

Case No. 14-35250

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**DEER CREEK VALLEY NATURAL RESOURCES CONSERVATION
ASSOCIATION,**

Plaintiff-Appellant,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT,

Federal Defendant-Appellee,

and

MURPHY COMPANY,

Defendant-Intervenor-Appellee.

Appeal from the United States District Court for the District of Oregon, Case No.
1:12-cv-1596-CL, Hon. Owen M. Panner

DEFENDANT-INTERVENOR-APPELLEE'S RESPONSE BRIEF

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATEMENT OF JURISDICTION	2
	A. <u>Basis for Jurisdiction in the District Court</u>	2
	B. <u>Basis for Jurisdiction in this Court</u>	2
III.	ISSUES PRESENTED FOR REVIEW	2
IV.	STATEMENT OF THE CASE	4
V.	STATEMENT OF FACTS	5
	A. <u>Nature of the BLM Land at Issue</u>	5
	B. <u>The Purpose and Need for the Project</u>	7
	C. <u>Ecological Conditions in the Project Area</u>	9
	D. <u>The Modest Deer North Timber Sale</u>	11
	E. <u>Leaving It to Mother Nature, or the Natural Selection Alternative</u>	12
VI.	SUMMARY OF ARGUMENT	14
VII.	STANDARD OF REVIEW	14
VIII.	ARGUMENT	18
	A. <u>The District Court Correctly Held that the Vegetation Management Project Complies Fully with NEPA</u>	18
	1. <u>BLM considered a reasonable range of alternatives</u>	19

2.	<u>BLM took a NEPA "hard look" at the potential impacts to red tree voles</u>	24
a.	<u>Survey and manage requirements for the red tree vole</u>	26
b.	<u>BLM fully assessed Project effects on red tree voles</u>	29
B.	<u>The District Court Correctly Held that the Vegetation Management Project Complies Fully with FLPMA</u>	33
IX.	CONCLUSION.....	39

TABLE OF AUTHORITIES

	Page(s)
CASES	
<u>Cold Mountain v. Garber</u> , 375 F.3d 884 (9th Cir. 2004)	24
<u>Conservation Northwest v. Rey</u> , 674 F.Supp.2d 1232 (W.D. Wash. 2009), <u>rev'd</u> , 715 F.3d (9th Cir. 2013)	26
<u>Ctr. for Biological Diversity v. Salazar</u> , 695 F.3d 893 (9th Cir. 2012)	18, 19
<u>Ctr. for Food Safety v. Vilsack</u> , 636 F.3d 1166 (9th Cir. 2011)	18
<u>Douglas Timber Operators, Inc. v. Salazar</u> , 774 F.Supp.2d 245 (D.D.C. 2011)	6
<u>Earth Island Inst. v. Carlton</u> , 626 F.3d 462 (9th Cir. 2010)	16-17
<u>Ecology Ctr. v. Casteneda</u> , 574 F.3d 652 (9th Cir. 2009)	16
<u>Gifford Pinchot Task Force v. U.S. FWS</u> , 378 F.3d 1059, <u>amended by</u> 387 F.3d (9th Cir. 2004)	6
<u>Headwaters, Inc. v. BLM</u> , 914 F.2d 1174 (9th Cir. 1990)	23, 24
<u>Lands Council v. McNair</u> , 537 F.3d 981 (9th Cir. 2008), <u>abrogated in part on other grounds by Am. Trucking Ass'ns, Inc. v. City of Los Angeles</u> , 559 F.3d 1046 (9th Cir. 2009)	15, 16, 17, 38
<u>League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen</u> , 615 F.3d 1122 (9th Cir. 2010)	15, 16, 25

N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.,
545 F.3d 1147 (9th cir. 2008) 19

N. Plains Res. Council v. Lujan,
874 F.2d 661 (9th Cir. 1989) 23

Nat'l Ass'n of Home Builders v. Defenders of Wildlife,
551 U.S. 644 (2007)..... 14, 17

Native Ecosystems Council v. U.S. Forest Serv.,
428 F.3d 1233 (9th Cir. 2005) 19, 20

Norton v. S. Utah Wilderness Alliance,
542 U.S. 55 (2004)..... 34

Or. Natural Res. Council Fund v. Brong,
492 F.3d 1120 (9th Cir. 2007) 30

Pac. Rivers Council v. Shepard,
No. 03:11-cv-442-HU (D. Or. final judgment May 16, 2012)..... 6

Robertson v. Methow Valley Citizens Council,
490 U.S. 332 (1989)..... 18

Seattle Audubon Soc'y v. Lyons,
871 F. Supp. 1291 (W.D. Wash. 1994), aff'd sub nom., Seattle Audubon
Soc'y v. Moseley, 80 F.3d 1401 (9th Cir. 1996)..... 6

Siskiyou Reg'l Educ. Project v. U.S. Forest Serv.,
565 F.3d 545 (9th Cir. 2009) 38-39

Tri-Valley CARES v. U.S. DOE,
671 F.3d 1113 (9th Cir. 2012) 25

Winter v. Natural Resources Defense Council, Inc.,
555 U.S. 7 (2008)..... 15

STATUTES

5 U.S.C. § 701 3

5 U.S.C. § 706.....14
16 U.S.C. § 1532.....26
28 U.S.C. § 1292.....3
28 U.S.C. § 1331.....3
28 U.S.C. § 1346.....3
42 U.S.C. § 4321.....3
42 U.S.C. § 4332.....18
43 U.S.C. § 1701.....3, 33
43 U.S.C. § 1712.....33

OTHER AUTHORITIES

40 C.F.R. § 1500.1(b).....25
40 C.F.R. § 1508.9(a).....18
43 C.F.R. § 1601.5-3(a)..... 33-34
FEDERAL RULE OF APPELLATE PROCEDURE 3(a)(1).....3
FEDERAL RULE OF APPELLATE PROCEDURE 28(i).....14

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26, Murphy Company states it is an Oregon corporation that does not issue shares to the public and that has no parent corporation or subsidiaries.

DATED this 6th day of October, 2014.

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I. INTRODUCTION.

Before the Court is an appeal brought by lone plaintiff-appellant the Deer Creek Valley Natural Resources Conservation Association (Association) to the now-completed Deer North Timber Sale (Deer North Sale) on the Bureau of Land Management's (BLM) Grants Pass Resource Area in southwestern Oregon. The Deer North Sale was an exceptionally modest and much-needed forest thinning project involving timber harvest on only 98 acres of forest with accompanying beneficial road maintenance on seven miles of roads and 1,100 feet of temporary routes. Excerpts of Record (ER) 3 (Decision Documentation at 3). Remarkably, even the light touch of Deer North was objectionable to the Association, which advocated instead for its preferred Natural Selection Alternative, a passive "Mother Nature" approach whereby only dead or dying trees would have been subject to harvest. In other words, the Association preferred implementation of the No Action Alternative assessed in the Deer North Vegetation Management Project Environmental Assessment (EA), even though the No Action Alternative was rejected for its failure to meet the purpose and need for the Deer North Vegetation Management Project (Vegetation Management Project, or Project).

