No. 14-35250

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEER CREEK VALLEY NATURAL RESOURCE CONSERVATION ASSOCIATION,
Plaintiff-Appellant,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT,
Defendant-Appellee,

and

MURPHY COMPANY,
Intervenor-Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

RESPONSE BRIEF FOR THE FEDERAL DEFENDANT-APPELLEE

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GLOSSARY

Association	Deer Creek Valley Natural Resource Conservation Association
BLM	United States Bureau of Land Management
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FLPMA	Federal Land Policy and Management Act
FONSI	Finding of No Significant Impact
NEPA	National Environmental Policy Act
O&C Act	Oregon & California Railroad and Coos Bay Wagon Road Grant Lands Act
RMP	Resource Management Plan

STATEMENT OF JURISDICTION

1. *District Court Jurisdiction:* Plaintiff-Appellant, Deer Creek Valley Natural Resource Conservation Association ("Association"), brought the instant action under the National Environmental Policy Act ("NEPA"), the Federal Land Policy Management Act ("FLPMA"), and the Administrative Procedure Act ("APA"). The district court had jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. §§ 701-706.

2. *Appellate Court Jurisdiction:* This Court has jurisdiction under 28 U.S.C. § 1291. The district court granted judgment in favor of defendants on February 5, 2014. Plaintiff filed a timely notice of appeal on March 28, 2014. Fed. R. App. P. 4(1)(B).

STATEMENT OF THE ISSUES

The United States Bureau of Land Management ("BLM") developed the Deer North Vegetation Management Project ("Project") to improve forest stand health and vigor, reduce the risk of wildfires, and provide forest products for local and regional economies. The Project, which is located within the Deer Creek watershed in the BLM's Medford District in southwestern Oregon, prescribes forest health treatments, including thinning and commercial harvest on BLM-administered land allocated for timber production. This case concerns the Deer North Timber Sale, a BLM

decision implementing in part forest management activities that the agency analyzed under the Environmental Assessment for the Project, pursuant to NEPA. This appeal presents the following issues:

1. Whether the BLM properly conducted pre-disturbance surveys and managed all known sites for red tree voles in accordance with the Northwest Forest Plan and the Medford District Resource Management Plan, pursuant to FLPMA.

2. Whether the BLM took a hard look at the environmental impacts of the Deer North Sale on red tree voles, pursuant to NEPA requirements.

3. Whether the BLM properly considered a reasonable range of alternatives, including those offered by the public, prior to authorizing the Deer North Sale, pursuant to NEPA requirements.

STATEMENT OF THE CASE

The BLM developed the Deer North Vegetation Management Project under land and resource management plans to improve forest conditions on BLM-administered lands, which are specifically allocated for sustained yield timber production within the Deer Creek watershed. The forest in the area has become unhealthy and predisposed to high intensity wildfire because of overly-dense stands, insect infestation, and disease. The BLM

proposed to address these problems in the Project through silvicultural treatments including commercial thinning harvest that would improve the health and vigor of the forest. The Project is also intended to provide forest products, maintain all existing northern spotted owl habitat, and enhance socioeconomic conditions in the local and regional area.

After years of data gathering and analysis, the BLM produced a 169-page Environmental Assessment ("EA") for the Project and made a finding that the selected alternative would have no significant impact on the quality of the human environment. The BLM issued a Decision Documentation for the Deer North Timber Sale ("Sale"), implementing in part the selected alternative and authorizing 98 acres of commercial harvest on lands set aside primarily for commercial timber production. BLM later awarded the Sale to Murphy Company, intervenor in the instant case.

The Association brought the instant lawsuit under NEPA and FLPMA challenging the BLM's decision to authorize the Sale on myriad grounds. The district court granted summary judgment in favor of defendants on all grounds. The Association appealed and later moved in the district court for an injunction pending appeal to halt the timber harvesting activities of the Sale, which had begun. The district court denied such relief, and all timber under the contract has now been logged, with the only BLM-supervised,

timber sale work remaining being hand piling and slash burning, and minor road maintenance.

STATEMENT OF FACTS

I. Statutory and Regulatory Background.

A. FLPMA and Oregon & California Railroad and Coos Bay Wagon Road Grant Lands Act.

FLPMA governs management of lands owned by the United States and administered by the Secretary of the Interior though the BLM. 43 U.S.C. §§ 1701-1787. FLPMA designates "timber production" as one of the "principal or major uses" of public lands under the BLM's management. *Id.* § 1702(l). FLPMA directs the BLM's management of these lands "be on the basis of multiple use and sustained yield unless otherwise specified by law." *Id.* § 1701(a)(7).

Pursuant to FLPMA, the BLM field offices create resource management plans ("RMP") for the lands under their control. 43 U.S.C. § 1712(a); 43 C.F.R. §§ 1601.0-1 to 1610.8. Once the BLM approves an RMP for an area, all of the BLM's future actions in the area must "conform to the approved plan." 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a). However, FLPMA "leaves BLM a great deal of discretion in deciding how to achieve" objectives in an RMP. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 66 (2004).

The Deer North Project lands are also managed pursuant to the Oregon & California Railroad and Coos Bay Wagon Road Grant Lands Act ("O&C Act"), 43 U.S.C. § 1181a-j. On lands governed by the O&C Act, Congress directed that these timberlands be managed

> . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principal [sic] of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facil[i]ties.

43 U.S.C § 1181a. Consistent with these principles, the BLM's management of O&C Act lands focuses upon sustained yield timber production. *See Headwaters, Inc. v. BLM*, 914 F.2d 1174, 1183-84 (9th Cir. 1990). FLPMA does not alter the O&C's management direction for O&C Act lands, but in the event that FLPMA conflicts with any provisions of the O&C Act "insofar as they relate to the management of timber resources," the O&C Act prevails. *See* 43 U.S.C. § 1732(a); Pub. L. No. 94-579, 701(b), 90 Stat. 2743, 2786 (1976), *reprinted in* 43 U.S.C.A § 1701 historical note on "Savings Provisions."

B. NEPA.

NEPA, 42 U.S.C. § 4321 *et seq.*, serves the dual purpose of informing agency decision makers of the environmental effects of proposed major

federal actions and ensuring that relevant information is made available to the public. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA is a purely procedural statute that does not mandate any substantive result. *Id.* at 350. Rather, NEPA "simply provides the necessary process to ensure that federal agencies take a hard look at the environmental consequences of their actions," *Neighbors of Cuddy Mtn. v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002) (citations omitted).

Before undertaking any "major Federal actions significantly affecting" the quality of the human environment, an agency must first prepare an Environmental Impact Statement ("EIS"). 42 U.S.C. § 4332(2)(C). To determine whether an EIS is necessary, an agency may first prepare an Environmental Assessment ("EA"). 40 C.F.R. § 1508.9. The purpose of the EA "'is simply to create a workable public document that briefly provides evidence and analysis for an agency's finding regarding an environmental impact.'" *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1053 (9th Cir. 2012) (quoting *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1129 (9th Cir. 2012)). If the agency concludes that the proposed action will not significantly affect the quality of the human environment, it may issue a Finding of No Significant Impact ("FONSI"), and no EIS is required. 40 C.F.R. §§ 1501.4(e), 1508.13.

