

No. 14-35250

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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DEER CREEK VALLEY NATURAL RESOURCES CONSERVATION  
ASSOCIATION,  
*Plaintiff-Appellant*

v.

UNITED STATES BUREAU OF LAND MANAGEMENT,  
*Defendant-Appellee*

and

MURPHY COMPANY,  
*Intervenor-Appellee*

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Appeal from the Denial of Summary Judgment  
in the District Court for the District of Oregon

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**Opening Brief of Appellant**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure Rule 26.1, Appellant hereby states that it does not have any parent companies, subsidiaries, or affiliates that have issued shares to the public.

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## **INTRODUCTION**

This is an appeal of a denial of Summary Judgment before the Honorable Judge Owen Panner of the District Court for the District of Oregon. Plaintiff-Appellant Deer Creek Valley Natural Resources Conservation Association (the Deer Creek Association) raises one claim under the Federal Land Policy and Management Act, 43 U.S.C. §§ 1701 et seq., and two claims under the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321 et seq., arising from the Deer North Vegetation Management Project (Deer North Project) Environmental Assessment (EA) (ER-59-227), Decision Documentation approving the Deer North timber sale (ER-1-28), and Finding of No Significant Impact (FONSI) (ER-29-33) on the Grants Pass Resource Area for the Bureau of Land Management (BLM), which implemented a portion of the Deer North Project, referred to as the Deer North timber sale.<sup>1</sup>

First, the BLM failed to comply with the Northwest Forest Plan's Survey and Manage Standards and Guidelines. Specifically, the BLM failed to "manage

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<sup>1</sup> Importantly, there is a distinction between the Deer North Project, which was analyzed in the EA, and the Deer North timber sale, which was authorized by the Decision Documentation. The Deer North Project will apparently be implemented in a piecemeal fashion, of which the Deer North timber sale is but the first of several timber sales to be authorized pursuant to the Deer North Project. See ER-1 ("The Decision Documentation for the Deer North Timber Sale is the first decision to implement forest management activities analyzed under the Deer North Vegetation Management Project Environmental Assessment....").

all known sites” for red tree voles. Previous surveys identified red tree vole nests, but current surveys determined that those nests were inactive. The BLM refused to protect those nests because the nests are allegedly inactive, despite the fact that abandoned red tree vole nests are recolonized by other red tree voles more than 2/3 of the time. According to the Survey and Manage Guidelines, “known sites” include historic sites unless those sites do not contain red tree vole habitat. Because red tree voles recolonize abandoned nests with a high frequency, inactive nests remain habitat, and, therefore, the BLM failed to “manage all known sites.”

Second, the BLM failed to consider the Deer Creek Association’s reasonable Natural Selection Alternative. The BLM failed to acknowledge the Natural Selection Alternative within the Deer North Project EA, and the BLM provided inadequate reasons to not consider the Natural Selection Alternative in detail, despite having blended the Natural selection Alternative with other action alternatives in the past.

Finally, the BLM failed to take a hard look at the environmental impacts to red tree voles. The BLM purports to “essentially eliminate” impacts to red tree voles by complying with the Survey and Manage Guidelines. The BLM, however, improperly minimized impacts to red tree voles by failing to disclose to the public that red tree voles recolonize their nests more often than not. The BLM further

erred by relying on an invalidated technique that dilutes impacts by averaging those impacts across a significant acreage.

## **STATEMENT OF JURISDICTION**

### **I. DISTRICT COURT**

The Deer Creek Association's claims arise from the BLM's violations of the FLPMA and NEPA, pursuant to the Administrative Procedures Act (APA), 5 U.S.C. §§ 500 *et seq.*, in planning, designing, and implementing the Deer North Project and timber sale. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (injunctive relief), 28 U.S.C. § 2202 (declaratory relief), 28 U.S.C. § 1346 (United States as a Defendant), and because the Deer Creek Association sought judicial review of a final agency action pursuant to the APA, 5 U.S.C. § 706.

### **II. APPELLATE COURT**

The District Court's denial of the Deer Creek Association's Motion for Summary Judgment is an appealable order. This Court has jurisdiction pursuant to 28 U.S.C. § 1292.

### **III. ATTORNEYS FEES**

The Deer Creek Association intends to seek attorney's fees and costs for this case, including this appeal, at an appropriate stage of the litigation, pursuant to the

Equal Access to Justice Act (EAJA), 28 U.S.C. § 2412.

### **QUESTIONS PRESENTED**

1. Under FLPMA and the Northwest Forest Plan's Survey and Manage Guidelines, is the BLM required protect inactive red tree vole sites that are recolonized more than 2/3 of the time under the direction to "manage all known sites" when "known sites" are defined to include historic sites that remain habitat for red tree voles?
2. Under NEPA, did the BLM arbitrarily exclude the reasonable Natural Selection Alternative when the BLM failed to adequately justify why the Natural Selection Alternative could not be considered in detail and when the BLM failed to acknowledge the Natural Selection Alternative in the Deer Creek Project EA?
3. Under NEPA, did the BLM take a hard look at the environmental impacts of the Project on red tree voles when the BLM (a) alleged that impacts would be "essentially eliminated" as a result of protecting sites pursuant to the Survey and Manage Guidelines, despite not protecting inactive sites and not disclosing to the public that inactive red tree vole sites are recolonized more than 2/3 of the time; and when the BLM diluted impacts to the red tree voles by averaging impacts across the watershed, a technique that has been invalidated by this Court?

## **STATEMENT OF THE CASE**

### **I. NATURE OF THE CASE**

This is a civil action for declaratory and injunctive relief arising from Defendant-Appellee BLM's violations of FLPMA, NEPA, and the APA. The Deer Creek Association challenges the BLM's decision to approve and implement the Deer North Project and timber sale EA, Decision Documentation, and FONSI.

### **II. LEGAL BACKGROUND**

#### **A. The Federal Land Policy and Management Act (FLPMA)**

The Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. §§ 1701 et seq., sets forth standards for BLM's management of "public lands," which are lands owned by the United States and administered by the Secretary of the Interior through the BLM. San Juan Citizens Alliance v. Norton, 586 F.Supp. 2d 1270 (D. N.M. 2008). FLPMA mandates the BLM to prepare Resource Management Plans (RMPs) for the various districts under its control. 43 U.S.C. § 1712. RMPs are land use plans which must "provide for compliance with applicable State and Federal air, water, noise, and other pollution standards or implementation plans." 43 U.S.C. § 1712(c). FLPMA and its implementing regulations require BLM to manage all future resource management actions in compliance with the requirements of the RMP. 43 U.S.C. § 1732(a); 43 C.F.R. §

1610.5-3(a).

The Medford District RMP, as amended by the Northwest Forest Plan Record of Decision, implements FLPMA. Failure to comply with the requirements of the RMP is a violation of FLPMA and its implementing regulations. Klamath-Siskiyou Wildlands Center v. BLM, 400 F. Supp. 2d 1234 (D. Or. 2005). The Northwest Forest Plan Record of Decision was issued by the BLM and the Forest Service. Id. It establishes management requirements for all BLM and Forest Service lands within the range of the northern spotted owl, and includes Standards and Guidelines which must be followed, including the Survey and Manage Guidelines.

B. The National Environmental Policy Act (NEPA)

NEPA requires all federal agencies to assess the environmental impact of the proposed actions that significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C). NEPA's disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action; and (2) to insure that the public has sufficient information to challenge the agency's action. See Baltimore Gas & Electric Co. v. Natural Resources Defense Council, 462 U.S. 87, 97 (1983).

