IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEDFORD DIVISION

KLAMATH-SISKIYOU WILDLANDS CENTER, et al.,

Plaintiffs,

v.

UNITED STATES BUREAU OF LAND MANAGEMENT,

Defendant,

AMERICAN FOREST RESOURCE COUNCIL, et al.,

Intervenor Defendants.

Case No. 1:23-cv-00519-CL (Lead Case)
Case No. 1-23-cv-01163-CL (Trailing)

FINDINGS AND RECOMMENDATION

CLARKE, Magistrate Judge.

Plaintiffs Klamath-Siskiyou Wildlands Center, Cascadia Wildlands, Oregon Wild, and Soda Mountain Wilderness Council (collectively, "KS Plaintiffs") are joined by Plaintiff Applegate Siskiyou Alliance ("AS Plaintiff") in bringing this action against Defendant the United States Bureau of Land Management ("BLM"). The American Forest Resource Council and Association of O&C Counties have joined as intervenor defendants (together, "Intervenor Defendants").

This case comes before the Court on four cross-motions for summary judgment: KS Plaintiffs' Motion for Summary Judgment (ECF No. 21), AS Plaintiff's Motion for Summary

Judgment (ECF No. 30), Intervenor Defendants' Motion for Summary Judgment (ECF No. 35), and BLM's Motion for Summary Judgment (ECF No. 37). The Court held oral argument on April 2, 2024. For the reasons below, the Motions should be GRANTED and DENIED in part.[1]

INTRODUCTION

The United States Bureau of Land Management administers 1.2 million acres of federal land throughout southwestern Oregon, a region uniquely and extraordinarily vulnerable to severe wildfire. AR 48418. Of the fifty communities in Oregon identified as "the highest cumulative wildfire risk," nearly half are located in southwestern Oregon. AR 2602. There has never been a higher need for proactive land planning solutions that are founded on reliable research and dedicated to preserving this area's homes, communities, and natural resources.

Plaintiffs in this consolidated case challenge BLM's approval of the Integrated Vegetation Management for Resilient Lands Program ("IVM Program"). The IVM Program, which provides for a broad program of admirable fire resilience and forest restoration work, also authorizes commercial logging of large-diameter trees in areas of Oregon's forests that have historically been preserved. Plaintiffs seek to halt the IVM Program, arguing that BLM, in its approval, violated the Federal Land Policy and Management Act and the National Environmental Policy Act. Each party now moves for summary judgment pursuant to Federal Rule of Civil Procedure 56.

The Ninth Circuit endorses the use of Rule 56 motions in reviews of agency administrative decisions under the limitations imposed by the Administrative Procedure Act ("APA"). *See, e.g., Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471–72 (9th Cir.

[1] All citations to the record will correspond with the ECF docketing in the lead case, *Klamath-Siskiyou Wildlands Center et al. v. United States Bureau of Land Management*, 1:23-cv-00519-CL.

1994). Under Rule 56, "[t]he moving party is entitled to summary judgment as a matter of law where, viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there are no genuine issues of material fact in dispute." *Id.* at 1472. Because the role of the Court under the APA is not to "find facts" but is limited to reviewing the Administrative Record ("AR") to determine whether the agency considered the relevant factors and reached conclusions that were not arbitrary and capricious, there can be no genuine issue of material fact, and summary judgment is the appropriate resolution of this case.

STATUTORY BACKGROUND

I. Federal Land Policy and Management Act

The Federal Land Policy and Management Act ("FLPMA"), 43 U.S.C. §§ 1701–85, provides "for the management, protection, development, and enhancement of the public lands." *See* Pub. L. 94-579.

FLPMA establishes standards for public land use planning and describes a process by which "present and future use is projected." § 1701(a)(2). FLPMA requires BLM, under the Secretary of the Interior, to develop, maintain, and, when appropriate, revise land use plans to ensure that public lands are managed under principles of multiple use and sustained yield. 43 U.S.C. §§ 1712(a), 1732(a); *see also Or. Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1125 (9th Cir. 2007). Land use plans, also referred to as "resource management plans" ("RMPs"), provide the allowable uses, goals, and next steps for a particular area. § 1712; *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 59 (2004). Once a land use plan is developed, "[a]ll future resource management authorizations and actions…shall conform to the approved plan." 43 C.F.R. § 1610.5-3(a); § 1732(a). BLM is afforded "a great deal of discretion in deciding how to achieve" compliance with the applicable land use plan. *Norton*, 542 U.S. at 66; *Klamath Siskiyou*

Wildlands Ctr. v. Gerritsma, 962 F. Supp. 2d 1230, 1235 (D. Or. 2013), aff'd, F. App'x 648 (9th Cir. 2016).

II. National Environmental Policy Act

The National Environmental Policy Act ("NEPA") "is our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). Its purpose is twofold: "(1) to ensure that agencies carefully consider information about significant environmental impacts and (2) to guarantee relevant information is available to the public." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1072 (9th Cir. 2011). "In order to accomplish this, NEPA imposes procedural requirements designed to force agencies to take a 'hard look' at environmental consequences" of their actions. *Lands Council v. Powell*, 395 F.3d 1019, 1026–27 (9th Cir. 2005) (original citation omitted). For any "major Federal actions significantly affecting the quality of the human environment," the agency is to prepare an environmental impact statement ("EIS"). 42 U.S.C. § 4332. A less comprehensive environmental assessment ("EA") may be prepared first to determine whether a formal EIS or, alternatively, a finding of no significant impact ("FONSI") is warranted. 40 C.F.R. §§ 1501.4, 1508.9.

NEPA "does not mandate particular results, but simply the necessary process." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989) ("NEPA merely prohibits uninformed—rather than unwise—agency action."). In reviewing agency decisions, courts are generally "most deferential when reviewing scientific judgments and technical analyses within the agency's expertise under NEPA." *Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) (internal quotation marks and citation omitted).

FACTUAL BACKGROUND

I. Northern Spotted Owl Habitat

The northern spotted owl ("NSO") is a medium-sized, dark brown owl with a barred tail, a white-spotted head and breast, and prominent facial disks surrounding each eye. AR 12550. NSOs are primarily nocturnal and spend virtually their entire lives beneath the forest canopy, to which they are biologically adapted for maneuvering the tree base as opposed to strong, sustained flight out in the open. *Id.* For their roosts, NSOs seek sheltered areas, like the shady recesses of understory trees, to harbor the owl from inclement weather, heat, and predators. AR 12551.

In order to perform its essential biological functions (roosting, nesting, foraging, and dispersal), NSOs rely on the natural structures and characteristics provided by mature and complex forest habitats. Those structures include: a multilayered and multi-species tree canopy dominated by large overstory trees; moderate to high canopy closure; a high incidence of trees with large cavities and other types of deformities; numerous large snags; an abundance of large, dead wood on the ground; and open space within and below the upper canopy for the owls to fly. AR 12380–81; AR 48486. This habitat is referred to as "nesting, roosting, and foraging habitat" ("NRF Habitat"). AR 12347. NRF Habitat requires at least 60 percent canopy coverage. AR 14810, 13874, 2775.

