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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

KLAMATH SISKIYOU WILDLANDS
CENTER, *et al.*,

Plaintiffs,

v.

KATRINA SYMONS,^{1/} in her official capacity
as Glendale Field Manager, *et al.*,

Federal Defendants,

and

D.R. JOHNSON LUMBER CO.,
an Oregon corporation,

Defendant-Intervenor.

Civ. No. 03 - 3124 - CO

**FEDERAL DEFENDANTS'
COMBINED MEMORANDUM
IN SUPPORT OF CROSS-MOTION
FOR SUMMARY JUDGMENT AND
OPPOSITION TO PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT**

^{1/} Ms. Symons is substituted for Lynda L. Boody pursuant to Fed. R. Civ. P. 25(d)(1).

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INTRODUCTION

This case involves challenges to two timber sales in Southern Oregon on Federal land managed by Bureau of Land Management (“BLM”), as well as two decisions by BLM which changed the management category for the Oregon red tree vole and removed that species from the Survey and Manage program under the Northwest Forest Plan (“NFP”). Federal Defendants submit this Memorandum in support of their Motion for Summary Judgment on all claims in Plaintiffs’ Second Amended Complaint, which alleges violations of the National Environmental Policy Act (“NEPA”), Federal Land Policy and Management Act (“FLPMA”), and Endangered Species Act (“ESA”). Plaintiff environmental groups challenge BLM’s decisions for the Cow Catcher and Cottonsnake timber sales on the Roseburg and Medford Districts, respectively. They argue the sales did not conform to the former Survey and Manage requirements of the NFP and 2001 Record of Decision (“ROD”). They also argue that BLM acted contrary to the 2001 ROD by implementing the 2001 and 2003 Annual Species Reviews (“ASRs”), which recategorized and removed red tree vole from the Survey and Manage program, respectively.

Plaintiffs’ claims related to Survey and Manage should be dismissed because they are moot. A ROD issued by the Department of the Interior and Department of Agriculture on March 24, 2004, removes the Survey and Manage requirements Plaintiffs allege were not followed, removes the species update process challenged here, and supersedes the provisions of the 2001 ROD upon which Plaintiffs rely. Even if these claims were not moot, Plaintiffs’ challenges to the ASRs still must fail, as BLM followed the procedures in the 2001 ROD for making the changes challenged here, fully complying with NEPA and FLPMA. Moreover, BLM adequately analyzed environmental effects and all reasonable alternatives under NEPA for the two timber sales and reasonably determined they would comply with the Resource Management Plans under FLPMA. Finally, BLM complied with

the Endangered Species Act (“ESA”) by consulting with the Fish and Wildlife Service under Section 7 of that statute. Moreover, BLM was not required to reinitiate consultation as a result of changes to the survey and manage mitigation measures.

For the reasons explained in this Memorandum, Plaintiffs’ motion should be denied, and the Court should grant summary judgment in favor of Federal Defendants.

FACTUAL BACKGROUND

I. HISTORY OF SURVEY AND MANAGE REQUIREMENTS UNDER THE NORTHWEST FOREST PLAN AMENDMENT

A. Northwest Forest Plan Amendment And The Role Of Survey And Manage

In 1994, the Secretaries of the Interior and Agriculture issued the ROD for Amendments to Forest Service and BLM Planning Documents Within the Range of the Northern Spotted Owl, commonly known as the Northwest Forest Plan (“NFP”). The NFP amended the Resource Management Plans (“RMPs”) for numerous BLM Districts, including the two on which the timber sales in this case are located.^{2/} See NFP ROD (Docket #48) at 11.^{3/}

The main component of the NFP is a broad-scale system of land allocations on 24.4 million acres of federal lands across the Pacific Northwest. This broad-scale approach balances BLM’s obligation to manage for multiple use with the need to protect fish, wildlife and the ecosystems they support. To achieve this balance, the NFP allocates lands to different categories: (1) congressionally reserved areas; (2) late-successional reserves (“LSRs”); (3) adaptive management areas; (4) managed late-successional areas; (5) administratively withdrawn areas; (6) riparian

^{2/} BLM issued new RMPs in 1995 which incorporated elements of the NFP. See Roseburg RMP (Docket #31); Medford RMP (Docket #45.) Even though the NFP was superseded by the RMPs, the term NFP is still used to refer to the conservation strategy found in those documents.

^{3/} Defendants refer to the administrative records for Cow Catcher and Cottonsnake timber sale decisions and the 2001 and 2003 Annual Species Reviews as “CC AR,” “CS AR,” “2001 ASR” and “2003 ASR,” respectively. Other documents are referenced by docket number.

reserves (“RRs”); or (7) matrix. See NFP ROD, Attach. A at A-4 to A-5. Each category is assigned specific direction, called standards and guidelines, about how to manage the land. See id. at A-6.

In addition to the land allocations, the NFP also contained Survey and Manage requirements to “provide additional protection for species that, because of rarity or endemism, might not be adequately protected by the broad-scale, ecosystem approach of the [NFP].” See ROD & Standards & Guidelines for Amendments to Survey & Manage, Protection Buffer, & Other Mitigation Measures Standards & Guidelines (“2001 ROD”) (Docket #25) at 7; NFP ROD, Attach. A at C-4 to C-6. These provisions required BLM to manage sites where certain species were known to occur and to conduct surveys prior to ground-disturbing activity. See NFP ROD, Attach. A at C-5 to C-6. In 2001 the provisions were amended to create a process for changing species’ management status in response to new information. See 2001 ROD at 3. This process classified species into categories based upon rarity and whether pre-disturbance surveys were practical. See id., Attach. 1 at 6, 7.

In October 2002, the Forest Service and BLM (collectively, “the Agencies”) issued a notice of intent to prepare a supplemental environmental impact statement (“SEIS”) that would eliminate the Survey and Manage requirements. See 67 Fed. Reg. 64601 (Oct. 21, 2002). After releasing a draft SEIS for public comment, the Agencies published a final SEIS (“2004 FSEIS”) in January 2004. See 69 Fed. Reg. 3340, 3341 (Jan. 23, 2004). In March 2004 the Agencies issued a decision adopting Alternative 2 of the 2004 FSEIS, removing the Survey and Manage requirements from the RMPs at issue here. See Defs.’ Ex. A (“2004 ROD”) at 29.

B. The Annual Species Review Process and Requirements for Red Tree Vole

Many species were included on the original Survey and Manage list because little was known about how the NFP’s broad-scale measures would ensure those species’ persistence. See 2001 ROD, at 7-8, Attach. 1 at 7. For some species, it was expected that future information would

indicate that the NFP broad-scale protections provided reasonable assurance the species would persist, and that Survey and Manage measures would no longer be needed. See id. at 8. The NFP thus envisioned a process by which the Agencies could changes species management, including dropping the survey and manage measures for species whose status was determined to be more secure than originally projected. See NFP ROD at 37, Attach. A at C-6 This process, developed in more detail in the 2001 ROD, was known as the annual species review (“ASR”). See 2001 ROD at 3. The ASR was conducted in fiscal years (“FY”) 2001, 2002, and 2003. Plaintiffs here challenge the 2001 and 2003 ASRs.

1. The 2001 Annual Species Review

The 2001 ASR was a highly detailed and complex review process consisting of four phases: (1) a three-step assessment of new information; (2) an expert review of the assessment results; (3) review by an Intermediate Management Group (“IMG”) to resolve inconsistencies between the first two phases and to forward recommended changes to the Regional Interagency Executive Committee (“RIEC”); and (4) review by RIEC and recommendation to the final decisionmaker. 2001 ASR 119.

The first phase consisted of three steps. Step 1 was a screening process to determine whether substantial new information on the species was available. Id. Step 2 was an in-depth evaluation of “the current state-of-knowledge on species’ distribution, habitat association, association with late-successional forests, and level of concern for persistence” in the NFP planning area. Id. In Step 3, resource specialists and managers evaluated the evidence from Step 2, then voted for draft recommendations for any changes to species management. See id. In the second phase, the Step 3 Panel’s draft recommendations were sent to various agency experts “to identify errors and conflicting information between Steps 2 and 3,” and to provide any additional evidence not already considered. Id. These recommendations were reviewed by IMG during the third phase, then

forwarded to RIEC for review and recommendation to the deciding officials for the fourth and final phase. See id.

In March 2001 the Agencies began soliciting new information on Survey and Manage species by sending letters to public agencies and organizations, including Plaintiffs. See id. at 1240-42, 1255, 1260, 1268. Following initial screening, an in-depth analysis was conducted by scientists under Step 2. For the red tree vole, the Step 2 Panel identified variations in abundance in different parts of the species' range. See id. at 1207 (observing "more potential sites in the lower elevation mesic forest areas," and lower abundance in northern Coast Range, northern Cascades and parts of Klamath National Forest and Rogue River Valley). This led the Panel to conclude that "[d]ifferent management strategies may be warranted in different portions of the range." Id. at 1218.

In April 2001 the Step 2 Panel identified some errors and inconsistencies in the way that red tree vole data had been entered and edited in the database. See id. at 1207, 1218-19. These problems included missing and incorrectly entered location information, and duplicate and missing records. See id. at 1218. Most of the errors were "errors of omission (sites not entered into the database, or insufficient site information entered), inaccurate site locations, or duplicate entries." Id. at 148. At the time, the Panel believed these data inconsistencies precluded it from offering "an accurate estimation of the total number of known sites" or their distribution. Id. at 1207.

These inconsistent data did not form the basis of any recommendation or decision on red tree vole. Rather, RIEC decided to correct the errors and re-run the Step 1 and 2 analyses. See 2001 ASR at 650. As a result, error rates were reduced from an overall rate of more than 46% to rates of approximately 7.57% and 11.08% for survey and site records, respectively. See id. at 651, 1218-19. The new analysis "confirmed and underscored the high number of sites located within the central

part of the range.” Id. at 148. Despite the residual error, the Step 2 Panel determined the “*data is sufficient to respond to the questions posed in Step 1 and Step 2.*” Id. at 618 (emphasis added).

Based on the revised analysis, the Step 3 panel voted in December 2001 to place the vole in Category D in the central part of its range. See id. at 298. Category D includes uncommon species for which pre-disturbance surveys are either not practical or unnecessary for persistence. See 2001 ROD, Attach. 1 at 11. Panelists voted 600 of 800 possible points in favor of this result, while 100 points were voted to delist, and 100 for Category C. See 2001 ASR at 298-99. Category C includes uncommon species for which pre-disturbance surveys are practical. See 2001 ROD, Attach. 1 at 10. In voting for Category D, panelists generally found the “high number of sites” in the Matrix indicated there was no need for pre-disturbance surveys. See 2001 ASR at 300.

The Step 3 recommendation was reviewed by IMG and RIEC, which both agreed the data supported Category D. See id. at 23, 150. In June 2002 BLM implemented the 2001 ASR by reassigning the vole to Category D in the central part of its range.^{4/} See id. at 97-100, 112.^{5/} The memorandum implementing this decision expired on September 30, 2003. See id. at 1.

2. The 2003 Annual Species Review

The 2003 ASR generally followed the same four-phase format as the 2001 ASR. See 2003 ASR 9 In March 2003 the agencies began soliciting new information and data on Survey and Manage species for the 2003 ASR. See id. at 369A-369C. The Step 2 Panel then reviewed the new information, which included data from pre-disturbance surveys, strategic surveys, published and unpublished scientific papers, and other sources such as geographic information systems. See id.

^{4/} Three relatively large distribution zones for red tree vole (Mesic, North Mesic and Xeric) have been identified. See 2001 FSEIS (Docket #26) 378. For the purposes here, the phrase “central part of the range” is used interchangeably with the Mesic zone.

^{5/} Both timber sales challenged in this case are within the central part of the vole’s range. See CC AR 268, 378; CS AR 14.

at 295. The Step 2 Panel found the vole was “uncommon” rather than rare, and with some exceptions, did not find potential habitat to be limited. See id. at 292 (finding “a moderate number of known sites and a greater likelihood that additional quality sites occur . . .”).

