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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON WILD, an
Oregon non-profit
corporation; CASCADIA
WILDLANDS, an Oregon
non-profit corporation,

Plaintiffs-Appellees,

v.

BUREAU OF LAND
MANAGEMENT, an
administrative agency of
the United States
Department of Interior,

Defendant,

and

SCOTT TIMBER CO.;
CARPENTERS
INDUSTRIAL COUNCIL,

Intervenor-Defendants-
Appellants.

No. 15-35336

D.C. No. 6:14-cv-00110-AA

MEMORANDUM*

(Filed May 11, 2017)

Appeal from the United States District Court
for the District of Oregon Ann L. Aiken,
District Judge, Presiding

* This disposition is not appropriate for publication and is
not precedent except as provided by Ninth Circuit Rule 36-3.

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Submitted May 9, 2017**

Portland, Oregon

Before: BYBEE and HURWITZ, Circuit Judges, and
RAKOFF,*** Senior District Judge.

Appellants Scott Timber Co. and Carpenters Industrial Council appeal from a grant of summary judgment in favor of Plaintiffs Oregon Wild and Cascadia Wildlands. The district court held that the Bureau of Land Management (BLM) violated the National Environmental Policy Act (NEPA) when it authorized the White Castle Variable Retention Harvest Project without considering a reasonable range of alternatives, creating an Environmental Impact Statement (EIS), or taking a hard look at the project's potential environmental consequences. We dismiss this appeal for lack of jurisdiction.

1. District court orders remanding to an agency for further proceedings “generally are not ‘final decisions’ for purposes of [28 U.S.C. § 1291].” *Alsea Valley All. v. Dep’t of Commerce*, 358 F.3d 1181, 1184 (9th Cir. 2004). When, as here, the agency subject to the remand order chooses not to appeal, private litigants generally cannot appeal the remand order. *See Pit River Tribe v. U.S. Forest Serv.*, 615 F.3d 1069, 1074-77 (9th Cir. 2010) (concluding that a district court’s remand order

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

*** The Honorable Jed S. Rakoff, Senior United States District Judge for the Southern District of New York, sitting by designation.

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directing the BLM and other agencies to complete a new EIS was not an appealable order under § 1291). Although the district court here did not explicitly remand to the BLM for further proceedings, it functionally did so. There is no other way to interpret its acknowledgment that the “BLM cannot proceed with the project until it complies with NEPA.” *Oregon Wild v. BLM*, No. 6:14-CV-0110-AA, 2015 WL 1190131, at *13 (D. Or. Mar. 14, 2015). Under these circumstance, “[t]he reasoning of *Alsea* remains persuasive.” *Pit River Tribe*, 615 F.3d at 1076. Appellants can participate in further BLM proceedings and challenge any adverse outcome of those proceedings. *See id.*

2. We also lack jurisdiction under 28 U.S.C. § 1292(a)(1). We have consistently rejected attempts to recharacterize non-final remand orders as injunctions. *See Pit River Tribe*, 615 F.3d at 1077-78; *Alsea Valley All.*, 358 F.3d at 1186-87. Were we to accept Appellants’ argument that jurisdiction exists under § 1292(a)(1) because the remand order had the practical effect of enjoining the BLM from carrying out the project until it complies with NEPA, we would effectively undo the general rule that private parties cannot appeal a remand order when the agency decides not to appeal.

DISMISSED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON WILD, an
Oregon non-profit
corporation; and CASCADIA
WILDLANDS, an Oregon
non-profit corporation,

Case No.
6:14-CV-0110-AA
OPINION AND ORDER
(Filed Mar. 14, 2015)

Plaintiffs,

v.

BUREAU OF LAND
MANAGEMENT, an
administrative agency of
the United States
Department of Interior,

Defendant,

v.

SCOTT TIMBER Co., an
Oregon corporation; and
CARPENTERS
INDUSTRIAL COUNCIL, an
Oregon non-profit corporation,

Defendant-
Intervenors.

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AIKEN, Chief Judge:

Plaintiffs Oregon Wild and Cascadia Wildlands move for summary judgment pursuant to Fed. R. Civ. P. 56. They allege that defendant, the U.S. Bureau of Land Management (“BLM”), violated the National Environmental Policy Act (“NEPA”), the Federal Land Policy and Management Act (“FLPMA”), the Administrative Procedure Act (“APA”), and those statutes’ implementing regulations. Defendant BLM and defendant-intervenors, Scott Timber Co. (“Scott Timber”) and Carpenters Industrial Council (“CIC”), oppose plaintiffs’ motion and filed cross-motions for summary judgment. For the reasons set forth below, the Court

partially grants plaintiffs' motion for summary judgment and denies the defense cross-motions. The Court need not reach plaintiffs' FLPMA claims, because it finds BLM violated NEPA and APA.

BACKGROUND

Plaintiffs challenge BLM's authorization of the White Castle Project ("project") located in BLM's Roseburg District near the community of Myrtle Creek in Douglas County. Administrative Record ("AR") 739, 770. In December 2010, the U.S. Secretary of the Interior directed Roseburg and other BLM districts in southwest Oregon to develop demonstration pilot projects to apply the principles of "ecological restoration" developed by Drs. Jerry F. Franklin and K. Norman Johnson ("Franklin and Johnson"). AR 6410; *see* AR 18332-40. The White Castle Project is one of two timber harvests that comprise the Roseburg District Secretarial Demonstration Pilot Project ("pilot project"). AR 739. Plaintiffs do not challenge the pilot project's other timber harvest, the Buck Rising Timber Sale, because it would affect younger trees that do not provide nesting, roosting, and foraging habitat for the threatened northern spotted owl. Compl. 11.

The federal government listed the northern spotted owl as a threatened species under the Endangered Species Act in 1990, and its population has continued to decline since then, due, in part, to habitat loss from timber harvest. Determination of Threatened Status for the Northern Spotted Owl, 55 Fed. Reg. 26, 114

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(June 26, 1990) (codified at 15 C.F.R. § 17.11(h)); AR 1366, 1382. The White Castle Project falls within the purview of the Northwest Forest Plan (“NWFP”), which coordinates federal efforts to balance environmental concerns with the need for sustainable forest products in the range of the northern spotted owl. AR 1381. The project also falls under the Revised Recovery Plan for the Northern Spotted Owl published by the U.S. Fish and Wildlife Service (“FWS”) to provide recommendations for the conservation of the species and its habitat. AR 1382, 2307. In February 2012, during the project’s planning stages, FWS proposed designating almost all of the pilot project area as “critical habitat . . . essential to the conservation of the spotted owl.” AR 1011, 16403-506.¹ In December 2012, after BLM had already approved the project, FWS finalized a critical habitat designation that included an even greater portion of the pilot project area. AR 475, 478; Designation of Revised Critical Habitat for the Northern Spotted Owl, 77 Fed. Reg. 71876 (Dec. 4 2012).

The White Castle Project implements variable retention harvesting methods,² a shift for the Roseburg

¹ The pilot project’s Finding of No Significant Impact noted, “The Roseburg District Secretarial Demonstration Pilot Project is located in an area almost entirely proposed for designation as critical habitat for the northern spotted owl on February 28 2012.” AR 1011.

² Distinguishable from traditional clear-cutting, the variable retention harvesting method logs some trees and retains others in a predetermined ratio. Pls.’ Mem. Mot. Summ. J. vii; Def.’s Resp. Mot. Summ. J. 22-23; AR 6594. Trees may be retained in patches (aggregated retention) or dispersed throughout a harvested area

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District, which has relied almost exclusively on less intensive thinning and density management strategies for timber production since 2000. AR 513. The project would apply variable retention harvesting techniques to 265 acres, retaining 78 acres and logging 187 acres of forest. AR 740, 537, 544. The project would harvest the 187 acres in nine separate units clustered within a few miles of one another. AR 739, 770, 726. The forest stands to be harvested range in age from 60 to 110 years old, and “most of the stands to be treated are between 100 and 110 years of age.” AR 539.³ The project would effectively remove 160 acres of “mature forest,” defined as stands over 80 years old.⁴ AR 503 (BLM response to project protest). Defendant-Intervenor Scott Timber purchased the project’s timber sale and would harvest an estimated 6,395 thousand board feet of timber. AR 739; Scott Mot. Intervene 4.