The NSO currently occupies late-successional and old-growth forest habitats extending from southwest British Columbia, through the Cascade Mountains, coastal ranges, and intervening forest lands, as far south as Marin County, California. AR 12550. NSOs are extirpated or uncommon in certain areas throughout the range, however. *Id.*

Timber harvest activities, particularly along the coast where habitat reduction has been concentrated, have eliminated, reduced, or fragmented NSO habitat to the point of range-wide population density decrease. *Id.* The widespread loss of habitat, further compounded by the inadequacy of existing conservation regulations, resulted in the NSO being listed as a threatened species on June 26, 1990. AR 12549.

II. 1994 Northwest Forest Plan

The Northwest Forest Plan ("NWFP") was the government's "comprehensive response to [the] long and bitter legal battle over the scope of logging in old-growth forests, home to the endangered northern spotted owl." *Brong*, 492 F.3d at 1126. Intended as a truce between conservationists and logging concerns, the NWFP provides a holistic management program throughout the range of the NSO that balances the protection of long-term forest health with sustainable production of timber. *Conservation Nw. v. Sherman*, 715 F.3d 1181, 1183 (9th Cir. 2013); *see also Seattle Audubon Soc. v. Lyons*, 871 F. Supp. 1291, 1304–06 (W.D. Wash. 1994).

In services of its twin goals, the NWFP divided 24.5 million acres of federal lands into varying categories, called "land use allocations." *Brong*, 492 F.3d at 1126. The two main allocations are "Matrix" and "Reserves." *Seattle Audubon*, 871 F. Supp. at 1304–05. Matrix are areas in which timber harvest may proceed, subject to environmental requirements. *Id.* at 1305. Reserves are areas that generally prohibit logging and ground-disturbing activities in order to protect the ecosystem and conserve threatened species like the NSO. *Id.* Late Successional Reserves ("LSRs") in particular "lie at the heart of the [NWFP's] ecosystem-based conservation strategy." *Brong*, 492 F.3d at 1126. "The objective of Late–Successional Reserves is to protect and enhance conditions of late-successional and old-growth forest ecosystems, which serve as habitat for late-successional and old-growth related species including the northern spotted owl."

Id. (quoting NWFP S & G at C–9). In setting LSR lands aside, logging could continue concurrently without risking the loss of species.

III. 2016 Southwestern Oregon Resource Management Plan

In 2016, BLM approved the Southwestern Oregon Resource Management Plan ("2016 RMP"), departing from the previous RMPs established in 1995. *See* AR 48409. The 2016 RMP was supported by a final EIS ("2016 FEIS"), and currently provides direction for the management of resources on approximately 1.2 million acres of BLM-administered land in the Lakeview, Medford, and Roseburg Districts. AR 48411, 48418.

The stated purpose of the 2016 RMP is to:

- Provide a sustained yield of timber.
- Contribute to the conservation and recovery of threatened and endangered species, including maintaining a network of large blocks of forest to be managed for late successional forests and maintaining older and more structurally-complex multi-layered conifer forests.
- Provide clean water in watersheds.
- Restore fire-adapted ecosystems.
- Provide recreation opportunities.
- Coordinate management of lands surrounding the Coquille Forest with the Coquille Tribe.

AR 48436.

Like the previous plans, the 2016 RMP balances multiple competing obligations by dividing lands into several land use allocations. AR 48459. The two largest allocations are the Harvest Land Base ("HLB") and Late-Successional Reserves ("LSR"). *Id.* Recreation Management Areas ("RMA") were also designated. *Id.*

Each allocation includes "objectives" and "directions" to guide the BLM's subsequent management actions. "Objectives" describe desired outcomes for BLM-administered lands; they are not rules, restrictions, or requirements by which the BLM must abide. AR 48463; 48746.

"Directions" are rules that identify where future actions may or may not be allowed and what restrictions or requirements may be placed on those future actions to achieve the objectives. AR 48463; 49050.

a. Harvest Land Base

HLB refers to 251,552 acres of land in southwestern Oregon dedicated to logging. AR 48459. The objectives of the HLB are generally to achieve continual, sustained timber production; to enhance the economic value of timber in forest stands; and to recover economic value following disturbances. AR 48478. To that end, the BLM is directed to conduct silvicultural treatments that contribute to timber volume and value, to retain specific stand characteristics, and to maintain the area through various treatments and prescribed burns. AR 48478–80.

b. Late-Successional Reserves

LSRs refer to 381,158 acres of forest dedicated to habitat preservation. AR 48459. The objectives of the LSR are to maintain habitat for NSOs and marbled murrelet and to promote the development of habitat in stands that do not currently meet habitat criteria. AR 48486.

The BLM is directed to manage the LSR in a myriad of ways: large blocks of nest-roosting habitat are to be distributed across a variety of ecological conditions in a way that facilitates movement and survival of the NSO; older, structurally-complex conifer forest stands are to be protected; individual tree removal and construction of facilities are to be undertaken for necessary purposes provided they do not disturb NSO habitat; and specific levels of snags, density, and openings are to be maintained. AR 48486–89.

Continuing, "[i]n stands that are currently northern spotted owl nesting-roosting habitat," the BLM is to "maintain nesting roosting habitat function, regardless of northern spotted owl occupancy." AR 48487. Alternatively:

> In stands that are not northern spotted owl nesting-roosting habitat, apply silvicultural treatments to speed the development of northern spotted owl nesting-roosting habitat or improve the quality of northern spotted owl nesting-roosting habitat in the stand or in the adjacent stand in the long term. Limit such silvicultural treatments (other than forest pathogen treatments) to those that do not preclude or delay by 20 years or more the development of northern spotted owl nesting-roosting habitat in the stand and in adjacent stands, as compared to development without treatment. Allow silvicultural treatments that do not meet the above criteria if needed to treat infestations or reduce the spread of forest pathogens.

AR 48488 (hereinafter, "the 20-year standard").

BLM is also directed to conduct integrated vegetation management[2] for any of the provided reasons, including to "[r]educe stand susceptibility to disturbances such as a fire, windstorm, disease, or insect infestation." *Id.*

LSRs are further broken down into "Dry" and "Moist" forest types. Dry LSRs are governed by the same management objectives and directions that apply to all LSRs generally, with an additional overlay of objectives and directions specifically applicable to Dry forest types. AR 48490–91.

[2] Integrated vegetation management refers to "[a] combination of silviculture treatments, fire and fuels management activities, and harvest methods. Activities include planting, prescribed fire, thinning, single-tree selection harvest, and group selection harvest." AR 48722.

c. Recreation Management Areas

RMAs refer to the 68 trails, campsites, parks, and other sites throughout southwestern Oregon that are designated by the 2016 RMP as requiring specific management to protect the unique recreational opportunities possessed by that area. AR 2852, 48678–79.

RMAs are broken into Special Recreation Management Areas ("SRMAs") and Extensive Recreation Management Areas ("ERMAs"). SRMAs have a strong recreational basis, in which recreation and visitor services management are recognized as the predominant focus. AR 48675. ERMAs, in contrast, require specific management consideration in order to address recreation use or demand. *Id.* ERMAs are managed "to support and sustain the principal recreation activities and the associated qualities and conditions of the ERMA," but such management is to be "commensurate with the management of other resources and resource uses." *Id.*

All RMAs are managed in accordance with their planning frameworks ("RMA Frameworks"). AR 48523; *see* AR 78304. RMA Frameworks outline the area's values, visitors, management actions, outcome objectives, allowable use restrictions, and Recreation Setting Characteristics. AR 48678. Recreation Setting Characteristics ("RSCs") reflect a combination of identifiable qualities that allow the BLM to plot RMAs along the Recreation Opportunity Spectrum ("ROS"), in a process BLM refers to as its Recreation Setting Classification System. AR 51648. Depending on the "remoteness" and "naturalness" of an area, it moves up or down the ROS accordingly, which is divided into six classes ranging from primitive to urban.[3] *See* AR 51648. The RMA is then assigned an ROS class reflecting its RSCs.