NEPA requires agencies to prepare an Environmental Impact Statement

(EIS) when a major federal action is proposed that may significantly affect the quality of the environment. 42 U.S.C. § 4332(2)(C), 40 C.F.R. § 1501.4(a)(1). An EIS is a “detailed written statement” that “provide[s] full and fair discussion of significant environmental impacts and shall inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” 40 C.F.R. §§ 1508.11 and 1502.1.

The Council on Environmental Quality's (CEQ's) NEPA regulations allow an agency to prepare a more limited NEPA document, an Environmental Assessment, or EA. The EA is a “concise public document” that “[b]riefly provide[s] sufficient evidence and analysis for determining whether to prepare an [EIS].” 40 C.F.R. § 1508.9(a). If an EA determines that agency actions will not have a significant effect on the human environment, the agency must issue a “Finding of No Significant Impact” (FONSI). See 40 C.F.R. §§ 1501.4(e), 1508.13. However, as explained herein, even in an EA the agency must evaluate feasible alternatives to the proposed action and conduct a “hard look” regarding the project's foreseeable environmental impacts.

“The purpose of NEPA is to foster better decision making and informed public participation for actions that affect the environment.” Or. Natural Res. Council Action v. U.S. Forest Serv., 293 F. Supp. 2d 1200, 1204 (D. Or. 2003)

(citing 42 U.S.C. § 4321; 40 C.F.R. § 1501.1(c)).

[NEPA] ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.

Friends of the Clearwater v. Dombeck, 222 F.3d 552, 557 (9th Cir. 2000) (quoting Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 349 (1989)). “Stated differently, NEPA’s purpose is to ensure that ‘the agency will not act on incomplete information, only to regret its decision after it is too late to correct.’”

Id.

NEPA also requires that federal agencies take a hard look at the environmental impacts of its actions. A hard look includes “considering all foreseeable direct and indirect impacts,” Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957, 973 (9th Cir. 2002), and requires the BLM to “undertake a thorough environmental analysis before concluding that no significant impact exists.” Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1239 (9th Cir. 2005). A hard look “involve[s] a discussion of adverse impacts that does not improperly minimize negative side effects.” Earth Island Inst. v. U.S. Forest Serv., 442 F.3d 1147, 1159 (9th Cir. 2006) (quoting Native Ecosystems Council, 428 F.3d at 1241); National Audubon Society v. Dep’t of Navy, 422 F.3d 174, 185 (4th



Cir. 2005) (“The hallmarks of a ‘hard look’ are thorough investigation into environmental impacts and forthright acknowledgment of potential environmental harms.”).

### **III. FACTUAL BACKGROUND**

The Deer North timber sale is located in the Deer Creek Watershed, ER-244 (Answer), west of the city of Selma in Josephine County, Oregon, ER-62 (Deer North EA). On June 30, 2011, Katrina Symons, Field Manager for the BLM Medford District Glendale/Grants Pass Resource Areas issued the FONSI and Decision Documentation for the Deer North timber sale. Id. The Decision Document implemented Alternative 3. Id. The Field Manager issued the Decision Documentation for the Deer North timber sale in June 2011. ER-243 (Answer). Plaintiff commented on, protested, and administratively appealed the Deer North Project and timber sale. ER-244 (Answer).

Though the Deer North timber sale includes only includes 98 acres, ER-1 (Decision Documentation), the Deer North Project EA proposed “750 to 800 acres (varying by alternative) ... for timber harvest through a combination of commercial thinning, regeneration harvest and group selection harvest prescriptions,” id. The Deer North Project proposes to enter the full spectrum of vegetation condition classes, including early (conifers 0 to 4.9” DBH), pole

(conifers 5-11” DBH), Mid (conifers 11-21” DBH), and Mature (conifers > 21” DBH). ER-100, Table 11

The 98 acres authorized by the Decision Document at issue here is but one in a series of timber sales that will be issued pursuant to the Deer North Project EA: “The Decision Documentation for the Deer North Timber Sale is the first decision to implement forest management activities under the Deer North Vegetation Management Project Environmental Assessment (DOI-BLM-OR-M070-2009-070-EA).” ER-1. Thus, the Deer North Project will be implemented in a piecemeal manner, with subsequent timber sales implemented at unknown times in the future.

Members of the Deer Creek Association live amongst the BLM lands slated for logging pursuant to both the Deer Creek Project and timber sale. The Deer Creek Association has

a long history devoted to the care of the human and natural environment of the Deer Creek watershed. [Their] involvement with the Deer North project area began in 1997 during the scoping process of the BLM Deer Mom Timber Sale. This is when [the Deer Creek Association] first developed and proposed the 14 Criteria for Sustainability (14 CS) which later became the Natural Selection Alternative (NSA), included in the 2005 BLM South Deer Landscape Management Project EA.

ER-313-314 (Administrative Protest). Members of the Deer Creek Association

have a direct personal interest in the Deer Creek Watershed and the Proposed Deer North Management Plan because [they] live adjacent to BLM

lands slated for deforestation, rely on the species that created and sustained BLM forests to sustain our natural and human community. [They] rely on the water to meet [] domestic and fish needs. [The Deer Creek Association] ha[s] been sponsoring public tours for more than 3 decades that include hiking to old growth forests on adjoining BLM lands to educate the public on how forests are sustained. These natural BLM forests would be deforested by the proposed actions in the [Decision Documentation], and never restored.

ER-314 (Administrative Protest).

### **STANDARD OF REVIEW**

#### **I. STANDARD OF REVIEW FOR A DENIAL OF SUMMARY JUDGMENT UNDER THE ADMINISTRATIVE PROCEDURES ACT**

In reviewing the BLM's decision to approve the Deer North Project and timber sale, this Court must determine whether the BLM's actions were "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); Idaho Sporting Congress v. Thomas, 137 F.3d 1146, 1149 (9th Cir. 1998). An agency decision is arbitrary and capricious if the agency:

relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, 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.

Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 43

(1983). The Court must "judge the propriety of such action solely by the grounds

invoked by the agency” at the time it made its decision. SEC v. Chenery Corp., 332 U.S. 194, 196 (1947).

Although the scope of review of agency action is limited, agency decisions are not by definition unimpeachable, and a probing and thorough inquiry by the reviewing court is required to determine whether there is a rational connection between the facts found and judgment to support the agency determination. See Baltimore Gas and Electric v. NRDC, 462 U.S. 87 (1983) (citing Bowman Transportation Inc. v. Arkansas-Best Freight System, 419 U.S. 281, 285-286 (1974)); Citizens to Preserve Overton Oak, Inc. v. Volpe, 401 U.S. 402 (1971). In record review cases under the APA, the Ninth Circuit conducts a de novo review. Lands Council v. Powell, 395 F.3d 1019, 1026 (9th Cir. 2005). In reviewing agency actions, the Court should conduct a searching and careful inquiry. Marsh v. Oregon Nat. Res. Council, 490 U.S. 360, 378 (1989).

### **SUMMARY OF ARGUMENT**

First, the BLM violated FLPMA by failing to comply with the Northwest Forest Plan’s Survey and Manage Standards and Guidelines. Specifically, the BLM failed to “manage all known sites” for red tree voles. Previous surveys identified red tree vole nests, but current surveys determined that those nests were inactive. The BLM refused to buffer and protect those nests because the nests are

allegedly inactive, despite the fact that abandoned red tree vole nests are recolonized by other red tree voles more than 2/3 of the time. In other words, inactivity is not determinative of whether a nest is habitat. According to the Survey and Manage Guidelines, “known sites” are defined to include historic sites unless those sites do not contain red tree vole habitat. Because red tree voles re-use and recolonize abandoned or inactive nests with a high frequency (i.e., 68% of the time), inactive nests remain habitat, and, therefore, the BLM failed to “manage all known sites” in violation of the Survey and Manage Guidelines.