II. Factual Background.

A. The Deer North Vegetation Management Project and Timber Sale.

The Deer North Timber Sale is a timber sale decision by the BLM, involving the commercial forest thinning of 98 acres, implementing in part the Deer North Vegetation Management Project located in the BLM's Medford District in southwestern Oregon. The BLM analyzed the Deer North Timber Sale, the agency action challenged by the Association in this case, as part of its environmental analysis for the Deer North Vegetation Management Project assessing forest management activities as a whole in the Project area.

The planning area for the Deer North Project consists of 8,848 acres, of which 3,414 is BLM-managed land. ER 62 (EA at 4). It is located within the Deer Creek (fifth field) watershed covering 73,000 acres. *Id.* The Project is consistent with the BLM's Medford District RMP, which incorporates the 1994 Northwest Forest Plan. SER 226, 230. The latter was developed to comprehensively manage 25 million acres of U.S. Forest Service and BLM lands in the range of the northern spotted owl. *Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv.*, 378 F.3d 1059, 1063-64 (9th Cir. 2004). The only part of the Deer North Project that the BLM has authorized through final agency action is the 98-acre Deer North Sale.

In the Deer North Sale, all the harvest units are located entirely on "matrix" land, the classification of forest land allocated for the long-term production of timber. ER 68 (EA at 10). Only about 20% of BLM land in the Medford District is matrix land. ER 11. Most BLM land in the Medford District falls under more restrictive categories, such as "late-successional reserves," where "logging and other ground-disturbing activities are generally prohibited." *Or. Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1126 (9th Cir. 2007); *see* ER 11. In addition, the forested land included in the Deer North Sale is governed by the O&C Act and thereby managed for permanent forest production in accord with sustained yield principles. SER 32; *see* SER 240-241 (Medford District RMP).

B. Administrative Process.

Before approving the Deer North Sale, the BLM studied the impacts of the Deer North Vegetation Management Project for more than two years and provided multiple opportunities for public participation. ER 1-2 (Decision Doc. at 1-2). The BLM extended invitations to participate in the environmental review process to local communities, state and federal agencies, organizations and individuals, including residents near BLM parcels within the Project area. *Id.* The BLM held a public meeting in February 2009 and conducted a field trip to the Project area in April 2011,

which was attended by agency employees, Deer Creek residents, and interested parties, including members of the Association. *Id.*; *see* SER 252 (Camp Declaration at 8). BLM also later participated in a presentation with Association members, upon their invitation, to discuss their preferred natural-selection-based alternative. *See id.*

As part of the planning process, the BLM consulted with the U.S. Fish and Wildlife Service as required by the Endangered Species Act, 16 U.S.C. § 1531 *et seq.*, to ensure that the Deer North Project would not jeopardize the continued existence of the threatened northern spotted owl or adversely affect any of the owl's critical habitat. ER 2 (Decision Doc. at 2). The BLM determined that the Project was not likely to adversely affect the owl, and the Fish and Wildlife Service issued a letter concurring with that determination to the BLM. *Id.* The BLM also coordinated with other agencies on the Project's potential impacts on other listed species or habitat. *Id.*

Using an interdisciplinary team of resource experts, the BLM prepared the Deer North Vegetation Management Project EA, which the agency made available for public comment on April 1, 2011 until May 11, 2011. ER 1-2 (Decision Doc. at 1-2). The BLM received comments from the Association, among others, and provided agency responses. *See id.;* ER 7-

28 (BLM's responses to public comments). In the EA, the BLM assessed the current condition of the Project area and recognized a "need to apply silvicultural treatments to forest stands to enhance the health, stability, vigor and economic value of forest stands" because excessive tree densities are at, or approaching, "a level of stand density where competition related mortality becomes significant." ER 64-65 (EA at 6-7). The forests in the area have shifted from historical conditions of stand diversity to conditions with a marked loss of "ecologically significant species of ponderosa pine and oak species" and an "unprecedented" increase of Douglas-fir encroachment. ER 102-104 (EA at 44-46). Absent treatment, stand diversity and individual tree vigor and growth would continue to decline. ER 109-113 (EA at 51-55).

Accordingly, to address these problems and to fulfill its statutory obligation to provide for sustained yield timber production, the BLM proposed to implement silvicultural treatments in several areas of the forest. The Project would address three primary needs, as described in the BLM's Purpose and Need statement: (1) provide commercial and non-commercial forest products to support the local and regional economy; (2) improve the health and vigor of a variety of forest stands in the area, and (3) enhance socioeconomic conditions. ER 63-66 (EA at 5-8).

In the Deer North EA, the BLM considered a No Action alternative (Alternative 1), where present economic and environmental conditions and trends would continue and serve as a baseline for evaluating the environmental effects of the action alternatives. ER 70-71 (EA at 12-13). The BLM also fully considered two action alternatives consistent with the Project's purpose and need: Alternative 2 proposed 557 acres of forest density management treatments and 242 acres of regeneration harvest, representing the highest level of timber harvest to meet management direction under the Medford District RMP. ER 68, 71-72 (EA at 10, 13-14). Alternative 3, the proposed preferred alternative, consisted of timber harvest treatments on 746 acres, retaining as much suitable northern spotted owl habitat as possible while still providing forest products to meet purpose and need. ER 68, 72-73 (EA at 10, 14-15). The BLM also considered, but did not analyze in detail, a Citizen's Alternative offered by the public. ER 213 (EA at 155); *see* ER 17 (Comment Response at 11) (concluding that this alternative "was adequately addressed" in the analysis for the other alternatives).

Based on site-specific analysis, an extensive record for the Project, public comments, and management directions in conformance with other environmental documents, the Grants Pass Resource Area, Field Manager

of BLM's Medford District decided to authorize the Deer North Timber Sale, involving the commercial harvest of 98 acres, implementing in part the selected Alternative 3 with modifications. ER 3 (Decision Doc. at 3). Significantly, the BLM reduced the Sale area from the 205 acres projected under the EA for the four harvest units of the Sale to 98 acres of harvest, excluding forest stands considered too small for commercial harvest and those providing buffers to protect habitat areas for red tree voles and to advance recovery objectives for the northern spotted owl. *Id*. The Field Manager determined that the Sale achieved the best balance between fulfilling resource use objectives and promoting a health forest ecosystem that maintains forest habitat for northern spotted owls and other dependent wildlife species. *Id*. Having determined that Alternative 3 analyzed in the EA would not have a significant impact on the quality of the human environment, she issued a FONSI for the Project and the Decision Documentation authorizing the Deer North Timber Sale on June 30, 2011. ER 1-5, 29-33 (Decision Doc. at 1-5, FONSI at 1-5).

