No. 18-36067

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE ECOSYSTEMS COUNCIL, and ALLIANCE FOR THE WILD ROCKIES,

Plaintiff-Appellants,

v.

LEANNE MARTIN, TONY TOOKE and WILLIAM AVEY,

Defendant-Appellees

and

MONTANA WOOD PRODUCTS ASSOCIATION, MONTANA LOGGING ASSOCIATION, and MEAGHER COUNTY,

Defendant-Intervenor-Appellees.

On Appeal from the United States District Court for the District of Montana,
Case No. 9:17-cv-00153-DWM

ANSWERING BRIEF OF DEFENDANT-INTERVENOR-APPELLEES MONTANA WOOD PRODUCTS ASSOCIATION, MONTANA LOGGING ASSOCIATION, and MEAGHER COUNTY, MONTANA

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1(a), defendant intervenors Montana Wood Products Association, a Montana non-profit corporation, and Montana Logging Association, a Montana non-profit corporation, state that they do not issue stock and defendant intervenor Meagher County is a government entity.

DATED this 13th day of May, 2019.

Respectfully submitted,

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I. INTRODUCTION

As concerns have grown about the state of our National Forests, weakened by decades of fire suppression, lack of management, and climate change, Congress has added tools to enable the Forest Service to act with speed and rigor. One of these is the Categorical Exclusion, or CE, enacted as part of the bipartisan 2014 Farm Bill. This CE permits the Forest Service, in its discretion, to conduct limited-size projects to restore forest health, reduce hazardous fuels, and combat outbreaks of insects and disease.

The Moose Creek Vegetation Project is one such project. Located in Montana's Helena-Lewis & Clark National Forest, in the Little Belt Mountains, it aims to address an area of the forest suffering from severe insect infestation and mortality. The project overlaps in significant part with parts of the Wildland-Urban Interface (WUI) that Meagher County has identified as needing work to reduce fire risk. Further, the project will produce a modest amount of timber, supporting the County's economy as well as local workers in a rural area where family-wage jobs are relatively scarce. Meagher County intervened in the case to protect the safety of its citizens and first responders and to support reduction of fire hazard along one of the major travel routes through the County. It is joined by the Montana Wood Products Association (MWPA) and Montana Logging Association (MLA), two associations that represent Montana's forest products businesses. The

State of Montana also submitted a brief in the district court supporting the project.

Appellants Native Ecosystems Council and Alliance for the Wild Rockies (the Council) appeal the district court's rejection of all their claims at summary judgment. The district court's ruling was correct and should be affirmed. First, the Council lacks standing because it did not meet its burden to show a concrete and particularized interest in the project, rather than an inchoate opposition to forest management. Such "armchair" standing falls far short of what Article III demands.

Second, the district court correctly found that the designation of 4,955,159 acres as eligible for the Farm Bill CE did not require a separate evaluation under the National Environmental Policy Act (NEPA). Since the designation was at the request of Montana's Governor, the Forest Service Chief had no discretion, and thus there was no decisionmaking process to which NEPA could apply. Moreover, an area designation only indicates areas where future action *may* occur, and has no on-the-ground effects, so any effects of the designation are speculative and cannot be evaluated. To add a NEPA process to the designation would undermine the whole structure and purpose of the Farm Bill CE, which is designed to expedite environmental reviews.

Third, the Forest Service correctly applied the Farm Bill CE to this project. It abided by statutory direction to maximize retention of old growth to the extent appropriate in light of stand conditions, going so far as to redraw unit boundaries to

avoid logging in old-growth stands. Though the text and structure of the Farm Bill do not require such an evaluation, the agency also examined whether extraordinary circumstances weighed against the use of the CE, and reasonably concluded they did not.

Moose Creek has the broad support of the community, multiple levels of government, was prepared with an extensive public process and analyzed with due diligence. The district court correctly upheld the project and should be affirmed.

II. STATEMENT OF THE ISSUES

1. Appellants rejected the well-established requirement to show site-specific interests in order to establish their Article III standing, instead claiming interests in the National Forest System as a "wholly integrated" body of land. When attempting to bolster their standing before the district court, appellants failed to show concrete future plans to visit the project area. Do appellants lack standing?

2. Congress established a CE in the 2014 Farm Bill in order to accelerate treatment of forests at risk from insects, disease, and wildfire. The statute requires designation of eligible landscapes when requested by a State's Governor, which occurred on about 5 million acres in Montana. Despite its lack of discretion following the request from Governor Bullock, and the lack of any on-the-ground effects from a landscape designation, was the Forest Service nevertheless required

to conduct a separate NEPA analysis when designating these areas where future projects may be eligible for use of the CE?

3. The text of 16 U.S.C. § 6591b permits the Forest Service to use the Farm Bill CE when certain specified statutory criteria are met, but does not require an "extraordinary circumstances" evaluation as is needed for projects under CEs established by regulation. In 2018, Congress twice added new CEs to the same subchapter which require extraordinary circumstances analysis without adding the requirement to section 6591b. In the absence of statutory direction, can the Forest Service be required to add its "extraordinary circumstances" analysis process to the streamlined statutory CE before using the CE to approve a project?

4. The Moose Creek Vegetation Project was designed to preserve all old growth in the project area and unit boundaries were redrawn to protect old growth. Does the project comply with the Farm Bill's direction, at 16 U.S.C. § 6591b(b)(1)(A), to "maximize[] the retention of old-growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insects and disease" ?

5. In approving Moose Creek, the Forest Service conducted an "extraordinary circumstances" analysis in an abundance of caution, concluding no such circumstances exist because the project is not within any sensitive areas and will not cause adverse effects on sensitive species. Was this determination

arbitrary or capricious?

III. STATEMENT OF JURISDICTION

The Council invoked the jurisdiction of the district court to challenge the Forest Service's approval of the Moose Creek Project pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1346, 28 U.S.C. § 2201, and 28 U.S.C. § 2202. District Court Record (CR) 1 at 3-4. The complaint asserted review of final agency action under NEPA, 42 U.S.C. § 4332(2)(C), National Forest Management Act (NFMA), 16 U.S.C. § 1604, Healthy Forests Restoration Act (HFRA), 16 U.S.C. §§ 6501-6591, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 704, 706. CR 1 at 3, 20-24. The Council filed the complaint October 20, 2017. CR 1 at 25.

The district court issued its order on summary judgment, and final judgment, on November 11, 2018. ER 1-21, 166. The court granted the government's and intervenors' motions for summary judgment, and denied the Council's motion. ER 21. The Council filed a timely Notice of Appeal. ER 158-59. The Council asserts this Court has jurisdiction under 28 U.S.C. § 1291. Opening Br. 1.