[3] "Remoteness" and "naturalness" are the two main defining characteristics of an RMA. AR 51648–49. "Remoteness" refers to an area's proximity to the road and road types. *Id.* "Naturalness" refers to an area's landscape quality, level of disturbance, forest structural complexity, and age. *Id.*

While the 2016 RMP does include land use planning decisions, it "does not include any implementation decisions." AR 48424. Per FLPMA, "land use plans are tools by which 'present and future use is projected' (43 U.S.C. 1701(a)(2)). The BLM's planning regulations make clear that land use plans are a preliminary step in the overall process of managing public lands, and are 'designed to guide and control future management actions and the development of subsequent, more detailed and limited scope plans for resources and uses' (43 CFR 1601.0–2)." *Id.* "As such, land use plan decisions (objectives, land use allocations, and management direction) do not directly authorize implementation of on-the-ground projects, which the BLM can carry out only after completion of further NEPA compliance and decision making processes and consultation as appropriate." *Id.*

IV. The Integrated Vegetation Management-Resilient Lands Program

The IVM Program, the subject of Plaintiffs' challenge, is a "programmatic" decision flowing from the 2016 RMP and authorizing a broad variety of work in the name of fire resilience.

BLM first released the IVM Program for scoping in July 2019. AR 42953. Both groups of Plaintiffs participated throughout the public hearings phase.[4] They submitted comments, attended meetings, and raised concerns regarding the proposed program of work and the lack of an EIS or any site-specific NEPA analysis. ECF No. 21 at 5; ECF No. 30 at 7–8.

In lieu of an EIS, BLM issued an EA, *see* AR 2596–937, paired with a FONSI, *see* AR 2955–72. The EA did not disclose any site-specific effects of the proposed logging. AR 2601.

[4] KS Plaintiffs are non-profit organizations whose members, supporters, and staff use and enjoy the public lands managed by the Medford District BLM for a variety of personal and professional recreational, scientific, and spiritual purposes. ECF No. 21 at 12. AS Plaintiff is a non-profit community and conservation organization based in the Applegate Valley that works to protect the scenic and biological values of lands within the IVM Program area and the Late Mungers Project area. ECF No. 30 at 3.

Instead, BLM stated that "[w]hen designing subsequent site-specific projects, the BLM would evaluate each project to determine if the project is adequately analyzed by this EA and the [2016 FEIS], and whether the project conforms to any programmatic decision for this EA." *Id.*

In March 2022, BLM issued its Decision Record ("the Decision"), AR 2938–54, for the Program, authorizing the implementation of Alternative C, as modified in the Decision and EA ("Alternative C Modified").

a. Authorized Actions

The "Planning Area" of IVM Program covers an estimated 875,290 acres within the Medford District boundaries. AR 2600. The "Treatment Area" covers approximately 684,185 acres. *Id.*; *see also* AR 24023. The Program authorizes roughly five categories of actions to occur anywhere within the Treatment Area: (1) commercial thinning, (2) small-diameter thinning, (3) temporary road construction, (4) protective barriers and boardwalks, and (5) prescribed fire. *Id.*; AR 2609.[5]

Commercial thinning involves the removal of larger trees, generally greater than 8 inches in diameter, for timber supply. AR 2935, 2940. The Program authorizes up to 4,000 acres per year, and up to 20,000 acres per decade of commercial thinning, with at most 17,000 acres of commercial thinning in the LSRs. AR 2940. This includes the cut and removal of mature and old-growth trees up to 36 inches in diameter and up to 173 years old. AR 2944.

Small-diameter thinning involves the removal of smaller trees and shrubs that are less than 8 inches in diameter at breast height but may treat up to 12 inches in diameter at breast

[5] "For analytical purposes only, the BLM assumes the actions analyzed in this EA would occur over a period of about 10-years. However, the EA does not have a specific 'sunset' date after which the BLM will no longer use it. Through the Determination of NEPA Adequacy process for specific projects, the BLM will regularly consider whether the EA analysis, including assumptions and methodology, continues to remain valid and relevant." AR 2601, n. 6.

height. AR 2941. The Program authorizes up 6,500 acres per year, and up to 60,000 acres per decade, of small-diameter thinning. AR 2940.

Temporary road construction is limited in SRMAs and ERMAs, and all temporary roads must be decommissioned after use. *Id.* The Program authorizes the construction of up to 10 miles per year, and up to 90 miles per decade, of temporary roads; no permanent road construction is authorized. *Id.* The installation of barriers, such as fences, boulders, or boardwalks, is also authorized "to protect vegetation as needed from damage by vehicles, off-highway vehicle, equestrian use, excessive foot-traffic, etc." AR 2941.

Prescribed fire involves controlled, intentional initiation of a wildland fire intended to replicate natural, low-intensity wildfires that reduce fuel loading and reduce the future risk of larger, uncontrolled wildfires. The IVM Program authorizes up to 7,500 acres per year, and up to 70,000 acres per decade of prescribed fires. *Id.*

b. Prescriptive Themes

Alternative C Modified was selected for its inclusion of a variety of treatment prescription options, or "themes." These prescriptive themes allow the greatest flexibility for treating stands. AR 2944. They include: "Near Term NSO," "Long-Term NSO," "Fuels Emphasis," and "Ecosystem Resilience–Open, Intermediate, and Closed." AR 2610–13, 2628–29, 2705. Each theme has a relative density index ("RDI") treatment objective, which roughly equates to the level of intensity for commercial thinning within a stand that is necessary to accomplish the purpose underlying that stand's theme. Areas that BLM has determined are non-nesting roosting habitat and not suitable for eventual habitat development are designated with the more aggressive logging theme, Ecosystem Resilience. Ecosystem Resilience-Open ("Open") is the heaviest logging prescription, and it is permitted across 17,000 acres in the LSR. AR 2940.

V. The Late Mungers Project

The Late Mungers Project is the first site-specific, commercial implementation of the IVM Program. It involves two timber sales and authorizes the following actions: 830 acres of commercial thinning within LSRs (including 461 acres of Open and 81 acres of Intermediate logging); 7,534 acres of small-diameter thinning and prescribed burns; 1.9 miles of temporary road creation; 55.4 miles of road maintenance; and 4 miles of temporary road decommissioning. AR 3.

Notably, within the Late Mungers treatment area, there are fourteen NSO home ranges, and at least three have been occupied by NSO within the last five years. *Id.* The Project will permit logging in all three sites. AR 269–77.

In its Determination of NEPA Adequacy ("DNA"), BLM concluded that the impacts of the Project were within the purpose and range of impacts analyzed by the IVM Program's EA. *See* AR 11. BLM therefore declined to conduct any further site-specific analysis. After a public comment period and an open house, BLM signed the Decision Record for the Project in February 2023. AR 8.