After the White Castle Project’s authorization, FWS designated all or almost all 187 acres slated for harvest as critical habitat for the northern spotted owl.

(dispersed retention). AR 6594, 2277. The project would use both methods to retain trees. AR 6421, 544.

³ BLM made this statement in its response to an administrative appeal of the White Castle Project. AR 539. More precisely, a review of data from the Environmental Assessment in combination with data from the White Castle Project decision document indicates that forest stands over 98 years old would represent 120 of the 187 acres to be harvested. AR 740, 6445.

⁴ Federal land management documents explain, “In Douglas fir west of the Cascades, [the mature forest] stage typically begins between 80 and 130 years depending on site conditions and stand history.” AR 10016 (NWFP amendment document).

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AR 1028-29, 1359, 748.⁵ The project would remove habitat within the home ranges⁶ of several spotted owls, although no nests would be located in the harvest area. AR 6468, 748, 1403. BLM consulted with FWS at all stages of project planning and requested a Biological Opinion (“BiOp”) which FWS issued June 4, 2012 and updated and confirmed on January 11, 2013 after FWS approved final critical habitat designations. AR 1351-1442 (BiOp), 1027-30 (errata), 475-80 (update). The BiOp determined the project would “adversely affect” northern spotted owls, their critical habitat, and their prey such as red tree voles but would not jeopardize the continued existence of the northern spotted owl as a species. AR 1351, 1412-13, 1421-23, 478-80.

The project area contains habitat for the red tree vole, an arboreal rodent that inhabits older conifer forests and serves as a key food source for spotted owls. AR 6479. The NWFP sets Survey and Manage requirements for red tree voles. AR 6479, 9876, 9878. During the development of the project, volunteers with the organization Northwest Ecosystems Survey Team (“NEST”) surveyed project units for voles and submitted evidence of nest sites to BLM. AR 4008-11, 3006. BLM acknowledged NEST’s submissions but rejected the findings and declined to analyze them in the

⁵ BLM has not specified precisely how many acres of critical habitat the White Castle Project would eliminate. For further discussion, see *infra* note 14.

⁶ A home range is a 1.2 mile radius circle (2,955 acres total) that surrounds a northern spotted owl nesting site and provides food, cover, and other necessities for the owls and their offspring. AR 6471.

project's Environmental Assessment ("EA") or to manage the alleged sites in accordance with the NWFP. AR 3006, 6480.

In April 2012, BLM issued the EA for the pilot project as a whole, analyzing the White Castle and Buck Rising project areas together. AR 6402-6652. The EA set forth the pilot project's three-fold purpose: (1) to demonstrate a variable retention harvesting model to create complex, early-successional habitat; (2) to design the pilot project with participation from FWS in order to apply Recovery Actions from the Northern Spotted Owl Recovery Plan; and (3) to design and offer timber sales that benefit local and regional employment and manufacturing. AR 6411. The EA assessed two alternatives: a no-action alternative and the project as proposed, breaking the analysis of the proposed action into two variations, one with and one without riparian treatments in the Buck Rising Project area. AR 6419-22. In June 2012, after public comment and the FWS BiOp, BLM opted for the proposed project with riparian treatments and issued a Finding of No Significant Impact ("FONSI"). AR 1006-15. In August 2012, BLM authorized both the Buck Rising and White Castle projects. AR 739-87.

On January 22, 2014, plaintiffs filed the present complaint, claiming BLM's analysis and authorization of the White Castle Project violated NEPA, FLPMA, APA, and accompanying regulations. Compl. 19. On May 12, 2014, the Court permitted Scott Timber, the contract holder for the White Castle timber sale, and CIC, a union representing affected lumber mill

workers, to intervene. On June 20, 2014, plaintiffs moved for summary judgment, and defendant and defendant-intervenors responded and made cross-motions seeking summary judgment in their favor.⁷ Plaintiffs allege BLM violated NEPA by failing to analyze an adequate range of project alternatives; not preparing an Environmental Impact Statement (“EIS”); and failing to take the required “hard look” at the project’s potential environmental consequences. Compl. 16-18. Plaintiffs also claim BLM violated FLPMA and NEPA by failing to adhere to NWFP requirements for surveying and managing red tree vole sites. Compl. 19. Plaintiffs ask the Court to find that BLM violated NEPA, FLPMA, and APA; to vacate the White Castle decision; and to enjoin BLM from proceeding with the project and compel them to correct the alleged violations. Pls.’ Mot. Summ. J. 2-3. Plaintiffs also seek attorney fees and costs. *Id.* at 3.

STANDARD OF REVIEW

Courts must review federal agencies’ compliance with NEPA or FLPMA under the APA. 5 U.S.C. § 706. In an APA case, a court will award summary judgment for the plaintiff if, after reviewing the administrative record, it determines that the agency’s action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Natural Res. Def. Council*

⁷ Defendant-intervenors’ pleadings are largely duplicative of BLM’s arguments. As such, the Court’s discussion of BLM’s claims subsumes those of defendant-intervenors, except where otherwise indicated.

v. Nat'l Marine Fisheries Serv., 421 F.3d 872, 877 (9th Cir. 2005) (quoting 5 U.S.C. § 706(2)(A)). Under this standard of review, the court must “engage in a substantial inquiry,” which entails “a thorough, probing, in-depth review,” *Native Ecosys. Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005). However, the court may not substitute its own judgment for that of the agency. *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (en banc), *overruled on other grounds by Am. Trucking Ass'ns Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009).

The Court need only defer to an agency's decision if it is “fully informed and well-considered” and must reject an agency decision that amounts to “a clear error of judgment.” *Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007) (citations and internal quotations omitted). Specifically, the court will reverse an agency's decision as arbitrary or capricious

if 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 ran counter to the evidence before the agency, or offered one that is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Id. (quoting *W. Radio Servs. Co. v. Espy*, 79 F.3d 896, 900 (9th Cir. 1996)). As such, in order to withstand summary judgment, the “agency must articulate a rational connection between the facts found and the conclusions reached.” *Sierra Club*, 510 F.3d at 1023.

Independent of these concerns, the court will set aside an agency's action if it acted without observing procedures required by law. *Sierra Club*, 510 F.3d at 1023; *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 567-68 (9th Cir. 2000).

DISCUSSION

I. NEPA Claims

NEPA is a procedural statute that does not mandate particular results but rather sets forth a review process to “ensure that federal agencies take a hard look at the environmental consequences” of a proposed action. *Sierra Club*, 510 F.3d 1016, 1018 (9th Cir. 2007); *Conservation Cong. v. Finley*, 774 F.3d 611, 616 (9th Cir. 2014). Critically, NEPA requires agencies considering “major Federal actions significantly affecting the quality of the human environment” to prepare an EIS. 42 U.S.C. § 4332(c); *Conservation Cong.*, 774 F.3d at 616. In order to determine if an EIS is required, an agency may first prepare a less extensive EA. *Sierra Club*, 510 F.3d at 1018; 40 C.F.R. § 1508.9. If the EA finds the proposed action will significantly affect the environment, the agency must prepare an EIS. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013). However, if the EA finds no significant environment impact, the agency may issue a Finding Of No Significant Impact (“FONSI”), “accompanied by a convincing statement of reasons to explain why a project’s impacts are insignificant,” and then proceed without further study. *Sierra Club*, 510 F.3d at 1018.

Plaintiffs argue that the BLM violated NEPA by: (1) failing to adequately analyze alternative approaches to the project in the EA; (2) not preparing an EIS; and (3) failing to take a “hard look” at the project’s direct and indirect environmental impacts.⁸ Compl. 16-19. For the reasons set forth below, the Court finds that the BLM acted arbitrarily and capriciously, violating the requirements of NEPA.