Pursuant to 43 C.F.R. § 5003, the Association administratively protested the Field Manager's decision authorizing the Sale. SER 49. The Field Manager denied the protest in February 2012. SER 16-48. The Association then administratively appealed that denial to the Interior Board

of Land Appeals ("IBLA") and requested a stay of the Sale decision.[1] SER 1. In the interim, the Sale was awarded to Murphy Company in July 2011, and harvest operations commenced in the fall of 2012 on one of four sale units. ER 37. After full consideration of the administrative appeal, the IBLA denied the Association's stay request and affirmed the BLM's decision. SER 268-281 (IBLA Decision).

C. District Court Proceedings.

The Association filed its complaint against the BLM in September 2012, challenging the Deer North Sale. ER 228-240. Murphy Company intervened as defendant. The magistrate judge issued a Report and Recommendation on December 9, 2013, to grant summary judgment in favor of the defendants on all claims. ER 34-56. The district court, adopting the findings and recommendation of the magistrate judge,

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[1] In addition to the Association's protest, Richard Nawa of the Siskiyou Project filed a separate administrative protest, arguing, among other things, that the BLM violated FLPMA by failing to survey and manage all known red tree vole sites in the Sale area in conformance with the Medford District RMP and the Northwest Forest Plan. *See* ER 369-373. The Association's protest did not include these specific arguments regarding the tree voles. *See* SER 49, 56-57. Later, in its administrative appeal to the IBLA, the Association raised its arguments concerning the voles. *See* SER 14-15. The IBLA decision addresses claims brought by both the Association and the Klamath-Siskiyou Wildlands Center ("KS Wild"), which had merged with the Siskiyou Project. *See* SER 271 & n.15, 272, 277-278. The latter did not file an action in the district court in this case.

granted judgment for defendants on February 5, 2014. ER 57-58. The Association filed a notice of appeal on March 28, 2014. ER 255-257.

More than four months after judgment was entered, and after the purchaser resumed timber harvesting following seasonal restrictions under the contract, the Association filed in the district court a motion for an injunction pending appeal on June 17, 2014. The district court denied that motion on July 25, 2014. SER 293. The Association did not request interim injunctive relief from this Court and the Sale's timber harvesting activities have continued.[2]

SUMMARY OF ARGUMENT

The district court correctly granted summary judgment in favor of the defendants because the BLM's approval of the Deer North Timber Sale comports fully with FLPMA and NEPA.

First, the BLM properly managed all known sites of red tree voles in accordance with the requirements of the Northwest Forest Plan and the

[2] The BLM had informed the district court that timber harvesting activities continued on the remaining three units in the summer of 2014, with harvesting operations on about 34 acres of one unit remaining as of July 7, 2014. *See* SER 291-292 (Randall Declaration at 3-4). To date, all the trees from the Sale have been cut. All that remains is the slash work (hand piling, lopping) and final road maintenance related to the timber harvest on the remaining timber unit. The Deer North Timber Sale contracts will be terminated once those activities are completed. The BLM will advise the Court and the parties of any pertinent developments.

Medford District RMP. In essence, the Association's argument turns on its assumption that once a red tree vole nest site is identified, then it automatically and permanently remains a known site requiring protective buffering regardless of current status. The Association's sweeping assertion, however, finds no support in the factual record or the BLM's reasonable interpretation of the Survey and Manage standards and guidelines or the Management Recommendations and Survey Protocols for the vole. Here, BLM properly considered the treatment of historic vole nest locations, conducted the requisite pre-disturbance surveys, and managed all vole sites requiring buffering, consistent with FLPMA requirements.

Second, the Deer North EA satisfies the procedural requirements of NEPA. The record shows that the BLM took the requisite "hard look" at the potential impacts of timber harvesting activities on the red tree vole. The Association failed to raise in the district court the particular challenges to the EA's analysis of impacts on the vole that it now presses on appeal and hence those arguments are waived. In essence, the Association critiques the methods and judgments made by the BLM, but such agency judgments are accorded deference by the courts. Therefore, even if this Court should consider the Association's arguments, they are without merit.

Finally, the BLM considered a reasonable range of alternatives, including a no action and two timber harvest alternatives. The BLM's treatment of the Association's proposed natural-selection-based alternative was proper based on the agency's expert judgment that this alternative was substantially similar to the no action alternative fully assessed in the Deer North EA, and in any event would not meet the purpose and needs of the Deer North Project.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment *de novo*. *Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012).

Agency compliance with NEPA and FLPMA is reviewed under the Administrative Procedure Act. *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1090 (9th Cir. 2013). Under that statute, an agency decision may be set aside only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). This standard is narrow and a court may not substitute its judgment for that of the agency. *Earth Island Institute v. U.S. Forest Serv.*, 697 F.3d 1010, 1013 (9th Cir. 2012). Rather, a court will set aside a decision as arbitrary and capricious "*only if* the agency relied on factors Congress

did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation 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." *Id.* (emphasis in original) (internal quotations omitted); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*). Review under this standard is therefore highly deferential, especially where the agency is making scientific judgments within its area of expertise. *McNair*, 537 F.3d at 990-94. Moreover "[e]ven when an agency explains its decision with less than ideal clarity, a reviewing court will not upset the decision on that account if the agency's path may reasonably be discerned." *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004) (internal quotation marks and citation omitted).

ARGUMENT

I. The BLM Authorized the Deer North Timber Sale in Conformance with FLPMA.

The Association contends that the BLM failed to survey for and manage all known sites for red tree voles in accordance with the Northwest Forest Plan and the Medford District RMP, in violation of FLPMA. As the district court concluded, however, the BLM complied with Survey and Manage requirements, including implementation of protective habitat

buffers in accordance with the Management Recommendations and Survey Protocols for the red tree vole prior to its authorization of the Deer North Timber Sale.

A. Survey and Manage Direction for the Red Tree Vole.

In 1994, the Northwest Forest Plan adopted a system of land allocations and a set of standards and guidelines for the BLM's resource management of habitat for late-successional and old-growth forest related species within the range of the northern spotted owl. SER 141, 146. The Survey and Manage requirements were adopted as mitigation measures that applied to about 400 species that, at the time, the BLM and the U.S. Forest Service did not know if they would be adequately protected by other elements of the Northwest Forest Plan, either because the species were rare or because the agencies lacked sufficient information about them. SER 146. The Survey and Manage requirements were included as part of the Northwest Forest Plan to help mitigate potential effects from agency actions and provide for the persistence of those species. *Id.*; SER 146-152.

The Northwest Forest Plan standards and guidelines were later amended by the *2001 Record of Decision and Standards and Guidelines for Amendments to the Survey and Manage, Protection Buffer, and other Mitigation Measures*. SER 141-164. The amendments reorganized the

Survey and Manage species—which are not endangered or threatened under the Endangered Species Act—into one of six categories based upon the relative rarity of the species, the practicality to conduct pre-disturbance surveys, and the level of information known about the species. SER 151, 182-190.