Murphy Company, the defendant-intervenor-appellee in this case, purchased the Deer North Sale in 2011 and completed its timber harvest and hauling in the

summer of 2014. Intervenor's Supplemental Excerpts of Record (ISER) 45-46 (Declaration of Randy Zustiak in Opposition to Stay Pending Appeal (Zustiak Decl.) ¶ 10) (stating that operations were expected to be completed "by the end of July 2014"). The Deer North Sale was the land management vehicle through which BLM employed density management and modified group selection silvicultural treatments to improve conditions in overcrowded and at-risk areas of the forest. ER 69 (EA 11).

Both the Vegetation Management Project as a whole and its Deer North Sale component are described below based on BLM's supporting record. As the Court will see from the record and the briefing, BLM fully complied with the National Environmental Policy Act (NEPA) and the Federal Land Policy and Management Act (FLPMA) in issuing a Finding of No Significant Impact (FONSI) for the Project, ER 29-33, and a Decision Documentation for the Deer North Sale, ER 1-28. BLM assessed land management activities on up to 800 acres, ER 63 (EA 5), but again Deer North comprised only 98 acres of BLM land, in part because the agency's Decision Documentation modified the Selected Alternative 3 by conservatively dropping "107 acres of harvest." ER 3 (Decision Documentation at 3). Murphy Company urges the Court to affirm the district court's decision upholding this now-completed prudent thinning Project.

II. STATEMENT OF JURISDICTION.

A. Basis for Jurisdiction in the District Court.

The Association's claims against federal defendant-appellee the BLM arose under FLPMA, 43 U.S.C. § 1701 et seq., NEPA, 42 U.S.C. § 4321 et seq., and the Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq. ER 228-29, 232-39 (Compl. ¶¶ 1, 25-81). The Association invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331, 1346. ER 230 (Compl. ¶ 11).

B. Basis for Jurisdiction in this Court.

The Association's appeal is from the district court's February 4, 2014 Order granting Murphy Company's motion for summary judgment and denying the Association's motion for summary judgment. ER 57-58 (Order Adopting Report and Recommendation, found at District Court Record (CR) 88); ER 34-56 (Report and Recommendation (CR 81)). In accordance with Federal Rule of Appellate Procedure (FRAP) 3(a)(1), the Association filed a timely notice of appeal on March 28, 2014. ER 255-57; ER 397 (CR 90). The Association thus correctly states that this Court has jurisdiction over its appeal pursuant to 28 U.S.C. § 1292.

III. ISSUES PRESENTED FOR REVIEW.

Whether the district court properly granted summary judgment in favor of Murphy Company after concluding that BLM: (1) considered a reasonable range of alternatives for the Vegetation Management Project; (2) took a NEPA "hard look"

at the potential impacts of the Project on red tree voles; and (3) complied fully with FLPMA with respect to the survey and manage requirements for red tree voles?

IV. STATEMENT OF THE CASE.

On September 5, 2012, the Association sued BLM in an effort to halt the Deer North Timber Sale (Deer North Sale, or the Sale). ER 387 (CR 1). The Association alleged that the Sale, which had been authorized pursuant to a June 30, 2011 Decision Documentation, ER 1-28, violated FLPMA and NEPA. ER 228 (Compl. ¶ 1).

On September 11, 2012, Murphy Company moved to intervene in the lawsuit on the side of BLM. ER 388 (CR 5-8). Murphy Company did so because it held the contract for the Deer North Sale, through which the Deer North Vegetation Management Project (Vegetation Management Project, or the Project) was being implemented. ISER 2 (Declaration of John R. Murphy in Support of Murphy Company's Motion to Intervene ¶ 4). The district court granted Murphy Company intervention on November 13, 2012. ER 388 (CR 10).

On November 19, 2013, the district court (Magistrate Judge Clark) heard argument on the parties' motions for summary judgment. ER 395-96 (CR 80). On December 9, 2013, the Magistrate Judge recommended that summary judgment be granted in favor of Murphy Company and against the Association. See generally ER 34-56 (CR 81). After considering the Association's objections, ER 396 (CR

83), and the responses thereto of Murphy Company, ER 396 (CR 84), and BLM, ER 396 (CR 86), the district court (Judge Owen Panner) on February 4, 2014 granted summary judgment in favor of Murphy Company and against the Association. ER 57-58; ER 396-97 (CR 88). Judgment was entered the next day. ER 397 (CR 89).

On March 28, 2014, the Association appealed the district court's judgment. ER 397 (CR 90). On June 17, 2014 – almost three months later – the Association moved the district court for a stay pending appeal. ER 397 (CR 92). On July 7, 2014, Murphy Company informed the district court that the Deer North Sale was nearly completed. ISER 46 (Zustiak Decl. ¶ 10) (explaining that Deer North Sale operations were projected to "be completed by the end of July 2014"). On July 25, 2014, the district court denied the Association's motion. ER 398 (CR 101). The grant of summary judgment in favor of Murphy Company is now before this Court, even though the Deer North Sale has been completed.

V. STATEMENT OF FACTS.

A. Nature of the BLM Land at Issue.

The Planning Area for the Vegetation Management Project included 8,848 acres in a checkerboard ownership pattern, "in which BLM administers approximately 3,414 acres," most of which are Matrix lands. ER 62 (EA 4). Matrix is the land category under the 1994 Northwest Forest Plan that allows

generally for timber harvesting. Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1305 (W.D. Wash. 1994), aff'd sub nom., Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401 (9th Cir. 1996). The Northwest Forest Plan amended all governing land management plans within the range of the northern spotted owl,¹ including the Medford District's 1995 Resource Management Plan (RMP) at issue in this case.² The Deer North Sale was located entirely on Matrix lands. ER 68 (EA at 10). It also was located entirely within the wildland urban interface, which is "the area where structures and other human development meet or intermingle with undeveloped wildland." ER 129 (EA 71). Thinning an overcrowded forest in the

¹ The Northwest Forest Plan classified forest lands into one of three general categories: (1) reserve areas, including late-successional reserves (LSRs); (2) Matrix lands; and (3) adaptive management areas. Gifford Pinchot Task Force v. U.S. FWS, 378 F.3d 1059, 1064 (discussing management rules for the different categories), amended by 387 F.3d (9th Cir. 2004). Unlike Matrix where timber harvest is generally allowed, LSRs provide habitat for late-successional and old growth-related species. Seattle Audubon Soc'y v. Lyons, 871 F. Supp. at 1304-05.