A. Adequacy of EA Alternatives Analysis

NEPA requires a federal agency to “study, develop, and describe appropriate alternatives” to a proposed project independent of whether the agency is preparing an EA or an EIS. 42 U.S.C. § 4332(2)(E); *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988); *see* 40 C.F.R. § 1508.9. “Informed and meaningful consideration of alternatives” is “critical to the goals of NEPA,” ensuring that agency decision-makers assess a project’s costs, benefits, and environmental impacts in the correct context. *Bob Marshall Alliance*, 852 F.2d at 1228-29. Although BLM is correct in asserting it bears a lesser burden to discuss alternatives in an EA than in an EIS, an EA must still “give full and meaningful consideration to all reasonable alternatives.” *Abbey*, 719 F.3d 1035, 1050 (9th Cir. 2013); *N. Idaho Cmty. Action Network v. U.S. Dep’t of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008). The Ninth Circuit

⁸ Plaintiffs also claim BLM violated NEPA by failing to consider red tree vole sites. Because this NEPA claim is closely linked to plaintiffs’ FLPMA claim, this opinion more fully addresses it in the next section.

made clear in *Western Watersheds v. Abbey*, “The existence of a viable but unexamined alternative renders an EA inadequate.” 719 F.3d at 1050.

Plaintiffs argue the EA was inadequate, because it failed to analyze viable alternatives to the proposed project, in particular, the alternative of limiting the project’s variable retention harvest to younger trees. Pls.’ Mem. Mot. Summ. J. 33. In response, BLM does not dispute the reasonableness of this alternative but instead argues the agency was not “obligated to analyze an alternative that Plaintiffs did not even suggest at the time of the Project decision.” Def.’s Reply 21; see Def.’s Mot. Summ. J. 30-31. BLM further argues that it fulfilled its NEPA obligation by “developing and analyzing several alternatives that encompassed varying levels of environmental impact.” Def.’s Reply 21.

The pilot project EA analyzed two alternatives: a no-action alternative and the project as proposed. AR 6404.⁹ The EA also provided “reference analyses,” briefly discussing and rejecting two different alternative harvest methods: commercial and variable density thinning only; and traditional regeneration harvesting. AR 6433-42. The EA did not analyze the possibility of conducting variable retention harvesting in younger stands of trees.

⁹ BLM divided its analysis of the proposed project into two “sub-alternatives”: one with variable thinning treatments in riparian reserves and one without such treatments. AR 6404. The analyzed sub-alternatives presented identical plans for White Castle Project area. AR 1006, 6431, 739.

In arguing that its analysis was sufficient, BLM misconstrues its obligations under NEPA. BLM argues the holding in *Western Watersheds* established only “the limited proposition” that an EA’s analysis of alternatives is adequate unless the agency has “failed to analyze any alternatives that would result in varying levels of environmental impact.” Def.’s Reply 20. On this basis, BLM concludes that an EA may satisfy NEPA by merely considering some alternative with less environmental impact than the proposed project. *Id.* BLM’s interpretation contradicts Ninth Circuit precedent and the plain language of *Western Watersheds* which hold agencies to the stricter standard of examining *all* viable and reasonable alternatives. See *W. Watersheds v. Abbey*, 719 F.3d. at 1050 (“The existence of a viable but unexamined alternative renders an EA inadequate”); *Native Ecosys. Council V. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005) (“So long as *all* reasonable alternatives have been considered and an appropriate explanation is provided as to why an alternative was eliminated, the regulatory requirement [for an EA or EIS] is satisfied”) (emphasis added); *N. Idaho Cmty. Action Network*, 545 F.3d at 1153 (both EA and EIS must consider all reasonable alternatives, but EIS must provide more detail and analysis of those alternatives); *Native Fish Soc. v. Nat’l Marine Fisheries Servs.*, 992 F. Supp. 2d 1095, 1110 (D. Or. 2014) (holding that a fish hatchery EA was inadequate, because “[w]here a feasible alternative would meet the project’s purpose and need, it should be considered”).

BLM also improperly places the burden of determining reasonable project alternatives entirely on plaintiffs. Indeed, courts have held that agencies need only consider alternatives that are “ascertainable and reasonably within reach.” *City of Angoon v. Hodel*, 803 F.2d 1016, 1021-22 (9th Cir. 1986). Generally, this means that if plaintiffs fail to raise a viable alternative in their comments, the plaintiffs cannot later object that the subsequent EA failed to consider the alternative. *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764-65 (2004). However, the U.S. Supreme Court and the Ninth Circuit recognize an exception to this rule. When the agency clearly has independent knowledge of specific issues or concerns, “there is no need for a commenter to point them out specifically in order to preserve its ability to challenge a proposed action.” *Id.* at 765; *‘Ilio’ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1093 (9th Cir. 2006); see *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 559 (9th Cir. 2000) (“Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs”).

Although plaintiffs provided extensive public comment on the need to preserve trees over 80 years old, BLM argues they did not suggest the precise alternative they now raise: proceeding with the planned variable retention harvest but on younger trees. *See, e.g.*, AR 2057, 2037-38, 4731-39, 4699-4702. However, this is not dispositive, because BLM was aware, well before the EA, of that alternative. In fact, in a February 2012

report describing the Roseburg Pilot Project, Franklin and Johnson said they “initially planned to use previously harvested stands between 60 and 80 years of age, given our intent of using stands that were less controversial.” AR 2314. They explained they later chose to harvest older trees, because there was a limited selection of the younger trees and “some stakeholders” wanted to harvest only trees older than 80 years old. AR 2314. Thus, not only did BLM know of the alternative of limiting variable retention harvesting to trees under 80 years old, it was BLM’s original plan for the project. Moreover, the alternative appears reasonable in light of the project’s purpose and need, and BLM does not argue otherwise. In this context, BLM failed to take a “hard look.” Moreover, BLM should have at least acknowledged the alternative in the EA and explained its reasons for rejecting it. BLM’s failure to consider this known alternative was arbitrary and capricious in violation of NEPA and APA.

B. EIS Requirement

Plaintiffs also challenge BLM’s decision not [to] prepare an EIS. Under NEPA, a government agency must prepare an EIS if a proposed federal action could “significantly affect the quality of the human environment.” 42 U.S.C. § 4332(2)(c). Importantly, the significant effect need not actually occur; it is sufficient to trigger the preparation of an EIS if a substantial question is raised “whether a project may have a significant effect on the environment.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9th Cir.

1998). If an agency moves forward without issuing an EIS, the agency must provide a “convincing statement of reasons” to support why the proposed project is not significant; this explanation is critical in demonstrating that the agency took the requisite “hard look” at the potential effects of a project. *Id.* at 1212.

In determining whether potential effects are significant, agencies and courts should evaluate their “context” and their “intensity.” 40 C.F.R. § 1508.27. In assessing the intensity, or the “severity of the impact,” courts and agencies should consider up to ten factors. 40 C.F.R. § 1508.27(b).¹⁰ A court may find substantial

¹⁰ The Court only discusses relevant factors in this opinion, but the full list of “intensity” factors is as follows:

- (1) Impacts that may be both beneficial and adverse. A significant effect may exist even if the Federal agency believes that on balance the effect will be beneficial.
- (2) The degree to which the proposed action affects public health or safety.
- (3) Unique characteristics . . . such as proximity to historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas.
- (4) The degree to which the effects . . . are likely to be highly controversial.
- (5) The degree to which the possible effects . . . are highly uncertain or involve unique or unknown risks.
- (6) The degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.
- (7) Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to

risk of a significant effect based on just one of these factors. *Ocean Advocates v. U.S. Army [Corps] of Eng'rs*, 402 F. 3d 846, 865 (9th Cir. 2004).

Plaintiffs argue that five factors support the preparation of an EIS for the project: (1) the project's highly controversial and (2) highly uncertain effects, (3) the project's precedential effect on future projects, (4) its adverse effects on spotted owls, and (5) potential violations of FLPMA and the NWFP. Pls.' Mem. Mot. Summ. J. i-ii. The Court agrees that an EIS is required.