IV. STATEMENT OF THE CASE

A. An agency may comply with NEPA by using a CE.

The Council's claims arise under NEPA, 42 U.S.C. §§ 4321-4347. NEPA's purpose is "to create and maintain conditions under which [people] and nature can exist in productive harmony, and fulfill the social, economic, and other

requirements of present and future generations of Americans." 42 U.S.C. § 4331(a). NEPA establishes the procedures by which federal agencies must consider the environmental impacts of their actions but does not dictate substantive results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Regulations promulgated by the Council on Environmental Quality (CEQ), 40 C.F.R. §§ 1500-1508, provide guidance for implementing NEPA, and the Forest Service has its own set of regulations. 36 C.F.R. Part 220.

Under NEPA, federal agencies must prepare an Environmental Impact Statement (EIS) for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(2)(C). To determine whether an action requires an EIS, an agency may prepare an Environmental Assessment (EA). 40 C.F.R. § 1501.4(b). Of course, Congress may also act to modify NEPA's requirements for particular classes of agency action. *See, e.g.*, *Apache Survival Coal. v. United States*, 21 F.3d 895, 904 (9th Cir. 1994) (holding a statute "exempt[ed] the Project [at issue] from those requirements [of NEPA and other laws] and substitute[d] new ones").

Some actions are "categorically excluded" from the requirement for an EIS. "Application of a categorical exclusion is not an exemption from NEPA; rather, it is a form of NEPA compliance, albeit one that requires less than where an environmental impact statement or an environmental assessment is necessary."

Ctr. for Biological Diversity v. Salazar, 706 F.3d 1085, 1096 (9th Cir. 2013). CEQ directs agencies to establish by regulation their own CEs for activities that are unlikely to have significant environmental impact. 40 C.F.R. § 1507.3 (b)(2)(ii). A regulatory CE "shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect." 40 C.F.R. § 1508.4. The Forest Service has established many such CEs for activities that do not require an EA or EIS, ranging from repaving a parking lot to salvage timber harvest of up to 250 acres. 36 C.F.R. §§ 220.6(d), (e).

B. Congress enacted a statutory CE in the 2014 Farm Bill.

Recognizing that forest mortality due to insects, disease, and fire is a growing threat to forest health, environmental protection, clean water, and economic stability, Congress enacted the 2014 Farm Bill provisions containing a statutory CE for projects like Moose Creek. Agricultural Act of 2014, Pub. L. No. 113-79, Title VIII, § 8204, 128 Stat. 649, 915-17 (2014), Healthy Forests Restoration Act §§ 601-04, 16 U.S.C. §§ 6591-6591c. Congress recognized, with growing apprehension, that "the current system for managing national forests affected by historic insect infestations has not been responsive to the speed and widespread impact of the infestations." H.R. Rep. 113-333, *Conference Report to Accompany H.R. 2642*, Jan. 27, 2014, at 512. Moreover, "[t]he outbreak of the pine bark beetle affecting states across the nation is a great concern. . . ." *Id.*

President Obama signed the bill into law on February 7, 2014. 128 Stat. at 1005. The 2018 Farm Bill extended these authorities an additional five years, from 2018 to 2023. Agriculture Improvement Act of 2018, Pub. L. No. 115-334, Title VIII, § 8407(b)(2), 132 Stat. 4490, 4847 (2018). This was the second statutory CE enacted within HFRA, after the CE for certain applied silvicultural assessments and treatments at 16 U.S.C. § 6554. The 2018 Omnibus added a CE for wildfire resilience, 16 U.S.C. § 6591d, and the 2018 Farm Bill added one for greater sage-grouse and mule deer habitat restoration, 16 U.S.C. § 6591e. The silviculture assessment, wildfire resilience, and mule deer CEs all expressly require use of the agency "extraordinary circumstances" procedures. 16 U.S.C. §§ 6554(d)(2)(B), 6591d(c)(4), 6591e(b)(2)(B), (C). The Farm Bill CE, at issue here, does not. 16 U.S.C. § 6591b.

The 2014 Farm Bill first provides for designation, by the Secretary of Agriculture, of eligible areas within the National Forests, and then for project-specific procedures. The area designations proceeded in two stages. First, "[n]ot later than 60 days after February 7, 2014, the Secretary *shall*, if requested by the Governor of the State, designate … 1 or more landscape-scale areas … in at least 1 national forest in each State that is experiencing an insect or disease epidemic." 16 U.S.C. § 6591a(b)(1) (emphasis added). Second, the Secretary has continuing discretion to designate "additional landscape-scale areas under this section as

needed to address insect or disease threats." 16 U.S.C. § 6591a(b)(2).

"To be designated a landscape-scale area" under this authority, "the area shall be—

> (1) experiencing declining forest health, based on annual forest health surveys conducted by the Secretary;
> (2) at risk of experiencing substantially increased tree mortality over the next 15 years due to insect or disease infestation, based on the most recent National Insect and Disease Risk Map published by the Forest Service; or
> (3) in an area in which the risk of hazard trees poses an imminent risk to public infrastructure, health, or safety."

16 U.S.C. § 6591a(c). These three qualifications are the sole requirements for landscape designations.

In designated landscapes, the Forest Service may carry out projects "to reduce the risk or extent of, or increase the resilience to, insect or disease infestation in the areas." 16 U.S.C. § 6591a(d). Such a project "may be. . . considered an action categorically excluded from the requirements of [NEPA]." *Id.* § 6591b(a)(2). The only requirements for using the CE are set forth in the statute. *Id.* §§ 6591b(b), 6591b(c). These requirements include "maximi[ng] the retention of old-growth and large trees, *as appropriate* for the forest type, *to the extent* that the trees promote stands that are resilient to insects and disease." 16 U.S.C. § 6591b(b)(1)(A). Project development must also consider the "best available" science and projects must be developed through a collaborative process that is diverse, transparent, and nonexclusive. 16 U.S.C. §§ 6591b(b)(1)(B), (C).

Farm Bill CE projects are limited to 3,000 acres of treatment and must occur in areas where fire risk is a concern. 16 U.S.C. §§ 6591b(c)(1), (2).

Congress moved to streamline the process, recognizing the large swaths of forest in need of restorative treatments to avoid further insect or disease infestation or catastrophic fire. As stated in the Conference Report, the pre-existing system is not responsive to the "speed and widespread impact" of insect and disease outbreaks. *Id.* Congress was aware of the delays inherent in the pre-existing system. For example, a report in progress at the time of the Farm Bill's passage found the average Forest Service EA takes 18 months and the average EIS takes five years. U. S. Gov't Accountability Office, Report No. GAO-14-369, at 13-14 (April 2014).[1] The Forest Service, according to the Government Accountability Office, is the single largest producer of Environmental Impact Statements. *Id.* at 10. Additionally, costs of EAs and EISs can easily reach six and seven figures, respectively, *id.* at 12-13, while the cost for preparing a CE "was generally much lower than the cost of an EA." *Id.* at 13.