ISSUE

KS Plaintiffs and AS Plaintiff seek to vacate and enjoin the implementation of IVM Program, including the two Late Mungers timber sales. KS Plaintiffs seek only to enjoin the commercial components of the IVM Program; not the noncommercial components such as thinning or prescribed fire. ECF No. 21 at ii. AS Plaintiff seeks the broader relief of vacating the EA, FONSI, and DR associated with the Program and enjoining the implementation of any projects flowing from it. ECF No. 30

Plaintiffs assert related and overlapping claims under FLPMA and NEPA against BLM for its approval of the IVM Program, alleging that BLM failed to comply with the governing 2016 RMP and failed to take a "hard look" at the Program's impacts. BLM and Intervenor Defendants argue the IVM Program complied with all statutory obligations under FLPMA and NEPA, and that the decision is fully supported by the record and is therefore not arbitrary or capricious.

Each party moves for summary judgment on all claims brought by Plaintiffs.

STANDARD OF REVIEW

Judicial review of agency decisions under FLPMA and NEPA is governed by Section 706 of the APA and may be resolved through motions for summary judgment. *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1205 (9th Cir. 2004) ("Because the statutes…do not contain separate provisions for judicial review, our review is governed by the APA"); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 964 (9th Cir. 2002) ("We review claims brought pursuant to…NEPA under the standards set out in the [APA]").

The APA allows the reviewing court to set aside a final agency action only if it is "arbitrary, capricious, an abuse of discretion, or not otherwise in accordance with the law." 5 U.S.C. § 706(2)(A). "A decision is arbitrary and capricious if the agency 'has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.'" *O'Keeffe's, Inc. v. U.S. Consumer Prod. Safety Comm'n*, 92 F.3d 940, 942 (9th Cir. 1996) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). An agency action is also arbitrary and capricious if the agency fails to "articulate

a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle*, 463 U.S. at 43 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

Review under the APA is "searching and careful." *Ocean Advocs. v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 858 (9th Cir. 2004). The court must ensure that the agency took a "hard look" at the environmental consequences of its proposed action. *Or. Nat. Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). However, the court may not substitute its own judgment for that of the agency. *Ocean Advocates*, 402 F.3d at 858. It must presume the agency acted properly and affirm the agency when "a reasonable basis exists for its decision." *Indep. Acceptance Co. v. Cal.*, 204 F.3d 1247, 1251 (9th Cir. 2000).

DISCUSSION[6]

I. The FLPMA Claims

FLPMA requires BLM to ensure that all future resource management authorizations and site-specific actions conform with the governing RMP. In this context, the IVM Program and any associated timber sales, including the Late Mungers Project, must conform with the 2016 RMP and any substantive management direction contained therein.

Plaintiffs each move for summary judgment alleging that BLM failed to ensure the IVM Program complied with two of the 2016 RMP's management directions: the 20-year standard (KS Plaintiffs) and the RMA Frameworks (AS Plaintiff). For the reasons below, summary judgment for KS Plaintiffs' FLPMA claim should be granted in KS Plaintiffs' favor and summary judgment for AS Plaintiff's FLPMA claim should be granted in Defendants' favor.

[6] KS Plaintiffs and AS Plaintiff also raise arguments as to their standing to bring the asserted claims. Those arguments do not appear to be disputed by Defendants. Accordingly, the Court does not address them in this Findings and Recommendation.

a. The 20-year standard

The 20-year standard is a 2016 RMP direction governing the development of NSO habitat in LSRs. KS Plaintiffs allege that BLM failed to comply with the 20-year standard when it approved the IVM Program's plans to commercially log LSRs. BLM argues the 20-year standard is inapplicable and justifies its failure to model the Open prescription's impacts on that basis. The Court finds BLM's interpretation plainly inconsistent with the 2016 RMP and recommends granting summary judgment in KS Plaintiffs' favor for the reasons below.

i. The 20-year standard is triggered by the IVM Program's plans.

Since their emergence, LSRs have safeguarded areas for habitat preservation expressly so that other areas may be logged concurrently, without threatening species loss. The 2016 RMP flows from that policy. It explicitly provides that LSRs are to be managed for two objectives: maintaining and promoting habitat. "In stands that are currently northern spotted owl nesting-roosting habitat," habitat is to be maintained regardless of owl occupancy. "In stands that are not northern spotted owl nesting-roosting habitat," the 20-year standard directs BLM to administer treatments to speed the development or improve the quality of NSO habitat and to limit such treatments "to those that do not preclude or delay by 20 years or more the development of" habitat, as compared to development without treatment. AR 48815 (provided in full above). Treatments in LSRs may therefore include those that log or temporarily downgrade habitat within reserves, so long as it does not delay the development of habitat by more than 20 years when compared to how the stand would develop without treatment.

The IVM Program authorizes commercial logging throughout LSRs under both the Open and Intermediate prescription themes. Because nesting-roosting habitat requires forest qualities

and characteristics[7] that are inapposite to the characteristic goals of the Open[8] and Intermediate[9] prescription themes, authorizing those prescriptions in LSRs could result in long-term destruction of habitat, thereby potentially violating the 2016 RMP's 20-year standard and triggering BLM's obligation to demonstrate the necessary FLPMA compliance.

BLM, however, chose not to demonstrate the Open prescription's impacts in LSRs, although BLM nonetheless did demonstrate the Intermediate prescription's impacts. BLM maintains that the 20-year standard is inapplicable to the IVM Program's plans and therefore, BLM claims it was not required to demonstrate how its plans would comply with the standard. AR 2656. The Court disagrees.

ii. BLM's interpretation is plainly inconsistent with the 2016 RMP.

According to BLM, "[t]he better reading is that 20-year standard only applies where BLM's treatments are for a discrete purpose—to accelerate future nesting-roosting habitat." ECF No. 37 at 17. A contrary interpretation would, according to BLM, "elevate one management direction above all others, eliminating the BLM's ability to undertake LSR forest health treatments for purposes other than speeding NSO habitat development." *Id.* at 1. "[W]here the primary purpose of the treatment is instead to implement RMP-directed treatments improving a

[7] Nesting-roosting habitat requires a minimum canopy cover of 60 percent. AR 14810, 2658. It requires the presence of older, structurally complex forest habitats, as well as single storied forest habitat with a lower basal area to support foraging habitat. AR 2775, 14641. Other targeted components of nesting-roosting habitat are: basal area 180–240 feet, mean diameter of trees ≥ 21", quadratic mean diameter ≥ 15", at least 12 trees per acre over 20" in diameter, and a high basal area of trees over 26" in diameter. AR 2658, 2775.

[8] The Ecosystem Resilience-Open ("Open") logging treatments allow a reduction in the relative density of forest stands down to 20 percent and the creation of openings, or "clearcuts," of up to 4 acres across 25 percent of the forest stand within the LSR. AR 2612, 2703–05. Generally, this will remove a substantial amount of the forest stand's basal area, remove larger diameter trees that comprise the canopy, and reduce overall canopy cover. AR 2642.

[9] The Ecosystem Resilience-Intermediate ("Intermediate") logging treatments allow a reduction of the relative density of forest standards to 30 percent. AR 2659. Although a less aggressive logging prescription, Intermediate "would downgrade spotted owl NR and F habitat because the post-harvest canopy cover is expected to drop below 60 percent but maintain at least 40 percent canopy cover." AR 2780.

stand's fire resilience to wildfire, the 20-year standard…simply does not apply. *Id.* at 14. The Open and Intermediate "treatments are not designed to speed the development of spotted owl nesting-roosting habitat." AR 2656, 2663. And therefore, because those treatments are for purposes other than speeding habitat development, such as promoting resilience to disturbances (like fire, drought, insects, and pathogens), the 20-year standard does not apply. BLM claims it is thus absolved of any duty to demonstrate compliance with the 2016 RMP's 20-year standard.