1. Controversiality of the Project

Plaintiffs claim BLM did not properly assess, among other significance factors, the degree to which the project's potential effects are "likely to be highly controversial." 40 C.F.R. § 1508.27(b)(4). A project

anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.

(8) The degree to which the action may adversely affect [sites/structures] listed in or eligible for listing in the National Register of Historic Places or may cause loss or destruction of significant scientific, cultural, or historical resources.

(9) The degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.

(10) Whether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment. 40 C.F.R. § 1508.27(b).

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qualifies as likely to be highly controversial if a “substantial dispute exists as to [its] size, nature, or effect.” *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1536 (9th Cir. 1997). Mere public opposition to a proposal does not render it highly controversial. *Id.* Rather, “a substantial dispute exists when evidence, raised prior to the preparation of an EIS or FONSI casts serious doubt upon the reasonableness of an agency’s conclusions.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001), *abrogated on other grounds by Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (internal citations omitted).

Here, the record provides ample evidence of controversy, including observations from the project’s own guiding scientists, Franklin and Johnson. BLM acknowledged the White Castle Project would effectively remove more than 160 acres of forest stands ranging in age from about 80-110 years old. AR 503. Yet, in project planning documents and emails, Franklin and Johnson repeatedly described the harvesting of trees older than 80 years as “controversial.” AR 2310, 2314, 2296-97; *see* 18335 (describing “societal interest” and “continuing legal battles” to preserve older trees), 6368-71.¹¹ In fact, they reported in pilot project documents, that they deliberately chose a controversial strategy to stimulate discussion:

¹¹ Other project planning documents also describe the practice as “controversial” and “highly controversial.” AR 4014, 5636, 6368-71.

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Initially, we intended to do early successional harvests in the less controversial previously harvested stands (60-80 years of age). Ultimately we also applied it in a natural older stand (90-110 years of age) that had experienced no past timber harvest, in part to stimulate the dialogue regarding harvests in such forests. AR 2310.

BLM argues that the project designers used the term “controversy” to refer to mere social and political opposition and not to “substantial dispute” or legitimate “scientific controversy.” Def.’s Resp. Mot. Summ. J. 9-13. However, scientific controversy appears to have accompanied the project from its inception. The 2011 Northern Spotted Owl Recovery Plan recommended applying Franklin and Johnson’s techniques but also described them as “controversial.” AR 17676. The plan noted differing views among scientists regarding the techniques’ impact on the spotted owl. AR 17676. More[o]ver, the Recovery Plan outlined as a primary goal “to conserve older stands that are either occupied or contain high-value spotted owl habitat.” AR 17682, 17684. To that end, it suggested applying Franklin and Johnson and their cohort’s “active management” strategies to younger and less diverse forest stands. AR 17683-84. Even BLM’s own planning documents noted ecological concerns about harvesting trees older than 80 years. AR 18335; 2290. Franklin and Johnson noted that “most BLM stands over 80 years old have not been subjected to timber harvesting,” because “such stands have special significance in conservation strategies for species associated with mature and old forests, such as

the [northern spotted owl] and the [red tree vole].” AR 2290. Furthermore, during the formulation of the project, FWS proposed and later approved designating project land as critical habitat for the northern spotted owl which nests, roosts, and forages in trees over 80 years old. AR 6468, 6472. Acknowledging, in part, the ecological need to retain dwindling stocks of older trees and spotted owl habitat, Franklin and Johnson initially planned to only harvest forest under 80 years old. AR 2310, 2314.

Members of the public and scientists also raised ecological concerns about BLM’s choice to harvest trees over 80 years old. AR 4884-99 (public comment), 1615. BLM considered in its decisionmaking process a scientific article from the “Journal of Forestry” that criticized Franklin and Johnson’s pilot project strategies and, in particular, their failure to adequately protect trees over 80 years old. AR 16230-39; Def.’s Resp. Mot. Summ. J. 11.

Clearly, BLM recognized the highly controversial nature of the project well before issuing the FONSI. The Recovery Plan, the critical habitat proposal, comments from the public and scientists, and Franklin and Johnson’s own reports demonstrated the existence of “a substantial dispute” casting “serious doubt upon the reasonableness” of BLM’s decision to harvest forest stands over 80 years old. *Nat’l Parks & Conservation Ass’n*, 241 F.3d at 736. In the FONSI, BLM carried the burden of showing there was no legitimate controversy but failed to do so in its terse one-paragraph acknowledgement of public comment and concerns. AR 1009;

see Nat'l Parks & Conservation Ass'n, 241 F.3d at 736 (agency has burden to convincingly refute evidence of controversy). The Court does not express an opinion about the merits of the BLM's decision to harvest designated critical habitat and trees older than 80 years. However, the Court finds that BLM's failure to acknowledge the "highly controversial" nature of that decision was arbitrary and capricious in light of the evidence in the record. This significance factor weighs in favor of an EIS.

2. Uncertain Effects

Plaintiffs also argue BLM failed to properly consider "the degree to which the possible effects . . . are highly uncertain or involve unique or unknown risks." 40 C.F.R. § 1508.27(b)(5). The Ninth Circuit explains, "The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action. . . . the 'hard look' must be taken before, not after, the environmentally-threatening actions are put into effect." *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 732-33.

Here, a key uncertainty is whether the project will benefit spotted owls and their habitat in the long term, as BLM and defendant-intervenors repeatedly assert. Def.'s Resp. Mot. Summ. J. 27; Def.'s Reply 13-14; Def.-Ints.' Reply 4-6; AR 746-47, 6410. The 2011 Revised Northern Spotted Owl Recovery Plan suggested testing out Franklin and Johnson's "ecological forestry and

restoration” techniques as a way “to address . . . uncertainty” about their effects on spotted owls as well as on shifting disturbance patterns and climate change issues. AR 17676. By its very nature as part of a pilot, the White Castle Project tests something new and uncertain.¹² Moreover, the project’s experimental use of Franklin and Johnson’s techniques on older trees that provide critical spotted owl habitat only increases uncertainty. In its brief, BLM quotes almost an entire paragraph from the Recovery Plan to argue that the plan supports projects such as White Castle in forest stands over 80 years old and even in specially designated late successional forest reserves (LSRs). Def.’s Reply 14 (quoting AR 17683-84). However, BLM omits sentences that stress the need for more research about the effects of applying Franklin and Johnson’s methods to older forests. Notably absent is the paragraph’s last sentence which states, “Research and monitoring on the specific effects of such treatments on spotted owls and their prey is needed and should evaluate effects on both spotted owl recovery as well as broader forest management goals.” AR 17684. Additionally, in a February 2012 report on pilot projects in Southwest Oregon, Franklin and Johnson noted the need for further research, stating that “scientific reviews can help . . . undertake analysis of the potential for some new alternatives, such as . . . ecologically-based timber harvests within Critical Habitat for the Northern Spotted Owl”

¹² Along these lines, defendant-intervenors define a “pilot project” as “something ‘done as an experiment or test before introducing something more widely.’” Def.-Ints.’ Resp. Mot. Summ. J. 14 (quoting Oxford English Dictionary).

– precisely what is proposed for the White Castle Project. AR 2274.

BLM’s conclusion in the FONSI that “there is little uncertainty regarding [the] effects” of the pilot project runs counter to the evidence in the record. The outcome of this experimental pilot project is highly uncertain, and thus, this significance factor favors preparation of an EIS.