Second, the BLM failed to consider the Deer Creek Association’s reasonable Natural Selection Alternative. The BLM failed to acknowledge the Natural Selection Alternative within the Deer North EA in violation of NEPA’s requirements. Furthermore, the BLM failed to provide adequate reasons to not consider the Natural Selection Alternative in detail, despite having blended the Natural Selection Alternative with other action alternatives in the past.

Finally, the BLM failed to take a hard look at the environmental impacts to red tree voles. The BLM alleged that impacts to red tree voles would be “essentially eliminated” by complying with the Survey and Manage Guidelines. The BLM, however, improperly minimized impacts to red tree voles because the BLM failed to protect inactive nests, and failed to disclose to the public that red

tree voles recolonize inactive nests more than 2/3 of the time. In addition, the BLM failed to disclose to the public that surveys for red tree vole nests need only survey 68% of an acre, necessarily resulting in the loss of active and inactive red tree vole nests. Finally, the BLM relied on an invalidated technique that dilutes impacts by averaging those impacts across a significant acreage.

## **ARGUMENT**

### **I THE BLM VIOLATED THE SURVEY AND MANAGE STANDARDS AND GUIDELINES, THE MEDFORD RESOURCE MANAGEMENT PLAN, THE NORTHWEST FOREST PLAN, AND THE FEDERAL LAND POLICY AND MANAGEMENT ACT**

#### **A. Legal Background**

FLPMA establishes requirements for land use planning on public lands. Under FLPMA, the BLM must “develop, maintain, and when appropriate, revise land use plans.” 43 U.S.C. § 1701(a)(7). Once a land use plan (or resource management plan) is developed, “[a]ll future resource management authorizations ... shall conform to the approved plan.” 43 C.F.R. § 1610.5-3(a); 43 U.S.C. §§ 1712, 1732(a). The RMP at issue here is the 1995 Medford District RMP as amended by the Northwest Forest Plan. In 2001, the BLM and the Forest Service amended the Northwest Forest Plan by issuing the Record of Decision (ROD) and Standards and Guidelines for Amendments to the Survey and Manage, Protection

Buffer, and other Mitigation Measures.<sup>2</sup> ER-352 (Survey and Manage Rod and Guidelines). The “Survey and Manage” requirements provide additional protections for species, including the red tree vole, that might not be adequately protected by the Northwest Forest Plan’s broad-scale land allocations. A violation of the Survey and Manage Guidelines results in a violation of the Northwest Forest Plan, the Medford RMP, and FLPMA.

B. Background on red tree voles

“The red tree vole is a small microtine rodent” with a relatively long tail, weighing about 25-50 grams and a total length of 15.8 - 17.6 centimeters. ER-263 (Management Recommendations). Red tree voles are “the most arboreal mammals in the Pacific Northwest,” and they are “recognized as closely associated with old-growth forest habitat.” ER-264 (Management Recommendations). In addition, red tree voles are “rated as highly vulnerable to local extirpations from habitat fragmentation or loss . . . .” *Id.* “Red tree voles build nests wherever there is a suitable foundation and a readily accessible food supply.” ER-266 (Management Recommendations). Importantly, “[i]nactive nests in suitable habitat may be

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<sup>2</sup> The 2001 Standards and Guidelines modified species protections from the NWFP by expanding from a four-category to a six-category classification system, and it assigned the red tree vole to Category C, which requires (1) management of high-priority sites, (2) pre-disturbance surveys, and (3) strategic surveys prior to any agency action that would disturb the species habitat. See Klamath-Siskiyou Wildlands Ctr v. Boody, 468 F.3d 549, 553 (9th Cir. 2006).

reused at any time by the last resident individual, or recolonized by a new individual[.]” ER-267 (Management Recommendations); id. (“When moving to a new nest tree, adult voles re-occupied previously constructed nest structures at least 68 percent of the time.”).

Red tree voles are also “important prey for the threatened northern spotted owls, though saw-whet and other owl species, raccoons, marten, ringtail, and fishers [a candidate species for listing as endangered under the Endangered Species Act] prey upon them as well.” ER-264 (Management Recommendations). Voles can comprise up to one-fifth of a northern spotted owl's diet. See id. (“Due to their small size, red tree voles provided 2 to 19 percent of the total diet biomass and were the third most abundant prey item (Forsman et al. 1984)”).

As is evident by their inclusion in the Survey and Manage Standards and Guidelines, the red tree vole faces a precarious future. See ER-269 (Management Recommendations) (“The Oregon red tree vole was added to Survey and Manage mitigation during the NFP [SEIS] . . . analysis because the species was believed to need more protection than provided by the standards and guidelines, Riparian Reserves, Late-Successional Reserves (LSRs) and other land allocations of the NFP”); id. (“The viability assessment conducted by the Scientific Analysis Team . . . rated the red tree vole as scarce everywhere within the range of the northern



spotted owl”; “habitat conditions and scarcity of active sites continues to suggest concern for the species' long term persistence”); ER-269-270 (Management Recommendations) (listing additional concerns and threats to the red tree vole).

The major threats to this species [i.e. the red tree vole] are the continued loss of occupied sites where these sites may be important to the persistence of vole populations and the increased geographic isolation of remaining populations. This species has many life history characteristics that cumulatively raise concerns for its long-term persistence such as very small home ranges, low dispersal capability, extremely low reproduction potential, short life span and a sensitivity to stand level disturbances.

ER-290 (Survey Protocol). See also ER-264 (Management Recommendations)

(red tree vole “distribution is patchy and limited to coniferous forests west of the Cascade crest of the Cascade Mountains”). Red tree voles are also:

rated as highly vulnerable to local extirpations from habitat fragmentation and loss (Huff et al. 1992), and are recognized as closely associated with old-growth forest habitat (Carey 1989, Ruggiero et al. 1991). Significant declines in tree vole populations are expected from major reductions in old-growth Douglas-fir habitat (Huff et al. 1992).

Id.

C. The BLM failed to manage all know sites for red tree voles

The 2001 Standards and Guidelines identify red tree voles as a Category C species. ER-355 (Survey and Manage ROD and Guidelines). The 2001 Standards and Guidelines provide: “**Objective**: Identify and manage high-priority sites to provide for reasonable assurance of species persistence. Until high-priority sites

can be determined, manage all known sites.” ER-353 (Survey and Manage ROD and Guidelines) (emphasis added). It is undisputed that “high-priority sites” have not been identified. Furthermore, the Survey and Manage Guidelines provide that “[u]ntil a Management Recommendation is written addressing high-priority sites, either assume all sites are high priority, or local determination (and project NEPA documentation) of non-high priority sites may be made on a case-by-case basis.” Id. Management Recommendations (ER-258-284) have been prepared for the red tree voles, but those management recommendations do not address high-priority sites. It is also undisputed that there has not been a local determination of non-high priority sites for the Deer North Project. Therefore, the BLM must “manage all known sites” for red tree voles.

For the Deer North Project, the BLM failed to “manage all known sites” in accordance with the 2001 Standards and Guidelines. Instead, the BLM refused to buffer known sites previously surveyed when it failed to either detect nests or determined the nest was inactive. According to the BLM, “prior to implementation, all active and associated inactive RTV [i.e. red tree vole] nests discovered during surveys would be buffered . . . .” ER-369 (Protest Response). However, the BLM went on to admit that it did not use buffers to protect nests

previously identified during the Deer Mom timber sale, a previously planned but unimplemented timber sale, as well as subsequent surveys:

Deer Mom units with RTV habitat were surveyed for RTVs in 1997 and 1998, using the draft protocol, but none of the trees were climbed which would have allowed them to get an accurate determination of the RTV nest status. Some Deer Mom Fuels units were surveyed and climbed in 2002. Deer North units that contained old Deer Mom units were completely resurveyed in order to update the status information on all old and new nests. Old nests were either blown out or determined to be inactive through current climbing surveys. Therefore the nests located in 1997 do not need to be protected and the old locations did not provide additional information that would change our effects analysis.