The Step 3 Panel convened in September 2003 and voted for Category D. See id. at 132. The IMG reviewed the record and found a moderate-to-high number of relatively well-distributed, likely existing sites. See id. at 114. Based on this, IMG recommended that the vole be dropped, rather than simply placed in Category D. See id. The RIEC agreed, based on high detection rates during pre-disturbance surveys and other types of surveys. See id. at 106-07 (noting survey detection rates were “among the highest of all Survey and Manage species”). In December 2003, the vole was removed from Survey and Manage in the central part of its range, which includes both timber sales challenged in this case. See id. at 53-55, 58, 66; CC AR 268, 378; CS AR 14.

II. COW CATCHER TIMBER SALE

The Cow Catcher timber sale was proposed on December 31, 1997. See CC AR 1109-1112. BLM prepared an environmental assessment (“EA”) for the project and released it for public comment on June 16, 2003. See id. at 356, 358-360. The EA analyzed two alternatives in detail: no action and the proposed action. See id. at 371-73.^{6/} The proposed action involves harvest of approximately 3.7 million board feet of timber on 155 acres of the BLM Roseburg District. See id. at 369. The sale was designed to meet several needs, including: (1) contributing to the annual allowable sale quantity (“ASQ”)^{7/} under the Roseburg RMP; (2) contributing to the socioeconomic

^{6/} BLM also considered, but did not analyze in detail, an alternative which would have authorized harvest on additional acres in Unit D. See id. at 373. This option was not further considered since BLM determined the area contained too many young trees and would be more appropriate for harvest in 15 to 20 years. See id. BLM also considered but rejected a proposal to construct a mid-slope road to allow access to the east side of Unit E. See id. This option was rejected when BLM encountered previously unidentified Riparian Reserves. Id.

^{7/} The ASQ is the “gross amount of timber volume, including salvage, that may be sold annually” from the District under the RMP. Roseburg RMP at 101.

objectives in the RMP, which contemplates supporting 544 jobs and providing \$9.33 million in personal income annually; and (3) meeting the requirements of the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands (“O&CLA”), 43 U.S.C. § 1141a *et seq.*, which provides that certain suitable commercial forest lands in the area “shall be managed . . . for permanent forest production” and that timber shall be cut to provide a permanent timber supply, protect watersheds, and contribute to local economic stability, among other things. See CC AR 369-70.

The project as authorized consists of 146 acres of regeneration harvest, as well as prescribed burning and reforestation by planting. See CC AR 213, 389. The project area is located in Lower Cow Creek watershed, which consists of 118,324 total acres--26,774 of which are managed by BLM. See CC AR 375. Eighty-three percent of this (approximately 22,200 acres) is within LSRs or RRs, and is not scheduled for regeneration timber harvest.^{8/} See id. Only 3,880 acres are allocated to the Matrix and are available for regeneration harvest. See id.

Timber harvest will occur within the Matrix on Sections 5, 7, 9, and 17 of T. 31 S., R. 6 W., W.M. See CC AR 369, 276. Sections 9 and 17 are designated by the Roseburg RMP as part of the Connectivity/Diversity (“C/D”) Block land use allocation. See id. at 375. Under the RMP, BLM must maintain 25 to 30 percent of each C/D Block as late-successional forest. See id. (citing RMP at 34). Eighty-eight percent of Section 9, and 39 percent of Section 17 are late-successional forest. Id. The forest stands proposed for harvest are “generally 110-to-220 years old and composed primarily of Douglas-fir.” See id. Other dominant conifers in the stand include ponderosa pine, sugar pine, and incense-cedar. Id. Hardwood species present in the stands include Pacific madrone, bigleaf maple and chinkapin, with California black oak present in Unit A. See id.

^{8/} Younger forest stands within RRs and LSRs, however, may be thinned under certain circumstances in future sales to manage density. See CC AR 375; Roseburg RMP at 24-25, 29.

BLM issued a Decision Record (“DR”) and Finding of No Significant Impact (“FONSI”) in August 2003, see id. at 276-78, and awarded the sale to DR Johnson in September 2003. See CC AR 157-58. Plaintiffs filed an administrative protest, which BLM denied. See id. at 137-55. Plaintiffs also filed an appeal and request for stay with the Interior Board of Land Appeals, which was denied on December 18, 2003. See id. at 1-7. Timber felling began in early February 2004. See Decl. of Michael L. Vallance (“Vallance Decl.”) ¶¶ 2,3. Plaintiffs sought a preliminary injunction in March 2004. On May 18, 2004, the Court issued an Order which

enjoins further implementation of the Cow Catcher timber sale until final resolution of plaintiff’s claims in this court, or until BLM completes a supplemental NEPA analysis that analyzes effects and cumulative effects to the project on red tree voles, and discloses the basis for BLM’s conclusion that the project complies with RMP management directives for connectivity/diversity blocks.

Order of May 18, 2004 (Docket #82) at 20-21.

In response to the Court’s order, BLM prepared a supplemental EA (“CC SEA”), which it released for public comment on June 22, 2004. See CC SEA (Defs.’ Ex. C). On August 2, 2004, BLM issued a decision determining that no modification to the original Cow Catcher decision was necessary and a finding that the CC SEA did not reveal significant impacts. See Defs.’ Exs. D, E.

III. COTTONSNAKE TIMBER SALE

In 1998, BLM began developing the Cottonsnake timber sale, a proposal for managing the landscape in the Middle Cow Creek watershed, Medford District, to produce commercial timber and implement the RMP. See CS AR 422. The project identified the need to maintain a high level of sustainable resource production as well as a biologically diverse forest. See id. In June 2003, BLM completed an EA which analyzed four alternatives in detail, including alternatives which displayed a timber emphasis, minimized risk of sedimentation, minimized effects to other resources, and the no action alternative. See id. at 431-42. BLM solicited and received comments on the EA,

including comments from two of the Plaintiffs. See id. at 322-35, 338-64. After considering the comments, BLM issued a DR and FONSI selecting Alternative 2, the alternative intended to minimize sedimentation. See id. at 310-12. The decision authorized a combination of regeneration harvest, commercial thinning, and selective harvest, with tractor yarding on 8 acres, cable yarding on 113 acres, and helicopter yarding on 201 acres. See id. In September 2003, BLM advertised the timber sale and received a high bid from Herbert Lumber. See id. at 222; Decl. of Vincent D. Randall (“Randall Decl.”) at 2. BLM has not yet awarded the sale. See id.

After the issuance of the DR and FONSI, one of the Plaintiffs filed an administrative protest, which was denied by BLM in December 2003. See id. at 82. On December 30, 2003, KSWC filed an appeal with IBLA, requesting a stay of project activity, which was also denied. See id. at 49.

STANDARD OF REVIEW^{9/}

In cases such as this one challenging agency decisions, summary judgment is a unique procedure, akin to a motion to dismiss. See Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221, 1226 (D.C. Cir. 1993). There are generally no genuine issues of material fact, and the Court need not, and indeed may not, “find” underlying facts. See, e.g., Northwest Motorcycle Assn. v. U.S. Dep’t of Ag., 18 F.3d 1468, 1471-72 (9th Cir. 1994); Bank of Commerce of Laredo v. City Nat. Bank of Laredo, 484 F.2d 284, 289 (5th Cir.1973), cert. denied, 416 U.S. 905 (1974). The court’s role in such a case “is not to resolve contested fact questions which may exist in the underlying administrative record, but rather the court must determine the legal question of whether the agency’s action was arbitrary and capricious.” Gilbert Equipment Co., Inc. v. Higgins, 709 F. Supp. 1071, 1077 (S.D. Ala. 1989), aff’d, 894 F.2d 412 (11th Cir. 1990); see also Occidental Eng’g Co. v. INS,

^{9/} The relevant legal background for NEPA and FLPMA is set forth in Defendants’ Opposition to Plaintiffs’ Motion for Preliminary Injunction (“Defs.’ PI Opp.”) (Docket #68) at 10-12. That discussion is incorporated herein and therefore is not repeated in this Memorandum. Applicable legal background for the ESA is discussed infra at 40.

753 F.2d 766, 769 (9th Cir. 1985) (court’s role “is to determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did.”).

The APA imposes a narrow and highly deferential standard of review limited to a determination of whether the agency acted in a manner that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. §706(2)(A); see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). The APA directs the Court to “review the whole record or those parts of it cited by a party.” 5 U.S.C. § 706. Thus, the Court’s review is limited to the administrative record before the agency decision maker. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985); Camp v. Pitts, 411 U.S. 138, 143 (1973).

Even if the Court determines that BLM’s actions violated NEPA, FLPMA, or the ESA, further proceedings are necessary to determine the proper scope of any injunctive remedy. See Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 542 (1987) (courts must balance equities before entering injunctive relief); Forest Conservation Council v. U.S. Forest Serv., 66 F.3d 1489, 1496 (9th Cir.1995) (injunction for violation of NEPA “will not automatically issue”). Defendant “should be allowed to present evidence to the court that ‘unusual circumstances’ weigh against the injunction sought, and to present evidence to assist the court in fashioning the appropriate scope of whatever injunctive relief is granted.” Id.

ARGUMENT

I. PLAINTIFFS’ FIRST, SECOND, AND THIRD CLAIMS ARE MOOT, BECAUSE THE 2004 ROD HAS ELIMINATED THE ANNUAL SPECIES REVIEW AND SURVEY AND MANAGE REQUIREMENTS

Plaintiffs challenge the Cow Catcher and Cottonsnake timber sales for failure to comply with the Survey and Manage Requirements for red tree vole in the 2001 ROD. See Pls.’ Summ. J. Mem. (Docket #96) at 26-28; Pls.’ Second Amended Compl. (Docket #101) ¶¶ 82-91. Plaintiffs also

challenge the decisions to implement the 2001 ASR and 2003 ASR, which changed the management status of red tree vole and removed it from Survey and Manage in the central part of its range, respectively. See Pls. Summ. J. Mem. at 14-26; Pls. Second Amended Compl. ¶¶ 92-97. The Court lacks jurisdiction over these claims, however, because they have become moot.

On March 22, 2004, the Agencies issued the 2004 ROD, which removes the Survey and Manage requirements “in their entirety” from the RMPs involved in this case. See 2004 ROD at 7. The 2004 ROD became effective on April 21, 2004, thirty days after it was signed. See id. at 28-29. The 2004 ROD applies to contracts awarded after March 22, 2004, and may also be applied to “[e]xisting contracts . . . where statutory or regulatory authority would allow the change.” Id. at 8.

The contract for the Cottonsnake timber sale has not yet been awarded. See Randall Decl. at 2. Thus, any future contract would be subject to the 2004 ROD. See 2004 ROD at 8. Additionally, BLM has modified the Cow Catcher contract so it falls under the 2004 ROD. See Fed. Defs.’ Ex. B. Plaintiffs’ claims that the two sales fail to conform to the prior 2001 ROD thus are moot. See Colorado Off Highway Vehicle Coalition v. U.S. Forest Serv., 357 F.3d 1130, 1133-34 (10th Cir. 2004) (claim that agency failed to comply with earlier version of Forest Plan rendered moot by issuance of new Plan); Aluminum Co. of Am. v. Adm’r, Bonneville Power Admin., 175 F.3d 1156, 1163 (9th Cir. 1999), cert. denied sub nom Columbia Falls Alum. Co. v. Adm’r Bonneville Power Admin., 528 U.S. 1138 (2000) (claim that agency violated NEPA rendered moot by subsequent EIS).