The Court cannot accept this interpretation. BLM's argument, at its core, is that because its actions are not intended to aid the development of habitat, its actions do not need to comply with the standard that requires BLM's actions aid the development of habitat. That reasoning is circular. If the prohibition on treatments that preclude or delay habitat development by 20 years or more only applies to treatments intended to accelerate habitat development, it would render the direction superfluous. More than that, BLM's interpretation of the standard is undermined by the plain language of the 2016 RMP. That language provides no indication that the applicability of the 20-year standard should be limited to only logging treatments with the stated intent of developing habitat. On the contrary, the plain language leading up to the standard says it applies "[i]n all treatment stands that are not northern spotted owl nesting-roosting habitat." There is nothing to support the contention that the 20-year standard should be read out from the rest of the directions and applied in an isolated manner.

This is particularly true where a full reading of the RMP allows the 20-year standard to apply harmoniously with the other management directions. Under that guidance, BLM is clearly permitted—at times even obligated—to conduct distinct fire management treatments in LSRs, even if they downgrade or remove habitat, so long as those treatments are limited to actions that do not preclude or delay future habitat development by 20 years or more. BLM is even permitted

to commercially log in LSRs, provided it complies with the 20-year standard and the other directives contained in the 2016 RMP. *See League of Wilderness Defs. Blue Mountains Biodiversity Project v. Allen*, 615 F.3d 1122 (9th Cir. 2010).[10]

LSRs, by their genesis, are endowed with the purpose of habitat protection. That purpose is clearly and properly reflected in the management directions for LSRs in the 2016 RMP. BLM cannot ignore that simply because it wants to increase commercial logging in addition to administering fire resiliency treatments. However, commercial logging and temporary removal of habitat in LSRs are not per se prohibited, and here, they are permitted, provided such treatments do not preclude the development of habitat by 20 years or more as compared to no treatment. In that regard, BLM mischaracterizes the degree to which the 20-year standard hamstrings its ability to conduct treatments for forest health.

As the agency, BLM is granted substantial deference in its interpretation; however, it is not entitled to such deference where the language is plain and unambiguous, and its interpretation is plainly inconsistent with the provision at issue. *See Brong*, 492 F.3d at 1127; *see also Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 957 F.3d 1024, 1035 (9th Cir. 2020). Here, the language of the 2016 RMP is plain and unambiguous. The "official interpretation" to which BLM points, *see* AR 22628, was created in 2020 in conjunction with the IVM Program and its aims. It therefore does not offer the objective, contemporaneous support that BLM argues it does.

[10] BLM's actions in *Allen* are in many ways distinguishable from the facts present by this case. However, *Allen* does stand for the proposition that BLM may implement projects that authorize commercial logging and temporary reduction of habit in LSRs in order to reduce risk of wildfire. *Allen*, 615 F.3d at 1134–35. The holding of *Allen* can be read consistent with this Court's interpretation of 20-year standard in that both allow temporary removal of NSO habitat where it will result in greater assurance of long-term maintenance of habitat, and both promote a balanced approach that reduces risk of fire while protecting areas of forest prone to fire. *Allen* does not however permit BLM to commercially log in areas of LSRs without any regard for the long-term degradation of NSOs habitat, like its interpretation would condone.

The Court finds that the 20-year standard clearly applies to any proposed actions in the LSRs, irrespective of BLM's stated purpose. BLM is therefore not permitted to conduct full-blown commercial logging throughout the LSRs without first demonstrating that those plans are compliant with the 2016 RMP's 20-year standard, in accordance with FLPMA. Given that the Open prescription allows openings of up to 4 acres and massive canopy reduction, it is likely that had BLM actually modeled the Open prescription, the modeling would have demonstrated a violation of the 20-year standard, emphasizing even further the propriety of obligating BLM to demonstrate compliance.

iii. The Intermediate prescription violates the 20-year standard.

BLM did model the effects of the Intermediate prescription in LRSs.[11] *See* AR 2791.

To test whether the Intermediate treatments complied with the 20-year standard, BLM selected three sample stands and looked at whether the results were consistent with the metrics for functional nesting-roosting habitat.

> Stand-level inventory plot data for these three selected stands were processed and modeled in ORGANON, a tree growth and yield simulator. Growth for each representative stand was modeled through time under a no treatment scenario and three treatment scenarios based on the proposed action: RD targets of 30 percent, 40 percent, and 45 percent (Long-Term Spotted Owl Theme, Ecosystem Resilience-Intermediate Theme, Alternatives A and B thinning prescriptions, Ecosystem Resilience-Intermediate Theme, and Ecosystem Resilience-Closed Theme, and the Spotted Owl Near-Term Theme). …The metrics for nesting-roosting habitat…were used to determine when these stands reached nesting-roosting conditions when modeled into the future because this specific management direction is about achieving nesting-

[11] Defendants maintain the position that "the 20-year standard does not apply to the Ecosystem Resilience Open or the Ecosystem-Resilience Intermediate themes, because the ecological objective for those treatments are the increased resilience to forest disturbance like fires and infestations." Nonetheless, BLM claims that its modeling of the Intermediate prescription, "though it was not required to do so, still met the 20-year standard when accounting for the natural regeneration of the forest." ECF No. 47 at 9–10; *see also* ECF No. 46 at 10.

> roosting habitat. ...The treated stands were then modeled for additional 20 years of growth to determine if there was a delay beyond 20 additional years in the treated stands.

AR 2656. Based on the results of this modeling, BLM determined that the Intermediate prescription complies with the 20-year standard. AR 2659.

The Court finds that BLM's determination of compliance was arbitrary and capricious. First, BLM's modeling cannot be rationally supported. The sheer results of the modeling exhibited that the treated stands could not return to the minimum threshold levels for canopy cover and basal area that is required for functional habitat even after 50 years. BLM offset the sheer results, contending that while ORGANON is capable of estimating canopy cover after treatment, it cannot account for the natural regeneration on canopy cover over time. Therefore, to mitigate the model's underestimation, BLM assumes a range of 10–20 percent additive canopy cover with natural regeneration post-harvest and at least 10 square feet of additive basal area. According to BLM, the added values "would help stands reach the 60 percent or greater even though the modeling results indicate lower canopy cover." AR 2791. The Court does not dispute the reliability of the ORGANON model,[12] nor does the Court deny the empirical data relied upon by BLM. The Court does however find that the overestimation employed by BLM to achieve compliant results relies on a contradictory assumption. On the one hand, the heavier Ecosystem Resilience prescriptions can only comply with the 20-year standard if the natural or artificial regrowth is *preserved*. Whereas, on the other hand, those heavier prescriptions, which aim to create open conditions and low fuel loading for fire resilience, depend entirely on the *removal* of

[12] "ORGANON has had more referenced publications written about its equations and architecture than any growth and yield model (public or private) available in the western United States." AR 2735. ORGANON does "predict[] future conditions for forested stands," but "natural and/or artificial regeneration is not reflected in the stand modeling, and not reflected in canopy cover estimates grown through time." *Id.*

natural or artificial regrowth. *See* AR 2631. The record must show that BLM's analysis was based on accurate information and defensible reasoning; contradictory assumptions are insufficient. *See Env't. Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 874 (9th Cir. 2022). Lastly, the modeling of the Intermediate prescription relied on only three, unrepresentative sample stands, only one of which is located in the Late Mungers treatment area. BLM's determination must be substantially based on fact and here, the Court finds that the rational connection between the facts found and conclusions made is tenuous.