Costs in time and money continue to rise despite guidance from CEQ encouraging administrative streamlining. "NEPA encourages *straightforward* and *concise* reviews and documentation that are *proportionate* to potential impacts and *effectively* convey the *relevant* considerations to the public and decisionmakers in a

[1] Available electronically at http://www.gao.gov/assets/670/662543.pdf.

timely manner while rigorously addressing the issues presented[.]" Council on Environmental Quality, *Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act*, 77 Fed. Reg. 14,473, 14,475 (Mar. 12, 2012) (emphasis added). Thus, agencies "are encouraged to develop meaningful and expeditious timelines for environmental reviews." *Id.* By enacting the Farm Bill CE, Congress recognized these administrative efforts were not adequate to the scale of the problem. It was responding to both a forest health crisis and an administrative logjam.

Prior to enactment of the Farm Bill, the Forest Service's regulatory CEs did not often permit treatment of as many acres. For example, the Forest Service established a sanitation harvest CE limited to 250 acres, 36 C.F.R. § 220.6(e)(13), and a road maintenance CE which is necessarily limited by road proximity, 36 C.F.R. § 220.6(d)(4). Legislating against this background, Congress chose, and President Obama approved, a statutory CE of up to 3,000 acres.

Congress acted to streamline the process, recognizing the large swaths of forests in need of restorative treatments to avoid further insect or disease infestation or catastrophic fire.

C. On the Governor's request, the Forest Service Chief designated 4.9 million eligible acres in Montana.

Pursuant to 16 U.S.C. § 6591a(b)(1), Montana's Governor requested designation of 5.1 million acres across seven National Forests within Montana as

eligible for treatments under the Farm Bill provisions. Letter from Gov. Steve Bullock to Tony Tooke, Associate Deputy Chief, U.S. Forest Service, Apr. 7, 2014.[2] Intervenor MWPA gave input to Governor Bullock as he considered what landscape designation to request. ISER 38.

The Governor stated, "[t]here is a lot of work to be done in the woods: to reduce fire risk, protect communities and municipal water supplies, and preserve and repair key streams and fisheries. In addition, our national forests, if sustainably managed, can be valuable carbon stores and play an important role in combatting climate change." *Id.* at 1. The State request was based "first and foremost being the pressing need for active management to address wildfire threats posed to communities and watersheds." *Id.* at 2. It also focused on areas with strong public support for forest restoration, *id.*, and was designed to provide "flexibility to address forest health and restoration needs" in the near- to medium-term. *Id.* at 4.

Pursuant to 16 U.S.C. § 6591a(b)(1), the Forest Service Chief designated 4.9 million acres in Montana on May 20, 2014. ER 22. Intervenors have strong interests in ensuring the Forest Service can use the Farm Bill CE on these 4.9 million acres. ISER 32, 38-41,47.

[2] Available electronically at http://dnrc.mt.gov/divisions/forestry/docs/assistance/forests-in-focus/forestservices.pdf.

D. The Moose Creek Project will address severe insect and disease infestation and risk.

The Moose Creek Project area falls within the landscape designated in 2014. The project is designed to maintain and restore the functions of a forested area that has been adversely affected by a number of insect and disease effects. ER 76. The district court recognized that "tree stands in the Project area are experiencing ongoing tree decline and mortality from insect activity." ER 4. The project will improve the health and vigor of live trees, recover value of dead and dying trees, and contribute to timber supply. ER 76. The project will also reduce fire risk in areas adjacent to the project and improve watershed conditions. *Id*. Both commercial and non-commercial forestry techniques will be used. ER 112, including 52 acres of aspen restoration, 45 acres of whitebark pine enhancement, and 2,024 acres of commercial harvest. ER 81.

The project treats part of the Wildland-Urban Interface identified in the County's Community Wildfire Protection Plan as an important area to treat for fire resilience and public safety. ISER 31. The forest management, both commercial and non-commercial, and prescribed burns, will help maintain and improve forest health and resilience which will improve growing conditions to help the forest combat insects, and disease and wildfire. The project area suffers from severe infestations of spruce budworm and mountain pine beetle. ISER 31, 45-46, 40. The County, MWPA members, and MLA members all participated in the

collaborative process with the Forest Service pursuant to 16 U.S.C. § 6591b(b)(C). ISER 39-40, 46-47, 32.

The project planning process began in early 2016 (two years after the landscape designation) and scoping began in September. ER 92. The Council filed scoping comments. At the conclusion of the collaborative process, the Forest Service issued its Decision Memorandum in late February 2017. The Council's Complaint was filed October 20, 2017. CR 1. The district court granted intervention to Meagher County and the trade associations on May 24, 2018. CR 22. It also granted the State of Montana leave to file an *amicus* brief. CR 19; ISER 1. The parties filed cross-motions for summary judgment, and the district court entered an order on November 19, 2018 granting the motions of the Forest Service and intervenors. ER 1-21.

V. SUMMARY OF ARGUMENT

The Farm Bill CE responded to an accelerating forest health crisis. Decades of fire suppression, combined with hotter temperatures and a lack of active management of the landscape, made the National Forests highly vulnerable to outbreaks of insects and disease. In turn, the forests have become a tinderbox, threatening outbreaks of catastrophic fire that can and will destroy habitat for sensitive species as well as impact watersheds, air quality, and local economies that depend on timber production.

The Moose Creek Project issue in this case is planned within one of the designated areas. The Council claims the Forest Service should be required to conduct a separate NEPA analysis of the speculative effects of the designation. This claim fails, foremost, because the Farm Bill did not give the Forest Service discretion, and NEPA does not apply to non-discretionary actions.

What is more, the Council's argument is not supported by statutory text or structure, either of the Farm Bill or NEPA. And imposing their proposed additional analysis would defeat the purpose of the legislation, which is to expedite NEPA compliance in the face of an emergency.

The Council's project-specific claims should also be rejected. Out of an abundance of caution, the Forest evaluated the Moose Creek Project to determine whether "extraordinary circumstances" exist under Forest Service regulations that would preclude use of a CE. ER 83-89; 36 C.F.R. § 220.6(b). It determined no such circumstances exist. While the analysis was correct, this Court should not reach the issue, as the statute does not require the Forest Service to apply its "extraordinary circumstances" regulation. The Court should not impose requirements in excess of those prescribed by Congress. Here, there is a specific statutory "checklist" that displaces any regulatory requirement.

To the extent the Court considers the extraordinary circumstances determination, the Forest Service's decision was neither arbitrary nor capricious.