Plaintiffs’ challenges to the ASRs have also become moot, since ASRs were eliminated along with the Survey and Manage provisions. See 2004 ROD at 7. Because ASRs are no longer required to be performed, Plaintiffs’ case has “lost its character as a present, live controversy.” Hall v. Beals, 396 U.S. 45, 48 (1969). At most, the relief Plaintiffs could obtain would be an injunction against

the timber sales and a remand to the agency to address alleged flaws in the ASRs, or timber sale decisions. However, the agency has now eliminated the requirements for Survey and Manage species which Plaintiffs argue BLM failed to observe. The Court therefore cannot afford Plaintiffs any meaningful relief by remanding to the agency, since the agency has already decided to remove those requirements, and Plaintiffs are not challenging that decision here.^{10/} See Northwest Env'tl. Def. Ctr. v. Gordon, 849 F.2d 1241, 1244-45 (9th Cir.1988) (question in deciding mootness is “whether there can be any effective relief”). Because the 2004 ROD eliminated the requirements for Survey and Manage, Plaintiffs’ claims are moot and should be dismissed for lack of jurisdiction.

II. EVEN IF PLAINTIFFS’ CLAIMS ARE NOT MOOT, BLM DID NOT VIOLATE FLPMA OR NEPA BY IMPLEMENTING THE ANNUAL SPECIES REVIEWS ^{11/}

As explained supra at 11-13, Plaintiffs’ claims regarding the ASRs were rendered moot by the issuance of the 2004 ROD. Even if the claims are not moot, Plaintiffs’ challenges to the ASRs still fail as a matter of law. Plaintiffs devote much of their brief to arguing that the ASRs were arbitrary and capricious, without referring to which statute they believe was violated. See Pls.’ Summ. J. Mem. at 14-22. Because Plaintiffs’ claims arise under FLPMA and NEPA--neither of which creates an independent cause of action--the court must review those challenges under the APA, 5 U.S.C. § 701 *et seq.* See Lujan v. Nat’l Wildlife Fed’n, 497 U.S. 871, 882 (1990); ONRC Action v. BLM, 150 F.3d 1132, 1135 (9th Cir.1998). Although the APA provides a standard of review, it unquestionably does not confer an independent grant of jurisdiction. See Califano v. Sanders, 430 U.S. 99, 107 (1977). The APA simply prescribes the standard for reviewing agency

^{10/} Two of the Plaintiffs in this case are among several organizations challenging the 2004 ROD in a separate action, Northwest Ecosystem Alliance v. Rey, Civ. No. 04-844-MJP (W.D. Wash.).

^{11/} Plaintiffs rely upon numerous extra-record declarations. See Pls.’ Summ. J. Mem. at 4, 9, 12, 14, 15, 21, 28. Because the declarations do not fit any exception to the rule that review is limited to the administrative record, Defendants are filing a separate motion to strike them. Defendants nevertheless will address the declarations, should the Court decide to consider them.

action *once jurisdiction is otherwise established*. Staacke v. U.S. Sec’y of Labor, 841 F.2d 278, 282 (9th Cir. 1988) (emphasis added). “[T]he APA is merely a vehicle for carrying substantive challenges to court.” ONRC v. Thomas, 92 F.3d 792, 796 (9th Cir. 1996). Further, “[w]hether an agency has overlooked ‘an important aspect of the problem,’ . . . turns on what a relevant substantive statute makes ‘important.’” Id. at 798. Thus, to determine whether the 2001 ASRs are arbitrary and capricious, the Court must look to the underlying substantive legal standard.

In this case, the relevant standard is set forth in FLPMA, which requires BLM to manage the public lands “in accordance with the land use plans” it develops, including the Roseburg and Medford RMPs. See 43 U.S.C. § 1732(a). The other standard is found in NEPA, which requires NEPA supplementation only when there is still “major Federal action” left to occur. See Norton v. Southern Utah Wilderness Alliance, 542 U.S. ---, 124 S. Ct. 2373, 2384-85 (2004) (“SUWA”). Because BLM satisfied these standards, Federal Defendants are entitled to summary judgment.

A. BLM Did Not Violate FLPMA Because The ASRs Complied With The Process Established By The 2001 ROD And Did Not Require A Plan Amendment

1. The ASRs Did Not Require A Plan Amendment Under FLPMA

Plaintiffs argue that BLM violated FLPMA by deciding not to amend its RMPs when it implemented the ASRs. This claim must fail, because changes made through the ASRs constitute only plan maintenance, which “reflects minor changes in data” and does not require a formal plan amendment. See 43 C.F.R. § 1610.5-4. BLM is thus entitled to summary judgment.

Under FLPMA, an RMP “*may* be changed through amendment.” 43 C.F.R. § 1610.5-5 (emphasis added). The regulations also describe when an amendment is required:

An amendment shall be initiated by the need to consider monitoring and evaluation findings, new data, new or revised policy, a change in circumstances or a proposed action that may result in a change in the scope of resource uses or a change in the terms, conditions and decisions of the approved plan.

Id. The regulations further describe circumstances where RMPs may be maintained without undertaking the process for formal amendment:

Resource management plans and supporting components shall be maintained as necessary to reflect minor changes in data. Such maintenance is limited to further refining or documenting a previously approved decision incorporated in the plan. Maintenance shall not result in expansion in the scope of resource uses or restrictions, or change the terms, conditions, and decisions of the approved plan. *Maintenance is not considered a plan amendment and shall not require the formal public involvement and interagency coordination process described under Secs. 1610.2 and 1610.3 of this title or the preparation of an environmental assessment or environmental impact statement.* Maintenance shall be documented in plans and supporting records.

43 C.F.R. § 1610.5-4 (emphasis added).

As explained supra at 3-4, the ASRs implement the adaptive management concept, which lies at the heart of the NFP and 2001 ROD. The NFP contemplated that “many adaptive management modifications may not require changes to Regional Guides, or Forest or District Plans.” Id. NFP ROD, Attach. A at E-13. Thus, it was expected that the ASRs would “implement[] changes or refinements to Survey and Manage” based on data within the scope of the NFP and 2001 ROD. See 2001 ROD, Attach. 1 at 18-19. Because the ASRs fall within the realm of administrative change, they constitute plan “maintenance.” 43 C.F.R. § 1610.5-4. Thus, BLM did not violate FLPMA by deciding not to amend its RMPs. See Native Ecosystems Council v. Dombeck, 304 F.3d 886, 900 (9th Cir. 2002) (deferring to Forest Service’s “particular expertise in interpreting its own Forest Plan” to uphold decision that significant plan amendment not required).

2. The ASRs Complied With The Process Established By The 2001 ROD

a. BLM Reasonably Determined That Species Persistence Would Be Assured When It Implemented the 2001 ASR

BLM’s decision to implement the 2001 ASR by changing the vole’s management category was a reasonable determination that, based on relatively wide distribution and number of vole sites

in the central part of the vole's range, the vole had a reasonable assurance of persistence that did not require protecting all known sites. The 2001 ROD established a process by which BLM solicited new information which might support adding or removing species, or changing species categories. To support changing a species from one category to another, the new information "must address the specific criteria for the categories involved in the change" by showing how the species better meets the criteria for the proposed category. 2001 ROD, Attach. 1 at 17.

Plaintiffs challenge the decision to implement the 2001 ASR by changing the category of red tree vole from C to D. The 2001 ROD sets forth the criteria for each of the categories. For category C, BLM must determine that pre-disturbance surveys are practical, and that "[t]he species is uncommon, and not all known sites or population areas are likely to be necessary for reasonable assurance of persistence" Id. at 10. Category D includes the "[s]ame criteria as Category C, except that pre-disturbance surveys are not practical or are not necessary to meet objectives for species persistence because inadvertent loss of some undiscovered sites would not change level of rarity." Id. at 11. Even where pre-disturbance surveys may be practical, species can still be placed in Category D if there are "a sufficient number of sites known to meet species objectives." Id.

BLM reasonably considered the criteria for moving the vole to Category D and found them to support the change within the central part of the vole's range. In particular, BLM based its decision on findings that: (1) the three basic Survey and Manage criteria were met; (2) the species was uncommon rather than rare; (3) surveys were "not necessary to meet objectives for species persistence" since inadvertent loss of some species would not change the level of rarity; and (4) BLM expected to identify high priority sites by the end of fiscal year 2002. See 2001 ASR 579-80.

Plaintiffs do not dispute that the three basic criteria were satisfied or that the species was considered uncommon. Rather, Plaintiffs argue that BLM did not reasonably determine that the vole

would meet the objectives for species persistence. Plaintiffs identify several factors they argue make the ASRs arbitrary and capricious: abundance conclusions are unsupported and do not satisfy persistence concerns, see Pls.’ Summ. J. Mem. at 18; newly found sites are unlikely to persist, see id. at 19-20; existing sites would not provide connectivity, see id. at 20-21; LSRs provide less habitat than the agencies expected, see id. at 21-22; and BLM did not complete studies it identified as part of its research needs. See id. at 22.

All these factors identified by Plaintiffs relate to species persistence. BLM is not required, however, to meet all these factors in order to satisfy the standard for Category D. To support a change to Category D, BLM’s finding of “reasonable assurance of persistence” need only be supported by “*one or more* of the following”: high number of likely extant sites/records does not indicate rarity; low-to-high number of individuals per site; moderate-to-broad ecological amplitude; and moderate-to-high likelihood of sites in reserves. See 2001 ROD at 10 (emphasis added).

BLM found that several of these criteria supported the change to Category D. See 2001 ASR at 23-25. For example, BLM found a large number of sites, indicating the species was not rare. See id. at 23, 25 (noting “large number of sites in the core area”). Additional factors also supported BLM’s finding, including the “potential in reserves because of gross habitat acres in reserves and the ecological amplitude of the species.” Id. at 229. This reasonably lead BLM to conclude that the high number of sites in the Matrix was sufficient not to need pre-disturbance surveys. See id. at 300.

Plaintiffs’ argument that this is not “new information” is without merit, since approximately 80% of all records in the database came from surveys conducted in the previous two years. See id. at 23. Additionally, the Court should reject Plaintiffs’ arguments that BLM improperly relied upon nest site data to determine abundance. BLM is not required by either FLPMA or NEPA to conduct actual population counts of the vole in order to make a determination about whether there is a

reasonable assurance of persistence. See, e.g., Inland Empire Pub. Lands Council v. U.S. Forest Serv., 88 F.3d 754,759-60, 760 n.6 (9th Cir. 1996) (Forest Service could rely upon habitat data to satisfy viability analysis under National Forest Management Act). Finally, the fact that BLM has not completed all the research needs does not prevent it from concluding that persistence would be reasonably assured through the strategic surveys and designation of high priority sites. See, e.g., 2001 ASR 1217-18 (Step 2 panel acknowledged that additional information was “needed to improve understanding of the population status,” but believed it was “not prevented from reaching cri[t]ical conclusions” in its report). See id. at 1218. In sum, because BLM found that some of these criteria supported a “reasonable assurance of persistence,” the 2001 ASR complied with FLPMA.

b. BLM Reasonably Determined That Species Persistence Would Be Assured When It Implemented the 2003 ASR

Even if Plaintiffs’ challenges to the 2003 ASRs were not moot, the FLPMA claims against the 2003 ASR still must fail as a matter of law.^{12/} The criteria for removing a species from Survey and Manage are set forth in the 2001 ROD, which requires BLM to “address specific factors indicating that persistence is not a concern.” 2001 ROD, Attach. 1 at 16. “Usually, most of the following factors must be true to indicate that persistence is not a concern:” moderate-to-high number of likely extant sites/records; high proportion of sites and habitat in reserves, or a high proportion or amount of potential habitat within reserves and a high probability the habitat is

^{12/} The lawfulness of the 2003 ASR should not result in an injunction against Cow Catcher because the 2003 ASR requirements did not apply to that sale. The 2003 ASR requirements do not apply to activities already under awarded contract on December 19, 2003. 2003 ASR 54. The Cow Catcher timber sale was awarded on September 23, 2003. See CC AR 157-58. Any deficiencies in the 2003 ASR, therefore, should not result in an injunction against the Cow Catcher sale, since the 2003 ASR plays no “causal role” in the timber sale decision. See Ohio Forestry Ass’n v. Sierra Club, 523 U.S. 726, 734 (1998) (Forest Service’s land and resource management plan may be challenged in context of a timber sale “if but (only if) . . . the Plan plays a causal role with respect to the future, then-imminent harm from logging”).

occupied; relatively well-distributed sites within the range; other elements of the NFP provide for a reasonable assurance of persistence. See id., Attach. 1 at 17.