ER-370 (Protest Response) (emphasis added). At issue here are those nests allegedly determined to be inactive, not those nests that were “blown out,” because “[i]nactive nests in suitable habitat may be reused at any time by the last resident individual, or recolonized by a new individual[.]” ER-267 (Management Recommendation); *id.* (“When moving to a new nest tree, adult voles re-occupied previously constructed nest structures at least 68 percent of the time.”).

The definition of “known site” indicates that both historic and current sites are “known sites.” See ER-356 (Survey and Manage ROD and Guidelines) (definition of “known site”). “Known site” is defined as:

Historic and current location of a species reported by a credible source, available to field offices, and that does not require additional species verification or survey by the Agency to locate the species.... Known sites can be based on any documented and credible source (such as herbaria/museum records, published documents, Agency records, species

expert records, and documented public information). Historic locations where it can be demonstrated that the species and its habitat no longer occur do not have to be considered known sites. A credible source is a professional or amateur person who has academic training and/or demonstrated expertise in identification of the taxon of interest sufficient for the Agency to accept the identification as correct. These can include Agency staff and private individuals.

Id. First, as noted above, both historic and current sites are included within the definition of “known sites.” Thus, previous sites identified in the Deer Mom timber sale and subsequently identified during subsequent surveys are within the definition of “known sites,” despite the fact that they may be “historic” sites.

Second, “[k]nown sites can be based on any documented and credible source.” ER-356 (Survey and Manage ROD and Guidelines). The BLM “documented” these historic sites in 1997, 1998, 2002, and subsequent surveys, see ER-370 (Protest Response), and it can only be assumed that the BLM is considered a “credible source.” Again, those historic sites previously identified fall within the definition of “known sites.”

Third, the definition of “known sites” provides that “[h]istoric locations where it can be demonstrated that the species and its habitat no longer occur do not have to be considered known sites.” This provision does not apply here because an inactive red tree vole nest remains red tree vole habitat because the nests are recolonized more than 2/3 of the time. See ER-267 (Management

Recommendations) (“When moving to a new nest tree, adult voles re-occupied previously constructed nest structures at least 68 percent of the time.”); *id.* (“Inactive nests in suitable habitat may be reused at any time by the last resident individual, or re-colonized by a new individual (Briswell, unpublished data).”). Simply put, an inactive nest is more likely than not to be recolonized by another red tree vole, and, therefore, it persists as red tree vole habitat that must be protected under the management direction to “manage all known sites.”

Finally, it is likely that BLM will argue that its interpretation of the Survey and Manage direction to “manage all known sites” is due deference. This argument falls short, however, because the BLM did not provide an interpretation of “manage all known sites” during the administrative proceedings. To invent an interpretation at this stage of the litigation would be nothing more than a prohibited post hoc rationalization of agency action. *See SEC v. Chenery*, 332 U.S. 194, 196 (1947) (“emphasiz[ing] a simple but fundamental rule of administrative law”: “in dealing with a determination or judgment which an administrative agency alone is authorized to make, [courts] must judge the propriety of such action solely by the grounds invoked by the agency”); *see also Motor Vehicle Mfrs Ass’n, Inc.*, 463 U.S. at 50 (courts may not accept counsel’s “post hoc rationalizations for agency

action”). The agency’s position must stand or fall based on the rationale provided within the agency’s EA, Decision Documentation, and FONSI.

## **II. THE BLM VIOLATED THE NATIONAL ENVIRONMENTAL POLICY ACT**

### **A. The BLM failed to consider the Deer Creek Association’s reasonable Natural Selection Alternative**

#### **1. NEPA requires rigorous evaluation of all reasonable alternatives**

NEPA requires agencies to “rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives, which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a). The alternatives section is the “heart” of the NEPA document. *Id.* § 1502.14. The Ninth Circuit has held that an agency must “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” Kootenai Tribe of Idaho v. Veneman, 313 F.3d 1094, 1120 (9th Cir. 2002).

In both an EA and EIS, NEPA requires the agency to “study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 102(2)(E). Agencies must “make every effort to disclose and discuss at appropriate points in the [NEPA document] all major points of view

on the environmental impacts of the alternatives including the proposed action.”

Id. § 1502.9(a). “NEPA requires that alternatives . . . be given full and meaningful consideration,’ whether the agency prepares an EA or an EIS.” Ctr for Biological Diversity v. Nat'l Hwy Traffic Safety Admin., 538 F. 3d 1172, 1217 (9th Cir. 2008) (quoting Native Ecosystems Council, 428 F.3d at 1245). The “touchstone” for the Court's inquiry is whether the “selection and discussion of alternatives fosters informed decision-making and informed public participation.” Id. at 767.

Reasonable alternatives are those that are viable, feasible, meet the stated goals of the project, or are reasonably related to the purposes of the project. Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992); City of Carmel v. U.S. Dept. Transp., 123 F.3d 1142, 1155 (9th Cir. 1997) ; Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974). “The existence of a viable but unexamined alternative renders an [EIS] inadequate.” Citizens for a Better Henderson v. Hodel, 768 F.2d 1051, 1057 (9th Cir. 1985). Defendant's exclusion of the Natural Selection Alternative was erroneous, because it is a viable, yet unexamined alternative, and because defendant failed to adequately justify the reasons for excluding the Natural Selection Alternative from detailed consideration.

The Ninth Circuit has counseled that courts should not accept conclusions in lieu of a reasonable discussion of alternatives. “A cursory dismissal of a proposed alternative, unsupported by agency analysis, does not help an agency satisfy its NEPA duty to consider a reasonable range of alternatives.” Environmental Protection Information Center v. U.S. Forest Service, 234 Fed. Appx. 440, 443, 2007 WL 1417163 (9th Cir. 2007). “An alternative may not be disregarded merely because it does not offer a complete solution to the problem.” Citizens Against Toxic Sprays v. Bergland, 428 F. Supp. 908, 933 (D. Or. 1977). As one court explained, “[o]bviously, any genuine alternative to a proposed action will not fully accomplish all of the goals of the original proposal. One of the reasons that Congress has required agencies to set out and evaluate alternative actions is to give perspective on the environmental costs, and the social necessity, of going ahead with the original proposal.” Town of Matthews v. United States Dept of Transp., 527 F. Supp. 1055, 1058 (W.D.N.C. 1981). Thus, while NEPA may not prohibit the BLM from ultimately implementing the preferred alternative, the courts find it “troubling” when the agency “saw fit to consider from the outset only those alternatives leading to that end result.” California v. Block, 690 F.2d 753 (9th Cir. 1982). Most importantly, NEPA does not mandate that an alternative be



implemented; instead, pursuant to its procedural requirements, NEPA requires only that reasonable alternatives be considered.

2. The Deer Creek Association's Natural Selection Alternative

The Deer Creek Association submitted the Natural Selection Alternative, an alternative that has been created over the course of decades, which also played a substantial role in the NEPA documentation for the Deer South timber sale<sup>3</sup> from 2005. ER-306-312 (Deer South EA). The Natural Selection Alternative is an alternative that was prepared by Deer Creek in collaboration with the BLM. ER-306 (Deer South EA). The Natural Selection Alternative “is based on 14 Criteria for Sustainability,” and proposes to “provide a variety of commodities and uses while allowing nature to retain and restore species, habitats, functions, and forest ecosystem health across the landscape.” Id. The cornerstone of the Natural Selection Alternative is that it would not harvest trees until those trees have been naturally selected, which allows for logging “green” trees:

Since no trees are removed before they have been naturally selected, the volume of removal is restricted to what the forest is naturally able to produce. Retaining forest structure and functions at all times means no forest “down time” so the forest is always in full productivity. No down

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<sup>3</sup> Because the natural selection alternative played a critical role in the Deer South timber sale, many of the documents related to the Deer South timber sale that support the Natural Selection Alternative were submitted for the Deer North timber sale.

time, means no restoration costs. Forest resource volume is expected to increase over time.