² BLM planned the Project under the Medford District's 1995 RMP. ER 4 (Decision Documentation at 4). But because the Medford District was one of six Oregon BLM districts involved in the 2008 Western Oregon Plan Revisions (WOPR) process, BLM also confirmed that Deer North was consistent with the Medford District's 2008 RMP. Id. In 2009, BLM tried to abandon the WOPR without notice or opportunity for public comment. That action was declared illegal, Douglas Timber Operators, Inc. v. Salazar, 774 F.Supp.2d 245, 259 (D.D.C. 2011), which had the effect of reinstating the 2008 RMP. Id. at 261. Subsequently, the WOPR was vacated in separate litigation, which led to the reinstatement of the Medford District's 1995 RMP as amended by the Northwest Forest Plan. Pac. Rivers Council v. Shepard, No. 03:11-cv-442-HU (D. Or. final judgment May 16, 2012).

wildland urban interface is an important step towards protecting people, property and natural resources in and around the Project area.

B. The Purpose and Need for the Project.

The Vegetation Management Project's three primary needs included: "1) the need for production of commercial and non-commercial forest products; 2) the need for improved forest health and vigor; and 3) the need to enhance socioeconomic conditions." ER 63 (EA at 5). These Project needs are consistent with governing RMP direction for Matrix lands, which requires BLM to "[a]pply silvicultural systems that are planned to produce over time, forests that have desired species composition, structural characteristics, and distribution of seral or age classes" ISER 28-29 (RMP at 71-72). See also ISER 29 (RMP at 72) (Matrix is "where most timber harvest and other silvicultural activities will be conducted").

Notably, only a small proportion (20%) of BLM land on the Medford District is allocated to Matrix, with the remaining land allocated to uses like late-successional reserves where timber production is not a driving goal. See, e.g., ER 11 (Response to Comments at 5). Yet even within Matrix, BLM has been falling far short of meeting the RMP timber production goals. ER 8 (Response to Comments at 2). See also ER 12 (Response to Comments at 6) (noting that

historically deficient harvest levels in Matrix mean that BLM is "gaining in standing inventory over previous estimates").

To meet the Project needs, BLM identified Project purposes, including the development of "a commercially viable timber sale and other forest product opportunities," the implementation of "silvicultural treatments to meet a variety of forest stand objectives" (like density reduction, restoration of the "*historic mixture of tree species*" and improved "*seral stage diversity across the landscape*"), and the provision of economic benefits to people and the community as a whole through various means of access to forest products. ER 64-66 (EA 6-8) (emphases in original). BLM then developed and fully assessed two action alternatives consistent with the Project purposes and needs – Alternatives 2 and 3 – in addition to the No Action Alternative, with the primary difference between the two action alternatives being Alternative 2's substantially greater "impact to northern spotted owl habitat" due to its inclusion of "242 acres of regeneration harvest."³ ER 4 (Decision Documentation at 4). See also ER 68 (EA 10) (explaining that "Alternative 2 emphasizes the highest level of timber harvest to meet management direction" under the RMP, whereas "Alternative 3 seeks to retain suitable spotted

³ Regeneration harvest is "harvest conducted with the partial objective of opening a forest stand to the point where favored tree species will be reestablished." ISER 30 (RMP at 111). It is more aggressive than the commercial thinning implemented on Deer North as it is used where commercial thinning "would not provide the desired growth and increase in productivity." ER 69 (EA 11).

owl habitat while still providing forest products"). Unlike Alternative 3, Alternative 2 also involved the construction of 0.5 miles of new permanent road. ER 214-15 (EA 156-57). In addition, BLM considered but did not analyze in detail a Citizen's Alternative, ER 213 (EA 155), having concluded that this alternative "was adequately addressed in the analysis for the No Action and action alternatives." ER 17 (Response to Comments at 11) (quoting the EA).

C. Ecological Conditions in the Project Area.

The Project area needed thinning "to enhance the health, stability, vigor and economic value of forest stands" because excessive tree densities in the forest were "approaching or . . . at a level of stand density where competition related mortality becomes significant." ER 64-65 (EA 6-7). Forest composition in the Project area has "shifted from historical conditions" with a marked loss of much of the ponderosa pine and sugar pine components and an increase in Douglas-fir trees. ER 102 (EA 44). See also ER 103 (EA 45) ("Black oak and white oak species are also declining."); id. (noting that the loss of plant species has an accompanying detrimental effect on associated animal species). Absent treatment, BLM projected a continual decline in stand diversity. ER 112 (EA 54).

BLM employs various tools to assess ecological conditions in the forest. For example, the agency considers the relative density index, or RDI, which should be in the 0.34 to 0.55 range for a healthy forest. ER 104 (EA 46). The relative

density index "is the ratio of actual stand density to the maximum stand density attainable in a stand with the same mean tree volume." Id. Sampling showed that the relative density index in the Project area far exceeded that of a healthy forest. ER 108 (EA 50) (reporting that the average RDI was 0.80). This means the trees were "spending their energy to compete" against other trees, making them vulnerable to insects and diseases and increasing the likelihood of stand-replacing wildfire. ER 111 (EA 53). BLM's assessment of forest conditions was consistent with "recent trends in southwest Oregon [which] illustrate that fire has been converting mature forest structure at a higher rate than harvest" ER 112 (EA 54). See also id. (observing that conditions were ripe "for a wildfire start on BLM [lands] to spread to adjacent private/public lands").

Another tool used by BLM to assess forest health is the tree vigor index, which assesses "the ratio of annual growth of stemwood to the area of leaves present to capture sunlight." ER 105 (EA 47). A tree with a too-low vigor rating lacks the physiological capacity to repel an insect attack. Id. Based on tree cores taken from Douglas-fir trees in the Project vicinity, the average vigor rating indicated the trees could "barely withstand a bark beetle attack." Id. Ponderosa pine was faring even worse. ER 106 (EA 48) (average vigor rating for ponderosa pine, a species in "sharp decline," was at a level indicating the species would succumb to insect attack, which was particularly worrisome given the local

"presence of western pine beetles and flatheaded fir borers"). The agency's assessment of tree growth rates in the Project vicinity strengthened this concern, given that "the average diameter growth in the last decade was 0.97 inches," well below the " \geq 1.50 inches of diameter growth per decade" needed to lessen susceptibility to a bark beetle attack. ER 107 (EA 49). See also ER 109 (EA 51) (further discussing inadequate growth rates in the Project area).

D. The Modest Deer North Timber Sale.

BLM authorized the Deer North Sale after concluding the action was consistent with the Project's purpose and need:

The Selected Alternative (modified Alternative 3) addresses the purpose and need of the EA to a) produce revenue from the sale of timber; b) improve forest health and vigor; (c) maintain tree species diversity and structure across the landscape; d) maintain existing northern spotted owl habitat within the provincial radius (1.3 miles) of known active northern spotted owl sites and all or substantially all of the older and more structurally complex, multilayered conifer forests; and e) enhance socioeconomic conditions through timber products.

My decision emphasized the need to maintain existing northern spotted owl habitat. My decision also does not preclude entry for future thinning or regeneration harvest in a separate environmental document.

ER 4 (Decision Documentation at 4). Again, the Selected Alternative conservatively dropped more than 100 acres that originally were designated for harvest and were assessed as such in the EA. ER 3 (Decision Documentation at 3).