BLM addressed all four of these criteria and found they warranted removal. First, the agency found there was a “moderate to high number of likely extant known sites” within the Mesic Zone. 2003 ASR 303 (finding of Step 2 Panel); see also id. at 114 (IMG’s recommendation to remove based partly on moderate-to-high number of likely known site/records). This conclusion was based on an overall detection rate of 26% by surveys conducted in all size classes of stands, where one or more active nests were detected during the survey. See id. “Near the center of the species geographic range . . . the species abundance is higher and its distribution is more well-distributed.” Id. at 309; see also id. at 114 (noting Step 2 Panel response that a “[m]oderate-to-high number of likely extant sites/records”). The IMG also recommended to remove the species based on this criteria. See id. (“IMG Recommendation: Remove based on Criteria 1 and 3”).

The partially completed strategic survey results also supported the agency’s conclusion that a moderate to high number of extant sites is found within the central portion of the range. Although strategic surveys were not analyzed because they were not yet complete, the RIEC noted that the detection rates for surveys that had been conducted were “among the highest rates of detection” for any species included in the surveys. See id. at 106. Accordingly, BLM concluded that the data supported the first criteria, a “moderate-to-high number of likely extant sites.” See id.

For the second criteria, BLM also reasonably found there was “acceptable risk in concluding that the proportion of sites and habitat was sufficiently high in the mesic zone,” given the detection rate in reserves as well as through random grid surveys. See AR 107. The Step 2 Panel had recorded that 17% of surveys in reserves in the Mesic Zone found one or more active nests. See ASR 106. The Panel also “documented that the proportion of potential habitat in reserves in the

mesic zone was 35%.” Id. This led the Step 2 Panel to conclude that while the proportion of sites and habitat in reserves “was not high . . . there was a *high probability* that potential habitat in reserves would be occupied.” Id. at 107 (emphasis added).

As with the first criteria, partially completed random grid surveys also supported the RIEC’s analysis of the second criteria, namely the amount of potential habitat within reserves and the potential it would be occupied. According to data collected through February 2003, the “detection rate of active nests in reserves in Oregon was 20% and the detection rate of active plus inactive nests in reserves was 35%.” Id. Additionally, research wildlife biologist Dr. Eric Forsman noted that the Forest Ecosystem Management Assessment Team (“FEMAT”), in formulating NFP alternatives, gave “the Red Tree Vole a 0 percent likelihood of extirpation” under the selected alternative. See ASR 107. This led IMG to determine that there was “acceptable risk” in removing the vole from Survey and Manage, based on high potential for habitat to be occupied in reserves. See id.

BLM also reasonably determined that removal would be supported by the third criteria, that sites were relatively well-distributed. The Step 2 Panel documented this finding by noting that “abundance is higher and . . . distribution is more well-distributed.” Id. at 309; see id. at 107, 114 (IMG finding that “[s]ites are relatively well distributed within the species range”). The Step 2 Panel’s finding of a “well-distributed” occurrence was also supported by detection rates and spatial display of survey data. See id. at 107. Finally, the fourth criteria was also analyzed, whether other elements of NFP provide for reasonable assurance of persistence. RIEC noted that although Step 2 had documented that other elements of the NFP could not clearly be shown to support assurance of persistence, that Panel also found that “riparian reserves and connectivity blocks did contribute to persistence,” though the specific contribution was unknown. See id. The RIEC noted that this observation that RRs contribute to persistence--albeit to an unknown extent--was “in harmony” with

the comments of a research wildlife biologist who had noted that RR buffers was added to the NFP after the FEMAT panel's evaluation of the vole in the early 1990s. See id. at 107-08. The FEMAT panel had concluded that voles had a "73% likelihood of sufficient habitat to provide for stable, well-distributed populations across" federal lands and a zero percent likelihood of extirpation. See id. at 108. Because riparian buffers were added after this assessment, RIEC determined the contribution of RRs, though unknown, supported removal. Because such determinations fall within the exercise of the agency's professional judgment in assessing risk, BLM reasonably determined that removal was supported. See 2001 ROD Attach. 1 at 17 (analysis "necessarily relies on the professional judgment of the panel of experts"). Federal Defendants should therefore be granted summary judgment on the challenges to the 2003 ASR.

B. BLM Did Not Violate NEPA By Changing The Management Status of Red Tree Vole

Even assuming that Plaintiffs' NEPA challenges to the ASRs are not moot, BLM is still entitled to summary judgment on those claims for two reasons. First, the Supreme Court's recent decision in SUWA, 124 S. Ct. 2373, makes clear that once a land use plan has been promulgated, there is no major federal action left to occur at the plan level that would require supplemental NEPA until the plan is amended or revised. See id. at 2384-85. Because BLM was not required to amend its land use plans when it conducted the ASRs, it did not have to conduct supplemental NEPA. Additionally, even if BLM's NEPA obligation had been triggered at the plan level, those obligations were satisfied, because the effects of the ASR process were already considered in the 2000 FSEIS and 2001 ROD and constituted only administrative changes not requiring supplemental NEPA. Federal Defendants are thus entitled to summary judgment on the NEPA challenges to the ASRs.

1. BLM Was Not Required To Prepare Environmental Documents On The ASRs Because There Was No Major Federal Action Left To Occur At The Plan Level

In SUWA, the Court considered a suit brought by environmental groups seeking to compel BLM to take action regarding off-road vehicle (“ORV”) use. Plaintiffs brought three challenges, the first two of which alleged under FLPMA that BLM had unlawfully failed to protect its land from impacts from ORV use. See SUWA, 124 S. Ct. at 2378. The third challenge--relevant to this case--was brought under NEPA and alleged that BLM had failed to take a hard look at whether “it should undertake supplemental environmental analyses for areas in which ORV use had increased.” Id.

The Court unanimously rejected all three of the plaintiffs’ claims. On the third claim, the Court found that to trigger the requirement that an agency conduct supplemental NEPA, there still must be major Federal action to occur. See id. at 2384-85 (“[S]upplementation is necessary only if ‘there remains ‘major Federal actio[n]’ to occur’ as that term is used in §4332(2)(C)”) (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 374 (1989)). Once a land use plan has been approved, the Court explained, there is no further major Federal action to occur at the plan level. See id. at 2385. The Court contrasted the lack of major federal action following approval of a land use plan to the situation in Marsh, where a project to construct a dam was not complete:

Here, by contrast, although the “[a]pproval of a [land use plan]” is a “major Federal action” requiring an EIS, 43 CFR § 1601.0-6 (2003) (emphasis added), that action is completed when the plan is approved. The land use plan is the “proposed action” contemplated by the regulation. There is no ongoing “major Federal action” that could require supplementation (though BLM *is* required to perform additional NEPA analyses if a plan is amended or revised, see §§ 1610.5-5, 5-6).

Id. (emphasis in original). Thus, the Court found that NEPA supplementation was not required.

In this case, BLM was not required to conduct supplemental NEPA for the ASRs because the land use planning process was complete. The Roseburg RMP was promulgated in 1995 and was amended by the 2001 ROD. BLM did not amend the Plan when it conducted the ASRs, nor was it

required to do so, as explained supra at 14-15. Because no plan amendment was required, there was no further “major Federal action” to occur at the plan level. See SUWA, 124 S. Ct. at 2385. Consequently, BLM did not have to undertake NEPA supplementation. See id. Federal Defendants are thus entitled to summary judgment on Plaintiffs’ NEPA challenges to the ASRs.^{13/}

2. NEPA Was Satisfied Because The Effects Of The ASR Process Were Already Considered In The 2000 FSEIS

Once an agency has prepared a NEPA document, further analysis is only required if there are substantial changes in the proposed action relevant to environmental concerns, or if significant new information relevant to environmental concerns arises. See 40 C.F.R. § 1502.9(c); Marsh, 490 U.S. at 374; Price Road Neighborhood Ass’n, Inc. v. U.S. Dep’t of Transp., 113 F.3d 1505, 1512 (9th Cir. 1997). When changes are made to a proposal, NEPA supplementation is only required when “there have been significant changes in the proposed action.” Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1152 (9th Cir. 1998). Supplementation is not required for every change to a project, and where an agency reviews the relevant factors and makes a determination that supplementation is unnecessary, a court should defer to that determination. Price Road, 113 F.3d at 1509-12. Although NEPA requires agencies to allow the public to participate in preparing supplemental NEPA documents, there is no requirement of public participation for the decision *whether* to prepare such documents. See Friends of the Clearwater v. Dombeck, 222 F.3d 552, 560 (9th Cir. 2000); Idaho Sporting Cong. v. Alexander, 222 F.3d 562, 566 n.2 (9th Cir. 2000).

BLM was not required to conduct supplemental NEPA because the procedures for changing the management status of red tree vole were established by the 2001 ROD. At the core of the NFP is the concept of adaptive management--the process of applying “the scientific principle of feedback

^{13/} BLM acknowledges that it stated it might prepare supplemental NEPA documents for Survey and Manage changes under certain circumstances. See 2001 ROD at 9. Nevertheless, SUWA makes clear that supplemental NEPA documents are not necessary unless the circumstances also require a plan amendment, and here they do not.

and adjustment, of identifying and evaluating new information, and adjusting to improve implementation” of the NFP. NFP FSEIS E-3. As explained in the NFP:

To be successful, the selected alternative must have the flexibility to adapt and respond to new information. Under the concept of adaptive management, new information will be evaluated and a decision will be made whether to make adjustments or changes. Each alternative incorporates the concept of adaptive management . . .

Id. at 2-12. In adopting the NFP, BLM anticipated that “many adaptive management modifications may not require changes to Regional Guides, or Forest or District Plans.” Id. “*Most adjustments will be within the realm of administrative change*, while others may need to meet formal NEPA requirements.” NFP FSEIS E-2 (emphasis added).

Adaptive management is also central to the 2001 ROD, which established parameters for changing species management under Survey and Manage. See 2001 ROD, Attach. 1 at 15-19. As long as changes are within the parameters of the 2001 ROD, BLM found “they would not constitute . . . new information on effects not already anticipated and addressed in the above [2000] FSEIS.”

Id., Attach. 1 at 18-19. BLM found supplemental NEPA not likely for three major reasons:

First, the parameters for making such changes are clearly delineated and part of these standards and guidelines. Second, adjustments made pursuant to the annual species review process are fully expected to occur and are included in the set of assumptions on which the effects analyses of the November 2000 Survey and Manage Final SEIS have been made. Third, the status of species relative to the standards and guidelines should remain consistent with, and at least as secure as, that reflected in the Final SEIS, given that the criteria guiding the species review process have been designed in large measure to achieve such consistency.

See id., Attach. 1 at 19.

Because the 2001 ROD contemplated that species could be added, deleted, or reassigned to other categories, BLM reasonably relied on the 2001 ROD in determining that the ASRs would not require supplemental NEPA. For example, BLM found that “[t]he parameters for making changes to [Survey and Manage] species are clearly delineated in the 2001 ROD. Those parameters provide

for making adaptive management changes that could result in species being added, removed, or changed among categories in [Survey and Manage].” 2001 ASR 121; see also 2003 ASR at 11-12.

BLM acknowledged that at some point, if effects rose above the level of the 2000 FSEIS, “supplemental NEPA analyses can be expected to be conducted at appropriate intervals as necessary or advisable.” 2001 ROD, Attach. 1 at 19. Plaintiffs, however, have not demonstrated that to be the case. Plaintiffs argue that the ASRs did not involve “new information,” but were based on information already available. See Pls.’ Summ. J. Mem. at 17, 19. Nowhere, however, do Plaintiffs argue that effects of the ASRs exceed those in the NFP and 2001 ROD. Federal Defendants are thus entitled to summary judgment on the NEPA challenges to the ASRs.