Every part of the forested landscape including meadows, aquatic, and riparian areas, will remain or become a corridor for evolved species. The Natural Selection Alternative leaves habitats intact so early and late successional ecosystems can evolve to their natural conclusions.

In natural-selection-based practices, the term “restoration,” or “recovery,” means to restore original late successional communities to their original species and ecological functions.

ER-307 (Deer South EA). See also ER-310 (Deer South EA) (“As young cut-over forests recover to late-successional conditions, they would produce more products with greater values.”). The Deer Creek Watershed Assessment acknowledges that “remaining mature and old-growth habitats are widely scattered and do not provide adequate dispersal paths for many low mobility species. In addition, a large percent of the remnant old-growth stands are too small to serve as quality habitat for interior forest late-successional species.” ER-351 (Deer Creek Watershed Assessment). The Natural Selection Alternative proposes to retain these few, scattered islands of late successional (or old-growth) forests:

The Natural Selection Alternative would retain the few remaining small islands of natural late successional and legacy forests ... to 1) sustain late successional species, 2) provide wildlife reservoirs for restoring early successional plantations that currently encompass much of the ... Project area, 3) moderate climate locally, regionally and globally, 4) store and filter high quality water, 5) provide wildlife corridors across the landscape, 6) understand the meaning of forest recovery by showing what they look like

and how they function, and 7) serve human visual, spiritual, educational, natural history, recreation and tourism needs.

Resource extraction would occur in early successional forests where past extraction has occurred and be such that young forests would be allowed to evolve to late-successional community conditions. Legacy, and structurally intact late-successional forests, would not have resource extraction.

ER-307-308 (Deer South EA). The Deer Creek Watershed Assessment documents that there are few areas of existing late-successional forest; therefore, focusing on early successional forests leaves the vast majority of the BLM lands available for logging.

Importantly, the Natural Selection Alternative was also carefully crafted to satisfy or exceed the prescriptions contained in the Medford District RMP: “The Natural Selection Alternative would meet or exceed the Medford District Resource Management Plan objectives and actions/directions requirement for down wood, snags, and riparian reserves (p. 26-28) including ACS objectives (p. 22), and for Matrix lands (p. 38-40).” ER-307 (Deer South EA). Finally, the Natural Selection Alternative ensures economic stability over the long run: “Long term economic health would have priority over short-term economic health.” ER-310 (Deer South EA). This long-term economic stability would be carried out by “forest stewardships” that are “created and tailored for local, small (one- or two-person), sustainable operations....” ER-311 (Deer South EA). Unlike most alternatives

submitted by the public, the Natural Selection Alternative is replete with scientific studies in support of its logging prescriptions. (ER-311-312) (Deer South EA).

The Natural Selection Alternative has been endorsed by fire and vegetation ecologists, including Dr. Dennis Odion, PhD:

I prefer the Natural Selection Alternative that has been developed by the local community over the other action alternatives. . . . The natural selection approach to extracting timber in this case appears to be a means of minimizing further damage and disturbance in the watershed while still providing sustainable levels of timber harvest. Further, the timber selection approach is said to produce minimal activity fuels over time, so it does not create the immediate slash management problems associated with more traditional timber harvests. The natural selection alternative would also not create fire hazards associated with the other action alternatives. . . . There is no need to further increase landscape level fire risk by opening forests and promoting more combustible understory vegetation.

The natural selection alternative would also not create fire hazards associated with the other action alternatives. This alternative recognizes that the project area is a fire prone environment, especially with the residual effects of past timber harvests. The alternative's threefold strategy of maintaining remaining closed forest, treating areas where fire severity is most elevated due to human impacts (dense plantations or second growth), and focusing on the home ignition zone for protecting property from fire is a logical approach to fire hazards. There is no need to further increase landscape level fire risk by opening forests and promoting more combustible understory vegetation.

ER-377 (Odion Protest).

3. The BLM arbitrarily refused to consider the Natural Selection Alternative

For the Deer North Project and timber sale EA, the BLM completely failed to consider the Natural Selection Alternative. The EA does not even reference the Natural Selection Alternative. When an alternative is not considered as part of the proposed alternatives the agency must briefly address alternatives that were not considered or analyzed in detail, explaining why the alternatives were not considered in detail. See e.g., Citizens' Committee to Save Our Canyons v. U.S. Forest Serv., 297 F.3d 1012, (10<sup>th</sup> Cir. 2002) (“In addition to discussing the proposed alternatives, the Forest Service outlined, as required by NEPA, alternatives that it had analyzed but not considered in detail...”) (emphasis added); 40 C.F.R. § 1502.14(a) (agencies must “rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives, which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated”). The Deer North Project EA is no exception; and appendix F contains those “alternatives and issues considered, but not analyzed in detail.” See ER-213-216 (Deer North EA). Appendix F, however, does not reference or explain why the Natural Selection Alternative was not considered in detail. This omission alone, within the EA, is clear error, and it is puzzling that despite being invited to and

visiting Camp Forest, the model for the Natural Selection Alternative<sup>4</sup>, the Deer North Project EA is silent about the Natural Selection Alternative.

Not until the Decision Documentation did the BLM even acknowledge that the Natural Selection Alternative was submitted by the Deer Creek Association. The BLM purported to address the Natural Selection Alternative in the Response to Comments. See ER-21-23 (Decision Documentation). In comment 38, the BLM does not maintain that the Natural Selection Alternative is not a reasonable alternative. Instead and somewhat misplaced, the BLM maintains that the Deer North timber sale would not violate RMP standards related to soil compaction and degradation. See ER-21-22 (Decision Documentation).

In Comment 39, the BLM finally purports to explain why the Natural Selection Alternative was not considered as a proposed alternative. See ER-22-23 (Decision Documentation). Because the BLM's explanation is critical to resolving the Deer Creek Association's claim, the BLM's rationale is set forth in full:

**Comment 39:** The Natural Selection Alternative (NSA) is a legal alternative and has met the BLM's Purpose and Need. The NSA should have been considered as an addition [*sic*] alternative or actually been included in the Deer North EA as Alternative 4. In the South Deer EA, BLM accepted the Natural Selection Alternative as part of the decision. To

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<sup>4</sup> "At the invitation of the commenter, the BLM visited Camp Forest, the model for the NSA alternative. The areas BLM were shown were regenerated clearcut lands tractor yarded in the mid 1900s." ER-22 (Decision Documentation).

now reject the Natural Selection Alternative for consideration in the Deer North EA is arbitrary and capricious.

**Response:** The NSA Alternative does not meet the purpose and need of the Deer North Vegetation Management Project. The NSA Alternative was considered under the No Action Alternative. Literature provided by the Deer Creek Association (Ecostry) indicates the NSA supports extracting naturally selected dead/dying trees as opposed to extracting green trees. The EA states that Alternatives should be “designed to address each of the needs and achieve each of the associated objectives which would assist in moving the current conditions found on the Deer North Planning Area toward desired forest conditions for lands within the Matrix land allocation” (p. 156).

The Medford ROD/RMP assumed an annual harvest of 1,140 acres of regeneration harvest (RH) and overstory removal (OR) the first decade (ROD/RMP, P, 9). However, the actual amount offered for sale on the Medford District from 1995 to 2004 fell far below this amount, as it was less than 500 acres of regeneration harvest and overstory removal per year. The RMP identified that the general prescription would be one of modified even-aged management within the Northern General Forest Management Area ([NGFMA], RMP, p 187). For the Southern General Forest Management Area (SGFMA) the prescription would be one of structural retention (ibid, 192).