The now-completed Deer North Sale helped remedy unhealthy forest conditions by implementing density management and modified group selection treatments. Density management "widen[s] the spacing of residual trees to promote growth and structural development of the remaining stand," ER 69 (EA 11), whereas modified group selection removes "trees (usually Douglas-fir) that are competing with vigorous pines and non-tanoak hardwoods" Id. (explaining that modified group selection creates small forest openings to "release" the growth of preferred tree species). The beneficial results of forest thinning include improved "structural forest composition," increased growth in released "legacy pine candidates or old growth incense cedar and Douglas-fir trees," and a decreased fire hazard. ER 124 (EA 66). See also ER 30 (FONSI at 2).

Deer North Sale operations brought density levels closer to approximate historical conditions, ER 125 (EA 67), and improved the relative density and tree vigor indices. ER 126 (EA 68). In addition to environmental benefits, Murphy Company and the local community also benefitted from implementation of the Deer North Sale. ER 66 (EA 8) (discussing the socioeconomic benefits of implementing BLM timber sales).

E. Leaving It to Mother Nature, or the Natural Selection Alternative.

Despite the ecological and socioeconomic benefits of Murphy Company having implemented the Deer North Sale, the Association continues to complain,

even now that the timber has been harvested, that BLM gave short shrift to its preferred Natural Selection Alternative. See, e.g., Opening Brief of Appellant (Opening Br.) at 25-39. The Natural Selection Alternative, however, was inconsistent with the Vegetation Management Project's purpose and need. ER 22 (Response to Comments at 16). The Natural Selection Alternative also was effectively assessed by BLM through the proxy of the No Action Alternative, given that the passive Natural Selection Alternative advocates limiting harvest to "naturally selected dead/dying trees," id., which is analogous to what would happen in the Project area absent action.⁴ ER 70 (EA 12) (pointing out that the No Action Alternative was "not a 'static' alternative" because inaction has environmental consequences).

Further, the Natural Selection Alternative would have usurped federal authority by placing "NSA-certified trustees" in charge of land management decisions, contrary to Congress' delegation of authority to BLM to manage the federal lands at issue. ISER 33 (Declaration of Mary Camp in Support of Plaintiff's Motion for Summary Judgment ¶ 9). Put simply, the Association's

⁴ The Natural Selection Alternative also aims to provide for "evolved species," see, e.g., Opening Br. at 26, 34, 38, which is nonsensical. The term "evolved" simply means changed, presumably as a result of a gradual evolutionary process. In that sense, all living organisms are "evolved species."

Natural Selection Alternative is a classic outgrowth of a myopic "Not in My Backyard" philosophy that has no place in public lands management.

VI. SUMMARY OF ARGUMENT.

Murphy Company agrees with, and hereby incorporates by reference, the BLM's summary of the argument. In a nutshell, the district court correctly held that BLM complied with all applicable environmental laws in authorizing the Vegetation Management Project, which was implemented through Murphy Company's now-completed Deer North Timber Sale.

VII. STANDARD OF REVIEW.

Murphy Company agrees with, and hereby adopts as allowed by FRAP 28(i), BLM's statement of the standard of review. Murphy Company writes separately, however, to emphasize the deferential nature of judicial review in cases like this arising under the APA, 5 U.S.C. § 706.

The arbitrary and capricious standard is a narrow one that precludes a reviewing court from substituting its own judgment for that of an expert federal agency. Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007). Recent Ninth Circuit case law has cemented the need for judicial deference to agency expertise in the context of scientific decision-making like that involving the Vegetation Management Project. The Ninth Circuit's en banc

opinion in Lands Council v. McNair, 537 F.3d 981 (9th Cir. 2008),⁵ aff'd, 629 F.3d 1074 (9th Cir. 2010), returned the Ninth Circuit to a path from which it had strayed in the context of APA cases, namely that of appropriate deference to agency decision-making consistent with that applied in other Circuits and by the U.S. Supreme Court. McNair reminded reviewing courts not to step into the role of scientist by second-guessing how an agency validates scientific hypotheses, evaluates scientific studies or explains scientific uncertainty. Id. at 988. McNair also emphasized that reviewing courts should be at their most deferential where an agency is addressing difficult scientific issues within its area of special expertise. Id. at 993.

In the years since the en banc McNair opinion issued, both the Ninth Circuit and district courts within its jurisdiction have heeded McNair by affording proper deference to scientific agency expertise in the APA setting. For example, in League of Wilderness Defenders Blue Mountains Biodiversity Project v. Allen, 615 F.3d 1122 (9th Cir. 2010) (Allen), the Ninth Circuit relied on McNair in reversing an Oregon District Court's decision regarding the legality of a forest restoration project involving limited thinning of eastside, Northwest Forest Plan

⁵ Although not relevant in the summary judgment context, the McNair preliminary injunction decision was overruled in part by Winter v. Natural Res. Defense Council, Inc., 555 U.S. 7 (2008), particularly as to the McNair court's discussion of the Ninth Circuit's "sliding scale" test for injunctive relief to the extent it suggested a lesser irreparable harm standard than allowed by the Supreme Court in Winter.

late successional reserve forest habitat. The Allen majority acknowledged its responsibility to grant its "highest deference . . . to the Forest Service's technical analyses and judgments within its area of expertise," and it also criticized a dissenting judge's effort to second-guess the agency's technical determinations "because he does not like the Forest Service's approach to solving the problems addressed. We went en banc to foreclose precisely this type of second-guessing." Id. at 1131.

In another decision, the Court relied on McNair in affirming a Montana District Court's decision in an APA case, holding that "[t]hough a party may cite studies that support a conclusion different from the one the Forest Service reached, it is not our role to weigh competing scientific analyses." Ecology Ctr. v. Castaneda, 574 F.3d 652, 659 (9th Cir. 2009) (affirming decision regarding the lawfulness of a series of timber sale and restoration projects). See also id. (declining to "second guess" the agency's technical determinations where the agency had "carefully considered the relevant scientific studies"); id. at 664 (affording "great deference" to the agency's "scientific prediction").

And in a timber sale case where the district court had declined to issue a preliminary injunction, the Ninth Circuit affirmed the denial of interlocutory relief after relying on McNair for the proposition that agencies are owed "great deference . . . when faced with . . . scientific evidence," and after reiterating that a reviewing

court's "role is 'simply to ensure that the Forest Service made no clear error of judgment that would render its action arbitrary and capricious.'" Earth Island Inst. v. Carlton, 626 F.3d 462, 471-72 (9th Cir. 2010) (quoting McNair).

McNair does not stand for, nor is Murphy Company advocating, blind deference to agency action. Rather, Murphy Company is emphasizing that the APA's arbitrary and capricious standard is a narrow one that precludes the Court from engaging in the type of second-guessing advocated by the Association. The APA standard requires that an agency's decision be upheld unless the agency "relied on factors Congress did not intend it to consider, 'entirely failed to consider an important aspect of the problem,' . . . 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.'" McNair, 537 F.3d at 987 (citation omitted). Consistent with the APA's deferential standard of review, the Supreme Court has stated that a court should uphold an agency decision even of "less than ideal clarity if the agency's path may reasonably be discerned." Nat'l Ass'n of Home Builders, 551 U.S. at 658.