III. EVEN IF PLAINTIFFS’ CLAIMS ARE NOT MOOT, BLM SATISFIED FLPMA BY COMPLYING WITH THE OBLIGATION UNDER THE 2001 ROD TO MANAGE KNOWN SITES FOR RED TREE VOLE

As explained supra at 11-13, Plaintiffs’ argument that the Cow Catcher project failed to comply with the 2001 ROD under FLPMA is now moot. Even if the claim is not moot, Defendants are still entitled to summary judgment. Plaintiffs argue that BLM failed to conform to the requirements of the 2001 ROD and manage sites that Plaintiffs allege contain red tree vole nests. See Pls.’ Summ. J. Mem. at 27-28. Because BLM reasonably determined that information provided by Plaintiffs had not been “reported by a credible source,” it was not required to manage the locations as known sites. BLM thus complied with the 2001 ROD for managing known sites and is entitled to summary judgment on this issue. See Pls.’ Second Amended Compl. ¶¶ 87-91.

The 2001 ROD defined known sites as “[h]istoric 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.” 2001 ROD, Attach. 1 at 76. Such sites can be based on “any documented and credible source (such as herbaria/museum records, published

documents, Agency records, species expert records, and documented public information).” Id. A credible source is a “professional or amateur person who has academic training and/or demonstrated expertise in identification of the taxon of interest sufficient for the Agency to accept the identification as correct,” and can include agency staff and private individuals. Id.

Plaintiffs contend that in August 2003 they presented BLM with evidence of “over 20 active Red Tree Vole nests and 14 inactive nests” in the Cow Catcher sale area. Pls.’ Second Amended Compl. ¶ 35. The information presented to BLM consisted of various plastic bags purporting to contain resin ducts and vole feces, as well as handwritten field notes. See CC AR 279, 289-97. The documents submitted to BLM did not include the actual names or credentials of surveyors but in some cases included aliases such as “frank,” “safron” [sic], “spindle,” “fox,” and “yellow.” See id. at 122-23, 291-97. Because BLM did not know the names--much less the credentials--of these individuals, it deemed the materials did not support evidence of known sites. See id. at 63, 138-39.

Plaintiffs have submitted declarations attempting to show they delivered nest materials to BLM and that such materials are evidence of known sites in the project area. As explained in Defendants’ separate motion to strike, the Court should not consider these declarations because review of Plaintiffs’ claims is limited to the administrative record. Even if the Court considers them, they fail to show the materials came from a “documented and credible source” due to inconsistent evidence of chain of custody. For example, Plaintiffs state that Mr. Jesse Crocker surveyed what he believed was Unit B of the Cow Catcher project area on August 7-8, 2003. See Crocker Decl. ¶ 3, 4. Mr. Crocker then states that he “gave the . . . nest samples and maps and other information to Josh Laughlin.” Id. ¶ 5. This is inconsistent with the Declaration of Ms. Frances Eatherington, which states that she received the Cow Catcher survey information directly from Jesse Crocker on July 29, 2003. See Eatherington Decl. ¶ 6. This date is a week prior to when Mr. Crocker conducted

the surveys. Nowhere does Mr. Crocker mention that he conducted any surveys on Cow Catcher prior to August 7, nor does he state that he gave the samples to Ms. Eatherington.

Even assuming Ms. Eatherington's declaration is true, she waited over a week between receiving the materials on July 29 and submitting them on August 8. See id. As for the samples from the August 7 and 8 surveys, those were "left by Josh Laughlin . . . at the Umpqua Watersheds office" and not delivered to BLM until August 11. Id. Moreover, BLM could not verify the surveyors' qualifications. Although Mr. Crocker and Ms. Stankiewicz state that they conducted surveys in the Cow Catcher project area, they did not identify themselves in the documents submitted to BLM. See CC AR 122 (listing only "Frank" and "Yellow" as surveyors on August 8, 2003). Because BLM had no basis to identify the surveyors, much less evaluate their qualifications, it reasonably determined their information was not credible.

Plaintiffs also imply that BLM failed to manage a site previously identified as containing an active red tree vole nest in the Cow Catcher project area. See Pls. Summ. J. Mem. at 8-9. BLM, however, did not have to manage this site because it reasonably determined the site was no longer occupied. In a January 2000 survey, BLM located an active nest structure in Unit A. See CC AR 410. In May 2003, a BLM wildlife biologist and four other employees visited the previously identified tree. See id. The tree, which was "easily viewed [from] the ground," no longer contained a nest, as fact confirmed by one BLM employee who climbed an adjacent tree. See id. (noting also that a search of the ground "located no . . . resin ducts" or other evidence of vole use). BLM reasonably determined this site did not have to be protected, since "[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." 2001 ROD, Attach. 1 at 76. Thus, even if the claim that BLM should have complied with the 2001 ROD is not moot, Federal Defendants are still entitled to summary judgment on this issue.

IV. BLM REASONABLY DETERMINED THAT C/D BLOCKS REQUIREMENTS WOULD BE MET UNDER FLPMA AND ADEQUATELY DISCLOSED THOSE REQUIREMENTS IN THE COW CATCHER EA AND SEA UNDER NEPA

Plaintiffs argue that BLM failed to disclose the RMP requirements for C/D Blocks under NEPA, or to provide sufficient information showing those requirements would be met under FLPMA. See Pls.’ Summ. J. Mem. at 33-34. The CC EA and CC SEA demonstrate this not to be the case. The Roseburg RMP relies upon a strategy of ecosystem management “to maintain or restore healthy, functioning ecosystems while providing a sustainable production of natural resources.” RMP ROD at 18. The building blocks of this management strategy are land use areas, which include among other areas, the Matrix. The Matrix consists of the General Forest Management Area and C/D Blocks, both of which have particular management requirements and objectives. See id. at 19.

In managing for timber productions in C/D Blocks, BLM must meet four requirements: (1) “[m]aintain 25 to 30 percent of each block in late-successional forest at any point in time,” id. at 34; (2) emphasize density management in stands under 120 years, see id. at 152, 153; (3) limit regeneration harvest to “a rate of 1/15 of the available acres in the entire Connectivity/Diversity Block land use allocation per decade,” id. at 152; and (4) “[m]anage available forest land within each block on a 150 year area control rotation,” id. at 34.

The question of whether the proposed action actually complies with the substantive RMP requirements is determined under FLPMA. That statute requires BLM land to be managed “in accordance with the land use plans . . . when they are available.” See 43 U.S.C. § 1732(a); 43 C.F.R. § 1610.5-3(a) (“All future resource management authorizations and actions . . . and subsequent more detailed or specific planning, shall conform to the approved plan”). By comparison, the question under NEPA is “to determine if the agency observed the appropriate

procedural requirements.” Northcoast Env'tl. Ctr. v. Glickman, 136 F.3d. 660, 665 (9th Cir. 1998). The CC EA and Supplemental EA demonstrate that both BLM has complied with both statutes.

Plaintiffs do not dispute that BLM has “disclosed and likely meets the first requirement,” nor could they, as the CC SEA reveals that at least 25 to 30 percent of each block is being retained as late-successional habitat. See CC SEA at 8 (proposed harvest would reduce late-successional habitat in two blocks to 30.5 and 80 percent, respectively); see also CC AR 375. BLM has also demonstrated compliance with the second requirement, as the CC Supplemental EA states that the age of stands proposed for harvest within C/D blocks is “approximately 225 years.” CC SEA at 8.

As for the third requirement, BLM has demonstrated that the CC timber sale will not authorize more than the decadal allowance, or 1/15 of the entire land C/D Block land use allocation. On a “decadal basis, approximately 1,790 acres are available for regeneration” harvest in the Roseburg District. CC SEA at 9. A total of 490 acres have been authorized, and another 421 acres are expected to be offered in fiscal year (“FY”) 2005. Id. Adding the 54 remaining acres to be harvested in C/D blocks here, this total of 911 acres amounts to only 50.8 percent of the decadal allowance, leading BLM to reasonably conclude that the sale is consistent with the RMP. Id.

Plaintiffs’ argument that BLM “only reveals the amounts cut over the last nine years,” rather than a decade, lacks merit. Pls.’ Summ. J. Mem. at 34. The current version of the Roseburg RMP was issued in 1995. See Roseburg RMP at 7. The Supplemental EA summarizes the amount of regeneration harvest authorized by fiscal year for the first nine years of the RMP, from FY 1995 through FY 2003. See CC SEA at 9, Appx. A. As BLM explained, because 1995 “was the year in which the [C/D] Block land use allocation was created, 1995 is also the beginning of the ‘decade’[] for the purpose of measuring compliance with decadal harvest limitations.” Id. Because BLM is entitled to deference in interpreting the requirements of its own land use plan, its use of 1995 as a

starting point for calculating the decadal allowance is reasonable and should be upheld. See Native Ecosystems Council, 304 F.3d at 900 (deferring to agency's interpretation of its forest plan).

In addition to reasonably explaining why BLM selected the beginning of the RMP as the starting point for measuring compliance, the Supplemental EA also estimates the amount of harvest expected to be offered in FY 2004 and FY 2005, the balance of the first decade. See id. (zero and 421 acres planned to be offered in FY 2004 and FY 2005, respectively). "When added to the acreage that has already been authorized, planned regeneration harvest for the entire land use allocation totals . . . 50.8 percent of the decadal allowance authorized by the ROD/RMP." Id. BLM has thus shown that the sale will comply with the third requirement for C/D Blocks.

Finally, BLM demonstrated that the fourth requirement would be met. Because the age of stands in C/D Blocks to be harvested is "approximately 225 years," BLM reasonably concluded that it was meeting the requirement to manage the stands on a minimum rotation age of 150 years, well below the actual stands age. See CC SEA at 8. Although Plaintiffs now argue that BLM had to disclose the harvest history or forest age classes within each C/D block to meet this requirement, the Court should reject that argument and defer to BLM's expertise in deciding such questions. See Central S. Dakota Co-op. Grazing Dist. v. Sec'y of Agric., 266 F.3d 889, 901(8th Cir. 2001) (The "standard for agency action is not one of perfection, but whether the agency acted arbitrarily and capriciously."); Lamb v. Thompson, 265 F.3d 1038,1047 (10th Cir. 2001) (deferring to agency's interpretation of its forest plan). Because BLM has shown compliance with C/D Block requirements for FLPMA and has disclosed those effects under NEPA, it is entitled to summary judgment.

V. BLM SATISFIED NEPA BY ANALYZING A REASONABLE RANGE OF ALTERNATIVES IN THE COW CATCHER EA

Plaintiffs also challenge the CC EA for failing to consider an adequate range of alternatives, specifically other methods and other locations for timber harvest. See Pls.’ Summ. J. Mem. at 34-36. Because Plaintiffs in the administrative process did not describe in detail the alternatives they wanted BLM to consider, they may not raise such an argument in litigation. See Vt. Yankee Nuclear Power Corp. v. Natural Resources Def. Council, Inc., 435 U.S. 519, 553 (1978). Even if Plaintiffs had raised the claim in detail, the alternative suggested by Plaintiffs is not feasible because it would not conform to the requirements of the RMP. Defendants are thus entitled to summary judgment.