The Forest Service also complied with the Farm Bill's requirements regarding old growth.

Accordingly, this Court should affirm the ruling of the district court.

VI. STANDARDS OF REVIEW

The arbitrary-and-capricious standard of review under the APA applies. *The Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008) (*en banc*); 5 U.S.C. § 706(2)(A). Under this standard of review, a court may not substitute its judgment for that of the agency. *McNair*, 537 F.3d at 987. Rather, an agency may only be reversed as arbitrary and capricious "if the agency relied on factors Congress did not intend it to consider, entirely failed to consider an important aspect of the problem, or offered an explanation that runs counter to the evidence before the agency or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Id.* (internal quotations omitted).

In *McNair*, the unanimous *en banc* panel held "the Forest Service acts arbitrarily and capriciously only when the record plainly demonstrates that the Forest Service made a clear error in judgment. . . ." *Id.* at 994. Courts must defer to the Forest Service's interpretation of its own regulations, as well as its interpretations of forest plans. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005). An agency's decision that a project qualifies for a CE will be upheld "so long as the application of the exclusion[] to the facts of

the particular action is not arbitrary and capricious." *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) (citation and quotation marks omitted).

As a general rule, in line with the APA standard of review, deference is owed to agencies' interpretations of NEPA. *Sylvester v. U.S. Army Corps of Eng'rs*, 884 F.2d 394, 399 (9th Cir. 1989). An "agency's threshold decision that certain activities are not subject to NEPA is reviewed for reasonableness. . . ." *California ex rel. Lockyer v. U.S. Dep't of Agric.*, 575 F.3d 999, 1011-12 (9th Cir. 2009) (citation and internal quotation marks omitted).

The district court decided the case on cross-motions for summary judgment, since a judgment on the administrative record "is a form of summary judgment." *Riddell v. Unum Life Ins. Co. of Am.*, 457 F.3d 861, 864 (8th Cir. 2006); *accord Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1108 (9th Cir. 2010). This Court reviews the summary-judgment decision de novo. *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601 (9th Cir. 2014). It also reviews decisions on standing de novo. *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004).

VII. ARGUMENT

A. Plaintiffs haven't met their burden to demonstrate standing.

The district court held that the Council adequately showed "use of the affected area" and that one of its members is a person "for whom the aesthetic and

recreational values of the area will be lessened by the challenged activity." ER 9 (quoting *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1149 (9th Cir. 2000)). The record demonstrates that the Council did not make an adequate showing, however, and the district court should have dismissed the case.

Specifically, the district court erred when it found that the Council had adequately demonstrated use of the affected area. The district court found, and the Council does not dispute, that no member of the plaintiff organizations has ever visited the project area. ER 9; SER 4 (stating "I have not been specifically in that portion of this mountain range."). The Council's declarant initially averred that she intended to visit the project area in July 2018. SER 4. In a "clarification" declaration she averred "concrete plans and a firm intention to visit the Project area in the summer of 2019 and in September of 2020." SER 12. Nothing in the record indicates whether the visit in July 2018 ever occurred.

The Council's declarant rejects the idea that a concrete interest in the project area is necessary. Instead the Council "view[s] national forests as a wholly integrated, living ecosystem[]" and claims an interest in the entire 5-million-acre portion of Montana that is designated eligible for use of the Farm Bill CE. SER 6. The Council thus claims its "aesthetic and recreational interest in the Lewis & Clark National Forest is not limited to any single area of the forest," and assert "it

is not sensible to attempt to separate our interest in Moose Creek from our interest in the national forest. . . ." *Id.*

But Article III requires such separation—a concrete and particularized showing of a plaintiff's interest in the particular area affected by the project separate from the forest as a whole. The evidence must identify a "particular" timber sale or other project that will impede a "specific and concrete plan … to enjoy the national forests." *Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009). A concrete interest requires "a geographic nexus between the individual asserting the claim and the location suffering an environmental impact." *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d at 485. A "geographic nexus" can be proven only by evidence that a plaintiff "will suffer harm as a result of their proximity to the area where the alleged environmental impact will occur." *Nuclear Info. & Res. Serv. v. Nuclear Regulatory Comm'n*, 457 F.3d 941, 952 (9th Cir. 2006).

When allegations relate to sites or areas that are remote or inaccessible, specific evidence that a plaintiff has used those sites and will return should be presented, because it is "not a case where it is reasonable to assume that the affiants will be using the sites on a regular basis." *Lujan*, 504 U.S. at 579 (Kennedy, J., concurring). In *Kraayenbrink*, this meant that plaintiffs had standing where they could identify specific grazing allotments that they had visited in the

past and were continuing to visit. 632 F.3d at 484-85. The allegations here are not concrete enough; instead they are analogous to vague claims in *Center for Biological Diversity v. Kempthorne*, No. C 06-07117 WHA, 2008 WL 205253, at *6 (N.D. Cal. Jan. 23, 2008), where the court found no standing for declarants who "indicate a desire to visit the relevant species' habitats and give general time frames (e.g., summer 2008 or July of 2009)."

The Council's vague allegations are little more than "some day" intentions. Coupled with the Council's express rejection of the requirement to show site-specific injury, this record shows no case or controversy. As the Supreme Court warned in *Summers*, "Accepting an intention to visit the national forests as adequate to confer standing to challenge any Government action affecting any portion of those forests would be tantamount to eliminating the requirement of concrete, particularized injury in fact." *Summers*, 555 U.S. at 496.

B. The landscape designation did not require NEPA procedures.

The Council asserts the Forest Service's May 2014 designation of eligible acres was required to undergo a separate NEPA analysis. Opening Br. 7-10. The district court found no NEPA procedures were required "because the nature and extent of future, individual projects under the Designation was speculative." ER

10 (citing *Native Ecosystems Council v. Erickson*, No. CV 17-53-M-DWM (D. Mont. Aug. 1, 2018)). [3]

The district court's judgment should be affirmed on two main grounds. First, because this was a designation at a State's request, the Forest Service had no discretion to undertake a NEPA evaluation. Second, as indicated by the court below, any on-the-ground effects were purely speculative at the time of the designation, so NEPA analysis would not be meaningful.

1. Designations pursuant to State request are not discretionary and cannot be subject to NEPA.

Moose Creek occurs within a Farm Bill landscape designated pursuant to the State's request under 16 U.S.C. § 6591a(b)(1). That section says the Secretary "shall, if requested by the Governor of the State," designate areas for treatment under the Farm Bill CE. *Id.* It sets a deadline of 60 days after February 7, 2014 (the effective date of the Farm Bill) for the Secretary to make the designation. *Id.* The use of "shall" means the Secretary has a mandatory duty to make the designation. *United Cook Inlet Drift Ass'n v. Nat'l Marine Fisheries Serv.*, 837 F.3d 1055, 1064 (9th Cir. 2016); *accord SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018).