Here, the district court properly afforded BLM an appropriate degree of deference in upholding the case on the merits. These deferential principles also inform this Court's review of the Association's case and counsel strongly in favor of affirmance.

VIII. ARGUMENT.

A. The District Court Correctly Held that the Vegetation Management Project Complies Fully with NEPA.

NEPA requires a federal agency to take a "hard look" at the potential environmental effects of a proposed federal action and inform the public about those effects. 42 U.S.C. § 4332(2)(C). The statute, which is purely procedural, mandates process without dictating any substantive environmental result.

Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989).

To implement its goals, NEPA "requires an agency to prepare an environmental impact statement ('EIS') for 'major Federal actions significantly affecting the quality of the human environment.'" Ctr. for Food Safety v. Vilsack, 636 F.3d 1166, 1169 (9th Cir. 2011) (quoting the statute). To determine whether an EIS is warranted, an agency may prepare an EA, like the Deer North EA in this case, which is a "less exhaustive" document than an EIS and "[b]riefly provide[s] sufficient evidence and analysis" for the agency's decision. Ctr. for Biological Diversity v. Salazar, 695 F.3d 893, 915 (9th Cir. 2012) (quoting 40 C.F.R. § 1508.9(a), alterations in original).

NEPA also requires a federal agency to "study, develop, and describe appropriate alternatives to recommended courses of action." 42 U.S.C. § 4332(2)(E). Although the alternatives analysis requirement applies regardless of

whether an agency prepares an EIS or an EA, the agency's obligation to consider alternatives in an EA "is a lesser one than under an EIS." Ctr. for Biological Diversity, 695 F.3d at 915 (quoting Native Ecosystems Council v. U.S. Forest Serv., 428 F.3d 1233, 1246 (9th Cir. 2005), where the Ninth Circuit upheld an EA that fully considered only two alternatives, the no action alternative and one preferred action alternative). Unlike an EIS, where the agency must "[r]igorously explore and objectively evaluate all reasonable alternatives," NEPA requires only "a brief discussion of reasonable alternatives" in an EA. Id. (quoting N. Idaho Cmty. Action Network v. U.S. Dep't of Transp., 545 F.3d 1147, 1153 (9th Cir. 2008) (further citations and quotation marks omitted)).

The district court properly concluded that BLM complied fully with NEPA's procedural requirements. ER 46-54 (Report and Recommendation at 13-21); ER 57-58 (Order Adopting Report and Recommendation). The following discussion demonstrates that this Court should do likewise.

1. BLM considered a reasonable range of alternatives.

The Association asserts that BLM failed to consider a reasonable range of alternatives by failing to adequately consider the Association's preferred Natural Selection Alternative and/or by failing to explain *why* it did not consider the Natural Selection Alternative. Opening Br. at 23-39. The Association is wrong, and the district court rightly rejected this argument. ER 49-50 (Report &

Recommendation at 16-17); ER 57-58 (Order Adopting Report and Recommendation).

BLM was not required under NEPA to assess the Association's preferred Natural Selection Alternative because an agency need not consider a proffered alternative that does not meet the Project's purpose and need. Native Ecosystems Council, 428 F.3d at 1247 (a proposed alternative "that do[es] not advance the purpose of . . . [a project] will not be considered reasonable or appropriate"). The Natural Selection Alternative advocates a passive, hands-off approach to land management. See, e.g., ISER 17 (describing the approach as one that "[e]xtracts **naturally selected dead and dying trees**, conditional upon meeting other species needs," whereas traditional forestry "[e]xtracts **green trees**, depriving other species of their needs") (emphasis in original). Relying on natural selection to provide only dead and dying trees for harvest (again contingent upon the needs of other species) is inconsistent with the active management direction for Matrix lands in the Medford District RMP. See, e.g., ISER 28-29 (RMP 71-72) (requiring BLM to "[a]pply silvicultural systems that are planned to produce over time, forests that have desired species composition, structural characteristics, and distribution of seral or age classes"); ISER 27 (RMP at 72) (Matrix is "where most timber harvest and other silvicultural activities will be conducted"). See also ER 22 (Response to Comments at 16) (explaining that the Natural Selection

Alternative "d[id] not meet the purpose and need of the Deer North Vegetation Management Project").

The Association alleges that its Natural Selection Alternative *would* further Matrix objectives, citing to and quoting from an administrative record document for support. Opening Br. at 27. Notably, the quoted language that purportedly supports the Association's allegation comes from an EA for a wholly separate project with a wholly separate purpose and need, namely the South Deer Landscape Management Project (South Deer Project). See ISER 20 (South Deer EA 2) (describing the South Deer Project's purpose and need).

BLM explained in its response to comments that the South Deer Project was not on all fours with Deer North:

. . . . [T]he BLM and [the Association] signed a memorandum of understanding (MOU) [for the South Deer Project] 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.

ER 23 (Response to Comments at 17). Indeed, the South Deer Project's purpose and need emphasized the passive promotion of "non-commodity outputs and conditions" as follows:

- Management of the watershed in a manner that would provide for and promote a wide variety of non-commodity outputs and conditions including wildlife habitats, sustainable forest conditions, fuel hazard reduction, recreation opportunities, maintenance or improvement of water quality, and fisheries.
- Contribution to the Medford District's timber harvest / forest products commitment on matrix lands, thus helping meet the demand for wood products locally, regionally and nationally.

ISER 20 (South Deer EA 2). In contrast, the purpose and need for Deer North focused on active management of the forest and commodity production:

a) produce revenue from the sale of timber; b) improve forest health and vigor; (c) maintain tree species diversity and structure across the landscape; d) maintain existing northern spotted owl habitat within the provincial radius (1.3 miles) of known active northern spotted owl sites and all or substantially all of the older and more structurally complex, multilayered conifer forests; and e) enhance socioeconomic conditions through timber products.

ER 4 (Decision Documentation at 4). Because the purpose and need for the South Deer Project was not fungible with that for Deer North, the Association's reliance on the South Deer Project does not further its case.

Nor was BLM required to separately consider the Natural Selection Alternative given that the consequences of passive land management mirror the consequences of the No Action Alternative, which BLM fully assessed in the EA.⁶

⁶ Consideration of the No Action Alternative is mandatory under NEPA "regardless of consistency with the Medford District RMP and without regard to meeting the purpose and need for the project." ER 71 (EA 13).

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"); Headwaters, Inc. v. BLM, 914 F.2d 1174, 1181 (9th Cir. 1990) ("NEPA does not require a separate analysis of alternatives which are not significantly distinguishable from alternatives actually considered, or which have substantially similar consequences"). BLM explained in its response to comments that the effects of passive land management, i.e. the Mother Nature approach, were not significantly different from those under the No Action Alternative:

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).