As part of the NEPA process, an agency must examine alternatives to the proposed project. See 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1508.9(b) (requiring EA to include “brief discussions” of reasonable alternatives). The range of alternatives to be analyzed is determined by the project’s purpose and need. See Northwest Env’tl. Def. Ctr. v. Bonneville Power Admin., 117 F.3d 1520, 1538 (9th Cir. 1997) (“An agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action.”); Vt. Yankee, 435 U.S. at 551-52. An agency need not consider every suggested alternative, but only those “reasonably related to the purposes of the project.” Trout Unlimited v. Morton, 509 F.2d 1276, 1286 (9th Cir. 1974). Additionally, the range of alternatives required to be considered in an EA, such as involved here, is narrower than in an EIS, because expected impacts are smaller. See Highway J Citizens Group v. Mineta, 349 F.3d 938, 960-61 (7th Cir. 2003) (less extensive search for alternatives required where “agency makes an informed decision that the environmental impact will be small”), cert. denied, 124 S. Ct. 1886 (2004).^{14/}

^{14/} See also Sierra Club v. Espy, 38 F.3d 792, 796, 803 (5th Cir. 1994) (range of alternatives to be considered in EA “decreases as the environmental impact of the proposed action becomes less and less substantial”) (internal quotations omitted); Friends of the Ompompanoosuc v. FERC, 968 F.2d 1549, 1558 (2d Cir. 1992) (range of alternatives to be considered is narrower when

The “overarching purpose and need of the Cow Catcher Timber [Sale] is to implement the Roseburg District ROD/RMP.” CC AR 152. Specifically, the CC EA identifies three relevant goals to achieve this: (1) the need “to meet the Roseburg District’s declared objective for an annual allowable sale quantity (ASQ) of 45 million board feet”; (2) the need to contribute to the socioeconomic objectives of analysis in the EIS for the RMP, “which estimated that BLM programs (including timber sales) would support 544 jobs and provide \$9.333 million in personal income annually”; and (3) the need to provide sustained yield of forest products to meet the requirements of the O&CLA. See id. at 369-70. Consistent with these goals the EA examined two alternatives in detail: the no-action alternative and the proposed action. See id. at 371-73.

Plaintiffs argue that BLM defined the purpose of the CC EA broadly, to “[p]roduce a sustainable supply of timber and other forest commodities.” Pls.’ Summ. J. Mem. at 35-36. The definition, however, is only one purpose of the Matrix generally. See CC AR 369. Nevertheless, Plaintiffs argue that since the EA has a broad purpose, BLM should have considered other alternatives that involve harvest in other locations using other prescriptions such as thinning and density management, rather than regeneration harvest. See Pls. Summ. J. Mem. at 36.

This claim should fail for two reasons. First, Plaintiffs have not met their burden of providing early in the NEPA process a sufficiently detailed description of alternatives they believe should have been considered. “Persons challenging an agency’s compliance with NEPA must ‘structure their participation so that it ... alerts the agency to the [parties’] position and contentions,’ in order to allow the agency to give the issue meaningful consideration.” U.S. Dep’t of Transp. v.

“agency has found that a project will not have a significant environmental impact”); River Rd. Alliance, Inc. v. U.S. Army Corps of Eng’rs, 764 F.2d 445, 452 (7th Cir.1985), cert. denied, 475 U.S. 1055 (1986)

Pub. Citizen, 124 S.Ct. 2204, 2214 (2004) (quoting Vt. Yankee, 435 U.S. at 553). In particular, Plaintiffs must come forward with a “specific, detailed counterproposal” early in the NEPA process. Morongo Band of Mission Indians v. Fed. Aviation Admin., 161 F.3d 569, 576 (9th Cir. 1998).

Plaintiffs’ administrative protest criticizes alternatives only in very general terms: “The EA says that if the Cow Catcher units were not logged now, the BLM would log someplace else. The BLM failed to consider this alternative. There was a lack of good alternatives in the EA.” CC AR 198; see also id. at 120. Such vague criticism of the EA’s consideration of alternatives is not sufficiently detailed to be meaningful and thus need not be addressed further by BLM. See Pub. Citizen, 124 S.Ct. at 2213-14; Vt. Yankee, 435 U.S. at 553; Morongo Band, 161 F.3d at 576.

Additionally, even if Plaintiffs had described in detail the alternatives they wanted BLM to consider, their claim still must fail because an alternative involving thinning in the Cow Catcher project area would not meet the requirements of the RMP. The RMP state that within the GFMA, “[c]ommercial thinning entries would be programmed for stands under 80 years of age.” Roseburg RMP at 151. “Priority for harvest in stands *under 80 years* of age would be commercial thinning.” Id. (emphasis added). Within C/D Blocks, density management will only be emphasized in stands under 120 years. See id. at 152, 153. The stands to be harvested in the Cow Catcher project area occur within C/D Blocks and GFMA and largely exceed the specified ages. See id. at 375 (stands in project area are “generally 110-to-220 years old”); CC SEA at 8 (stands in C/D Blocks are “approximately 225 years” old). Because the RMP indicates that thinning should not be prioritized in such stands, it was reasonable for BLM not to consider such an alternative. See Seattle Audubon Soc’y v. Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996) (agency need not consider alternatives “that are unlikely to be implemented or those inconsistent with its basic policy objectives”); Headwaters,

Inc. v. BLM, 914 F.2d 1174, 1180 (9th Cir. 1990) (“Nor must an agency consider alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives.”).

Additionally, the RMP suggests that BLM should only “[a]pply commercial thinning in the Matrix where practical and where research indicates increased gains in timber production are likely.” RMP ROD at 62. BLM explained to Plaintiffs that thinning would not satisfy these requirements:

Your assertion that thinning would provide much more volume is incorrect. The average volume per acre for the Cow Catcher timber sale is in excess of 32 MBF. Commercial thinnings typically average in the neighborhood of 12 MBF/acre. To provide the volume present in the Cow Catcher timber sale would require the preparation of 300-400 acres of commercial thinning at a *greater cost in time and money*.

CC AR 147 (emphasis added). Given BLM’s “particular expertise in interpreting its own Forest Plan,” the Court should defer to the agency’s reasonable explanation that it would not be feasible to consider the harvest prescriptions Plaintiffs suggest. See Native Ecosystems Council, 304 F.3d at 900 (deferring to Forest Service’s decision that significant plan amendment was not required).

BLM also adequately addressed Plaintiffs’ criticism that it should consider other harvest locations either within or outside the watershed. See Pls.’ Summ. J. Mem. at 36. BLM explained that it has already undertaken density management in LSRs and commercial thinning in the Matrix, and that the regeneration harvest proposed in the Cow Catcher timber sale area has not “precluded [the South River Field Office] from planning and implementing” those other efforts. See CC AR 74, 147 (noting the South River Field Office has been directing its efforts “entirely toward the management of these younger stands over the past four years”). Because BLM adequately considered all reasonable alternatives that would meet the purpose and need consistent with the RMP, Federal Defendants are entitled to summary judgment on this issue as well.

VI. THE COTTONSNAKE EA COMPLIES WITH FLPMA AND NEPA BY ADDRESSING INFORMATION FROM THE WATERSHED ANALYSIS

Plaintiffs raise two challenges to the CS EA based on the Watershed Analysis (“WA”) for Middle Cow Creek. See Pls.’ Summ. J. Mem. at 36-39. First, Plaintiffs argue that under FLPMA, the CS EA must demonstrate consistency with the RMP, which states:

The information from the watershed analyses will contribute to decision making at all levels. Project-specific NEPA planning will use information developed from watershed analysis. For example, if watershed analysis shows that restoring certain resources within a watershed could contribute to achieving landscape or ecosystem management objectives, then subsequent decisions will need to address that information.

Medford RMP at 96. Plaintiffs argue that the WA “did not serve as the basis for developing” the CS EA. Pls.’ Summ. J. Mem. at 37. Second, Plaintiffs argue that the CS EA violated NEPA by failing to disclose information contained in the WA. See id. at 39.

Neither argument is supported by the record. The WA is one of the principal analyses used to meet ecosystem management objectives of the NFP. See NFP ROD, Attach. A at E-20. It focuses on “collecting and compiling information within the watershed that is essential for making sound management decisions.” Id. In this context, BLM uses information from the WA to inform NEPA analyses and to design projects. The CS EA contains ample references to satisfy the broad requirement in the RMP that the project “use[d] information developed from watershed analysis.” Medford RMP at 96. For example, the CS EA discloses and addresses “potential problems with high soil compaction from past logging activities and relatively high road densities” that it notes were identified in the WA. CS AR 446, 457-58 (analyzing effects to soils). The CS EA also describes activities BLM is undertaking in response to watershed restoration opportunities identified in the WA, including road decommissioning, road renovation and maintenance, and culvert replacement to improve fish passage. See id. at 538, 539-40. Information from the WA was also

used to analyze hydrology, by showing that forested portions of certain subwatersheds are “functioning properly.” CS AR 544.

In arguing that road restoration needs in the WA were not considered, Plaintiffs ignore the fact that the selected alternative “proposes no permanent road construction,” only 0.1 miles of temporary road construction, and a variety of road decommissioning, blocking, and abandoning that would result in a “net decrease of approximately 2.2 miles of roads.” CS AR 437, 310-11. BLM’s efforts to address road restoration needs in the WA surely satisfy the substantive requirements that it conform to the RMP requirements under FLPMA. See 43 C.F.R. § 1610.5-3(a); see also Native Ecosystems Council, 304 F.3d at 900 (deferring to agency’s interpretation of its forest plan); Lamb, 265 F.3d at 1047 (same).

Plaintiffs also point out that the WA identifies certain types of units as the “highest priority for fuels management,” and argue this information should have been included in the CS EA. Pls.’ Summ. J. Mem. at 37 (citing WA at 57). Such information was not required to be included, because the CS project was not designed to address fuels reduction, but rather “to produce commercial timber.” CS AR 422. BLM continues to conduct fuels reduction projects elsewhere on the District. See id. at 7 (“Thousands of acres are currently being treated or being planned for [fuels] treatment under separate [EAs].”). Thus, it did not need to address fuels reduction as part of the CS EA.

Moreover, because the CS EA specifically addressed and disclosed the watershed restoration needs identified in the WA, it also satisfies NEPA. See CS AR 538-39. The CS EA discloses the number of acres that would be harvested in each unit, the estimated timber volume (5-9 million board feet), and maps of proposed activity under each alternative. Id. at CS AR 437-38, 491-93. It also makes clear that “[n]o timber harvest would occur within riparian reserves” and describes in detail the process for designating those reserves. See CS EA 424 (RR widths “would be 170 feet

(one site potential tree) on each side of non-fishery intermittent and perennial streams,” and 100 feet on springs and seeps). Although Plaintiffs argue BLM should have disclosed even more information, their argument must fail because the CS EA contains sufficiently detailed discussion to constitute a “hard look” at environmental consequences under NEPA. Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992) (once reviewing court is “satisfied that a proposing agency has taken a hard look at a decision’s environmental consequences, [its] review is at an end.”). Federal Defendants are thus entitled to summary judgment. See Pls.’ Second Amended Compl. ¶¶ 129-135.

VII. BLM SATISFIED NEPA BY ADEQUATELY ANALYZING POTENTIAL EFFECTS IN THE COW CATCHER EA, COTTONSNAKE EA, AND COW CATCHER SEA

The CS EA, CC EA, and CC SEA also satisfy NEPA by adequately analyzing effects and cumulative effects to red tree vole, noxious weeds, and del norte salamander. Under NEPA, an agency in an EA must take a hard look at the environmental consequences of the proposed action, including consideration of effects either directly in the document or through tiering to another NEPA document such as an EIS. See Native Ecosystems Council, 304 F.3d at 895-96. Because BLM adequately addressed these issues, Defendants should be granted summary judgment.