This Court may not substitute its own judgment for that of BLM, nor is it this Court's role to delve into scientific analysis or battle with experts. The Court's role is to ensure that the record does not plainly demonstrate that BLM made a clear error in judgment. Here, the Court finds that BLM has made a clear error in judgment with respect to whether the implementation of the Open and Intermediate themes will comply with the 20-year standard. BLM elected not to model the Open theme at all, and BLM failed to adequately demonstrate how the impacts of the IVM Program's Intermediate prescription plans will not result in long-term degradation of NSO habitat development.

Summary judgment should therefore be granted in KS Plaintiffs' favor as to their FLPMA claim.

b. The Recreation Management Area Frameworks

AS Plaintiff moves for summary judgment on its FLPMA claim as well. AS Plaintiff alleges that BLM failed to demonstrate how the actions contemplated by the IVM Program will be consistent with the 2016 RMP's management direction for RMAs.

The 2016 RMP directs BLM to manage all RMAs in accordance with their RMA Frameworks. The RMA Frameworks applicable to the IVM Program allow actions that

"maintain recreation setting characteristics," meaning allowable actions must maintain the RMA's ROS class based on its "remoteness" and "naturalness." AR 2852–53.

The IVM EA provides that none of the treatments authorized by the Program will shift an RMA towards a more developed class. AR 2853. In arriving at this conclusion, BLM incorporated the 2016 RMP's framework for evaluating effects to recreational opportunities, the ROS, and tiered its assessment of possible effects to those analyzed in the 2016 FEIS. AR 51648.

Although there are issues raised here as to BLM's specific use of tiering and its reliance on certain scientific assumptions, the Court addresses both below in connection to the NEPA claims and the IVM Program's significance and therefore declines to address them at length here.

With respect to the arguments raised by AS Plaintiff regarding the Mungers Butte ERMA specifically, the Court finds no clear error.

The Late Mungers Project overlaps with the Mungers Butte ERMA. The Mungers Butte ERMA encompasses 11,873 acres within the affected Medford District. AR 48678. The Mungers Butte Framework, *see* AR 78309–11, designates the area as "Middle Country" on the ROS scale. AR 78310. "Middle Country" means that the ERMA may be within a quarter mile of a local or resources road (*remoteness*) and that it contains natural-appearing landscape with human modifications that do not overpower the natural features and forest structures of either young, high-density stands with structural legacy trees, or young, low density stands with or without structural legacy trees (*naturalness*). AR 51651. The Mungers Butte Framework also allows "timber harvest" and "fuel treatments or other vegetation modifications," so long as those activities are "compatible with meeting recreation objectives [and] do not interfere with recreation opportunities, and maintain setting characteristics." AR 78310. As an ERMA,

Mungers Butte "requires specific management consideration" that is "commensurate with the management of other resources and recourse uses" AR 51561, 48675.

BLM ensured compliance with the 2016 Framework by requiring the Late Mungers Project treatments to follow the same sideboard and criteria that was established in the IVM EA: (1) no permanent road construction, and (2) inclusion of the type and scope of vegetation management treatments approved by the EA as not shifting the treated stand's structural stage. AR 9-31; *see also* AR 2853 ("in an RMA within the 'middle country' recreation setting characteristic class, commercial and non-commercial treatments would continue to retain structural legacies in the high density stands, therefore retaining the recreation setting characteristics for that RMA"). BLM therefore claims the Late Mungers Project will maintain the ERMA's RSC because it will not affect the remoteness of the area, nor will it shift the naturalness toward a more developed stage even with commercial treatments. AR 78310.

Based on the record, the Court does not find that BLM committed clear error in failing to comply with the 2016 RMP's recreation management directions. Summary judgment should be granted in Defendants' favor as to AS Plaintiff's FLPMA claim.

II. The NEPA Claims

NEPA is a procedural statute designed to ensure federal agencies like BLM take a "hard look" at the environmental impacts of their actions. *E.g.*, *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 730 (9th Cir. 2001) (original citations and quotations omitted). For any action that "significantly" affects the environment, NEPA requires BLM to prepare a detailed EIS. *Id.* Whether an action is "significant" may first be determined by an EA. *Id.* If the EA establishes that the action may have a significant effect on the environment, an EIS is required.

Id. If not, the agency may issue a FONSI, accompanied by a convincing statement of reasons explaining why an action's impacts are not significant. *Id.*

Here, BLM supported the IVM Program with an EA, rather than a formal EIS. In the EA, BLM analyzed the potential impacts of the Program's treatments and concluded that the Program would not have any significant impacts to the environment. BLM issued a FONSI accordingly, explaining its conclusion.

KS and AS Plaintiffs move for summary judgment challenging the BLM's failure to prepare an EIS for the IVM Program and alleging BLM failed to otherwise take a "hard look" at the Program's site-specific impacts. In the following ways, the Court agrees that BLM violated NEPA.

a. The Environmental Impact Statement

"Not every project necessitates an EIS." *Ocean Advocates*, 402 F.3d at 864. However, an EIS is required where "substantial questions are raised as to whether a project...*may* cause significant degradation of some human environmental factor." *Id.* (quoting *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998)). "To trigger this requirement a 'plaintiff need not show that significant effects *will in fact occur*,' [but] raising 'substantial questions whether a project may have a significant effect' is sufficient." *Id.*

Whether an action may have a "significant" effect on the environment requires a consideration of two broad components: "context" and "intensity." 40 C.F.R. § 1508.27.

"Context" refers to the setting in which the proposed actions take place, including the interests affected. *Ocean Advocates*, 402 F.3d at 865; *see also* § 1508.27(a). Here, the context is southwest Oregon. The IVM Program's Planning Area encompasses 875,290 acres throughout the Medford District, of which 684,185 acres comprise the eligible Treatment Area. Within this

massive area exists varied forest types that serve multiple distinctly important purposes, not the least of which include habitat for endangered, threatened, and rare species. The Program will occur over 10 years, without any secured sunset date, and it will authorize commercial logging and fire resiliency treatments. Wildfire prevention is an acutely important interest for this area's affected residents and neighbors, who have consistently demonstrated their dedication to effective land planning solutions by actively participating in BLM's process and voicing concerns.[13]

The second component considers an action's "intensity." Intensity refers to the severity of the impact. *Ocean Advocates*, 402 F.3d at 865; *see also* § 1508.27(b). "In considering the severity of the potential environmental impact, a reviewing agency may consider up to ten factors that help inform the 'significance' of a project." *Id.* Meeting just one of these factors may be sufficient to require preparation of an EIS. *Babbitt*, 241 F.3d at 731.