[3] Similar issues are presently before the Court in *Center for Biological Diversity v. Ilano*, No. 17-16760, *argued and submitted*, December 18, 2018, and in the appeal of *Erickson*, No. 18-35687.

NEPA procedures do not apply to non-discretionary agency actions, as "an agency cannot be considered the legal 'cause' of an action that it has no statutory discretion *not* to take. …" *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 667-68 (2007); *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 769 (2004). Thus, this Court has long "excus[ed] nondiscretionary agency action or agency 'inaction' from the operation of NEPA." *Sierra Club v. Babbitt*, 65 F.3d 1502, 1512 (9th Cir. 1995); *cf. Citizens Against Rails-to-Trails v. Surface Transp. Bd.*, 267 F.3d 1144, 1151 (D.C. Cir. 2001) (holding "[t]he touchstone of whether NEPA applies is discretion"). It would make no sense to require NEPA procedures "for an action by a federal agency which is non-discretionary in character and to which no viable options or alternatives exist." *Wilderness Soc'y v. Robertson*, 824 F.Supp. 947, 953 (D. Mont. 1993). NEPA operates to require "consideration of environmental factors in the course of agency decisionmaking on major federal actions." *Oregon Nat. Desert Ass'n*, 625 F.3d at 1099. But where there is no discretion, there is no decision to make and no process to apply.

Sierra Club is instructive here. In 1962, the Bureau of Land Management (BLM) entered into a reciprocal right-of-way agreement with a neighboring landowner, under which the landowner could construct a road across BLM land with only three substantive limitations. *Sierra Club*, 65 F.3d at 1505-06. The Court rejected application of the Endangered Species Act and NEPA because of

the BLM's lack of discretion to interpose those statutes' procedures. The Court noted that "[b]oth of the statutes' procedural requirements are triggered by a discretionary federal action. If anything, case law is more forceful in excusing nondiscretionary agency action or agency 'inaction' from the operation of NEPA." *Id.* at 1512. The Court held "we see no benefit from NEPA compliance where the BLM's ability to modify or halt [the] project is limited to the three conditions allowed by the right-of-way agreement." *Id.* Similarly, the Forest Service Chief's discretion extends, at most, to the three requirements set forth in 16 U.S.C. § 6591a.

The Court reached a similar conclusion in *Alaska Wilderness League v. Jewell*, 788 F.3d 1212 (9th Cir. 2015), finding NEPA could not be required where the agency's discretion was restricted to determining whether a statutory "checklist" had been met. *Id.* at 1226. There is no discretion in this landscape designation on which NEPA can operate. As in *Jewell*, "[t]his does not mean that NEPA review is entirely absent." *See id.* In *Jewell*, NEPA review would occur at the exploration-plan stage. *Id.* Here, the statutory CE provides for project-specific preparation, collaboration, and environmental review. 16 U.S.C. § 6591b.

The Council concedes here, as it did below, that 16 U.S.C. § 6591a(b)(1) is generally non-discretionary, such that no NEPA procedures could be required.

Opening Br. 2; CR 12 at 4.[4] The Council maintains, however, that since the May 20 designation was past the 60-day period for designations under subsection (b)(1), that discretion is restored. Opening Br. at 2-3. This argument misses the mark.

The Forest Service's failure to make the deadline does not change the mandatory nature of its duty. This Court clarified, in S*aratoga Savings and Loan Ass'n v. Federal Home Loan Bank Bd.,* 879 F.2d 689 (9th Cir. 1989), that failure to meet a deadline doesn't relieve an agency of its duty to act. In such cases, "[t]he proper remedy … is a suit under 5 U.S.C. § 706(1) to compel agency action." *Id.* at 694 (citing *Brock*, 476 U.S. at 260 n.7). A suit may be maintained under 5 U.S.C. § 706(1) only for actions "unlawfully withheld," *id.*, that is, actions the agency is "*required to take*." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). A court may accordingly "compel the agency to act" if the agency "is compelled by law to act within a certain time period." *Id.* So, the agency continues to be required to take actions—and to lack discretion—after the passage of the deadline.

[4] Though it cites to *Public Citizen*, the Forest Service does not address whether its duties under section 6591a(b)(1) are non-discretionary. Govt. Br. at 17. Though the government may be understandably reluctant to assume a mandatory duty when alternative arguments are available to it, this does not vitiate the effect of the statute's plain text.

The only discretion arguably available regarding a State-requested landscape designation is the Forest Service's verification that the landscape meets one of the three criteria in 16 U.S.C. § 6591a(c): that the area is experiencing decline of forest health, is at substantial risk of tree mortality over the next 15 years, or the area is one where hazard trees pose an imminent risk to the public. *Id.* Reviewing the State's designations, the Chief of the Forest Service found 4.9 million (96%) of the 5.1 million acres requested met one of these thresholds. ER 22. The Chief was required to designate at least those 4.9 million acres. This lack of discretion means that NEPA cannot apply to the designation.

2. No NEPA procedures are required for a landscape designation which is designed to facilitate expedited NEPA compliance, and which has no on-the-ground effects.

A Farm Bill landscape designation, whether discretionary or not, does not require a separate and duplicative NEPA analysis. This conclusion is compelled by statutory text, structure, and intent.

a. The statutory text and structure preclude imposing additional NEPA analysis.

Throughout HFRA, Congress is specific about what kind of NEPA analysis is to be required. For Farm Bill projects like Moose Creek, a statutory CE may be used. 16 U.S.C. § 6591b(a)(1). For certain applied silvicultural assessments and treatments, a statutory CE may be used "subject to the [Forest Service's] extraordinary circumstances procedures." 16 U.S.C. § 6554(d)(2)(B). Projects for

wildfire resilience or mule deer/sage-grouse habitat may also use a CE subject to agency extraordinary circumstances procedures. 16 U.S.C. §§ 6591d(c)(4), 6591e(b)(2)(B), (C). And for authorized fuels reduction projects not subject to the Farm Bill CE, the Forest Service "shall prepare an environmental assessment or an environmental impact statement." 16 U.S.C. § 6514(b). The Farm Bill subjects designations to only the three requirements explicitly enumerated in section 6591a(c).

Section 6591a should not be read to add NEPA procedures to the three requirements for landscape designation. In such instances, courts are directed "neither to add [to] nor to subtract[]" from a statute. *Ariz. State Bd. for Charter Sch. v. U.S. Dep't of Educ.,* 464 F.3d 1003, 1007 (9th Cir. 2006). "Courts may not impose 'procedural requirements not explicitly enumerated in the pertinent statutes.'" *Earth Island Inst. v. Carlton*, 626 F.3d 462, 472 (9th Cir. 2010) (quoting *McNair*, 537 F.3d at 993). A requirement for additional NEPA procedures should not be imposed where the statute has left no gap to fill.

b. Additional NEPA procedures would frustrate Congressional intent.