Those standards and guidelines identify the red tree vole as a "Category C" species, characterized as uncommon, but not rare, and a species where "not all known sites or population areas are likely to be necessary for reasonable assurance of persistence." SER 186; *see* ER 355. For Category C species, pre-disturbance surveys are practical, and the Survey and Manage standards and guidelines specify that BLM "identify and manage high-priority sites to provide for reasonable assurance of species persistence" and "until high-priority sites can be determined, manage all known sites." SER 186. "Site (as used in manage known sites)" refers to "[t]he occupied site plus any buffer needed to maintain the habitat parameters described in the Management Recommendation." SER 214.

The guidelines and standards provided direction for the preparation of Survey Protocols and Management Recommendations that would require interagency review and approval and would provide guidance to the BLM and Forest Service in conserving Survey and Manage species. SER

152. Under the pertinent Survey and Manage guidelines and standards, the agency would conduct site-specific, pre-disturbance surveys in accordance with Survey Protocols for the species. SER 187 ("Surveys will be conducted at the project level prior to habitat-disturbing activities and in accordance with Survey Protocols"); SER 197-202 (describing pre-disturbance surveys); *see*, *e.g.*, ER 288-300 (Survey Protocol for the Red Tree Vole, Version 2.1, applicable in the instant case). The intent of pre-disturbance surveys is to gather relevant information during the NEPA process so that it is available to the agency before actions are taken. SER 200.

Sites found by these pre-disturbance surveys are managed in accordance with the Management Recommendations that specify the required protections for the species found. *See* SER 195-197 ("Management Recommendations are documents that address how to manage known sites * * * that provide guidance to Agency efforts in conserving Survey and Manage species"). For example, "[t]he Management Recommendations describe the habitat parameters (environmental conditions) that will provide for a reasonable likelihood of persistence of the taxon at that site. These parameters serve as the basis for site-specific decisions about the size of buffers to be applied and what management activities are appropriate

within the site. The size of the area to be managed depends on the habitat and requirements for the species." SER 196.

The Management Recommendations for the red tree vole ("Management Recommendations" or "Recommendations") provide for buffers or "habitat areas" of at least 10 acres in size around active or assumed active red tree vole nests discovered during the surveys, in accordance with the Northwest Forest Plan direction to "manage habitat for the species on sites where they are located." ER 261, 272-274. The buffers "provide for protection of the physical integrity of the nest(s) and retain adequate habitat for expansion in the number of active nests at that site." ER 272.

The Management Recommendations provide that habitat areas "encompass active and undetermined red tree vole sites," but are "not delineated for inactive sites." ER 273. The Recommendations, however, do not ignore the possibility that inactive sites could be recolonized in the future. They provide for management direction of circumstances where habitat should be treated to facilitate the potential for re-colonization by red tree voles in the future. For example, the Recommendations provide that "confirmed inactive red tree vole nests" located within 100 meters of

confirmed or assumed active vole nests also be buffered within the habitat area. ER 273-275.

B. The Deer North Sale Comports with the BLM's Survey and Manage Direction for the Red Tree Vole.

The Association contends (Br. 17-22) that the BLM failed to comply with Survey and Manage requirements for the red tree vole because the agency did not "buffer known sites previously surveyed" more than a decade ago. In essence, the Association argues that once a vole nest site is identified, then it remains a "known site" that must be managed by the BLM in perpetuity, regardless of current status or more recent information gained by the agency demonstrating that the nest is not active or occupied by voles, as in the instant case. The Association's sweeping assertion is not supported by the factual record or the BLM's reasonable interpretation of the Survey and Manage standards and guidelines or Vole Management Recommendations and Survey Protocols.

1. The BLM resurveyed previously identified vole nest sites and properly managed all known sites.

The Association contends that the BLM arbitrarily declined to provide buffers for inactive vole nest sites in the Deer North Sale area. Essentially, its argument turns on its assumption that every historical vole nest location

must automatically remain a "known" site requiring protective buffering in conformance with Survey and Manage guidelines.

The previously identified nest sites on which the Association bases its argument arose from survey work performed by the BLM more than a decade ago. ER 18 (Comment Response at 12). For this Sale, BLM explained why resurveyed historic nest locations no longer require site management. *Id.*; *see also* ER 370. The BLM resurveyed historic nest locations in units that had been previously surveyed for red tree voles in 1997, 1998 and some in 2002. The 1997 and 1998 surveys had used the "draft protocol" and "none of the trees were climbed" which would have allowed the BLM "to get an accurate determination" of the vole nest status. ER 18. Some units were surveyed and climbed in 2002. *Id.* "[B]ecause the original surveys had expired and were no longer valid," the historic locations were "completely resurveyed in order to update the status information on all old and new nests." ER 372-373. Based on the new information, the BLM found that "[o]ld nests were either blown out or determined to be inactive through current climbing surveys." ER 18.

The old survey information was also "used to help determine [vole] habitat and areas to survey in 2010." *Id.* Thus, not only did the BLM resurvey the older nests, the agency also conducted additional surveys in

the proposed action area and discovered new active vole nests. *See, e.g.* SER 115-124 (examples of habitat evaluation forms, some with areas meeting vole habitat parameters and some not); SER 58-114 (examples of red tree vole ground survey data sheets and climbing records, some with active vole nests in area dropped from the Sale and others in areas where no active nests detected).

Because the BLM determined in 2010 that the old nests were blown out or inactive (and not associated with any active sites), the BLM reasonably concluded that those old nest locations were not sites that required buffering or protection. ER 18, 370-373. This is consistent with the Management Recommendations for the vole that expressly indicate that buffers or habitat areas "are not delineated for inactive sites." ER 273. Moreover, as explained above, recognizing that voles move around, the BLM completed new surveys and discovered new nests, and consistent with Survey and Manage requirements, buffered "all active and associated inactive vole nests" detected by these surveys in accordance to Management Recommendations, prior to the implementation of any timber harvesting activities. ER 181 (EA at 123). The buffers or habitat areas delineated under these Management Recommendations "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." *Id.; see also* ER 273 (Management Recommendations further providing that "[c]onfirmed inactive red tree vole nests" that are sufficiently proximate to confirmed or assumed active vole nests (within 100 meters) be included in the habitat area).

Here, the BLM completed updated pre-disturbance surveys for the red tree vole on the four units of this Sale and all active and associated inactive tree vole nests discovered during new surveys were buffered according to the Management Recommendations, consistent with Survey and Manage requirements. ER 370; *see also* ER 18, 181.

2. The BLM reasonably interpreted and applied Survey and Manage requirements for the vole.

Despite the BLM's reasonable treatment of historic vole nest sites in the Sale area, the Association contends (Br. 19-20) that a "known site" requiring management must necessarily include all historic vole locations ever identified by the BLM. The Association's argument, based on a misreading of the Survey and Manage definitions, is unpersuasive.