Here, the parties raise multiple intensity factors not addressed by this Court, such as the inarguably unique characteristics of the geographic area and the degree of possible adverse effect to endangered or threatened species. Rather, the Court finds that the following four factors sufficiently demonstrate that the IVM Program's impact on southwest Oregon would be

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[13] See AR 22059, for an email explaining public dissatisfaction with the validity and accuracy of information provided during the IVM comment period, as well as a disapproval of BLM's "insensitive" process to approve its "timber agenda," believed to "make the problem worse," while communities are actively preparing for ongoing wildfire.

See AR 78292–93, for one person's criticism regarding the lack of public process, "the secrecy by which BLM designed the Late Mungers Project," the lack of public scoping, the lack of an ETA, the lack of any real site-specific analysis, and "the total disregard for surrounding communities, and for community collaboration." Also expressing disagreement with the plans in that "[t]he resulting loss of fire resistant or trees and the dramatic loss of canopy cover will increase fire risks and increase [fuel] loading by regenerating dense young highly flammable vegetation [where] old fire resistant" trees once stood.

See AR 78295, for comments noting that the IVM Program's 10-year timeline leaves out information regarding "what intensity and what the specific direct, indirect, and cumulative impacts" will result, as well as concerns regarding how the Late Mungers Project would have the opposite effect of those intended and would result in increased fire hazards near communities.

significantly severe: the degree of controversy generated, the degree of uncertainty manifested, the likelihood of problematic precedent, and the threat of violating federal law.

i. Controversy

Where an action's effects on the quality of the human environment are likely to be highly controversial, an EIS is warranted. § 1508.27(b)(4). "A project is 'highly controversial' if there is a 'substantial dispute [about] the size, nature, or effect of the major Federal action," not mere opposition to that action. *E.g.*, *Bark*, 958 F.3d at 870 (original citations omitted). "A substantial dispute exists when evidence…casts serious doubt upon the reasonableness of an agency's conclusions." *Id.* It then becomes the agency's burden to put forth a well-reasoned explanation demonstrating why the dispute does not suffice to create a public controversy. *Babbitt*, 241 F.3d at 736.

The IVM Program will rely on gap creation and group openings under the Open and Intermediate prescriptive themes to create conditions that are intended to promote species diversity and prevent high intensity surface fire from evolving into large crown fires.

When presented to the public, the IVM Program received deep public disapproval and skepticism during its comment phase. Neighbors and advocates disputed the lack of transparency and site-specific analysis, as well as the nature of the Program, which sacrifices habitats for commercial logging. AS and KS Plaintiffs presented substantial evidence that BLM's chosen logging prescriptions would not have the intended effect and would instead exacerbate fire issues. For example, some studies found that treatments like Open and Intermediate, which create open conditions through thinned portions of forests stands and rely on regeneration, not only remove the habitat and connectivity that is required for NSO survival, but those treatments have also been found to create highly flammable young stocks interspersed throughout the

thinned units. Another study found that the regrowth and replanting required in younger plantation stands will eliminate the effort to mimic past fire regimes, and the gap openings will increase fire hazard in these stands. Other research concurred that open conditions and more intensive forest management can lead to accelerated levels of fire severity in this region specifically, and that thinning and group selection openings may indirectly increase surface wind gusts and temperatures, increasing severity of surface fire behavior.

BLM denies such controversy. It provided a generalized conclusion that "[f]rom a technical or scientific standpoint, BLM determined that the treatments will not have highly controversial impacts." ECF No. 37 at 56. "To the extent that such impacts could be deemed to be highly controversial," BLM claims "they have already been addressed in the [2016 FEIS], and therefore BLM has met its obligations to address such controversies in an EIS." *Id.* To BLM's point, it did reiterate that thinning and group selection openings may indirectly increase surface wind, reduce fuel moisture content, and increase flammable understory vegetation, all of which can contribute to fire risk. However, BLM argues that because it explained that such openings would possibly promote species diversity, disrupt fuel connectivity, and alter surface fuel patterns based on BLM's past findings, the IVM Program is cured of its controversy and BLM absolved of its duty to prepare an EIS.

The controversy inherent in the IVM Program's plans remains unresolved by BLM's response. In simply electing its chosen alternative without fully exploring the conflicting research on the issue through a formal EIS, BLM effectively reduces its findings to only the positive outcomes, while discounting the coinciding negative possibility that treatments would exacerbate forest fires. Plaintiffs have adequately presented evidence that casts serious doubt upon the reasonableness of BLM's conclusions and therefore raised a substantial dispute

sufficient to show that the Program is highly controversial. Preparation of an EIS was required in this context.

This Court's finding does not stand for the proposition that an EIS is always required for forest thinning projects. Rather, this case arises out of an extraordinarily delicate situation and presents a unique opportunity to address a solution that will impact hundreds of thousands of acres of high-risk lands. In this regard, the Court echoes KS Plaintiffs' sentiment: "Getting this project right could benefit southwestern Oregon for years to come, while getting it wrong may have devastating consequences across the landscape for fire behavior and wildlife habitat."

ii. Uncertainty

Where the environmental effects of a proposed action are highly uncertain or involve unique or unknown risks, an agency must prepare an EIS. § 1508.27(b)(5). "The purpose of an EIS is to obviate the need for speculation." *Babbitt*, 241 F.3d at 732.

Here, the effects of the IVM Program are highly uncertain. BLM adopted an intentionally non-specific approach in the EA to allow the plans to proceed flexibly under a "programmatic" framework. By design, the Program has an inherently high degree of uncertainty about the proximate environmental impacts of the approved program of work. *See* § 1508.27(b)(5).

BLM claims it will evaluate each future implementation-level project in a DNA to determine if it was adequately analyzed by the EA and the 2016 RMP. If it was not, BLM claims it will prepare additional NEPA review. This style of tiering is useful to "eliminate repetitive discussions of the same issues" and is permitted. § 1502.20. However here, BLM tiers to a global EIS that omits any site-specific analysis and explicitly pushes review to later implementation-level projects. Yet, when faced with a later implementation-level project, like the Late Mungers Project, BLM relies on a DNA, a non-NEPA document which cannot substitute for NEPA

analysis, to conclude no further NEPA analysis is required. *See S. Utah Wilderness All. v. Norton*, 457 F. Supp. 2d 1253, 1261–62 (D. Utah 2006) (original quotation omitted). In this way, site-specific analysis is never completed, and it breeds problems for public participation, transparency, and establishing any sort of concrete certainty as to impacts.

As to the modeling of the long-term effects of the proposed Open and Intermediate treatments in NSO habitat throughout LSRs, the Court has already explained the lack of certainty in BLM's results. The scale and timing of the IVM Program's effects remain uncertain as well. It is unclear which elements of the Program may continue beyond the 10-year time frame, which is particularly troubling considering how rapidly environmental conditions and scientific understanding changes.

The Court acknowledges that a "quotient of uncertainty" is expected in this context. *See Ctr. For Biological Diversity v. Kempthorne*, 588 F.3d 701, 712 (9th Cir. 2009). However, the Court cannot conclude that the impacts contemplated here are anything but highly uncertain.

iii. Precedence

"If approval of a single action will establish a precedent for other actions which may cumulatively have a negative impact on the environment, an EIS may be required." *Anderson v. Evans*, 371 F.3d 475, 493 (9th Cir. 2004); § 1508.27(b)(6). Here, BLM's approval of the IVM Program failed to consider the degree to which its actions may establish a precedent with significant effects in two ways.