The purpose of the Farm Bill was to move quickly to respond to "the speed and widespread impact" of insect infestations. H.R. Rep. 113-333, *Conference Report to Accompany H.R. 2642*, at 512 (Jan. 27, 2014). The statute, as described by the conference committee, "recognize[d] the current system. . . has not been

responsive to the speed and widespread impact of the infestations." *Id.* (emphasis added). The legislation is aimed at "priority projects . . . to reduce the risk or extent of, or increase the resilience to, insect or disease infestation." *Id.* Congress thus acted to accelerate action both in response to problems stemming from forest health and from problems with "the current system." Requiring NEPA analysis at the designation stage would "resurrect the very problems that Congress sought to eliminate" by passing the Farm Bill. *Ilano*, 261 F.Supp.3d at 1067 (quoting *Cal. Save Our Streams Council, Inc. v. Yeutter*, 887 F.2d 908, 912 (9th Cir. 1989)). Thus it "is implausible that Congress would involuntarily create a glaring loophole that would undermine the efficacy of the expedited process it adopted." *Id.*

Assuming, for sake of argument, that an EA or an EIS would be required before any project could use a Farm Bill CE within the area, project implementation across a wide swath of land would be delayed, potentially for years. The special authorities in the Farm Bill initially applied to projects initiated prior to September 30, 2018, 16 U.S.C. § 6591a(d)(2), 128 Stat. at 916, which has now been extended with the 2018 Farm Bill reauthorization, 132 Stat. at 4847. The Forest Service's authority to designate landscapes commenced in April 2014. Id. § 6591a(b)(2). There is no reason to suspect that Congress intended to undermine this sunsetting authority as the Council suggests.

Merrell v. Thomas, 807 F.2d 776 (9th Cir. 1986), is analogous to this case, in that some of the provisions at issue were enacted to "respond[] to a crisis: the registration process had 'come to a virtual halt' because of litigation spawned by the data compensation and trade secret provisions of the 1972 amendments." *Id.* at 779. The Court found to apply NEPA to FIFRA's registration process "would sabotage the delicate machinery that Congress designed to register new pesticides. It would increase a regulatory burden that Congress intentionally lightened in 1978 and create new opportunities for litigation where litigation was recently quelled." *Id.* The Council's claims would operate similarly, creating more procedures from a statute intended to expedite and streamline those same procedures. Congress did not intend such a perverse outcome.

c. Landscape designations are not sufficiently concrete to be considered a proposal or action requiring NEPA analysis.

NEPA only applies at the stage that a proposal for an action has been developed and its effects can be meaningfully evaluated. 40 C.F.R. § 1508.23; *Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.20 (1976) (noting that NEPA applies once "contemplated actions later reach the stage of actual proposals"). The regulation defines a "proposal" as "that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision

on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated." 40 C.F.R. § 1508.23.

A landscape designation does not qualify as a "proposal" subject to NEPA. Designation does not compel or prohibit any action. There are no "effects" to analyze under NEPA because there are no changes to the environment that are actually caused or directed by the designation.

A "'but for' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA and the relevant regulations." *Public Citizen*, 541 U.S. at 767. Instead, NEPA requires "'a reasonably close causal relationship' between the environmental effect and the alleged cause." *Id.* (quoting *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983)). The Supreme Court has instructed courts to "'look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.'" *Id.* (quoting *Metropolitan Edison*, 460 U.S. at 774 n.7). Here, Congress and the agency have drawn an easily manageable line by directing NEPA compliance on priority projects at the project scale, a line this Court should adopt.

The Council relies on *California Wilderness Coalition v. U.S. Department of Energy*, 631 F.3d 1072 (9th Cir. 2011), which held NEPA analysis was required for the decision of where to place transmission corridors that could be approved by

the Federal Energy Regulatory Commission under the Energy Policy Act of 2005. *Id.* at 1100; Opening Br. 10. *California Wilderness* is fundamentally inapposite. In *California Wilderness*, the energy corridor designations were final agency actions, which "create new federal rights, including the power of eminent domain, that are intended to, and do, curtail rights traditionally held by the states and local governments." *California Wilderness*, 631 F.3d at 1101. A Farm Bill area designation is not a final agency action. There are no rights created by the designations. The eventual projects are subject to substantive restrictions as well as collaboration requirements to ensure public involvement. 16 U.S.C. §§ 6591b(b), (c), (f).

An agency action which is not "final agency action" will not be considered a "major federal action" subject to NEPA. *Northcoast Envtl. Ctr. v. Glickman,* 136 F.3d 660, 668 (9th Cir. 1998). To constitute final agency action, an act must "mark the 'consummation' of the agency's decisionmaking process" and be one by which "rights or obligations have been determined or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citation and quotation marks omitted). The landscape designation is not the consummation of the agency's decision process. Whether, when and how further projects will be implemented is completely speculative. Nor have any rights been affected by the

designation itself. It merely allows the Forest Service to further evaluate these landscape areas for potential treatments.

This is a far cry from the energy corridor designations in *California Wilderness*, which "create new federal rights, including the power of eminent domain, that are intended to, and do, curtail rights traditionally held by the states and local governments." *Id.* at 1101. The landscape designation is merely a step in a process that may or may not result in eventual treatment somewhere within the 4.9 million designated acres.

In a memorandum or "white paper," the Chief of the Forest Service affirmed that even discretionary designations did not qualify as a "proposal" subject to NEPA. ISER 19.[5] Designations are "without regard to future projects, if any, that may take place in a land-scape scale area." *Id.* at 1. "[D]esignation does not compel or prohibit any action." *Id.* at 2. Thus, it is distinguishable from a Forest Plan which "establish[es] management goals through standards and guidelines, and as a result ha[s] effects that can be meaningfully evaluate[d]." *Id.* at 2. Since the landscape designation does not have concrete effects that can be evaluated in isolation from a specific project, it is not subject to NEPA procedures.

[5] This document was also included in the excerpts of record in *Center for Biological Diversity v. Ilano*, No. 17-16760, Dkt. 17-2 at 115-16 (Jan. 5, 2018), Excerpts of Record at 123-24, and cited by the Forest Service's brief at 21 n.2.