Turning to the definition of "known site," the Association focuses on its reference to "historic locations" and thereby concludes that historic vole sites previously identified by the agency must fall within the definition of "known sites" requiring buffering and protection. *See* SER 207 ("Known

sites. -- Historic and current location of a species reported by a credible source, available to field offices, and that does not require species verification or survey by the Agency to locate the species"). This reference to "historic location," however, does not support the Association's sweeping interpretation when read in context with the other statements in the definition and the Survey and Manage standards and guidelines as a whole. The Association notes that the "known sites" definition also 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," *id.*, and argues that 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* Br. 20 (citing statements in the Management Recommendation about voles recolonizing inactive nests in suitable habitat). In other words, the Association asserts that since "an inactive nest is more likely than not to be recolonized by another red tree vole," it is vole habitat that must be protected under the management direction to "manage all known sites." *See* Br. 21.

The Association's claims fail because under the Survey and Manage standards and guidelines, as well as the Management Recommendations, inactive or historic nests no longer *occupied* by red tree voles do not require

management, *i.e.* protection or buffers, unless they are associated (within 100 meters) of active or assumed active nests. Significantly, the definition of "Site" as "used in manage known sites" indicates that the area to be managed or buffered must be *occupied* by the species in question, in this case the red tree vole: "Site (as used in manage known sites)" is defined as "[t]he *occupied site* plus any buffer needed to maintain the habitat parameters described in the Management Recommendation." SER 214 (emphasis added). Plainly, the Survey and Manage standards and guidelines contemplate management of a site as one that is occupied by the species.

The definition of "Manage" similarly emphasizes management of an occupied site: "Manage (as in manage known sites) – To maintain the habitat elements needed to provide for persistence of the species at the site. Manage may range from maintaining one or more habitat components such as down logs or canopy cover, up to the complete exclusion from disturbance for many acres, and may permit loss of some individuals, area, or elements not affecting *continued site occupancy*." SER 208 (emphasis added). It is clear from this definition, as well as that for "Site," that there was never an intent under the Survey and Manage standards to manage areas shown not to be occupied by the species.

In a similar vein, the Record of Decision for the 2001 Survey and Manage standards and guidelines also refers to "management direction changes" when "sites become unoccupied" or no longer considered necessary for the persistence of the species. SER 167-168. That is, when surveys confirm that a known site is no longer active or occupied by the species, there is an expected change in management of the site. *See* SER 168 (explaining that "managed species sites can be considered transitional, and management direction changes when the sites become unoccupied, are no longer considered necessary for the persistence of the species, or when the species is removed from Survey and Manage").

The BLM's reasonable interpretation is further bolstered by the Management Recommendations for the red tree vole, which distinguish how "active" and "inactive" sites are managed and provide protection within the 10-acre buffered habitat areas of confirmed "inactive" vole nests when they are within a certain range of an active nest, but do not provide such protection when an "inactive site" consists solely of inactive nests. ER 273-275; *see* ER 282-283 (sample diagrams of habitat area delineation).

Contrary to the Association's contentions, the BLM was not required to treat all old inactive nests as "known sites" that require buffering. As the district court found, the BLM's interpretation of its own management

direction is reasonable and this Court has accorded deference to an agency's interpretation and application of its own management direction under land management plans such as in this case. ER 44; *see Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1055-56 (9th Cir. 2012) ("substantial deference" provided to the agency's interpretation and application of its own management direction); *see also Forest Guardians v. U.S. Forest Serv.*, 329 F.3d 1089, 1097 (9th Cir. 2003) (same).

The Association's assertions (Br. 21) of post hoc rationalization are unpersuasive given that the BLM explained during administrative proceedings that inactive nest sites, not associated with active vole nests (within 100 meters of active nests), need not be protected. *See, e.g.*, ER 18 (BLM's response to comments noting that "[o]ld nests" located in 1997 were determined "to be inactive through current climbing surveys" and therefore "the nests located in 1997 do not need to be protected"); ER 369-370 (BLM's response to protest explaining same and that "only current and associated inactive [vole] nests need to be buffered"). The BLM's interpretation and application of its management direction for Survey and Manage species has been consistent since its inception and as applied in this case, and the Association has not provided evidence to the contrary.

In short, the BLM properly managed all known sites for the tree vole consistent with Survey and Manage requirements and FLPMA.

II. The BLM Took a "Hard Look" at Environmental Impacts on Red Tree Voles under NEPA.

"The purpose of an EA under NEPA is not to amass and disclose all possible details regarding a proposal, but to create a 'concise public document' that serves to '[b]riefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.'" *Tri-Valley CAREs*, 671 F.3d at 1128 (quoting 40 C.F.R. § 1508.9); *cf. Northwest Envtl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1139 (9th Cir. 2006) ("NEPA requires not that an agency engage in the most exhaustive environmental analysis theoretically possible, but that it take a 'hard look' at relevant factors").

In reviewing a challenge to the adequacy of an EA, this Court applies a "rule of reason" to determine whether the agency took a "hard look" at the possible environmental impacts of its proposed action. *Dep't of Trans. v. Public Citizen*, 541 U.S. 752, 767-68 (2004). An agency need not "compile an exhaustive examination of each and every tangential event that potentially could impact the local environment. Such a task is impossible and never-ending." *Tri-Valley CAREs*, 671 F.3d at 1129; *Native*

Ecosystems Council, 697 F.3d at 1053. Rather, the agency must undertake "a reasonably thorough discussion of the significant aspect of the probable environmental consequences" of its action, such that the EA "foster[s] both informed decision-making and informed public participation." *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1194 (9th Cir. 2008).

A. The BLM Adequately Considered Impacts on Red Tree Voles in the Deer North EA.

In this case, the BLM took the requisite "hard look" at the potential environmental impacts on red tree voles. The Deer North EA disclosed that "[a]pproximately 1,155 acres proposed for treatment within the Deer North Planning Area qualify as suitable [red tree vole] habitat." ER 180. The EA also noted that historic and recent surveys indicated that the voles are present within the Area and "ground and climbing surveys were completed in 2010" for approximately 210 acres of the Deer North proposed treatment units. *Id.* The BLM would conduct protocol surveys, including climbing, for all treatment units prior to implementation and the signing of the decision. *Id.*

Under the No Action alternative, the BLM informed the public that the "greatest risk" would be "the potential wildfire related loss of important habitat components such as high canopy cover, large live remnant conifers,

and large limbed conifers." ER 181. The BLM explained that, under the two action alternatives, the agency would buffer all active and associated inactive nests discovered during surveys conducted in accordance with the Management Recommendations for the vole. *Id.* The BLM further indicated that these pre-disturbance surveys and habitat buffers "would remove available acres from potential commercial harvest treatments, and *essentially eliminate the direct effects to [voles] from the proposed action*." *Id.* (emphasis added).