ER 22 (Response to Comments at 16). See also ER 17 (Response to Comments at 11) (again explaining that the effects of the Natural Selection Alternative were "considered under the No Action Alternative"). For that matter, BLM's decision to consider, but not analyze in detail, the "separate 'Citizen's Alternative,'" which also overlapped with the No Action Alternative, further obviated any need to assess the

consequences of the Natural Selection Alternative's passive approach to land management. Id. Headwaters, 914 F.2d at 1181 (concluding that BLM considered a reasonable range of alternatives, even though it "did not consider some of the specific proposals advanced," because BLM "reasonably concluded that the proposals were similar to alternatives actually considered").

In sum, the Association's arguments are not well taken because BLM considered a reasonable range of alternatives and also explained why it was not required under NEPA to separately consider the Natural Selection Alternative. The district court thus reached the right result, and this Court should affirm the district court's determination.

2. BLM took a NEPA "hard look" at the potential impacts to red tree voles.

The Association also seeks to convince the Court that the thorough Deer North EA failed to take a NEPA "hard look" at potential impacts to red tree voles and hence provided the Association with insufficient information on the Project with respect to this rodent species. See generally Opening Br. at 39-47. In making this assertion, the Association offers arguments that it never made in the district court and hence cannot raise for the first time on appeal. See, e.g., Cold Mountain v. Garber, 375 F.3d 884, 891 (9th Cir. 2004). Indeed, the Association's NEPA "hard look" argument in the district court was limited to a single allegation, namely

that BLM failed to disclose it was not managing all known sites for red tree voles in the Project area. ISER 36 (relevant excerpt from the Association's opening summary judgment brief); ISER 38-41 (relevant excerpt from the Association's summary judgment reply brief). The Association thus waived all other arguments now offered in support of its NEPA "hard look" claim.

Even if the Association had raised the additional arguments in the district court, the Association would have lost on the merits. This is because an EA's purpose is "not to amass and disclose all possible details regarding a proposal." Tri-Valley CARES v. U.S. DOE, 671 F.3d 1113, 1128 (9th Cir. 2012). Rather, the NEPA analysis "must concentrate on the issues that are truly significant to the action in question, rather than amassing needless detail." League of Wilderness Defenders, 615 F.3d at 1136 (quoting 40 C.F.R. § 1500.1(b)). The Deer North EA more than met the requirement of being a "workable public document that briefly provides evidence and analysis" in support of BLM's decision. Tri-Valley CARES, 671 F.3d at 1129 (emphasis in original).

The following discussion shows that BLM took a hard look at the effects of the Vegetation Management Project on the red tree vole, a small arboreal rodent found in the Project area. ER 179-80 (EA 121-22). But first, it helps to understand the land management implications of the red tree vole being classified as a survey and manage species.

a. **Survey and manage requirements for the red tree vole.**

The survey and manage requirements originally were adopted as part of the Northwest Forest Plan as mitigation measures that applied to about 400 species within the range of the northern spotted owl. See Conservation Northwest v. Rey, 674 F.Supp.2d 1232, 1238 (W.D. Wash. 2009) (discussing the history of the survey and manage requirements), rev'd, 715 F.3d 1181 (9th Cir. 2013). Survey and manage species were not organisms listed as threatened or endangered under the Endangered Species Act (ESA) – in fact, many of them were not even subject to the ESA, like the more than 200 species of survey and manage fungi. See 16 U.S.C. § 1532(16) (ESA permits only the listing of fish, wildlife and plants, which do not encompass fungi). Nor were the survey and manage mitigation measures designed to guarantee the viability of any species. Rather, species were categorized as survey and manage species either because they were apparently uncommon or because the agencies simply lacked information about them and did not know whether other elements of the Northwest Forest Plan would provide them with sufficient protections. Conservation Northwest, 674 F.Supp.2d at 1238.

Deer North is governed by the 2001 Survey and Manage Record of Decision (ROD) and Standards and Guidelines. ER 66-67 (EA 8-9) (stating that the Vegetation Management Project EA "conforms and/or tiers to" this document).

Under the 2001 Survey and Manage ROD, the red tree vole is characterized as an uncommon species assigned to Category C. ER 353 (2001 Survey and Manage Standards and Guidelines at 10) (indicating that Category C denotes uncommon (not rare) species where pre-disturbance surveys are practical). That categorization carries with it certain obligations, namely to "survey" and to "manage" for the vole as described below.

Regarding the "survey" requirement, because the vole was known to exist in the Project area, BLM was required to conduct pre-disturbance surveys for the species, with "the date of the [NEPA] decision . . . the cut-off date for the" survey requirement. ISER 24 (2001 Survey and Manage Standards and Guidelines at 24). The 2001 Survey and Manage ROD explicitly stated that after a NEPA decision, "no NEPA analysis will have to be re-done and no decisions will have to be re-made because of additional survey requirements." Id. The response to comments on the Final Supplemental EIS (FSEIS) for the 2001 Survey and Manage program further explained that the discovery of a survey and manage species subsequent to a project's NEPA decision would not require timber sale contract modifications because such discoveries were anticipated and taken into account in the environmental analysis:

There is no requirement in the standards and guidelines to modify a timber sale contract for sites found after the decision is granted. Survey and Manage species are not "listed" species, the potential loss

of any given site is not likely to be disastrous for the species, and the implications of this element of the standards and guidelines was considered in the effects to species described in Chapter 3&4. The Survey and Manage mitigation measure adds confidence that the Northwest Forest Plan will meet persistence objectives for late-successional forest associated species, without requiring unreasonably disruptive or expensive measures be taken to manage every site regardless of when it is detected.

ISER 26 (FSEIS for Amendment to the Survey & Manage Standards and Guidelines at 312) (emphasis added).

Regarding the "manage" requirement for the red tree vole, BLM complied with Northwest Forest Plan direction to "manage habitat for the species on sites where they are located" through the "[d]elineation and management of Habitat Areas" around vole nest sites discovered during the Project's pre-disturbance surveys.⁷ ER 261 (Management Recommendations for the Oregon Red Tree Vole (Vole Recommendations) at 2) (quoting Northwest Forest Plan ROD). Habitat Areas are buffers at least 10 acres in size. Id. (explaining that 10 acres is the minimum and that "for sites with greater than 10 nests, [the buffer] is either 1.0 acre per nest, or a polygon encompassing the site, whichever is greater and must include a one site potential tree buffer around nests on the outer edge of such polygons"). The buffers, within which timber harvest generally is excluded, ER

⁷ This discussion regarding management requirements for red tree voles and the way in which they were satisfied for Deer North also pertains to part VIII.B, which explains why there is no merit to the Association's red tree vole FLPMA argument.

274 (Vole Recommendations at 15), "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 (Vole Recommendations at 13).