C. The Forest Service did not err in applying the Farm Bill CE to Moose Creek.

1. The project complies with the Farm Bill's direction on old growth.

To qualify for the Farm Bill CE, a project should "maximize[] the retention of old-growth and large trees, as appropriate for the forest type, to the extent that the trees promote stands that are resilient to insects and disease." 16 U.S.C. § 6591b(b)(1)(A). Based on the administrative record, the Forest Service concluded the project met this requirement. ER 94. This finds support in the project old growth report, which states the Forest surveyed the project area for all old growth and potential old growth. ER 121. All old growth is being preserved in the project area, even where it occurs in units of less than 20 acres, which is the Forest Plan standard for old growth retention. The project "will not be affecting any old growth." ER 121-22. The Forest found the project in compliance with the Forest Plan standard for old growth. SER 75. The Forest's "proposed activity unit boundaries were redrawn on multiple occasions specifically to avoid diminishing the OG [old growth] resource." ER 122. The pre-project surveys, which included every unit with proposed management, were comprehensive. The agency's expert foresters concluded "In short, we may not know where every 20+ acre tract of OG is within the project area boundary, but we certainly know where it isn't." *Id.*

The project complies with the governing Forest Plan, which is incorporated into the Farm Bill CE by 16 U.S.C. § 6591b(e). The Forest Plan is one of the best sources for determining whether an activity is appropriate to the forest type, so the project's compliance with the Forest Plan is another indication it meets the old growth requirement. The district court agreed that the old growth requirements were met. ER 15-16. It noted that whether a stand is old growth depends on the "size, number, and age of trees within a grouping," and the Forest Service found the "appropriate for the forest type" language was only met it certain circumstances. ER 16. The district court appropriately deferred to the Forest Service on this point.

The Council acknowledged below that the Forest Service's analysis is "conducive of full and fair disclosure on the issue of old growth[.]" CR 36 at 14. It maintains, however, that Moose Creek does not comply with the Farm Bill because project Unit 7, they speculate, will involve removal of old growth. The Council offers its own interpretation of documents, maps and photographs found in the record. Such speculation may not overcome the deference given to "agency's interpretation of complex scientific data." *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1150 (9th Cir. 2007).

Moreover, the record refutes the Council's contentions. In unit 7, the record shows that an area within the unit was identified as old growth, and "therefore this

14 acre piece plus a 1.6 acre [adjacent] piece … will be reserved for old growth." ER 122. The forest also reserved two additional parcels of 8.7 and 6.8 acres in the unit. *Id.* It noted "[o]ther patches of OG in this unit are isolated and less than 10 acres." This analysis supersedes the entomology report on which the Council relies. And in any case, the entomology report reflects "significant" dwarf mistletoe in unit 7 and notes that regeneration harvest is an appropriate treatment for stands with widespread dwarf mistletoe infestation. ER 66, 70.

The project thus maximizes retention of old growth and mature trees "as appropriate for the forest type" and "to the extent that the trees promote stands that are resilient to insects and disease." 16 U.S.C. § 6591b(b)(1)(A). The Forest Service found that the mountain pine beetle "has dramatically reduced the extent of lodgepole pine OG in the Moose Creek Vegetation project area, particularly since the beetle attacks primarily the largest diameter trees in an outbreak area." ER 122. Some of the stands are now "many decades, perhaps centuries from recruiting into OG status again." *Id.* "The current capacity of this project area to recruit and retain abundant and high quality old growth is strongly limited." *Id.* Thus, the Forest, as shown in the record, "took great care to avoid proposing activities that might diminish the existing OG resource in the Moose Creek Vegetation project area." *Id.*

2. No "extraordinary circumstances" analysis was required.

In applying the CE to the project, the Forest Service precautionarily applied its "extraordinary circumstances" regulation, 36 C.F.R. § 220.6. ER 83-89. Because 16 U.S.C. § 6591b does not require such analysis, the Forest Service only needed to ensure the project complied with the specific requirements for using the CE, which include the area limitation, use of a collaborative process, public notice and scoping, Forest Plan consistency, and limitations on road construction. 16 U.S.C. §§ 6591b(b), (c), (d), (e), (f); ER 92-94.

The Council maintains that an extraordinary circumstances analysis is required in order to use the Farm Bill CE. Opening Br. 20-22. It assumes that by using the term "categorial exclusion," Congress incorporated the extraordinary circumstances requirement as part of the cluster of ideas that come with a CE. *Id.* The Council is wrong.

The use of the term "categorical exclusion" does not carry with it an "extraordinary circumstances" requirement. The NEPA rule, 40 C.F.R. § 1508.4, on which the Council relies, Opening Br. 21, applies to standards for agency regulations, not to whether extraordinary circumstances apply to particular actions: "Any procedures *under this section* shall provide for extraordinary circumstances . . . ." *Id.* (emphasis added). The Forest Service's regulations do so provide. 36 C.F.R. § 220.6. The Forest Service regulations also provide that

actions, like those under the Farm Bill, that are *statutorily* exempt, are not subject to NEPA procedures. 36 C.F.R. § 220.4(a)(4).

The Farm Bill's inclusion of scoping among the prerequisites for using the CE, 16 U.S.C. § 6591b(f) does not include extraordinary circumstances review. Scoping is an extremely broad concept; it is defined as an "early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action." 40 C.F.R. § 1501.7. Forest Service regulations apply scoping to "all Forest Service proposed actions. . . ." 36 C.F.R. § 220.4(e)(1). "Because the nature and complexity of a proposed action determine the scope and intensity of analysis, no single scoping technique is required or prescribed." 36 C.F.R. § 220.4(e)(2). Thus, the inclusion of scoping says nothing about what NEPA process is appropriate for a Farm Bill CE project.

For the Farm Bill CE, scoping gives the public an opportunity to participate in development and selection of projects. 16 U.S.C. § 6591b(f). This fulfills the chief purpose of scoping, which is to "[i]nvite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds)." 40 C.F.R. § 1501.7(a)(1). Here, the Forest Service used the scoping process to invite such participation and comment. ER 46-47, ISER 50. The agency also reached out directly to the Council to request input.

ISER 49. It received substantial input from the public. ISER 52-56. Meagher County, for example, advised the Forest Service to work with private landowners and to prioritize treatment of areas where residential structures might be at risk. ISER 59-60. The author of the County's Community Wildfire Protection Plan also gave input on how best to follow the plan. ISER 57. The Council had ample opportunity to participate, and they did by submitting voluminous comments. ISER 61-124; ER 50-62. The ultimate decision incorporated the public input acquired during scoping. ER 82-83.

As the Council points out, scoping can be a means to obtain information pertinent to an extraordinary circumstances analysis. But there is nothing about scoping that requires such an analysis be conducted. Congress chose certain elements of the NEPA framework to include in the Farm Bill CE, including scoping, limitations on road construction, and consistency with forest plans. 16 U.S.C. §§ 6591b(b), (c), (e), (f). Adding extraordinary circumstances would undo Congress' precise construction of the statute. And the new CE in 16 U.S.C. § 6591d, two sections away, essentially copies the Farm Bill CE but also adds an extraordinary circumstances requirement. 16 U.S.C. § 6591d(c)(4). This action would be meaningless if section 6591b already required extraordinary circumstances review.