3. Precedential Effect

Plaintiffs argue that another factor weighs in favor of an EIS: “the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration.” 40 C.F.R. § 1508.27(b)(6). Generally, this factor is “insufficient on its own to demonstrate a significant environmental impact” unless the approval of the project is binding on future decisions regarding other actions. *Anderson v. Evans*, 371 F.3d 475, 493 (9th Cir. 2004). However, the factor may still support a need for an EIS. *Id.*

BLM correctly points out that the project will not bind any other future BLM actions; they would still be subject to NEPA analysis. Def.’s Resp. Mot. SUMM. J. 28. However, BLM also emphasizes repeatedly the project’s role as part of a larger series of “pilot projects” aimed at “inform[ing] long-term planning” for management of BLM lands in Oregon and California. AR 6410(EA), 4947 (press release). Franklin and Johnson described the Roseburg pilot project and its counterpart

in the Medford district as important in shaping the development and implementation of the Revised Recovery Plan for the Northern Spotted Owl. AR 18336. “The insights learned [in the two projects] could assist in shaping the role for active management and ecological restoration that has been recognized in the [Northern Spotted Owl] Recovery Plan.” AR 18336. Project materials describe the pilot projects as test of new harvest methods and “new policies” that could supplant BLM’s current “risk-adverse strategy” of avoiding regeneration harvesting and other “active management” methods. AR 644. Approval of the White Castle Project will not have binding impact on future projects, but it will, by design, shape BLM forestry methods and strategies moving forward. Although, in this case, the precedential factor alone is not dispositive, it supports the conclusion that an EIS is necessary.

4. Effect on the Northern Spotted Owl

Another significance factor is “[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the Endangered Species Act of 1973.” 40 C.F.R. § 1508.27(b)(9). Here, the FWS BiOp concluded that the project would “adversely affect” the northern spotted owl, its critical habitat, and its prey, but it would not likely jeopardize the continued existence of the species. AR 1351, 1412-13, 1421-23, 1029. Plaintiffs argue the adverse effects are sufficient to merit an EIS, while BLM contends that the effects are not significant given that the project

would not endanger the species' survival. Def.'s Resp. Mot. Summ. J. 24 (citing AR 1423).

Courts have held that “a project need not jeopardize the continued existence of a threatened or endangered species to have a ‘significant’ effect” for the purposes of NEPA. *Cascadia Wildlands v. U.S. Forest Serv.*, 937 F. Supp. 2d 1271, 1282 (D. Or. 2013), *appeal dismissed* (Feb. 27, 2014); *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1080 (E.D. Cal. 2004).¹³ In *EPIC*, the Ninth Circuit recognized that species viability is the relevant standard for assessing a project under the Endangered Species Act, but the standard is adverse effect under NEPA. *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1012 (9th Cir. 2006) (“EPIC”); see *Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv.*, 726 F. Supp. 2d 1195, 1213 (D. Mont. 2010).

¹³ Defendant-intervenors attempt to distinguish those cases, claiming the courts found a significant effect only because those projects would have resulted in the taking of spotted owl pairs, unlike in this case where there is no projected taking. Def.-Ints.’ Resp. Mot. Summ. J. 9 n.3. Yet, defendant-intervenors then undermine this point by arguing that the Court must consider “the degree of adverse effect on a species, not the impact on individuals of that species.” *Id.* at 8. (quoting *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1010 (9th Cir. 2006) (“EPIC”)). *EPIC* found that the logging of 14 acres of suitable nesting roosting, and foraging habitat and the projected taking of three owl nests did not amount a significant effect for NEPA purposes. 451 F.3d at 1010-11. By contrast, this project involves no projected taking of owls but would log 153 acres of suitable nesting, roosting, and foraging habitat.

Here, although the White Castle Project may not drive the northern spotted owl to the verge of extinction, it would nonetheless have an adverse effect on the species. The project would remove 187 acres of forest, all or almost all of it designated critical habitat for the northern spotted owl and 153 acres of it suitable nesting, roosting and foraging habitat. AR 1028-29, 1359, 365-66, 748.¹⁴ The harvest is contained within three overlapping spotted owl home ranges. AR 748, 512. It includes portions of one core area¹⁵ but no nests or projected taking of spotted owls. AR 748, 6468-70. In the BiOp, FWS concluded that the loss of home range

¹⁴ Notably, BLM has failed to provide clear information on this point. At oral arguments, the Court asked BLM to specify the precise number of acres of critical habitat it would harvest in the White Castle Project, but BLM failed to do so. Instead, BLM stated that 82% of the project area would be critical habitat. A subsequent review of record showed the 82% figure was not accurate since it combined data from the White Castle Project and the non-controversial Buck Rising Project. AR 479. Thus, the information BLM supplied the Court did not reflect the true impact of the White Castle Project alone. BLM also did not supply a project-specific figure in its briefs, nor in the project's FONSI, EA, or decision document. Environmental groups have repeatedly commented that the project would remove 187 acres of critical habitat, but BLM has neither confirmed nor denied the number in written responses, instead referring groups to the EA and decision document which do not provide the information. AR 76-77, 359, 365-66, 748. At oral argument, it was established that the White Castle Project would harvest 153 acres of suitable nesting, roosting, and foraging habitat, one type of critical habitat. However, it remains unclear how many acres of critical habitat suitable for dispersal activities would be logged. *See supra* note 5.

¹⁵ The BiOp explains that "spotted owls are 'central place' animals with the core use area (the area closest to the nest) being the focal area." AR 1412.

habitat, in particular reductions in the core area, would “adversely affect” northern spotted owls, as would the loss of habitat for owl prey such as red tree voles and northern flying squirrels. AR 1412-13, 1421, 478-79.

BLM emphasizes the small size of the project, arguing that “the minimal amounts of [spotted owl habitat] that will be impacted by the White Castle Project simply cannot be viewed as significant for the purposes of NEPA in the context of the overall amount of habitat on federal lands.” Def.’s Resp. Mot. Summ. J. 25. The Court recognizes that the degree of impact to the spotted owl might not be great enough, on its own, to require more study. However, this factor, combined with the others, requires an EIS.

5. Violation of Laws or Other Requirements

An additional factor is “[w]hether the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment.” 40 C.F.R. § 1508.27(b)(10). As discussed in the next section, the Court does not reach the issue of BLM compliance with FLPMA with regard to red tree vole sites. Moreover, the Court need not address this particular factor given that the other significance factors suffice to establish a need for an EIS.

The Court recognizes the deference afforded to an agency, and when considered individually, several of the factors might not require an EIS. However, when

considered together, they do. The project may be relatively small in size but it will adversely affect the northern spotted owl. Moreover, it represents a pilot test with effects that are likely to be highly controversial, highly uncertain, and influential on future project planning.

C. Hard Look Requirement

Under NEPA, an agency must take a “hard look” at a project’s environmental consequences.¹⁶ In assessing whether the requirement is met, a court must make “a pragmatic judgment” of whether an EA or EIS’s “form, content and preparation foster both informed decision-making and informed public participation.” *Ilio’ulaokalani Coal.*, 464 F.3d at 1094. “The ‘hard look’ must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already

¹⁶ Courts frequently treat the requirement that agencies take a “hard look” at a proposed project’s consequences as simply another formulation of the “arbitrary and capricious” standard of review in NEPA cases. *See, e.g., Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1376 (9th Cir. 1998) (hard look analysis, also called “rule of reason,” essentially the same as the “arbitrary and capricious” standard); *In Def. of Animals, Dreamcatcher Wild Horse & Burro Sanctuary v. U.S. Dep’t of Interior*, 751 F.3d 1054, 1068 (9th Cir. 2014). Others address it separately as a measure of the overall adequacy of an EA or EIS. *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992-93 (9th Cir. 2004); *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001). Here, the Court need not determine the standard’s place in the NEPA framework to find that BLM failed to take the requisite “hard look” at the White Castle Project.

made.” *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011). The agency must discuss adverse impacts and not minimize a project’s negative effects. *Id.*; *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1159 (9th Cir. 2006), *abrogated on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

Crucial to determining whether an agency took a “hard look” is whether the agency supplied “a ‘convincing statement of reasons’ to explain why” it concluded the project’s impacts were insignificant and did not prepare an EIS. *Blue Mountains Biodiversity*, 161 F.3d 1208 at 1212. Here, BLM’s FONSI recited each significance factor, but failed to adequate[ly] explain its conclusion that none of them were significant. For example, the FONSI addressed the controversy significance factor in three short paragraphs, two of them summarizing the project’s background. BLM then stated broadly and without further explanation that none of the project’s public comments “established scientific controversy.” AR 1009. As for the uncertainty significance factor, BLM only specifically addressed the issue of climate change, and did not mention public concerns about removal of spotted owl habitat. AR 1009-10. Although BLM listed out reasons in the project’s FONSI, they were largely conclusory and did not demonstrate that BLM took a “hard look” at the project’s potential effects.