Notably, a location's characterization as a "known site" for the vole is not carved in stone. Rather, "[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." ER 356 (2001 Survey and Manage Standards and Guidelines at 76). Note too that for the vole (which again is an uncommon species, not a rare species), the direction to manage known sites may, at BLM's discretion, also be applied to later-discovered vole nest sites "depending upon factors such as the level of concern for persistence of the species and its habitat in and adjacent to the activity area." ISER 24 (2001 Survey and Manage Standards and Guidelines at 24).

b. BLM fully assessed Project effects on red tree voles.

Turning to the Project's potential environmental impacts on the red tree vole, BLM disclosed that about "1,155 acres proposed for treatment within the Deer North Planning Area qualify as suitable" vole habitat. ER 180 (EA 122). BLM informed the public that under the No Action Alternative, the "greatest risk" to the species would be "the potential wildfire related loss of important habitat components." ER 181 (EA 123). BLM further explained that under both of the Project's action alternatives, pre-disturbance surveys and the resulting habitat

buffers "would remove available acres from potential commercial harvest treatments, and essentially eliminate the direct effects to [voles] from the proposed action." Id.

Based on its analysis, BLM concluded (and disclosed) that the Project was unlikely "to affect long-term population viability of [voles] in the watershed." ER 182 (EA 124). Further, because of "the small scope of the proposed action compared to the combined acreage of the Deer Creek 5th field watershed," BLM concluded the Project "would not contribute to the need to federally list" the vole under the ESA. Id. (so stating based on anticipated treatment of up to 799 acres in the Project area, which equates to 2.6% of the watershed, whereas Deer North treated only 98 acres, or about 0.3% of the watershed).⁸ Keep in mind that forest treatment cannot be equated with habitat destruction, as the Association implies.

⁸ The Association wrongly criticizes these disclosures for allegedly relying on an invalid "averaging technique." Opening Br. at 42 (citing to Or. Natural Res. Council Fund v. Brong, 492 F.3d 1120, 1130 (9th Cir. 2007)). But in Brong, the court took issue with an agency "representation that between eight and twelve large snags per acre" would remain on the landscape after a post-fire logging project where in reality, "over two-thirds" of the 1,004 acres was to be stripped of dead trees. 492 F.3d at 1129-30. In contrast, for Deer North "all active and associated inactive [vole] nests discovered during surveys" were buffered as described above. ER 181. Pointing out the modest nature of the Project and the way in which it would leave "a mosaic of untreated patches across the landscape," ER 182, cannot be described as averaging, let alone a disfavored method of averaging.

Rather, thinning treatments "retain habitat and cover," thereby allowing voles to continue occupying a treated site. ER 372.

Because of the vole's presence in the Project area, pre-disturbance surveys were conducted for Deer North Timber Sale units. ER 180 (EA 122) (explaining that BLM would survey all treatment units prior to authorizing ground-disturbing activities in the Project area but that its initial focus would be on about 201 acres first slated for treatment); ER 648 (Response to Comments at 12) (due to limited budgets, surveys first focused on Deer North units). See also ISER 7-16 (representative documentation of surveys).⁹ As a result of the surveys, vole buffers were established within the Project area with a resulting reduction in treatment acreage. ER 3 (Decision Documentation at 3). See also ER 18 (Response to Comments at 12) (disclosing the location of buffers established around known sites and also explaining that historical locations of vole nests were re-surveyed to determine whether they were still active sites).¹⁰

⁹ There are hundreds of pages of red tree vole survey documentation in the administrative record. For example, the ten representative pages included as ISER 7-16 came from a 430-page compilation of survey records, which is but one of multiple compilations of survey data in the administrative record.

¹⁰ BLM resurveyed historic nest locations that had been surveyed for voles in 1997, 1998 and in some cases 2002. ER 18 (Response to Comments at 12) (explaining that the 1997 and 1998 surveys had used the "draft protocol" and that "none of the trees were climbed which would have allowed them to get an accurate determination of the nest status"). See also ISER 6 (historic nest locations were

The Association criticizes the vole surveys for covering less than 100% of the acreage in a given survey area, Opening Br. at 46, but that criticism reflects the Association's misunderstanding of the survey protocol. Pre-disturbance surveys are not perfect, nor are they meant to be. ER 295 (stating, in the context of survey protocol revisions, that "the modified line transect methods [used for Deer North] do not assume 100 percent detection"). Rather, the survey protocol "was designed to ensure a high probability of finding red tree vole nests" by, among other things, examining at least "68% of each acre in the survey area." ER 329. Because a high probability of finding vole nests cannot be equated with perfect detection of vole nests, the analysis inherently assumes some red tree vole sites will be undocumented at the time of a project decision. That is simply how the survey and manage program works for the vole, and it cannot be equated with a failure to take a NEPA hard look.

After BLM approved the small (98 acres) and light touch (thinning) Deer North Timber Sale, data regarding alleged additional red tree vole nests were submitted to BLM. See generally ISER 4-6 (discussing and assessing same).

resurveyed "because the original surveys had expired and were no longer valid"); id. (further explaining that the stale survey data "was used to help determine [vole] habitat and areas to survey in 2010"). Based on the new surveys, BLM determined that "[o]ld nests were either blown out or determined to be inactive through current climbing surveys." Id. BLM then relied on the Vole Recommendations to conclude that the old nest locations did not require protective buffering. ISER 6.

BLM reasonably concluded there was no need to manage these sites by buffering them with Habitat Areas because: (1) the data post-dated BLM's approval of Deer North, ISER 4; and (2) treatment in the vicinity of the alleged vole nests would not impair the species' persistence in the Project area. ISER 5-6 (documenting the basis for BLM's conclusion). BLM also fully explained why resurveyed historic nest locations did not need to be buffered with Habitat Areas per the survey and management requirements. ISER 6.

On this record, which demonstrates that BLM thoroughly assessed the Project's impact (or lack thereof) on red tree voles, BLM more than satisfied the NEPA "hard look" requirement for voles in the Project area. BLM's analysis and disclosure of possible environmental effects was sufficiently thorough and supported by the administrative record, which warrants affirmance on the NEPA "hard look" claim.

B. The District Court Correctly Held that the Vegetation Management Project Complies Fully with FLPMA.

FLPMA establishes requirements for land use planning on public lands. Under FLPMA, BLM must "develop, maintain, and when appropriate, revise land use plans" to ensure that land management be conducted "on the basis of multiple use and sustained yield." 43 U.S.C. §§ 1701(a)(7), 1712(a). Once a land use plan is developed, "[a]ll future resource management authorizations and actions . . .

shall conform to the approved plan." 43 C.F.R. § 1601.5-3(a). FLPMA gives BLM "a great deal of discretion in deciding how to achieve" such compliance. Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 66 (2004).