The CC SEA analyzes direct effects to voles by explaining that the project will remove 146 acres of primary habitat, which is “slightly more than one-half of one percent (0.54%) of the 26,951 acres of primary red tree vole habitat provided by federal lands in the watershed.” CC SEA at 4. The CC SEA explains that even though nests and voles may be lost within harvest units, “there is sufficient habitat to support stable red tree vole populations throughout the watershed,” including nearly 27,000 acres of primary habitat on BLM-managed lands in the watershed. Id. at 5. Eighty-five percent of this area is within LSRs and RRs, where timber harvest is prohibited except under

very limited conditions. See id.; Roseburg RMP (Docket #45) at 24-25, 29-30. Such analysis is sufficiently detailed and reasonable to constitute a “hard look” at effects to the vole.^{15/}

BLM also analyzed cumulative effects to the voles by examining future timber harvest that would occur over the next 100 years, as projected in the EIS for the Roseburg RMP. See id. at 6. “By projecting current age class distributions into the future, and allowing for anticipated future timber harvest in the watershed,” BLM was able to estimate acreage in 10 year age classes. Id. at 6. The age class was then examined as an indicator of suitable habitat. See id. “For the Lower Cow Creek watershed, 80 years of age is considered to be the age at which forest stands would provide such habitat.” Id.^{16/} Based on this, BLM estimated that in 100 years there would still be sufficient habitat for voles, given that 92 percent (36,641 of 39,945 acres) of BLM-administered land in the watershed would still provide primary habitat, and that 90 percent of habitat “would remain in reserved land use allocations withdrawn from timber harvest.” Id.

By arguing that BLM’s analysis is “not applicable to the relevant 5th field watershed,” Plaintiffs imply that BLM selected an inappropriate scale of analysis. This argument should be rejected, for while agencies are not required to conduct their analysis along watershed boundaries, the choice of a watershed boundary is reasonable, since it is a natural landscape feature. See Kleppe

^{15/} Plaintiffs’ Complaint might be construed as challenging the CS EA’s analysis of effects to red tree vole. See Pls.’ Compl. ¶ 123. Plaintiffs in their Preliminary Injunction Reply Brief, however, conceded that the CS EA’s analysis of red tree vole was adequate. See Pls.’ PI Reply Mem. (Docket #77) at 12-13. Any such challenge to the CS EA should thus be rejected.

^{16/} The Court should reject Plaintiffs’ argument that the CC SEA lacks an adequate basis to rely on the contribution of 80 year old stands to vole habitat. See Pls.’ Summ. J. Mem. at 40. As BLM explained in the CC SEA, primary habitat for red tree vole is generally characterized as old growth and older mixed-age stands with conifers greater than or equal to 20 inches in diameter. See CC SEA 3 (citing 2000 FSEIS at 377). BLM relied upon one of its own scientific analyses for another timber sale to determine that the age at which stand diameter reached 20 inches is typically 80- 90 years. See id. (citing a 2002 publication by Department of the Interior). This disclosure of the scientific references supporting BLM’s assumptions satisfies NEPA. See 40 C.F.R. § 1502.24 (requiring agencies to disclose, through footnotes, the “scientific and other sources relied upon for conclusions” in an EIS).

v. Sierra Club, 427 U.S. 390, 414 (1976) (identification of geographic area where affects may occur “is a task assigned to the special competency of the appropriate agencies”).

BLM also adequately considered other potential environmental impacts mentioned by Plaintiffs. See Pls.’ Summ. J. Mem. at 41. For example, the CS EA identifies the presence of noxious weeds in the project area, including scotch broom, meadow knapweed, and blackberries. See CS AR 451. The CS EA notes that efforts have been taken in response by treating some areas for “containment of Scotch broom.” Id. Additionally, logging equipment “would be washed before moving into the Planning Area to remove soil and plant parts to prevent the spread of invasive and noxious weeds and disease,” thus reasonably supporting a finding of no significant impact. CS AR 429. As for the claim that BLM should have disclosed information from the WA on Del Norte salamander, the WA “was written prior to the removal fo the Del Norte salamander from the list of Survey and Manage species.” CS AR 87. Because Plaintiffs do not challenge the decision to drop the salamander from Survey and Manage, it was reasonable for BLM not to disclose information from the WA related to that species. Finally, effects to northern spotted owl were adequately analyzed as well. See CC AR 376-77; CS AR 458-62. Federal Defendants are thus entitled to summary judgment on Plaintiffs’ remaining NEPA challenges. See Pls.’ Second Amended Compl. ¶¶ 115-124.

VIII. DEFENDANTS ARE ENTITLED TO JUDGMENT ON PLAINTIFFS’ ENDANGERED SPECIES ACT CLAIMS

Plaintiffs seek to enjoin the timber sales based on alleged violations of the Endangered Species Act (“ESA”), 16 U.S.C. § 1531 et seq., claiming that Defendants violated ESA Section 7(a)(2), 16 U.S.C. § 1536(a)(2), by: (a) failing to insure against destruction or adverse modification of critical habitat for the spotted owl; and (b) failing to reinitiate consultation after changing the Survey and Manage requirements that applied to red tree voles, a food source for spotted owls. On

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the basis of the administrative record, Plaintiffs have failed to satisfy their burden to show that Defendants' actions were arbitrary and capricious.^{17/}

A. Statutory Background

Section 7 of the ESA requires each federal agency to ensure that any action authorized, funded, or carried out by that agency “is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification” of designated critical habitat. 16 U.S.C. § 1536(a)(2). To achieve this objective, the agency proposing the action (“the action agency”) is required to consult with FWS (the “consulting agency”) whenever a federal action “may affect” a threatened or endangered species. 50 C.F.R. § 402.14(a). Unless the action agency determines with the written concurrence of the consulting agency that an action is “not likely to adversely affect” the listed species or critical habitat, it must engage in “formal consultation.” 50 C.F.R. §§ 402.14(a), (b). The action agency must prepare a biological assessment (“BA”) for use in consultation if the activity is a major construction activity. 16 U.S.C. § 1536(c); 50 C.F.R. § 402.12(b). Formal consultation typically concludes with the issuance of a biological opinion (“BiOp”) by the consulting agency. 50 C.F.R. § 402.14(l)(1). The BiOp assesses whether the proposed action is likely to jeopardize the continued existence of the species or result in destruction or adverse modification of critical habitat. 50 C.F.R. § 402.14(g)(4).

B. The Court Lacks Subject Matter Jurisdiction Over Plaintiffs' Ninth Claim For Relief

Plaintiffs bring their ESA claims pursuant to the citizen suit provision, 16 U.S.C. § 1540(g)(1)(A), which authorizes “any person” to bring a civil suit to enjoin any person, including the United States, alleged to be in violation of a provision of the ESA or its implementing

^{17/} When reviewing a challenge to agency action taken under Section 7 of the ESA, the reviewing court applies the arbitrary and capricious standard of review applicable under the APA. Greenpeace Action v. Franklin, 14 F.3d 1324, 1336 (9th Cir. 1992). This standard of review is discussed supra at 10-11.

regulations. Before filing a citizen suit against the Secretary of the Interior, the plaintiff must provide sixty days written notice of the violation to the Secretary. 16 U.S.C. § 1540(g)(2)(C). The notice requirement is jurisdictional, and failure to strictly comply “acts as an absolute bar to bringing suit under the ESA.” Southwest Ctr. for Biological Diversity v. U.S. Bureau of Reclamation, 143 F.3d 515, 520 (9th Cir. 1998) (“SWCBD”). The purpose of the notice requirement is to give the agency “an opportunity to review [its] actions and take corrective measures if warranted.” Id.

Plaintiffs’ Ninth Claim is premised on allegations that Defendants (a) failed to “discuss the impact of harvesting in critical habitat on the recovery of the owl” and (b) improperly relied upon Late Successional Reserves (LSRs). Amended Complaint at ¶ 139. Plaintiffs sent two notice letters, dated December 29, 2003 and May 7, 2004, neither of which raised the alleged failure to consider impacts on spotted owl recovery.^{18/} Because Plaintiffs failed to provide sufficient notice with respect to their Ninth Claim For Relief, the claim should be dismissed for lack of jurisdiction. See SWCBD, 143 F.3d at 522.

C. Plaintiffs’ ESA Claims Fail On The Merits

Plaintiffs have failed to prove on the record that Defendants violated the ESA, and Defendants are thus entitled to summary judgment on the Ninth and Tenth Claims for Relief. See Pls.’ Second Amended Compl. ¶¶ 136-144.

1. BLM Reasonably Determined That The Timber Sales Would Not Result In Destruction Or Adverse Modification Of Critical Habitat

BLM satisfied its obligation under ESA Section 7(a)(2) to ensure, in consultation with FWS, that the timber sales would not likely result in destruction or adverse modification of critical habitat. BLM prepared programmatic BAs that specifically addressed potential impacts to the spotted owl

^{18/} Plaintiffs also failed to discuss this issue in their summary judgment memorandum.

and its critical habitat from projects taking place within its Roseburg District (including the Cow Catcher sale) and Medford District (including the Cottonsnake sale) (“Medford BA”).^{19/} BLM requested formal consultation with FWS and received BiOps from FWS for each project area.^{20/} In each case, FWS concluded that the projects were not likely to jeopardize the continued existence of spotted owls, and not likely to adversely modify spotted owl critical habitat. BLM reasonably relied on the expert agency’s BiOps, and the determination that the timber sales would not result in the destruction or adverse modification of spotted owl critical habitat is supported by the record, and entitled to deference. See, e.g., Arizona Cattle Growers’ Ass’n v. U.S. Fish and Wildlife Serv., 273 F.3d 1229, 1236 (9th Cir. 2001) (“As long as the agency decision was based on a consideration of relevant factors and there is no clear error of judgment, the reviewing court may not overturn the agency’s action as arbitrary and capricious.”).

a. The BAs and BiOps Relied Upon By BLM Did Not Substitute LSRs For Critical Habitat

The BAs and BiOps for the Cow Catcher and Cottonsnake sales did not rely on LSRs as a *substitute* for spotted owl critical habitat. Rather, BLM and FWS independently evaluated effects to critical habitat, but also recognized that LSRs would provide *additional* benefits to owls, supplementing the function of critical habitat. This analysis is consistent with the Ninth Circuit’s

^{19/} The Cottonsnake BA is part of the record in this case. CS AR Biological Assessment FY 01/02/03 Timber Sale Projects (“CS BA”). With respect to the Cow Catcher sale, BLM produced a BA dated February 22, 1999 (revised April 16, 1999), which addressed actions occurring in FY 1999 and FY 2000. (“Roseburg 1999 BA”) CC AR 976-1027. However, that BA was superceded by a BA dated December 12, 2002, which applies to timber sales in the Roseburg District from FY 2003 through FY 2008, including the Cow Catcher sale. (“Roseburg 2002 BA”) See Declaration of Christopher C. Foster in Support of Federal Defendants’ Notice of Supplementation of the Record (“Foster Decl.”), Attachment 1.

^{20/} The Cottonsnake BiOp is part of the record in this case. CS AR Biological Opinion 1-7-01-F-032 (“CS BiOp”). With respect to the Cow Catcher sale, FWS produced a BiOp dated June 28, 1999, which responded to the April 16, 1999 BA. (“Roseburg 1999 BiOp”) CC AR 894-945. However, that BiOp was superceded by a BiOp dated February 21, 2003, which responds to the December 12, 2002 BA. (“Roseburg 2003 BiOp”) See Foster Decl., Attachment 2.]

directive in Gifford Pinchot Task Force v. U.S. Fish and Wildlife Serv., 378 F.3d 1059 (9th Cir. 2004), that LSRs may not substitute for critical habitat in the context of the adverse modification inquiry. Id. at 1075.

The BiOps for both sales consider impacts to spotted owl critical habitat, acknowledging that harvest would occur in critical habitat, but concluding that such harvest would not adversely modify critical habitat. See Foster Decl., Attachment 2 at 30 (concluding that activities are “not likely to adversely modify spotted owl . . . critical habitat because the potential impacts will be sufficiently dispersed over time and space”); CC AR 924 (finding that removal of 1,700 acres of NRF and degradation of 620 acres of dispersal habitat “will not preclude the network of critical habitat units from functioning as intended”); CS BiOp at 41 (based on “the amounts of spotted owl habitat impacts specifically proposed in the SW Oregon administrative units’ BA” FWS did not anticipate that “the connectivity goals of the SW Oregon administrative units’ critical habitat network will be precluded by the proposed action”). These determinations were not dependent upon the function of LSRs.

