted. Pls.' Br. 30 (citing AR_16180-81); *see* AR_01393 (permitting exceptions to "should" standards). But as noted in

the final EA, the Forest Service concluded that an exception to FW-215 was unnecessary because “no snags are proposed to be cut as part of the [Project] and large snags that need to be cut [for safety reasons] would remain nearby.” AR_17384. As a result, any effect to snag density would be so minor as to “not be measurable at the watershed scale.” AR_17384; *see also* AR_20906; AR_20912. Because the Project does not affect stand density in the Project area or Forest-wide, this claim fails.

III. The DN/FONSI Does Not Identify a Minimum Road System under the TMR.

Finally, Plaintiffs maintain that the DN/FONSI improperly identified the minimum road system in the Project area under subpart A of the TMR. Pls.’ Br. 31-35. But Plaintiffs misunderstand the DN/FONSI. The DN/FONSI approved thinning treatments, fuel treatments, and the decommissioning or closing of certain roads. AR_21070-71 (detailing decision). It did not identify a minimum road system as contemplated by subpart A of the TMR. *See* 36 C.F.R. § 212.5(b)(1). Instead, a section of the DN/FONSI labeled “Public Involvement” noted that some “[p]ublic comments raised a concern about achieving a minimum road system,” and indicated that the roads “retained on the system were found to be needed for managing the Forest.” AR_21074. But rather than identifying the minimum road system under the TMR, the DN/FONSI stated that the transportation analysis completed as part of the Project “move[s] the area toward a minimum road system.” *Id.* Therefore, because the DN/FONSI did not identify a minimum road system, Plaintiffs claim that the DN/FONSI violated subpart A of the TMR fails.

CONCLUSION

For the reasons stated above, the Court should deny Plaintiffs’ motion for summary judgment, grant the Forest Service’s cross motion, and dismiss Plaintiffs’ claims with prejudice.

Respectfully submitted, February 8, 2019,

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