The EA considered a separate “Citizen’s Alternative” that provided more detail. Appendix F “Alternatives and Issues Considered, but not Analyzed in Detail” (pp 155, 156) determined that “The Citizen’s alternative was adequately addressed in the analysis for the No Action and action alternatives.”

The South Deer Decision Record acknowledged that Alternative 4 was prepared by the Deer Creek Valley Natural Resource Conservation Association (DCVNRCA). At that time the BLM and DCVNRCA signed a memorandum of understanding (MOU) that included providing a purpose and need. However, the South Deer Decision Record noted on page 23 for Alternative 4 (Natural Selection Alternative) that “Other than trail and road locations, the project relied heavily on philosophy, making a side by side

evaluation problematic.” The purpose and need of the Deer North EA is not the same as that for the South Deer Project. The South Deer EA addressed the need to promote a wide variety of non-commodity outputs.

The South Deer EA analyzed the Natural Selection Alternative (alternative 4) and determined that “The level of removal for this alternative is inconsequential which allows current stand trajectories to progress. The cumulative impacts to vegetation would be the same as those described for the no-action alternative” (South Deer EA, p. 60). The Decision Record for the South Deer Landscape Management Project identified Alternative 2 as the selected alternative for the management themes. Alternative 2 was selected for the young stand management theme except for “stands in 39-7-3 [T39S, R07W, Section 3] that were identified for young stand management.... Young stands are a priority for treatment under Alternative 4 [NSA] and implementing this alternative in section 3 will allow an opportunity to demonstrate the effectiveness of the approach of the NSA in young stand development” (DR, p. 12).

South Deer considered the NSA (Alternative 4) and disclosed “the general support for Alternative 4 as evidenced by the public comments received, and given the desire by the BLM to demonstrate the NSA alternative, the BLM has decided to blend Alternative 2 and 4 into a proposed action by choosing to implement NSA on 501 acres of land in 39-7-3. And, although BLM planners requested anticipated or potential timber volume produced by the NSA, no information was made available.”

Because the South Deer Project was enjoined indirectly by a court ruling affecting another regulatory agency, the effectiveness of the NSA on young stand development was never evaluated. The Deer North Timber Sale does not propose to demonstrate young stand development.

ER-22-23 (Decision Documentation). The Decision Document also provides another reference to the Natural Selection Alternative, though it reiterates much of what was presented above:



The purpose and need statement is consistent with the goals and objectives identified in the Medford RMP. Two action alternatives in addition to the No Action Alternative were analyzed. The NSA Alternative was considered under the No Action Alternative. Literature provided by the Deer Creek Association (Ecostry) indicates the NSA supports extracting naturally selected dead/dying trees as opposed to extracting green trees. The EA states that alternatives should be designed to address each of the needs and achieve each of the associated objectives which would assist in moving the current conditions found on the Deer North Planning Area toward desired forest conditions for lands within the Matrix land allocation (p. 156).

The EA considered a separate Citizens Alternative that provided more detail. Appendix F "Alternatives and Issues Considered but not Analyzed in Detail" (pp 155, 156) determined that The Citizens alternative was adequately addressed in the analysis for the No Action and action alternatives. The purpose and need was broad enough to analyze a range of alternatives.

ER-17 (Decision Documentation).

From the above quotations, the BLM argues that the Natural Selection Alternative was not considered because:

- The Natural Selection Alternative was considered under the No Action Alternative.
- The Natural Selection Alternative removes only dead/dying trees instead of green trees.
- The Natural Selection Alternative would not satisfy annual harvest quotas.
- The Deer North Timber Sale does not propose to demonstrate young stand development.
- The Natural Selection Alternative would not move the Deer North Planning Area toward desired forest conditions for lands within the Matrix land allocation.

These arguments, however, do not stand up to even modest scrutiny, as explained below.

First, the Natural Selection Alternative could not be considered under the No Action alternative because the Natural Selection Alternative proposes an action, which includes selective thinning of the forest. Clearly, an alternative that proposes logging is fundamentally different than action that proposes no logging. Furthermore, the BLM makes a fundamental error in assessing the Natural Selection Alternative by assuming that the Natural Selection Alternative does not propose to log “green trees.” The BLM’s error is evidence in and of itself that the agency did not seriously consider the Natural Selection Alternative. As noted by the Natural Selection Alternative, “[t]he dead and dying (including snags and woody material of the forest floor) sustain the living. To extract sustain[ably] (including green and dead), humans must share these resources with all natural evolved species.” ER-307 (Deer South EA).<sup>5</sup> Therefore, even a cursory review of the Natural Selection Alternative demonstrates that green trees can be removed.

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<sup>5</sup> The distinction between green and dying trees was put to rest in Lands Council v. Martin, 479 F.3d 636, 642-643 (9<sup>th</sup> Cir. 2007). There, the Forest Service argued that it could log trees that were dying, despite a forest plan requirement known as the Eastside Screens that prohibited logging of any live tree. This Court determined that, absent some definition of live trees that excluded dying trees, the common definition of “live” controlled:

Next, the BLM vaguely argues that annual harvest levels were not satisfied from 1995 to 2004 for regeneration harvest<sup>6</sup> and overstory removal. First, annual harvest levels are not binding on the BLM, and the BLM does not argue to the contrary. Second, what has occurred from 1995 to 2004 does not reflect what is occurring in a timber sale in 2014. Third, because the Deer North timber sale

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The Forest Service tries to escape this simple formulation by arguing that the term ‘live trees’ is a technical term understood by foresters to exclude dying trees and that we must defer to its technical expertise. We need not decide whether, in theory, we must employ a technical definition in a Forest Plan because there is no evidence in this record that the Forest Service adopted a technical meaning. Not only are the NFMA and the Forest Plan silent on the definition of “live trees,” but neither the Forest Service nor Intervenor have cited any authoritative definition of the term “live trees.” The Forest Service introduced evidence of a practice of harvesting dying trees, but that does not establish a technical definition of the term “live trees.”

(emphasis in original). In the absence of a definition of “live trees,” the Ninth Circuit determined that no dying trees include trees with “green needles,” and instructed the District Court to enter an appropriate injunction:

We therefore reverse the district court’s denial of a preliminary injunction on the NFMA claim and remand with instructions to grant immediately a preliminary injunction to prohibit the logging of any “live tree” 21” diameter at breast height that currently exists in the sale areas – i.e., any tree of the requisite size that is not yet dead. In accord with the “conservative definition” of a “live tree” given by Intervenor’s expert, no tree of the requisite size with green needles shall be harvested.

Id. at 643. In the absence of a definition to the contrary, dying trees include those trees with green needles, and, therefore, the BLM misunderstood the Natural Selection Alternative to exclude logging “green” trees.

<sup>6</sup> “Regeneration harvest” is a euphemism for a “clear cut” that retains a handful few trees.

includes only 98 acres (though more timber sales will be issued pursuant to the Deer North Project EA), it is unclear how this particular timber sale would have a meaningful effect on annual harvest levels. To that end, it is unlikely that any one timber sale could satisfy the entirety of an annual harvest level. Finally, BLM misconstrues NEPA's alternatives requirement because NEPA only requires that reasonable alternatives be considered, not that they be actually implemented.