As discussed previously, the BLM conducted surveys for red tree voles, including completely re-surveying units previously surveyed in the Deer North units, and all active and associated inactive trees were buffered. *See supra* at 22-25. Based on its analysis, the BLM determined and disclosed in the EA that although the action alternatives may potentially cause the loss of habitat in some cases, they were unlikely to affect long-term population viability of red tree voles in the watershed. ER 182 (EA at 124). In addition, because the scope of the proposed action is small compared to the combined acreage of the watershed (73,000 acres, 30,000 of which are managed by the BLM), the action alternatives, combined with other actions in the watershed, would not contribute to the need to federally list the vole under the Endangered Species Act. *Id.* (based on

anticipated treatment under the action alternatives of up to 799 acres or 2.6% of the BLM-managed lands in the watershed). Indeed, the Deer North Sale, the only sale that has actually been authorized as analyzed under the EA, would treat only 98 acres.

B. The Association's Arguments Were Waived and in any Event Are Meritless.

The Association raises several challenges to the EA's consideration of the likely effects of timber harvest on the red tree voles. *See* Br. 39-47. These arguments were not clearly raised in the district court, however, and are therefore waived on appeal. *E.g.*, *Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010); *In re Am. West Airlines*, 217 F.3d 1161, 1165 (9th Cir. 2000) (absent exceptional circumstances, arguments raised for the first time on appeal are not considered); *National Steel Corp. v. Golden Eagle Ins. Co.*, 121 F.3d 496, 500 (9th Cir. 1997) (arguments not raised at summary judgment waived).

The Association, in its summary judgment briefing in the district court, challenged the BLM's impacts analysis on the red tree vole only summarily. Indeed, the Association limits its argument to only two sentences in its opening summary judgment brief, asserting that the Deer North EA inadequately addressed impacts to the vole because the BLM failed to disclose that it does not manage all known sites for voles. *See* SER

258 (opening brief stating: "As discussed *supra*, the Deer North Project does not manage all known sites for red tree voles. The EA does not acknowledge this and therefore does not adequately address impacts to red tree voles."); *see also* SER 284 (similar argument in summary judgment response brief).[3] "It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered" and "[i]f it does not do so and loses the motion, it cannot raise such reasons on appeal." *Liberles v. County of Cook*, 709 F.2d 1122, 1126 (7th Cir.1983).

Even if the Association's challenges to the EA's analysis of tree vole impacts were not waived, they are without merit. The Association now argues (Br. 44) on one hand that the BLM erred in allegedly substituting its obligations under the Survey and Manage guidelines for its obligation to consider impacts on voles under NEPA. On the other hand, the Association

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[3] In briefing in the district court, the Association's argument turned primarily on its assertion that the BLM failed to analyze the impacts on the red tree vole in light of new information provided by another public organization on new vole nests. See ER 51-54 (district court rejecting NEPA argument that the BLM failed to prepare supplemental environmental analysis in light of allegedly significant new information regarding the red tree vole); *see also* ER 371-373 (BLM's response to this issue raised by Siskiyou Project, later merged with KS Wild). On appeal, the Association has abandoned this particular NEPA argument and raised others for the first time.

references (Br. 44-47) those guidelines, and the Management Recommendations and Survey Protocols, in support of its NEPA argument, claiming that the EA has failed to disclose statements on inactive nest recolonization made in such documents. The record does not support either of the Association's seemingly contradictory claims.

First, the Association itself acknowledges (Br. 45) in its opening brief that the BLM has considered that inactive vole nests can be recolonized as disclosed in the agency's Management Recommendations. *See* ER 266-267. Nonetheless, the Association urges (Br. 45-46) that such specific language and consideration of vole nest colonization found in the Management Recommendations must be expressly "disclosed" in the Deer North EA, Decision Document or FONSI. No court has ever held that NEPA imposes a burden to include in an EA every statement or finding made in planning documents relied upon by the agency. *Cf. Tri–Valley CAREs*, 671 F.3d at 1129 (purpose of an EA is "simply to create a workable public document that *briefly* provides evidence and analysis for an agency's finding regarding an environmental impact") (emphasis in original and citing 40 C.F.R. § 1508.9); *Earth Island Inst. v. Carlton*, 626 F.3d 462, 472 (9th Cir. 2010) ("[c]ourts may not impose procedural requirements not explicitly enumerated in the pertinent statutes") (internal quotation omitted).

Nonetheless, both the EA and Decision Document expressly note that they conform or tier to several land management documents, including the *Final Supplemental Environmental Impact Statement and Standards and Guidelines for Amendment to the Survey and Manage, Protection Buffer, and other Mitigation Measures Standards and Guidelines*. ER 4 (Decision Doc. at 4), ER 66-67 (EA at 8-9). The BLM has a substantive duty under FLPMA to assure that its actions are consistent with the RMP and the Northwest Forest Plan. Those land use documents, as well as the Management Recommendations can help inform the public on project planning and design, as well as environmental review, for purposes of the agency's procedural requirements under NEPA. *See* ER 67 ("project planning drew from information and recommendations" from land use documents and the Deer Creek Watershed Analysis); *cf. California ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of the Interior*, 2014 WL 3766720 at *8 (9th Cir. 2014) (agency did not rely too heavily on non-NEPA documents incorporated by reference, as the EIS had adequately considered environmental effects of agency action).

Second, the EA explained that the BLM employed the Management Recommendations for the vole and "prior to implementation, all active and associated inactive [vole] nests discovered during surveys would be

buffered." ER 181; *see* ER 372 (providing additional details on some areas buffered in the sales units). As detailed previously, the BLM did not ignore the vole nest recolonization issue raised by the Association, but conducted actual pre-disturbance surveys, consistent with updated Survey Protocols, and found old nest locations blown out or determined to be inactive or unoccupied, and therefore not requiring protective buffering. *See supra* at 22-25.[4] In addition, the Management Recommendations provide direction for the management of "confirmed inactive sites," which typically are not included in protective buffers or habitat areas, but when within 100 meters of active vole nests are afforded protective buffers. ER 273-275. As the BLM adequately explained in the Deer North EA, "[t]hese buffers (Habitat Areas) delineated under the management guidelines, are intended to provide for protection of the physical integrity of the nests and retain

[4] Nor is there any merit to the Association's claim (Br. 46-47) that the BLM did not disclose that under the Survey Protocol for the vole, surveys are designed to cover approximately 68% of the surveyed area. The EA clearly states that the surveys were conducted pursuant to the updated Survey Protocol. ER 180 (EA at 122); *see* ER 296, 300 (Survey Protocol Version 2.1). To be sure, some nests may not be discovered through the agency's survey efforts, but since the vole is a Category C species, not every site is likely necessary to provide for a reasonable assurance of species persistence or likely to have a significant impact on voles in the action area. *See* ER 370 (BLM response explaining protocol not designed to locate 100% of vole nests but to ensure high probability of finding nests across species range to allow for continued persistence and protection of red tree voles).

adequate habitat for the expansion of active nests at that site" and would be removed from timber harvest thereby eliminating the Sale's direct effect to voles. ER 181.