First, the interpretation of the 20-year standard upon which BLM hangs its approval of the Program's commercial components would have sweeping impacts. LSRs make up the largest land allocation in the 2016 RMP. Allowing BLM to apply its interpretation of the 20-year

standard across all lands managed under the 2016 RMP would severely undercut the ability of the RMP to protect and promote habitat decades into the future.

Second, the style of tiering employed by BLM in this context effectively allows the agency to avoid completing any site-specific analysis under the guise of passing it off as already considered. The only EIS conducted in relation to this project, to which all other decisions are tiered, is the 2016 RMP's FEIS. It explicitly provides that BLM "will carry out additional decision-making, including NEPA compliance, Endangered Species Act (ESA; 16 U.S.C. 1531 et seq.) consultation, and other consultation, as appropriate, before authorizing any future actions and implementation decisions that result in on the-ground activities." AR 48746. While tiering is certainly permitted, BLM here is relying on it to maneuver around its obligation, hanging each subsequent decision where no specific issues have been addressed. *See Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1214 (9th Cir. 1998) ("Nothing in the tiering regulations suggests that the existence of a programmatic EIS for a forest plan obviates the need for any future project-specific EIS, without regard to the nature or magnitude of a project.") The Court declines to validate BLM's practices as generally acceptable NEPA procedure.

iv. Legal Violation

If "the action threatens a violation of Federal, State, or local law or requirements imposed for the protection of the environment," an EIS may be required. § 1508.27(b)(10). As explained above, allowing BLM to proceed with the IVM Program as planned will threaten a violation of FLPMA because it currently fails to comply with the governing 2016 RMP.

In sum, the Court finds that Plaintiffs have raised substantial questions over whether the IVM Program will have a significant environmental impact. Preparation of an EIS was therefore

required. Summary judgment as to KS and AS Plaintiffs' NEPA claims should be granted in KS and AS Plaintiffs' favor.

Having concluded that the IVM Program was significant and required preparation of an EIS, the Court does not reach Plaintiffs' arguments regrading whether BLM took a "hard look" for purposes of the IVM EA.

III. The Motion to Strike and Notice of Supplemental Authority

Of final concern are Defendants' motion to strike the Cady Declaration and Plaintiffs' Notice of Supplemental Authority.

KS Plaintiffs, in support of their Reply, submitted an excerpt of the Rogue Gold Forest Management Project EA and requested that the Court take judicial notice. *See* Cady Declaration, ECF No. 43. Both Defendants oppose Plaintiffs' late invocation of the EA, arguing that it constitutes extra-record evidence that should be excluded under the APA. ECF No. 46 at 2–5; ECF No. 47 at 10–12. It appears the parties conferred in good faith over this evidentiary objection and were unable to reach a resolution.

KS Plaintiffs also filed a Notice of Supplemental Authority providing the Court with a Findings and Recommendation recently issued by this District in *Cascadia Wildlands v. Adcock*, No. 6:22-cv-1344-MK. *See* ECF No. 50. Defendants argue that reliance on the *Cascadia* F&R would be misplaced at this time, as it is not a final order of the District Court and remains subject to objections. ECF No. 51.

The Court did not rely on the Rogue Gold EA or *Cascadia* F&R in reaching its decision. Defendants' motion to strike is therefore denied as moot.

CONCLUSION

The Court may overturn an agency's conclusion when it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A).

For the above reasons, the Court finds that the commercial logging portions of the IVM Program are inconsistent with the governing RMP's 20-year standard and therefore violate FLPMA, Summary judgment as to KS Plaintiffs' FLPMA claim should be granted in KS Plaintiffs' favor accordingly. As to AS Plaintiffs' FLPMA claim, the Court does not find that the IVM Program is clearly inconsistent with the 2016 RMP's recreation management direction. Summary judgment should therefore be granted as to AS Plaintiff's FLPMA claim in Defendants' favor.

With respect to KS and AS Plaintiffs' NEPA claims, the Court agrees with KS and AS Plaintiffs' that BLM's failure to prepare an EIS in connection to the IVM Program arbitrarily and capriciously violated BLM's obligations under NEPA. Summary judgment should therefore be granted in KS and AS Plaintiffs' favor as to each of their NEPA claims.

Lastly, Defendants' motion to strike the Cady Declaration is denied as moot.

REMEDY

The parties seek differing remedies. KS Plaintiffs request the partial vacatur of the commercial logging components of the IVM Program, enjoining the implementation of only the Ecosystem Open and Intermediate treatments. They do not seek to enjoin the noncommercial components, such as noncommercial thinning or prescribed fire. AS Plaintiffs seek to vacate the IVM EA, DR, FONSI, and the Late Mungers DNA, and to enjoin BLM from implementing any projects flowing from the IVM Program. All parties have requested an opportunity to provide the Court with further remedy briefing.

The Court agrees the parties should be allowed an opportunity to confer as to the appropriate relief in light of this Court's specific findings. Plaintiffs acknowledge that BLM's plans include proactive and admirable strategies directed across many high-risk areas. Given the mutual affection for Oregon's forests shared by all in this action, the Court is confident that dedicated collaboration will result in an effective solution. The Court therefore recommends that if this Findings and Recommendation is adopted, the parties should be given 30 days to confer and brief the appropriate remedy and provided an opportunity to discuss it with the Court. All relief requested in the Motions is therefore specifically withheld from the Court's ruling at this time.

The Court further strongly encourages the parties to work collaboratively to see if the noncontroversial parts of this important forest management project can move forward without significant dely. The parties appear to be three-quarters of the way to a successful resolution, with a relatively small holdout delaying important action. Because of the time sensitivity of this project, the Court requests that the parties begin to confer regarding what portions of the program may continue, even any pending objections to this Findings and Recommendation and potential Ninth Circuit appeals.

RECOMMENDATION

The Court recommends the motions be resolved as follows: KS Plaintiffs' Motion for Summary Judgment, ECF No. 21, should be GRANTED in KS Plaintiffs' favor as to KS Plaintiffs' FLPMA and NEPA claims. AS Plaintiff's Motion for Summary Judgment, ECF No. 30, should be DENIED as to AS Plaintiff's FLPMA claim and GRANTED as to AS Plaintiff's NEPA claim. BLM Defendant's Motion for Summary Judgment, ECF No. 37, and Intervenor Defendants' Motion for Summary Judgment, ECF No. 35, should be DENIED in all respects

except as to AS Plaintiff's FLPMA claim, which should be GRANTED in Defendants' favor. Defendants' motion to strike the Cady Declaration is denied as moot.

The relief requested is being held in abeyance pending further briefing. Should the District Court adopt this Findings and Recommendation, the parties are directed to confer and submit their proposed remedy briefs to the Court within 30 days of the adopting order. The parties in the meantime are recommended to confer collaboratively regarding which noncontroversial components of the IVM Program may be implemented without harmful delay.

This Findings and Recommendation will be referred to a district judge. Objections to this Findings and Recommendation, if any, are due fourteen (14) days from today's date. If objections are filed, any response is due fourteen (14) days from the date of the objections. *See* Fed. R. Civ. P. 72, 6. Parties are advised that the failure to file objections within the specified time may waive the right to appeal the district court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991). This Recommendation is not an order that is immediately appealable to the Ninth Circuit Court of Appeals. Any notice of appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1) should not be filed until entry of the district court's judgment or appealable order.

DATED this 24 day of May, 2024.

MARK D. CLARKE
United States Magistrate Judge