Next, the BLM argues that the Natural Selection Alternative is inappropriate because the Deer North timber sale does not propose to demonstrate young stand development, as was one of the objectives in the Deer South timber sale. In the Deer South timber sale, under the heading "Young Stand/Forest Development," the BLM states that:

Many of the conifer plantations in the project area are experiencing intense competition from brush and hardwoods and need to be managed to reduce stand densities, promote species diversity, and maintain vigorous crowns. The primary objective of young stand treatment is to reduce surplus vegetation in order to accelerate the growth of desired conifers, promote stand differentiation, and maintain the non-tanoak hardwood component for future stand diversity.

ER-301 (Deer South EA). First, consistent with the Natural Selection Alternative, the Deer North Project proposes to "[p]rovide habitat for a variety of organisms associated with both late-successional and younger forests." ER-64 (Deer North EA) (emphasis added). In addition, the Deer North Project contains young stands:

“The vegetation and land forms within the Planning Area are very diverse, from flat valley bottom vegetation and meadows, to slopes and ridges with young/mid and older forest stands.” ER-193 (Deer North EA). The Deer North Project Planning Area contains 233 acres of “early” vegetation condition class: “The early class most often represents plantation stands.” See ER-100, Table 11 (Deer North EA). Regardless of the small amount of young stands in the Deer North Project, the BLM is not required to consider only alternatives that provide “a complete solution to the problem.” Citizens Against Toxic Sprays, 428 F. Supp. At 933. For example, in the South Deer Project, the BLM “decided to blend Alternative 2 and 4 [i.e., the Natural Selection Alternative] into a proposed action by choosing to implement the [Natural Selection Alternative] on 501 acres ....” ER-23 (Decision Documentation). The BLM has not provided any rationale for why such “blending” could not occur under the Deer North Project.

Finally, the BLM argues generally that the Natural Selection Alternative would not move “the Deer North Planning Area toward desired forest conditions for lands within the Matrix land allocation.” ER-17 (Decision Documentation). The Deer North EA provides the “following objectives for Matrix lands”:

- Produce a sustainable supply of timber and other forest commodities to provide jobs and contribute to community stability.

- Provide connectivity (along with other allocations such as Riparian Reserves) between late-successional reserves.
- Provide habitat for a variety of organisms associated with both late-successional and younger forests.
- Provide for important ecological functions such as dispersal of organisms, carryover of some species from one stand to the next, and maintenance of ecologically valuable structural components such as down logs, snags, and large trees.
- Provide early-successional habitat.

ER-64 (Deer North EA). First, as noted by the BLM in the Deer South EA, the “Natural Selection Alternative would meet or exceed the Medford District Resource Management Plan objectives and actions/directions requirement for down wood, snags, and riparian reserves (p.26-28) including ACS objectives (p. 22), and for Matrix lands (p. 38-40).” ER-307 (Deer South EA) (emphasis added).

Second, a cornerstone of the Natural Selection Alternative is to provide for sustainable supply of timber through selective thinning: “As young cut-over forests recover to late-successional conditions, they would produce more products with greater values.” ER-310 (Deer South EA). In other words, “[r]etaining forest structure and functions at all times means no forest ‘down time’ so the forest is always in full productivity.” ER-307 (Deer South EA).

Third, the Natural Selection Alternative provides connectivity because “[e]very part of the forested landscape including meadows, aquatic, and riparian areas, would remain or become a corridor for evolved species.” Id.

Fourth, the Natural Selection Alternative provides “habitat for a variety of organisms associated with both late-successional and younger forests” by retaining those habitats instead of logging them: “The Natural Selection Alternative would retain all naturally evolved successional habitats across the landscape, including riparian reserves.” Id. Retaining these habitats necessarily preserves the ecological functions of organisms and structural components. In other words, the Natural Selection Alternative retains biological equity and maximum productivity across the landscape while removing trees.

Finally, the Natural Selection Alternative provides for early-successional habitat by selectively thinning younger plantations, as noted supra.

Simply put, the BLM has not provided an adequate or reasonable justification for eliminating the Natural Selection Alternative from detailed consideration. Therefore, the BLM's rejection of the Natural Selection Alternative for consideration in the Deer North EA is arbitrary and capricious, and it precluded the BLM from considering a reasonable range of alternatives.

- B. The BLM failed to take a hard look at the environmental impacts to red tree voles
  - 1. NEPA requires that agencies take a hard look at the environmental impacts of its actions

Under NEPA, “[t]he sweeping policy goals announced in § 101 are []

realized through a set of ‘action-forcing’ procedures that require that agencies take a ‘hard look’ at environmental consequences.” Robertson, 490 U.S. at 350; California v. Block, 690 F.2d 753, 776 (9th Cir. 1982) (“NEPA’s central requirement is that agencies must take a ‘hard look’ at the environmental consequences of its proposed action”) (emphasis in original); Nat’l Parks & Conservation Ass’n v. Babbitt, 241 F.3d 722, 733 (9th Cir. 2001) (“[G]eneral statements about possible environmental effects failed the ‘hard look’ test required under NEPA”); Blue Mountains Biodiversity Project v. Blackwood, 161 F.3d 1208, 1213 (9th Cir. 1998) (“We have warned that ‘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”) (quotations omitted).

For the courts, “the task is to ensure that the agency has taken a ‘hard look’ at the potential environmental consequences of the proposed action.” Klamath-Siskiyou v. BLM, 387 F.3d 989, 993 (9th Cir. 2004). A hard look includes “considering all foreseeable direct and indirect impacts.” Rittenhouse, 305 F.3d at 973. “A hard look should [also] involve a discussion of adverse impacts that does not improperly minimize negative side effects.” Earth Island Inst., 442 F.3d at 1159 citing (Native Ecosystems Council, 428 F.3d at 1241). The BLM “must



‘undertake a thorough environmental analysis before concluding that no significant environmental impact exists.’” Id.

2. The Deer North Project EA and Deer North timber sale Decision Documentation failed to take a hard look at the environmental impacts to red tree voles

The Deer North Project EA, Decision Documentation, and FONSI omit and sidestep the environmental impacts to red tree voles from the Deer North Project. Instead of disclosing actual impacts, the documents disclose only generalized possibilities of some impacts to red tree voles and rely on invalidated averaging techniques to dilute the appearance of impacts. The only actual impact to red tree voles conceded within the Deer North EA provides that “[e]ven though the action alternatives may potentially cause the loss of habitat in some cases, this project is not expected to affect long-term population of RTVs in the watershed.” ER-182 (Deer North EA). This statement provides nothing more than a generalized notion that there is a possibility of some impact. This type of disclosure has been repeatedly found to violate NEPA: “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.” Klamath-Siskiyou Wildlands Ctr, 387 F.3d at 994 (quoting Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998)).

The remainder of the BLM's disclosures downplays or minimizes the impacts to red tree voles. For example, the BLM's "Summary and Conclusions for Survey and Manage Species" within the Deer North Project EA states:

action alternatives combined with other actions in the watershed would not contribute to the need to federally list RTVs because of the small scope of the proposed action compared to the combined acreage of the Deer Creek 5<sup>th</sup> field watershed, leaving a mosaic of untreated patches across the landscape.

ER-182 (Deer North EA). First, this statement is premised on an averaging technique that has been struck down by the Ninth Circuit. See Or. Natural Res. Council Fund v. Brong, 492 F.3d 1120, 1130 (9th Cir. 2007) (holding unlawful an agency's "attempt to dilute the effects of its proposed activities by averaging ... over such a wide area.")<sup>7</sup>; Pac. Coast Fed'n of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1035-37 (9<sup>th</sup> Cir. 2001) (holding that an agency cannot try to "minimize" the environmental impact of an activity by simply adopting a scale of analysis so broad that it marginalizes the site-level impact of the activity on ecosystem health)<sup>8</sup>. The BLM is masking the true impacts to red

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<sup>7</sup> Justice Brandeis cautioned against the potential illogic in averages: "I abhor averages.... A man may have six meals one day and none the next, making an average of three meals per day, but that is not a good way to live." THE WORDS OF JUSTICE BRANDEIS 32 (Solomon Goldman ed., 1953).