Therefore, contrary to the Association's contention (Br. 43) made for the first time on appeal, the BLM did not "dispose of its hard look requirement" by simply concluding that the Sale would not result in the red tree vole being listed under the Endangered Species Act. As the EA demonstrates, and the Association acknowledges, the BLM based its conclusion on consideration of several factors and not simply on the basis of whether the chosen alternative will result in the listing of the species under the ESA.[5] Therefore, the cases relied upon by the Association (Br. 43) are all distinguishable from the instant case because the BLM's consideration of the Project's impacts on the species as a whole and ESA listing was only part of its overall evaluation of impacts on the vole, pursuant to NEPA requirements; it was not used as a substitute for the agency's analysis of significant impacts under NEPA.

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[5] As discussed above, the fact that the BLM applied Survey and Manage requirements to eliminate the Sale's direct effects to voles and disclosed that outcome in the EA in terms of the persistence of the species as a whole is not evidence that the BLM clouded its FLPMA obligations with its NEPA obligations as implied by the Association. Rather, it shows that Survey and Manage is working as the agency intended and that the BLM took seriously its obligation under NEPA.

Nor is there any merit to the Association's argument (Br. 42), also made for the first time here, that the BLM's impacts analysis was improperly based on "an averaging technique" that has been struck down by this Court. The Association contends, absent any detailed discussion on the method employed by the BLM, that the agency cannot rely upon any calculation or method that involves averaging, in its analysis of the Project's impacts. In support of its sweeping claim, the Association relies upon *Oregon Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1129-30 (9th Cir. 2007), which held that an averaging method employed by the agency was "grossly misleading" and "inconsistent with the Northwest Forest Plan." But that case is inapposite, because, unlike *Brong*, the Association has failed to cite to any evidence that the BLM manipulated the boundaries to dilute the effects of its proposed activities over a broad geographical region. *See Cascadia Wildlands v. Bureau of Land Management*, 2012 WL 6738275, *4-5 (D. Or. Dec. 21, 2012) (distinguishing *Brong*, concluding that the BLM's averaging method was neither arbitrary nor capricious and that the BLM had not employed improper methods).

In essence, the Association takes issue with the analytical methods and technical judgments made by the BLM. However, judicial deference is at its highest when "reviewing an agency's technical analyses and

judgments involving the evaluation of complex scientific data within the agency's technical expertise." *League of Wilderness Defenders Mountains Biodiversity Project v. Allen*, 615 F.3d 1122, 1130 (9th Cir. 2010). The Association cannot show that the BLM acted arbitrarily or capriciously in its evaluation of the environmental impacts of the Deer North Sale on the red tree vole.

III. The BLM Considered a Reasonable Range of Alternatives under NEPA.

The Association bases its other NEPA claim on the BLM's purported failure to consider the organization's preferred alternative that promotes a natural-selection-based approach to land management and that, in essence, advocates limiting harvest to "naturally selected dead/dying trees." ER 22; *see* SER 50-54. This claim is meritless, as the record establishes that the BLM considered a reasonable range of alternatives that meet the Project's purpose and needs, which the Natural Selection Alternative does not.

This Court has made clear that "'an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS.'" *Earth Island Institute v. U.S. Forest Serv.*, 697 F.3d 1010, 1021-22 (9th Cir. 2012) (quoting *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005)); *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 915-16 (9th Cir. 2012); *N. Idaho Cmty. Action Network v. U.S. Dep't of*

Transp., 545 F.3d 1147, 1153 (9th Cir. 2008). "[W]hereas 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*, 545 F.3d at 1153 (internal quotation marks omitted); *Ctr. for Biological Diversity*, 695 F.3d at 915.

Thus, this Court has previously upheld EAs that gave detailed consideration to only the agency's proposed action and a no-action alternative. *See Ctr. for Biological Diversity*, 695 F.3d at 916 (holding Forest Service's analysis of no action alternative and proposed regulations in EA not arbitrary or capricious); *N. Idaho*, 545 F.3d at 1153-54 (holding that "the Agencies fulfilled their obligations under NEPA's alternatives provision when they considered and discussed only two alternatives in the 2005 EA"); *Native Ecosystems Council*, 428 F.3d at 1245-46 (rejecting plaintiff's argument that "having only two final alternatives—no action and a preferred alternative—violates the [NEPA] regulatory scheme"); *see Earth Island Institute*, 697 F.3d at 1022 (panel noting that it was not aware of any Ninth Circuit case since *Native Ecosystems Council* where an EA was found arbitrary and capricious when it considered both a no action and preferred action alternative). The Association wholly ignores (Br. 22-25), in its

discussion of NEPA case law, that an agency's lesser obligation to consider alternatives in an EA may be satisfied by consideration of only the no action and preferred action alternative.

Here, the Deer North EA considered an appropriate range of alternatives, giving detailed consideration to three alternatives in the EA: the proposed timber harvest alternative, a more extensive timber harvest alternative, and a no action alternative. ER 70-73.[6] In addition, the BLM considered, but did not analyze in detail, a Citizen's Alternative proposed by the public. ER 213-214 (explaining that this alternative was adequately addressed in the analysis for the no action and action alternatives); *see* ER 367-368 (Siskiyou Project had proposed this additional "community forestry" alternative). "The BLM's range of alternatives in the EA represented a full spectrum of options that meet the purpose and need of

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[6] The No Action alternative "serves as the baseline to compare effects and what it means if any of the action alternatives were not selected." ER 3. Under the first action alternative, Alternative 2, the BLM proposed a higher level of timber harvesting that would achieve Medford District RMP objectives, including 242 acres of regeneration harvesting, 282 acres of density management/modified group selection, and 275 acres of density management/understory removal. See ER 71-72. Under Alternative 3, the BLM proposed timber harvesting that would meet objectives for matrix lands, retain as much suitable spotted owl habitat as possible, and not include any regeneration harvesting on a total of 746 acres. ER 72-73. The BLM later decided to authorize Alternative 3 with modifications, which for the Deer North Sale included a reduction of approximately 107 acres of harvest from 205 acres to 98 acres. ER 3.

the project." SER 20. Therefore, as the district court concluded, the BLM considered a reasonable range of alternatives in the EA. ER 48-50.

The Association argues (Br. 22-39) that the BLM nevertheless failed to consider other reasonable alternatives such as its preferred Natural Selection Alternative.[7] This Court, however, has made clear that "NEPA does not require federal agencies to consider alternatives that are substantially similar to other alternatives." *Native Ecosystems Council*, 428 F.3d at 1249; *see Westlands Water Dist. v. U.S. Dep't of the Interior*, 376 F.3d 853, 868 (9th Cir. 2004) ("Nor is an agency required to undertake a 'separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences'") (quoting *Headwaters, Inc. v. Bureau of Land Mgmt.*, 914 F.2d 1174, 1181 (9th Cir. 1990)); *N. Plains Res. Council v. Lujan*, 874 F.2d 661, 666 (9th Cir. 1989) ("NEPA does not require a separate analysis of alternatives with consequences indistinguishable from the action proposed").