3. Recent enactments confirm the Farm Bill CE does not include a requirement to examine "extraordinary circumstances."

Strikingly, two sections of the same chapter, included in the 2018 Consolidated Appropriations Act and 2018 Farm Bill, add the extraordinary circumstances requirement not included in section 6591b. The wildfire resilience CE, 16 U.S.C. § 6591d, is a virtual carbon copy of the Farm Bill CE. It is even limited to areas that were designated under the Farm Bill as of March 2018. 16 U.S.C. § 6591d(c)(2)(C). But it adds an extraordinary circumstances analysis requirement. 16 U.S.C. § 6591d(c)(4). Similarly, Congress has directed the Forest Service to develop a sage-grouse and mule deer habitat CE and include an extraordinary circumstances analysis requirement. 16 U.S.C. § 6591e(b)(2)(B). Twice in 2018, Congress added an extraordinary circumstances requirement against the background of cases such as this one, while declining to add it to the Farm Bill. The Council's reading, therefore, would render 16 U.S.C. § 6591d(c)(4) and 16 U.S.C. § 6591e(b)(2)(B) to be surplusage.

"[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks omitted; brackets in original). For example, this Court reached an analogous

conclusion in construing the Fair Credit Reporting Act (FCRA). "That other FCRA provisions mandating disclosure omit the term 'solely,'" the Court held, "is further evidence that Congress intended that term to carry meaning in 15 U.S.C. § 1681b(b)(2)(A)(i)." *Syed v. M-I, LLC*, 853 F.3d 492, 501 (9th Cir. 2018). *Syed* reiterated that "[i]t is our duty to give effect, if possible, to every clause and word of a statute." *Id.* (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). As the defendants in *Syed*, GHCC's interpretation fails to give effect to the wildlife and mule deer CE provisions, thus "violating the precept that 'statutes should not be construed to make surplusage of any provision.'" *Id.* (quoting *Wilshire Westwood Assocs. v. Atl. Richfield Corp.*, 881 F.2d 801, 804 (9th Cir. 1989)).

Further, Congress is presumed to be aware of the legal context in which it legislates. *Abrego v. Dow Chem. Co.*, 443 F.3d 676, 683-84 (9th Cir. 2006). Given the emphasis on speed in the legislation, and the Ninth Circuit's recognition of the importance of the "efficiencies that the abbreviated categorical exclusion process provides," *Ctr. for Biological Diversity v. Salazar*, 706 F.3d 1085, 1097 (9th Cir. 2013), it is appropriate to hold that Congress did not intend the Farm Bill CE to be subject to extraordinary circumstances review.

The Ninth Circuit has acknowledged that Congress is free to replace NEPA procedures for certain actions or classes of actions. *Apache Survival Coal. v.*

United States, 21 F.3d 895, 904 (9th Cir. 1994). Moreover, the Forest Service has by regulation, 36 C.F.R. § 220.4(a)(4), declared that NEPA procedures do not apply to actions subject to a statutory exemption. This is a reasonable interpretation of a statutory scheme entitled to *Chevron* deference.

4. The Forest Service rationally concluded no extraordinary circumstances were present.

In an abundance of caution, the Forest Service analyzed whether extraordinary circumstances existed and rationally concluded no such circumstances existed. ER 83-89. The Forest Service's conclusion was appropriate in light of minimal effects on threatened and endangered, sensitive, and other species, as well as a lack of other sensitive areas. *Id.*

The Council asserts that cumulative effects on snag-dependent species constitute extraordinary circumstances. Opening Br. 24. The agency found "more than enough snags" in the project area and included design features responsive to need for snags. SER 70. The snag report found the project area would still meet Forest Plan snag standards after implementation. SER 16. And the project record indicates cumulative effects of past, present, and future actions were considered to the full extent that could be required. SER 124. "An agency … may satisfy NEPA by aggregating the cumulative effects of past projects into an environmental baseline, against which the incremental impact of a proposed project is measured." *Cascadia Wildlands v. Bureau of Indian Affairs*, 801 F.3d

1105, 1111 (9th Cir. 2015).

The Council's claim has a legal flaw as well, since the Forest Service's extraordinary circumstances regulation does not require consideration of cumulative effects. 36 C.F.R. § 220.6(b). This makes sense because a CE identifies a "category of actions which do not individually *or cumulatively* have a significant effect on the human environment." 40 C.F.R. § 1508.4 (emphasis added); *cf. Sierra Club v. Bosworth*, 510 F.3d 1016, 1025 (9th Cir. 2007) (declining to require EA or EIS for promulgation of regulatory CE because "a categorical exclusion is by definition not a major federal action"). The Farm Bill CE is a statutory CE, so the regulations do not generally apply. But in the special case pursued by the Council, which seeks to add other parts of section 1508.4 to the statutory text, the definition would have to carry through as well. The Council cannot pick and choose.

This Court does not uniformly require even an EA to consider cumulative impacts. *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir. 2002) ("We have held that an EA *may* be deficient if it fails to include a cumulative impact analysis or to tier to an EIS that has conducted such an analysis") (emphasis added). Thus, imposing a requirement to analyze cumulative effects on a CE would be inconsistent with Circuit precedent.

VIII. CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted this 13th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that for Case No. 18-36067, I electronically filed the foregoing Defendant-Intervenor-Appellees' Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF on May 13, 2019. I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

DATED this 13th day of May, 2019.

/s/ Lawson E. Fite, Ore. Bar #055573
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CERTIFICATION OF COMPLIANCE PURSUANT TO FED. R. APP. 27(d) FOR CASE NUMBER 18-36067

I certify that, pursuant to Fed. R. App. P. 32(a)(7), the attached Defendant-Intervenor-Appellee's Answering Brief is 9,605 words and complies with the length limitation of the rule.

DATED this 13th day of May, 2019.

/s/ Lawson E. Fite, Ore. Bar #055573
Attorney for Defendant-Intervenor-Appellee

STATEMENT OF RELATED CASES

This case is related to the following cases, which address the use of the Farm Bill CE and designations of landscapes under the statute.

1. *Center for Biological Diversity v. Ilano*, 9th Cir. No. 17-16760 (argued and submitted Dec. 18, 2018);
2. *Greater Hells Canyon Council v. Stein*, 9th Cir. No. 18-35742; and
3. *Native Ecosystems Council v. Erickson*, 9th Cir. No. 18-35687.

DATED this 13th day of May, 2019.

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