<sup>8</sup> The BLM also uses the invalidated averaging technique to determine impacts to red tree voles elsewhere in the Deer North Project EA. See ER-181 (Deer North EA) ("Approximately 8,058 acres (98%) of the existing spotted owl nesting

tree voles by averaging the acreage of the timber sale across the 72,573-acre Deer Creek 5<sup>th</sup> field watershed. ER-62 (Deer North EA).

Second, an agency cannot dispose of its hard look requirement by concluding that agency action will not result in the species' listing. If this were permissible, NEPA's requirements would be a mere formality for every agency action that did not result in a species being listed under the Endangered Species Act. It is well-established that an agency may not rely on compliance with one statute to abdicate its obligations under NEPA. See Makua v. Rumsfeld, 163 F. Supp. 2d 1202, 1218 (D. Ha. 2001) ("no jeopardy" opinion by FWS under the ESA is not equivalent to a finding of no potential impact under NEPA); Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1275 (10th Cir. 2004) (acknowledging that simply because an area is not "critical habitat" under the ESA does not mean destruction is not significant and noting the distinction between finding "no jeopardy" and "significance"); Sierra Club v. Norton, 207 F. Supp. 2d 1310, 1335 (S.D. Ala. 2002) (stating that the "jeopardy" analysis is distinct from the "significant impact" standard of NEPA and explaining the importance of preparing an EIS where there is uncertainty about impacts to listed species); National Wildlife Federation v. Babbitt, 128 F. Supp. 2d 1274, 1302 (E.D. Cal. 1999) (habitat, which is similar to RTV habitat, would be maintained throughout the Deer Creek 5<sup>th</sup> field watershed").

2000) (requiring an EIS even though mitigation plan satisfied the requirements of the ESA); Portland Audubon Society v. Lujan, 795 F. Supp. 1489, 1509 (D. Or. 1992) (rejecting agency's request for the court to “accept that its consultation with the United States Fish and Wildlife Service under the Endangered Species Act constitutes a substitute for compliance with NEPA.”). Agencies could simply dispose of NEPA’s hard look requirement without any actual analysis of the environmental impacts of a proposed action.

Next, compounding its error above, the BLM generally substitutes its obligations under the Survey and Manage guidelines for its obligation to take a hard look at environmental impacts under NEPA, stating:

Prior to implementation, all active and associated inactive RTV nests discovered during surveys would be buffered according to the 2000 RTV management recommendations, version 2.0 (USDA, USDI 2000). These buffers (Habitat Areas) delineated under the management guidelines, are intended to provide for protection of the physical integrity of the nests and retain adequate habitat for the expansion of active nests at that site (USDA, USDI 2000). These Habitat Areas would remove available acres from potential commercial harvest treatments, and essentially eliminate the direct effects to RTVs from the proposed action. ER-181 (Deer North EA).

The EA explains on page 123, that prior to implementation, all active and associated inactive RTV nests discovered during surveys would be buffered and essentially eliminate the direct effects to RTVs from the proposed action. ER-18 (Decision Documentation).

First, the statement that direct effects would be “essentially eliminated” fails to acknowledge that inactive nests are recolonized more than 2/3 of the time. See

ER-267 (Management Recommendations) (“When moving to a new nest tree, adult voles re-occupied previously constructed nest structures at least 68 percent of the time.”); *id.* (“Inactive nests in suitable habitat may be reused at any time by the last resident individual, or re-colonized by a new individual (Briswell, unpublished data).”). Red tree vole nest recolonization is disclosed in the document prepared pursuant to the Survey and Manage Guidelines entitled “Management Recommendations for the Oregon Red Tree Vole,” *see* ER-258-284 (Management Recommendations), not in the Deer North Project EA, Decision Documentation, or FONSI. Under NEPA, an agency’s hard look must be taken within the NEPA document, not buried in the administrative record. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) (“We do not find adequate support for the Forest Service's decision in its argument that the 3,000 page administrative record contains supporting data. The EA contains virtually no references to any material in support of or in opposition to its conclusions. That is where the Forest Service's defense of its position must be found.”); *League of Wilderness Defenders v. Zielinski*, 187 F. Supp. 2d 1263, 1271 (D. Or. 2002) (“A federal agency's defense of its positions must be found in its EA”); *Grazing Fields Farm v. Goldschmidt*, 626 F.2d 1068, 1072 (1st Cir. 1980) (“We find no indication in the statute that Congress contemplated that

studies or memoranda contained in the administrative record, but not incorporated in any way into an EIS, can bring into compliance with NEPA an EIS that by itself is inadequate”).

Furthermore, the Management Recommendations were neither incorporated into the Deer North Project EA, nor did the EA tier to the documents. See ER-66-67) (Deer North EA) (tiered documents does not list Management Recommendations). Even if the agency could demonstrate that it tiered to the Management Recommendations, doing so would be unlawful because “tiering to a document that has not itself been subject to NEPA review is not permitted, for it circumvents the purpose of NEPA.” Kern v. BLM, 284 F.3d 1062, 1073 (9<sup>th</sup> Cir. 2002); Muckleshoot Indian Tribe v. U.S. Forest Service, 177 F.3d 800, 811 (9<sup>th</sup> Cir. 1999) (holding that it is impermissible under the NEPA regulations to tier an EIS to a non-NEPA “report” to cure the deficiencies in the cumulative impact analysis of the EIS).

Second, the agency’s argument that effects to red tree voles would be “essentially eliminated” fails to acknowledge that red tree vole survey protocol requires only “a minimum of 68 % of each acre in the survey area should be covered.” ER-329 (Survey Protocol). In other words, the surveys cover only 2/3 of the area, necessarily omitting 1/3 of the area that may contain red tree voles. As

with the above shortcoming, this important factor was not disclosed to the public within the EA, Decision Documentation, or the FONSI.

Red tree vole nest recolonization and the incompleteness of red tree vole surveys reveal significant shortcomings in the agency's analysis of environmental impacts. As such, the BLM failed to consider important aspects of the problem. See Ctr for Biological Diversity, 538 F.3d at 1193 (agency action is arbitrary and capricious if the agency "failed to consider an important aspect of the problem."). The BLM improperly minimized negative side effects of the Deer North Project and timber sale. This Court has clearly stated that agency action that contains a void, such as here, cannot be given deference. ONDA v. BLM, 625 F.3d 1092, 1121 (9<sup>th</sup> Cir. 2010) ("Here, the BLM used no method to analyze or plan for such values. We cannot defer to a void.") (emphasis in original). Therefore, the BLM failed to take the requisite hard look at the environmental impacts to red tree voles from the Deer North Project and timber sale.

### **III CONCLUSION**

For the foregoing reasons, the Deer Creek Association respectfully requests that this Court reverse the District Court's denial of Summary Judgment, vacate the EA, Decision Documentation, and the FONSI for the Deer North timber sale, and remand the matter to the BLM.

Respectfully submitted this 6<sup>th</sup> day of August, 2014.

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## STATEMENT OF RELATED CASES

No other cases currently before the Ninth Circuit Court of Appeals are related to this case.

**Ninth Circuit Case No. 14-35250**  
**Certificate of Compliance Pursuant to Federal Rule of Appellate**  
**Procedure 32(a)(7)(B) and (C) and Ninth Circuit Rule 32-1**

I, Sean Malone, certify that:

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 11,158 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word version 2007, font size 14, and Times New Roman type style.

/s/ Sean T. Malone  
Attorney for Appellant  
Date: August 6, 2014

**Ninth Circuit Case No. 14-35250**

**Certificate of Service**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on August 6, 2014. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Sean T. Malone

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