Furthermore, as discussed in the next section, BLM failed to take a “hard look” at evidence of red tree vole nest sites in the project area. “NEPA’s purpose is

to ensure that the agency will not act on incomplete information, only to regret its decision after it is too late to correct.” *Friends of the Clearwater*, 222 F.3d 552, 557 (9th Cir. 2000). BLM received detailed data about a protected species six months before the EA was issued. Nonetheless, BLM failed to take a hard look at the data or the credibility of its source.

The Court finds BLM violated NEPA by not issuing an EIS, failing to consider a reasonable range of alternatives in the EA, and by failing, in multiple respects, to take a hard look at the project’s environmental effects.

II. Red Tree Vole NEPA and FLPMA Claims

Plaintiffs argue that BLM violated NEPA and FLPMA by failing to comply with NWFP requirements for the survey and management of red tree vole sites in the project area.¹⁷ FLPMA governs BLM’s planning

¹⁷ In support of their FLPMA claims, plaintiffs cite to declarations from Nicholas Sobb of Northwest Ecosystems Survey Team (“NEST”). Pls.’ Reply 32. BLM moves to strike the declarations as extra-record evidence. Def.’s Reply 24. Plaintiffs do not address BLM’s argument and, as such, have not shown that Sobb’s declarations satisfy any exception to record review rule under the APA. *See Lands Council v. Powell*, 395 F.3d 1019, 1029-30 (9th Cir. 2005). However, the Court does not rely on the evidence to reach its conclusions. Moreover, the Court is capable of independently resolving conflicts in the record and questions of admissibility, and therefore declines to strike the evidence at issue. *See Oregon Natural Desert Ass’n v. Sabo*, 854 F.Supp.2d 889, 925 (D.Or. 2012) (denying as moot defendants’ motion to strike where the “court has not considered the extra-record evidence offered by plaintiffs”).

and management of public lands and requires BLM to “develop, maintain, and when appropriate, revise land use plans” and, once they are in place, to act in accordance with them. *Oregon Natural Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007); 43 U.S.C. §§ 1732(a); 43 C.F.R. § 1610.5-3. Here, the governing land use plan is the NWFP and the Roseburg District Resource Management Plan (“RMP”) which incorporates the requirements of the NWFP. The plans designate the red tree vole as a Category C “uncommon” species. AR 9948, 9987. As such, BLM is required to “manage all known sites” until high-priority and non-high-priority red tree vole sites are determined. AR 9948, 10014-16.¹⁸ The amended NWFP defines a “known site” as the “historic and current location of a species reported by a credible source, available to field offices, and that does not require additional species verification or survey by the Agency to locate the species.” AR 10014, The plan adds that a “credible source” may include “amateurs” and “private individuals” provided they have sufficient “academic training and/or demonstrated expertise” in identifying the species. AR 10014.

At issue here are the findings of amateur citizen surveyors who reported active red tree vole nest sites in one of the project’s nine units, unit 31A. Volunteers with the organization Northwest Ecosystem Survey

¹⁸ No such determination occurred here. The EA proposed designating project unit 25A as a non-high-priority site but did propose such a designation for the area in dispute, unit 31A. AR 6598-6609.

Team (“NEST”) climbed trees, conducted pre-decisional surveys, and submitted to BLM, on Oct. 11, 2011, evidence of four active red tree vole nest sites in Unit 31A. AR 4008-11, 3006. Their submissions included GPS coordinates and samples of resin ducts, fecal pellets, and cuttings. AR 4008. An accompanying letter described NEST volunteers as receiving 40 hours each of training from biologists and professionals, among other qualifications. AR 4008. It also described NEST’s chain of custody procedures; provided contact information for further inquiry; listed previous submissions of data to Coos Bay BLM, Willamette National Forest, and Umpqua National Forest; and named individual references, including an Oregon State University professor and a wildlife biologist with the Willamette National Forest. AR 4008, 4011. Plaintiffs argue that the nesting sites identified by NEST qualified as “known sites,” and BLM failed to manage them in violation of the NWFP, FLPMA, and NEPA. PLs.’ Mem. Mot. Summ. J. 38-40. BLM acknowledges the amended NWFP required it to manage known vole sites in Unit 31A, but argues that NEST was not a “credible source” of known site information. Def.’s Reply 22-23; Def.’s Resp. Mot. Summ. J. 33-34.

BLM’s argument before the Court echoes its rationale in project documents for not considering NEST data. AR 3006, 6480. The EA stated: “NEST members’ training, their credentials, and the chain of custody of the samples are self-reported and have not been verified. For these reasons, their reported site locations . . . are not considered to be protocol survey data.” AR

6480, 3006. BLM became aware of NEST's survey plans in June 2011 due to NEST's participation in a different BLM project in Coos Bay. AR 4729. In August 2011, BLM surveyors and biologists interacted with NEST volunteers on various occasions at the project site and notified BLM project leaders of their presence. AR 4309, 4314-20. Finally, BLM received the NEST data and letter in October 2011 – six months before BLM issued the EA. AR 2613-16; 4309. In that time, it does not appear from the record or pleadings that BLM asked NEST for more information or otherwise sought to verify NEST's qualifications or the sites even though the coordinates were provided and the sites marked. AR 3006, 6480. In March 2012, a NEST leader emailed the BLM field manager in charge of the project, inquired how the agency was using the NEST data, and offered to submit more information or personally lead BLM surveyors to the sites. AR 2615-16. The BLM Field Manager declined to respond to the inquiry about the use of NEST data or to receive any additional information until after release of the EA. AR 2615.

It is debatable whether BLM's rejection of NEST's surveys constitutes a violation of the NWFP requirement to survey and manage "known sites." Regardless, NEPA mandates that an agency take a "hard look" at a proposed project's environmental consequences, adequately considering every significant aspect, and informing the public of its reasoning and conclusions. *Earth Island Inst. v. U.S. Forest Serv.*, 351 F.3d 1291, 1300-01 (9th Cir. 2003); *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983).

NEPA “emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that the agency will not act on incomplete information.” *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1166 (9th Cir. 2003). Here, NEPA did not necessarily require BLM to accept the NEST data or even to independently verify it, but it required appropriate consideration of the data and a coherent explanation for rejecting it. Instead, BLM relied on circular reasoning to reject NEST data, arguing the data was “self-reported” and unverified but rejecting efforts by NEST to provide such verification. BLM declined, without adequate explanation, to consider possible impacts to a species protected under the NWFP. In doing so, BLM made a decision that was not “fully informed and well-considered,” and BLM failed to “articulate a rational connection between the facts found and the conclusions reached.” *Sierra Club*, 510 F.3d at 1023. The Court finds that BLM did not take a “hard look” at environmental impacts, and its rejection of NEST data without sufficient consideration or explanation was arbitrary and capricious in violation of NEPA.

III. Remedies

The APA states that a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A); *see Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1184-85 (9th Cir. 2011). On

this basis, this Court holds unlawful and vacates BLM’s analysis and approval of the White Castle Project.¹⁹

Plaintiffs also ask the Court to grant injunctive relief halting the White Castle Project until BLM complies with NEPA. Pls.’ Mot. Summ. J. 2-3. However, even when a court finds a NEPA violation, “an injunction should issue only if the traditional four-factor test [for an injunction] is satisfied.” *Sierra Forest Legacy*, 646 F.3d at 1184 (quoting *Monsanto*, 561 U.S. at 157) (internal quotation marks omitted).²⁰ Moreover, the Supreme Court recently held that recourse to the “additional and extraordinary relief of an injunction” was not warranted if a less drastic remedy, such as vacatur of the offending action, was sufficient to redress the plaintiff’s injury. *Monsanto*, 561 U.S. at 165-66; *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 954 (N.D. Cal. 2010). Here, the vacatur of BLM’s inadequate EA and authorization of the White Castle project will

¹⁹ Despite the mandatory language of the APA, the Ninth Circuit has held that in limited circumstances, the court may leave in place an action that violates the APA but only if “equity demands” it. *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995). The Court has analyzed the equities and finds no such circumstances here.