As discussed at the outset, FLPMA requires BLM to manage lands in the Project area in conformance with the 1995 Medford District RMP as amended by the Northwest Forest Plan. The following discussion demonstrates that BLM complied with the RMP with respect to voles when it authorized the Project's now-completed Deer North Sale. The discussion in part VIII.A.2 of this brief also informs the Court's FLPMA analysis.¹¹ In addition to describing the survey and manage program, the 2001 Survey and Manage ROD's applicability to Deer North, and the survey and manage requirements for a Category C species like the vole, that discussion shows that BLM complied substantively with the RMP requirements pertaining to voles and hence complied with FLPMA.

The survey and manage program assigned covered species to one of six categories based on several attributes, including the "ability to reasonably and consistently locate occupied sites during surveys prior to habitat-disturbing activities." ISER 22 (2001 Survey and Manage Standards and Guidelines at 6). Because the red tree vole is a Category C species, ISER 23 (2001 Survey and

¹¹ Part VIII.A.2 discusses the survey and manage requirements and their application at Deer North in connection with the NEPA "hard look" argument.

Manage Standards and Guidelines at 7), the objective is to "manage all known sites." ER 353 (2001 Survey and Manage Standards and Guidelines at 10). The Association seizes on that objective as the holy grail of land management for voles, but one cannot ignore the actual management direction that follows and that does not require Habitat Area buffers for all inactive sites. ER 43 (Report & Recommendation at 10) (deferring to the expert agency on this issue); ER 57-58 (Order Adopting Report and Recommendation).

The district court correctly declined to automatically equate each and every historical vole nest location as a known site requiring a protective buffer. First, a location's characterization as a known site for the vole is not immutable. Rather, "[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." ER 356 (2001 Survey and Manage Standards and Guidelines at 76).

Second, the Vole Recommendations provide that "[c]onfirmed inactive red tree vole nests" that are sufficiently proximate to confirmed or assumed active vole nests (i.e. within 100 meters) should be conservatively buffered via Habitat Areas. ER 273 (Vole Recommendations at 14). It is undisputed BLM did just that for Deer North. See, e.g., ER 181 (EA 123) ("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."); ER 18 (Response to Comments at 12) ("[A]ll active and associated inactive RTV nests discovered during surveys would be buffered and essentially eliminate the direct effects to RTVs from the proposed action."). Thus, the Association cannot complain that BLM inadequately managed inactive nests located sufficiently proximate to active vole nests.

Third, the Vole Recommendations do not require that any remaining inactive sites, i.e. those not in close proximity to active vole nests, be buffered with protective Habitat Areas. ER 273 (Vole Recommendations at 14) ("Habitat Areas . . . are not delineated for inactive sites."). See also ER 274 (Vole Recommendations at 15) (same). The reason these inactive sites "are not included in Habitat Areas . . . [is] due to the [Northwest Forest Plan] ROD direction to 'manage habitat for the species on sites where they are located (USDA, USDI 1994a, page C-5)'. ER 275 (Vole Recommendations at 16). This does not mean BLM ignored the possibility that inactive sites could be recolonized in the future. Cf. Opening Br. at 20-21, 44-45. Indeed, the Vole Recommendations explicitly acknowledge that the "primary concern . . . is whether [inactive sites] have been 'permanently' [versus temporarily] abandoned." ER 275 (Vole Recommendations at 16). To address that concern, management direction provides that where an inactive site is located within habitat that is neither suitable for voles nor headed on

such a trajectory, the habitat should be treated to facilitate the development of suitable vole habitat in the future. Id.

Essentially, the Association's vole argument asks the Court to read one phrase from the 2001 Survey and Manage Standards and Guidelines – "manage all known sites" – in a vacuum, informed only by the Association's preferred management of inactive vole nests regardless of location. Respectfully, context matters.

Nor is there any merit to the cursory assertion that BLM violated FLPMA by failing to detect 100% of nest sites. Opening Br. at 18. As discussed above, the vole survey protocol "was designed to ensure a high probability of finding" nests, ER 329, not to ensure finding 100% of nest sites. Because it was always assumed surveys would not detect each and every vole site, see, e.g., ER 295, ER 298, the survey and manage program addressed the management of subsequently discovered nests by leaving it to the agency's discretion to determine whether there was a need to apply known site management direction to a later-discovered vole site. ISER 24 (2001 Survey and Manage Standards and Guidelines at 24).

On a final note, the Association tries to paint the red tree vole as a species facing a precarious future, which is inaccurate. Opening Br. at 16-17. Although the vole had been found at only about "235-310 locations" when it was added as a Northwest Forest Plan Survey and Manage species in 1994, ER 267 (Vole

Management Recommendations at 8), subsequent survey efforts have identified many more confirmed vole nest locations, a large number of which have been on the BLM's Medford District. Id. Although an individual nest is not a perfect proxy for an individual rodent, individual voles are "hard to locate." Id. The vole survey methodology thus focuses on "nest trees [as] an indicator of a possible vole population," ER 295 (Vole Survey Protocol at 8), with subsequent management direction emphasizing the retention of "sufficient habitat to maintain [the vole's] potential for reproduction, dispersal, and genetic exchange." ER 180 (EA at 122). Given that a large number of new vole nests have been found on the BLM's Medford District, BLM's management appears to be working well for the species.

In sum, BLM conducted the requisite pre-disturbance vole surveys for Deer North and then buffered known sites based on survey results and in accordance with survey and manage requirements. As the district court properly recognized, BLM's decisions regarding treatment of historic vole nest locations were within the expert land management agency's purview and wholly lawful. ER 42-44 (Report & Recommendation at 9-11); ER 57-58 (Order Adopting Report and Recommendation). See also McNair, 537 F.3d at 993 (a reviewing court should be at its most deferential where an agency is addressing difficult issues within its area of special expertise); Siskiyou Reg'l Educ. Project v. U.S. Forest Serv., 565 F.3d 545, 555 (9th Cir. 2009) (stating in the analogous context of the U.S. Forest

Service that "plan directives [are treated] as equivalent to federal regulations adopted under the APA" such that an agency's interpretation of that direction is entitled to deference so long as it is not "plainly erroneous or inconsistent with the directive"). The district court thus reached the right conclusion on this issue of FLPMA compliance, and this Court should affirm that determination.

IX. CONCLUSION.

Based on the above, and for the reasons set forth by the BLM, the district court rightly upheld the Deer North Vegetation Management Project in its entirety. Because the district court reached the right result, this Court should affirm the district court's grant of summary judgment to Murphy Company.

DATED this 6th day of October, 2014.

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STATEMENT OF RELATED CASES

Defendant-intervenor-appellee Murphy Company states that it is not aware of any related cases as defined in Ninth Circuit Rule 28-2.6.

DATED this 6th day of October, 2014.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,293 words, excluding the parts of the brief exempted by Fed R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010, font size 14 and Times New Roman type style.

DATED this 6th day of October, 2014.

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Attorneys for Defendant-Intervenor-
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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2014, I caused the foregoing **DEFENDANT-INTERVENOR-APPELLEE'S RESPONSE BRIEF** to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I have caused the foregoing document to be sent by electronic mail to the following non-CM/ECF participant:

None

/s/ Julie A. Weis
Julie A. Weis