FWS then went on to consider the effect of LSRs, concluding that they would provide *additional* benefits to the spotted owl that would supplement the performance of critical habitat. See CC AR 911 (concluding that “the LSR network appears to be making contributions to spotted owl conservation that are *similar* to those being made by the designated critical habitat in the action area”) (emphasis added)^{21/}; CS BiOp at 48 (concluding that the proposed harvesting would not “preclude the connectivity goals” of the critical habitat network, but also noting that “the redundancy built-in to the NFP of well-distributed clusters of breeding habitat connected by

^{21/} The Roseburg 2003 BiOp recognizes the importance of owl dispersal between LSRs to provide “interchange and replacement of individuals due to the loss of individuals or habitat within the LSRs.” Foster Decl. Attachment 2 at 21. However, FWS does not address the contributions of LSRs in its discussion of effects to critical habitat. Id. at 27-28.

dispersal habitat will adequately *support* the intended functions of critical habitat”) (emphasis added). Unlike the BiOps in Gifford Pinchot, which relied on LSRs to “stand in” for loss of critical habitat, 378 F.3d at 1075, the Cow Catcher and Cottonsnake BiOps, while recognizing the benefits of LSRs to the spotted owl, independently considered effects to spotted owl critical habitat.

b. The BAs And BiOps Relied Upon By BLM Address Recovery

Plaintiffs allege that the BAs and BiOps fail to discuss “the impact of the harvesting in critical habitat on the recovery of the owl.” Pls.’ Second Amended Complaint at ¶ 139. Plaintiffs appear to rely on the Ninth Circuit’s decision in Gifford Pinchot, which held that the BiOps at issue were required to include an “analysis of recovery in the context of critical habitat.” 378 F.3d at 1074. The BiOps for the Cow Catcher and Cottonsnake sales include an analysis of recovery in the context of critical habitat, and BLM reasonably relied on the BiOps to conclude that the timber sales would not result in the destruction or adverse modification of spotted owl critical habitat.

With respect to the Cow Catcher sale, FWS found that “the additional consulted-on effects to critical habitat . . . will not preclude the connectivity goals of the southwest Oregon CHUs because adequate habitat to support dispersal still remains within these CHU’s.” Foster Decl., Attachment 2 at 16. Thus, FWS concluded that the CHU network “will continue to provide for spotted owl *recovery* at the range-wide level.” Id. (emphasis added).

Additionally, the BAs and BiOps for the timber sales incorporated the results of a “baseline evaluation” of the spotted owl and its critical habitat completed by the Service in 2001. Id. at 20²²;/ CS BA, Appendix B. This evaluation examined the status of the spotted owl and its critical habitat in the Rogue River Basin and South Coast Drainages based on data from consultations completed from 1994 to 2001, concluding that “the effects to critical habitat do not impair its ability to

²²/ The Roseburg 1999 BiOp predated the baseline evaluation.

contribute to *recovery* of the owl across its range.” BO #1-7-01-F-032 at 15 (emphasis added). See also Foster Decl., Attachment 2 at 20 (noting that the baseline evaluation found that “timber management activities affecting critical habitat have not appreciably diminished the attainment of spotted owl *recovery* at the local or provincial levels”) (emphasis added). The consultation process for the timber sales included the type of consideration of spotted owl recovery in the context of critical habitat that the Ninth Circuit found lacking in Gifford Pinchot; thus, the BiOps are consistent with the Ninth Circuit’s analysis in that case.

2. Defendants Were Not Required To Reinitiate Consultation.

Plaintiffs’ Tenth Claim, alleging that changes to the Survey and Manage requirements affecting red tree voles necessitated reinitiation of consultation, lacks merit and should be dismissed. The Survey and Manage requirements did not play any role in the jeopardy analysis with respect to the CHUs at issue here. Rather, the consultation process focused on loss of habitat, as opposed to the impact of a particular food source, and reinitiation was not required based on changes to the Survey and Manage requirements. Moreover, FWS has considered effects to the spotted owl as a result of the elimination of the Survey and Manage requirements, finding that any adverse effects would be minimal.

a. BLM And FWS Have Considered Effects To The Spotted Owl From Removal Of The Survey And Manage Measures

BLM and FWS have already consulted with respect to the effects of removal of the Survey and Manage requirements on the spotted owl at the programmatic level for the NFP as a whole, and FWS determined that any adverse effects would be minimal. In the BiOp for the proposal to remove the Survey and Manage requirements (“Survey and Manage BiOp”), dated March 15, 2004, the Service expressly found that elimination of the measures “is not likely to jeopardize the continued

existence of the northern spotted owl and is not likely to destroy or adversely modify its designated critical habitat, and would have minimal adverse effects.” Foster Decl., Attachment 4 at 21. The Service evaluated the potential for removal of “habitat-protecting management direction” at Survey and Manage sites and overlapping spotted owl habitat, finding that the biological significance to the owl would be minimal. *Id.* at 18-19. FWS specifically determined that the biological significance of effects to spotted owl critical habitat would be minimal, and concluded that such effects should not compromise dispersal, since “[t]he NWFP did not rely on the Survey and Manage Program to provide connectivity.” *Id.* at 20. Since consultation has occurred at the plan level, BLM is not required to reinitiate consultation with respect to the particular timber sales at issue here.

b. Plaintiffs Have Failed To Establish That Changes To The Survey And Manage Requirements Meet The Statutory Standard For Reinitiation

Notwithstanding the fact that consultation has occurred at the plan level, the changes to the Survey and Manage requirements do not require reinitiation with respect to the BiOps for the Cow Catcher and Cottonsnake sales. Reinitiation of consultation is required only under one of the four following conditions:

- (a) If the amount or extent of taking specified in the incidental take statement is exceeded;
- (b) If new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered;
- (c) If the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion;
or
- (d) If a new species is listed or critical habitat designated that may be affected by the identified action.

50 C.F.R. § 402.16. The agency’s decision regarding whether to reinitiate consultation should only be overturned if the court finds that the agency abused its discretion or the decision was arbitrary and capricious. *Sierra Club v. Marsh*, 816 F.2d 1376, 1386-87 (9th Cir. 1987). Plaintiffs’

allegations fail to establish that the action has been modified in a manner causing impacts to the spotted owl which were not considered in the BiOps.

Plaintiffs characterize the changes to the status of the red tree vole as a Survey and Manage species, and the recent elimination of the Survey and Manage requirements, as “changes” to the agency action which necessitate reinitiation, stating that the consultations “relied upon compliance with” the Survey and Manage requirements. Pls.’ Second Amended Compl. ¶ 143. This characterization is inaccurate. Neither the BAs nor the BiOps for the timber sales at issue in this case relied on the Survey and Manage requirements with respect to the spotted owl critical habitat at issue in this case. Thus, the elimination of those provisions does not constitute a modification requiring reinitiation.

The focus of the consultation process for these sales was loss of spotted owl habitat, specifically as it relates to nesting, roosting, and foraging (“suitable” habitat). See, e.g., Foster Decl., Attachment 2 at 22; CC AR 909; CS BiOp at 14. The jeopardy analysis was not dependent upon the availability of red tree voles or any other particular food source for the spotted owl. By definition, suitable habitat contains a sufficient forage base to provide for the spotted owl.

Plaintiffs correctly allege that the 1999 BiOp for the Cow Catcher sale mentions in passing that buffers around Survey and Manage species support dispersal. CC AR 909. However, neither the Cow Catcher nor the Cottonsnake BiOp discusses the role of Survey and Manage requirements with respect to the specific CHUs at issue here, OR-62, OR-63 and OR-64. Moreover, there is no evidence that there are any red tree vole sites in the areas of the Cow Catcher and Cottonsnake sales.^{23/} Therefore, changes to the Survey and Manage requirements, although they may impact the

^{23/} Plaintiffs’ evidence of active red tree vole sites is limited to unverified reports submitted to BLM that purport to document red tree vole sites in the Cow Catcher sale area. However, BLM reasonably determined these reports were not submitted by a credible source, for the reasons set forth supra at 25-27.

red tree vole, do not cause effects to the *spotted owl* that would alter the analysis in the biological opinions, such that reinitiation is required.

Plaintiffs also note that the BiOps say the project “must be consistent with the Standards and Guidelines established by the NWFP.” Pls.’ Summ. J. Mem. at 29. However, the NFP did not rely on the Survey and Manage requirements to protect the spotted owl or its critical habitat. The BiOp for the NFP, which represents the conclusions of the consultation process between BLM, the Forest Service, and FWS with respect to the measures that would be taken by the Federal government to “contribut[e] to recovery of the northern spotted owl and assurance of adequate habitat for its reproduction and dispersal,” does not even mention the survey and manage measures. See Foster Decl., Attachment 3.^{24/}

c. Any Potential Impact To The Spotted Owl From Changes To The Survey And Manage Measures With Respect To Red Tree Voles Would Be Minimal

Finally, any impact on the spotted owl from changes to the survey and manage measures for red tree voles would be minimal, and would not require reinitiation for the Cow Catcher and Cottonsnake sales. Plaintiffs overstate the significance of the red tree vole to the spotted owl in the region at issue here, characterizing it as the “primary food source of the spotted owl.” Pls.’ Second Amended Compl. ¶ 143. Although this may be true in other portions of the spotted owl’s range, it is not the case with respect to the Klamath Mountains region of Oregon in which the Cow Catcher and Cottonsnake sales are located. In this region, woodrats are the spotted owl’s primary food source, and red tree voles make up less than five per cent of the diet. See CC SEA at 5 (“In the

^{24/} The Survey and Manage requirements are discussed in the Record of Decision for Amendments to Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl (April 13, 1994) (Docket #48), which requires land managers to take certain actions with respect to rare species of plants of animals. Id. at 11. However, the ROD does not draw any connection between the Survey and Manage requirements and spotted owl recovery.

Klamath Mountains of Oregon . . . studies have found that red tree voles comprised 4.9 percent of spotted owl diet by number of individual prey items and slightly less than one (0.9) percent of spotted owl diet by total prey biomass consumed.”); CS BiOp at 12 (citing Forsman et al. (1984) for the proposition that dusky-footed woodrats dominate the diet in the Klamath Mountains province). Thus, the potential for adverse impacts to the spotted owl in the area of the timber sales is minimal, and BLM is not required to reinitiate consultation.

CONCLUSION

For the foregoing reasons, Plaintiffs’ motion for summary judgment should be denied, and summary judgment should be granted in favor of Federal Defendants. The preliminary injunction issued by the Court on May 18, 2004 (Docket #82) should also be dissolved.

Respectfully submitted this 28th day of September, 2004.

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TABLE OF EXHIBITS

Exhibit	Description
A	March 2004 Record of Decision to Remove or Modify the Survey and Manage Mitigation Measure Standards and Guidelines in Forest Service and Bureau of Land Management Planning Documents Within the Range of the Northern Spotted Owl ("2004 ROD")
B	Mem. from Joseph Ross, Acting Field Manager, South River Field Office, U.S. Department of the Interior Bureau of Land Management (March 24, 2004)
C	Supplemental Environmental Assessment for the Cow Catcher Timber Sale, EA #OR-105-04-10 ("CC SEA")
D	Cow Catcher Supplemental Decision Document (Aug. 2, 2004)
E	Cow Catcher Supplemental Finding of No Significant Impact (Aug. 2, 2004)
F	Forest Ecosystem Management Assessment Team Report (excerpt)

CERTIFICATE OF SERVICE

I hereby certify that on September 28, 2004, I electronically filed the foregoing (1) FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT; (2) [PROPOSED] ORDER GRANTING FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT; (3) FEDERAL DEFENDANTS' COMBINED MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT and attached exhibits; (4) FEDERAL DEFENDANTS' CONCISE STATEMENT OF MATERIAL FACTS IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT; and (5) FEDERAL DEFENDANTS' RESPONSE TO PLAINTIFFS' CONCISE STATEMENT OF MATERIAL FACTS, with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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