²⁰ Under the four-factor test, the moving party must show “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.” *Monsanto*, 561 U.S. at 156-57; *Abbey*, 719 F.3d at 1054.

provide sufficient relief, since, by law, BLM cannot proceed with the project until it complies with NEPA. Plaintiffs have not provided evidence to the contrary. As such, the Court declines to issue an injunction.

Plaintiffs also move for an award of costs and attorneys' fees under the Equal Access to Justice Act. 28 U.S.C. § 2412. A decision concerning attorney fees and costs will issue at a later date, following a proper motion. *See* 28 U.S.C. § 2412(d)(1)(B).

CONCLUSION

For above reasons the Court GRANTS Plaintiffs' Motion for Summary Judgment (Doc. 23) as to the NEPA claims and DENIES Defendant and Defendant-Intervenors' Cross-Motions for Summary Judgment (Docs. 28, 27). The Court SETS ASIDE the White Castle Project's authorization, holding that BLM violated NEPA and APA.

IT IS SO ORDERED.

Dated this 14th of ~~February~~ March 2015.

/s/ Ann Aiken

Ann Aiken
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON WILD, an
Oregon non-profit
corporation; CASCADIA
WILDLANDS, an Oregon
non-profit corporation,

Plaintiffs-Appellees,

v.

BUREAU OF LAND
MANAGEMENT, an
administrative agency of
the United States
Department of Interior,

Defendant,

and

SCOTT TIMBER CO.;
CARPENTERS
INDUSTRIAL COUNCIL,

Intervenor-Defendants-
Appellants.

No. 15-35336

D.C. No. 6:14-cv-00110-AA
District of Oregon,
Eugene

ORDER

(Filed Jul. 19, 2017)

Before: BYBEE and HURWITZ, Circuit Judges, and
RAKOFF,* Senior District Judge.

* The Honorable Jed S. Rakoff, Senior United States District
Judge for the Southern District of New York, sitting by designa-
tion.

App. 41

Judges Bybee and Hurwitz voted to deny the petition for rehearing en banc, and Judge Rakoff recommended denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellants' petition for rehearing en banc, filed June 23, 2017, is DENIED.

App. 42

No. 15-35336

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OREGON WILD and CASCADIA WILDLANDS,
Plaintiff-Appellees,

v.

BUREAU OF LAND MANAGEMENT,
Defendant-Appellee,

and

SCOTT TIMBER CO., and
CARPENTERS INDUSTRIAL COUNCIL,
Defendant-Intervenor-Appellants.

On Appeal from the United States
District Court for Oregon
Case No. 6:14-cv-00110-AA

**APPELLANTS' MOTION TO RECALL
MANDATE AND JUDGMENT AND
RE-SET CASE FOR ORAL ARGUMENT**

(Filed Oct. 4, 2017)

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[1] I. INTRODUCTION

Appellants Scott Timber Co. and Carpenters Industrial Council (Scott Timber) respectfully move for the Court to recall the mandate and judgment of dismissal following its conclusion that there is no jurisdiction to consider Scott Timber’s appeal involving the White Castle Variable Retention Harvest timber sale. The district court opinion held that the sale cannot go forward unless the Bureau of Land Management (BLM) prepares an environmental impact statement (EIS). ER 28. The BLM has decided that it will not prepare an EIS for the White Castle timber sale meaning the sale as purchased by Scott Timber cannot go forward unless the district court is reversed on the merits. See September 6, 2017 letter attached as Exhibit 1.

Consequently, it is clear that the district court's decision is final and has the effect of an injunction such that there is jurisdiction of the appeal under 28 U.S.C. §§ 1291 and 1292. Thus, the Court should withdraw its mandate and judgment, and set the case for oral argument on the merits.

II. STANDARD

This Court has inherent authority to recall the mandate. *Zipfel v. Halliburton*, 861 F.2d 565, 567 (9th Cir. 1988). While a court should recall its mandate only “in exceptional circumstances,” *Carrington v. United States*, 503 F.3d 888, 891 (9th Cir. 2007), it may do so “for ‘good cause’ or to ‘prevent injustice.’” *Zipfel*, 861 F.2d at 567 (citation omitted); *Graham v. Balcor Co.*, 241 [2] F.3d 1246, 1248 (9th Cir. 2001). The inherent power to recall the mandate is exercised when required to protect the integrity of the judicial process. *Zipfel*, 861 F.2d at 567. Procedurally, if “an appeal is improvidently dismissed in this court the remedy is by way of a motion directed to this court asking for recall of the mandate . . . so that this court may determine whether the appeal should be reinstated.” *Williams v. United States*, 307 F.2d 366, 368 (9th Cir. 1962).

III. ARGUMENT

The issue of whether the Court of Appeals has jurisdiction to decide an appeal is one of exceptional importance that goes to the integrity of the judicial process. If an appellant is denied a decision on the

merits based upon an incorrect assessment that the Court has no jurisdiction, that appellant is unjustly denied appellate review. This Court has emphasized the importance of appeal to the judicial process and that litigants deserve not only their day in district court but also their day on appeal. *Share v. Air Props. Grp. Inc.*, 538 F.2d 279, 282 (9th Cir. 1976), *cert. denied*, 429 U.S. 923 (1976). The Court explained that “Congress set up the federal judiciary so that litigants are allowed at least ‘two bites at the apple’ before they are foreclosed on the merits one before a trial court and another before a court of appeals. Presumably this was felt to be the proper balance between achieving finality on the one hand and reducing the probability of error in the individual case on the other.” *Id.* “Recall is easily justified” where, as here, “an appeal was mistakenly dismissed for want of a final judgment, only to encounter a [3] district court [or agency] persuaded that there was a final judgment and nothing more to be done.” 16 Wright & Miller, Fed. Prac. & Proc. Juris. § 3938 (citing *Patterson v. Crabb*, 904 F.2d 1179 (7th Cir. 1990)).

Similarly, an appellate ruling on the merits against a party when the Court of Appeals had no jurisdiction can unjustly harm the party. In instances where the Court has found it had jurisdiction to decide an appeal but later learned the case was moot before it issued its decision, it recalled its mandate and vacated the decision on the grounds that the court was without power to decide the case. See *United States v. Pressman*, 593 F.2d 906 (9th Cir. 1979) (Recalling mandate

and vacating decision that was moot before the opinion was filed).

A petition to recall the mandate that relates to the court's jurisdiction rather than the merits is more likely to be held to present exceptional circumstances to prevent injustice. *See Alsamhour v. Gonzales*, 471 F.3d 209 (1st Cir. 2006). In *Alsamhour* the mandate was recalled to rehear a petition over whether the court of appeals had jurisdiction over a petition for review of an immigration removal order. The court acknowledged that the rule that the mandate will be recalled only in extraordinary circumstances is meant to protect the interests in repose. However, those interests were viewed as minimal because the Court of Appeals decision denying jurisdiction was less than four months old and the issue was one of the court's jurisdiction involving the orderly administration of justice based on newly-presented arguments. *Id.* Here, the mandate was issued on July 27, 2017 [4] and is less than three months old, the issue disposed of by the court and the subject of this motion to recall the mandate solely involves jurisdiction, and BLM has now decided it will not proceed with an EIS, a key fact unknown at the time of the jurisdictional dismissal.