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[7] The Association had proposed the Natural Selection Alternative during the BLM's scoping process for the EA. SER 279. It provided additional information regarding the alternative during the EA comment period as well as during a tour of the Sale area with agency representatives. The BLM was therefore fully apprised of the Natural Selection Alternative and specifically declined to analyze the alternative in detail.

Here, the BLM was not required to separately consider the Natural Selection Alternative because the BLM determined reasonably that this alternative was substantially similar to the No Action alternative, which the BLM fully assessed in the EA. BLM explained through the Deer North administrative process that the agency considered the Association's proffered alternative not to be significantly distinguishable from the No Action alternative. ER 17 (Natural Selection Alternative already "considered under the No Action Alternative" as the "[l]iterature provided by the Deer Creek Association (Ecostry) indicates the NSA supports extracting naturally selected dead/dying trees as opposed to extracting green trees"); *see also* ER 22-23; SER 23-39 (alternative considered "to be more philosophical in nature and similar to the No Action alternative"); SER 280 (IBLA decision finding that "because the extent of timber harvesting under the NSA was inconsequential, the alternative was virtually the equivalent of the no action alternative"). Moreover, the BLM's determination to consider, but not analyze in detail, the other community forestry alternative--the separate "Citizen's Alternative"--because it was adequately addressed by the no action and other alternatives, is further support that the BLM's exploration of alternatives was neither arbitrary nor capricious. *Cf. N. Alaska Envtl. Ctr. v. Kempthorne*, 457 F.3d 969, 978

(9th Cir. 2006) (agency's consideration of alternatives is sufficient if it considers an appropriate range of alternatives, even if it does not consider every available alternative); *Headwaters, Inc.*, 914 F.2d at 1181.

Nor was the BLM required to assess the Natural Selection Alternative here because an agency need not have considered an alternative that does not meet the purpose and need of the proposed action. *See Native Ecosystems Council*, 428 F.3d at 1247 ("[a]lternatives that do not advance the purpose" of the proposed action "will not be considered reasonable or appropriate"). As this Court has explained, "'it makes no sense for agencies to consider alternatives that do not promote the goal or the purpose the agency is trying to accomplish." *Earth Island*, 697 F.3d at 1023 (internal quotations and citation omitted).

The BLM concluded that "[t]he NSA Alternative does not meet the purpose and need of the Deer North Vegetation Management Project." ER 22. As the agency explained, "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.'" ER 17, 22-23; *see* ER 214. The Natural Selection Alternative would not meet the timber harvesting objectives of the

Medford RMP on a predictable and long-term basis, as the BLM further explained in its responses to the Association. *See* ER 17, 22-23; SER 23-24. In short, "[a] less extensive timber harvest like the Natural Selection Alternative was not considered because it does not accomplish the intended purpose of the proposed action."[8] SER 280.

Nonetheless, the Association argues that the Natural Selection Alternative would further the RMP and matrix harvest and other forest management objectives of the Deer North Sale. For support, the Association relies heavily upon an administrative record document for a different project with a wholly separate and distinct purpose and need, namely the Deer South Landscape Management Project. Significantly, the Association fails to note that the discussion and description of the Natural

[8] For the first time on appeal, the Association attempts to create the impression that the Natural Selection Alternative is significantly different from the no action alternative because it purportedly proposes the "logging" of green trees. This argument was not raised in the district court and thus was waived. In any event, this recent characterization is contrary to past descriptions of the alternative. *See, e.g.*, SER 50 ("waiting until [the trees] die from natural causes"); SER 54 ("the NSA extracts only dead and dying trees"). Moreover, as the BLM's Field Manager noted in the protest decision, the Association has failed to provide any scientific support for its claims that it would meet the purpose and need of the proposed action. *See* SER 23. While the Association states that "the NSA is based on 'Charles Darwin's theory of evolution through natural section" the BLM "is not aware of such a theory being practiced for multiple use management of lands committed to predictable sustained yield outputs." *Id.*

Selection Alternative in the Deer South EA "are those of the Association and do not necessarily represent the BLM's position or opinion regarding this alternative, nor does it represent the spectrum of concerns raised by others in the community." ER 306 (South Deer EA at 18) (making clear that the Natural Selection Alternative in the South Deer EA "is presented as submitted by the [Association] in [its] own words").

As the BLM explained in its response to comments on the Deer North EA, "the purpose and need of the Deer North EA is not the same as that for the South Deer Project." ER 23. First, the "South Deer EA addressed the need to promote a wide variety of non-commodity outputs" unlike the Deer North Sale here. *Id.* Second, in South Deer, the BLM did not select the Natural Selection Alternative for meeting the goal of timber harvesting, "but as an opportunity to demonstrate the effectiveness of the approach of the NSA in young stand development." SER 25; ER 23; *see* SER 130. By contrast, the Deer North Sale "does not propose to demonstrate young stand development." ER 23.

Moreover, the South Deer Decision Record acknowledged that the BLM and the Association had entered into a memorandum of understanding that included providing a purpose and need and developing the Natural Selection Alternative, as submitted in its own words by the

Association in the EA. *Id.; see* SER 127-128. Later, the BLM noted that "[o]ther than trail and road locations, the project relied heavily on philosophy, making a side by side evaluation [of alternatives] problematic." *Id.;* SER 135. In the end, the South Deer EA, as did the agency here, concluded 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." ER 23; SER 140.

The Association's reliance (Br. 28) on the reflections of Dr. Dennis Odion, who had commented on South Deer, only highlights the flaws of its argument. As the BLM noted in response to the Association's protest of the Sale, "You have not identified any specific concern or conflicting scientific literature" to support the claims. SER 32. "The BLM cannot model for predictable harvest levels [to support the RMP] if the amount of dead and dying trees, and quality of wood, is unknown." SER 24. To the extent that this or any evidence proffered by the Association can be considered scientific or conflicting with the BLM's views, courts defer to the informed discretion of the agency. *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) ("When specialists express conflicting views, an agency

must have discretion to rely on the reasonable opinions of its own qualified experts"); *see Tri-Valley CAREs*, 671 F.3d at 1124.

In sum, the record demonstrates that the BLM fully complied with NEPA's requirement to explore alternatives.

CONCLUSION

The district court's judgment should be affirmed.

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STATEMENT OF RELATED CASES

Counsel for the Federal Defendant-Appellee is unaware of any case that is related to this appeal within the meaning of Ninth Circuit Rule 28-2.6.

s/*Evelyn S. Ying*
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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF APPELLATE PROCEDURE 32(A)

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,700 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/*Evelyn S. Ying*
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CERTIFICATE OF SERVICE

I hereby certify that on October 6, 2014, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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