This appeal never reached the merits and was dismissed on jurisdictional grounds in a Memorandum relying on *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181 (9th Cir. 2004), in part based on the assumption that a remand can provide relief to Scott Timber –

an assumption now shown to be erroneous.¹ The Memorandum of dismissal concluded that on remand “[a]ppellants can participate in further BLM proceedings and challenge any adverse outcome of those proceedings.” Dkt. 57-1, Memorandum at 3. Appellees argued “[t]he remand itself could provide all the relief Scott Timber wants should BLM approve the Project again. . . . During remand, Scott Timber can participate in the decision process to ensure its interests are met as allowed by law.” Dkt. 28, Appellees’ Response Br. at 27. Scott Timber pointed out that BLM had not conducted any further proceedings and had not begun preparation of an EIS. Scott Timber explained that the district court’s decision would have final effect if BLM chose not to prepare an EIS and Scott Timber would have no remedy. App. Reply Br. at [5] 26 (“[I]f the agency never prepares an EIS, appellants have no remedy since the appeal deadline to challenge the district court’s order requiring an EIS will have elapsed and there is no remedy for agency inaction under NEPA.”) (citing *State of Alaska v. Andrus*, 591 F.2d 537, 541 (9th Cir. 1979)); *id.* at 31 n.9 (“If BLM decides not to prepare an EIS” then “Scott Timber will have no remedy against the district court or BLM for its economic loss from not being able to harvest the sale.”); *id.* at 30.

¹ The district court’s order did not remand the action to BLM or instruct the agency to make specific findings as did the court in *Alsea*. Rather the district court’s order was a final judicial action that “SETS ASIDE the White Castle Project’s authorization.” ER 35.

In a September 6, 2017 letter to Scott Timber Co., BLM explained that it will not prepare an EIS. Ex.1. BLM stated that the effect of the district court's decision is as if "BLM is essentially enjoined from authorizing activity on the timber sale until the agency prepares the EIS required by the court." *Id.* BLM further concluded that it "will not be completing an EIS for the White Castle VRH timber sale" and that "unless the district court[]s March 14, 2015 order requiring an EIS for this timber sale is reversed, we have determined that it is in the best interests of the Government to cancel and terminate the sale." *Id.* BLM also emphasized that Scott Timber Co. has no remedy because "BLM is not able to or legally required to offer any replacement timber sale with timber of equal size and quality as the White Castle VRH timber sale." *Id.*

Given BLM's decision not to prepare an EIS and to terminate the timber sale contract unless the district court's decision is reversed, it is a manifest injustice to preclude Scott Timber from proceeding with the merits of its appeal of the district [6] court's decision requiring an EIS. More importantly, BLM's decision now demonstrates that the effect of the district court's opinion and order is not a preliminary order staying judicial proceedings. Instead, the opinion below is a final decision within the meaning of 28 U.S.C. § 1291 since it is a decision by the district court that ended the litigation on the merits and left nothing for the court to do but execute the judgment. *Serv. Employees Int'l Union, Local 102 v. Cty. of San Diego*, 60 F.3d 1346, 1349 (9th Cir. 1994), *cert. denied*, 516 U.S. 1072 (1996).

The Court should recall the mandate and consider the BLM's response to the district court's opinion and order, which has remained unexpressed until now.

In *Alsea*, the agency response was central to the Court's decision that there was no jurisdiction for an appeal under 28 U.S.C. § 1291. In *Alsea*, the National Marine Fisheries Service "informed the district court it would comply[,] . . . [and] unveiled a four-step 'Action Plan' that envisioned" public rulemaking and maintenance of ESA [Endangered Species Act] listings. *Alsea*, 358 F.3d at 1183. This "evinced the Service's intent to conduct a comprehensive review of its hatchery salmon policy along the West Coast" in which appellants could participate. *Id.* at 1183-84. Here, unlike in *Alsea*, we now know that there will be no EIS process or proceedings in which Scott Timber can participate, contrary to the panel's assumption that "[a]ppellants can participate in further BLM proceedings." Dkt. 57-1, Memorandum at 3. The district court's holding that an [7] EIS is required will be foreclosed from review if appeal is unavailable and therefore, the effect of the decision is final and appealable under 28 U.S.C. § 1291.

The BLM letter also makes clear that the district court order has the practical effect of an injunction providing this Court with jurisdiction under 28 U.S.C. § 1292(a)(1). Plaintiffs sought an injunction in the district court, BLM's letter demonstrates that it is "essentially enjoined from authorizing activity on the timber sale until the agency prepares the EIS required by the court," Ex. 1, and this appeal is the only way to challenge the opinion and order. That opportunity will be

irreparably lost if this Court refuses to accept jurisdiction to hear the appeal. The Supreme Court emphasized that in assessing jurisdiction under 28 U.S.C. § 1292(a)(1), the assessment of serious or irreparable harm relates to the merits of the controversy and whether denial of jurisdiction will irreparably foreclose appellant from obtaining a ruling on its legal claims which are the basis for appeal. *Gardner v. Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978). In *Alsea* the court concluded that the district court order did not have the practical effect of enjoining the agency. *Alsea*, 358 F.3d at 1186. In contrast, BLM's decision confirms that the practical and actual effect of the district court order is an injunction. Thus, there is jurisdiction under 28 U.S.C. §1292(a)(1).

IV. CONCLUSION

For the foregoing reasons the Court should withdraw the mandate and judgment of dismissal to reconsider its conclusion that the district court decision is [8] not final under 28 U.S.C. § 1291 nor has the effect of an injunction under 28 U.S.C. § 1292(a)(1), hold that the Court has jurisdiction to hear the appeal, and set the appeal for oral argument on the merits.

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Respectfully submitted this 4th day of October,
2017.

/s/ Scott W. Horngren
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[Certificate Of Service Omitted]

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Exhibit 1 – p. 1

[SEAL] United States Department [LOGO]
 of the Interior

BUREAU OF LAND MANAGEMENT

Roseburg District Office
777 NW Garden Valley Blvd.
Roseburg, Oregon 97471
<http://www.blm.gov/or/districts/roseburg>

SEP 06 2017

CERTIFIED MAIL – 7015 0640 0006 1025 2533
RETURN RECEIPT REQUESTED

Mr. Dana Kjos
Scott Timber Co.
P.O. Box 1088
Roseburg, OR 97470

Dear Mr. Kjos:

The purpose of this letter is to inform you of the Bureau of Land Management's (BLM) intention regarding the White Castle Variable Retention Harvest (VRH) timber sale, Contract No. ORR05-TS12-08.

As you know, on March 14, 2015, the United States District Court of Oregon vacated the decision for the White Castle VRH timber sale, and ordered BLM to prepare an Environmental Impact Statement (EIS) for the sale. The United States did not appeal the court's decision; BLM is essentially enjoined from authorizing activity on the timber sale until the agency prepares the EIS required by the court.

We are aware that Scott Timber Company continues to pursue appeal of the court's order. Unless the district court's March 14, 2015 order requiring an EIS for this timber sale is reversed, we have determined that it is in the best interest of the Government to cancel and terminate the sale. The BLM will not be completing an EIS for the White Castle VRH timber sale. With completion of an EIS, BLM would be required to issue a new decision for the timber sale under the 2016 Southwestern Oregon Record of Decision and Resource Management Plan (2016 ROD/RMP). A new timber sale decision approving the project as originally planned would not qualify as a transition project under the requirements of the 2016 ROD/RMP, and substantial changes to the overall project would be necessary.

In previous conversations, you inquired whether the BLM is planning to offer replacement volume to Scott Timber Company in the event that the White Castle VRH timber sale is cancelled. The current version of the Forest Management Code of Federal Regulations (CFR 5401.0-6 and 5402.0-6) does not give the BLM the legal authority to negotiate a timber sale greater than 250 thousand board feet with a purchaser as replacement volume. In consideration of this and Modification No. 1 of the timber sale contract, the BLM is not able or legally required to offer any replacement timber sale with timber of equal size and quality as the White Castle VRH timber sale.

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If you have any questions or would like to discuss further, please contact me at 541-464-3211.

Sincerely,

/s/ Michael J. Korn
Michael J. Korn
Field Manager
South River Field Office

cc:
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