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**UNITED STATES DISTRICT COURT**  
**DISTRICT OF OREGON**  
**PORTLAND DIVISION**

**BARK, CASCADIA WILDLANDS, OREGON  
WILD; and WILDEARTH GUARDIANS,**

Plaintiffs,

vs.

**U.S. FOREST SERVICE**, a federal agency,

Defendant,

and

**HIGH CASCADE, INC.**, a Washington  
Corporation.

Defendant-Intervenor.

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Civil No. 3:18-cv-01645-MO

**DEFENDANT-INTERVENOR'S  
SUPPLEMENTAL BRIEF**

Following oral argument on the parties' motions for summary judgment, the Court requested the parties' response to the following question: "Is an EIS required if one objective of an agency action is highly controversial but the action is justified by separate objectives that are not controversial?"

The answer is no for three reasons. First, the objectives of the project are not determinative of whether an EIS is required—the question is whether the nature, size, or effect of the project is a subject of scientific controversy. Second, this is not the unusual case where one factor could require an EIS. Third, the effects of the project are not highly controversial.

An EIS is required for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). The appropriate inquiry is whether a project's *effects* are significant, which depends on an evaluation of the proposed action's context and its intensity. 40 C.F.R. § 1508.27. As relevant to the Court's inquiry, the regulation identifies ten factors for evaluating intensity, one of which is "[t]he degree to which the *effects* on the quality of the human environment are likely to be *highly controversial*." 40 C.F.R. § 1508.27(b)(4) (emphasis added). Thus, the question under NEPA is whether the project's effects on the environment are highly controversial, not whether project objectives are highly controversial.

Plaintiffs have not challenged any purpose and need (or objective) of the project. Whether the purposes and needs for the CCR Project are arbitrary and capricious is not at issue in this case. And an agency "has considerable discretion to define a project's purpose and need." *Wild Wilderness v. Allen*, 12 F.Supp.3d 1309, 1326 (D. Or. 2014) (Coffin, J.), *aff'd*, 871 F.3d 719 (9th Cir. 2017). Thus, there is no dispute as to the reasonableness of the project's objectives.

To determine whether the effects of the CCR Project are highly controversial, the Court must evaluate whether "a substantial dispute exists as to the size, nature, or effect of the major

Federal action rather than the existence of opposition to a use.” *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1057 (9th Cir. 2010) (internal quotation marks omitted). A substantial dispute exists only if “evidence . . . casts serious doubt upon the reasonableness of an agency’s conclusions.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 736 (9th Cir. 2001). Controversy is just one of the ten intensity factors. Although the Ninth Circuit has indicated that one factor “may be sufficient to require preparation of an EIS,” such requirement only applies “in appropriate circumstances,” so it should not be considered the ordinary course. *Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108, 1125 (9th Cir. 2004), *opinion amended and superseded*, 402 F.3d 846 (9th Cir. 2005). There is no authority for finding a project may have significant overall effects if none of the individual factors rises to significance on its own. To the contrary, courts have rejected categorical rules in evaluating the reasonableness of a decision not to prepare an EIS. *See Nat’l Audubon Soc., Inc. v. U.S. Fish & Wildlife Serv.*, 55 F.Supp.3d 316, 363 (E.D.N.Y. 2014) (collecting cases).

Plaintiffs allege that “a substantial dispute exists over the nature and effect of the CCR Project as it relates to using commercial logging to purportedly reduce future fire severity *in largely undisturbed and late-successional forests*, particularly those in forests that have not departed from their natural range of variability.” Pls.’ Mot. for Summ. J. at 10 (emphasis added). At oral argument, plaintiffs argued that the effects of variable density thinning in *non-plantation* stands versus *plantation* stands are highly controversial. There is no basis in the record or science to distinguish between variable density thinning (or thinning from below) in non-plantation versus plantation stands. *See* AR 19269-329; AR 19371-74; AR 19375-83; AR 19390-99; AR 20139-59; Pls.’ Ex. A at 56-57 (ECF No. 18-1). Instead, this distinction is based solely on what treatments plaintiffs do or do not oppose. Such mere “opposition to a use” does

not “render an action controversial.” *WildEarth Guardians v. Provencio*, 918 F.3d 620, 637 (9th Cir. 2019) (citation and quotation marks omitted).

The material relied on by plaintiffs generally challenges the efficacy of using commercial logging to reduce wildfire risk and improve forest resiliency to wildfire. AR 19269-329 (*Fire Probability, Fuels Treatment Effectiveness and Ecological Tradeoffs in Western U.S. Public Forests*); AR 19371-74 (*The Ecological Importance of Mixed-Severity Fires: Nature’s Phoenix*); AR 19375-83 (*Severity of an uncharacteristically large wildfire, the Rim Fire, in forests with relatively restored frequent fire regimes*); AR 19390-99 (*Adapt to more wildfire in western North American forests as climate changes*); AR 20139-59 (*Everything you wanted to know about wildland fires in forests but were afraid to ask: lessons learned, ways forward*). Much of this material lacks credibility as it consists of opinion pieces described as “science.”

The Forest Service explained why there is not a high level of controversy about the nature, size, or effects of the action. The DN/FONSI noted “the science behind thinning and other vegetation management techniques is not highly controversial based on . . . a thorough review of relevant scientific information” and “[t]he effects analyses discussed in [the EA] are based on sound scientific research and previous experience implementing thinning and fuel treatment projects across the Forest.” AR 21078.

Although plaintiffs have opposed thinning in “older” or “mature” stands for fire reduction purposes, they have not alleged that a scientific dispute exists over whether the treatments will increase the overall health of the forest, nor do they dispute the nature and effect of strategic fuels treatments as it relates to increasing suppression effectiveness by firefighters. For moist mixed-conifer stands, strategic fuels treatments are designed to “create defensible space for fire fighters,” in addition to reducing the risk of mortality from insects and disease infestations. AR

21731, 20795, 20785, 21070, 20172 (“I feel it is prudent to take action now to minimize the risk to fire-suppression forces”). These aspects of the project are sufficient on their own to establish a lack of controversy, and sufficient to deny plaintiffs’ claim that an EIS is required.

The Forest Service identified and explained the robust scientific information it had relied on in support of the conclusion that thinning in the treatment units would reduce the risk of high-intensity wildfire. The agency first noted that it relied on the FlamMap (Finney et. al, 2015) to determine “the potential characteristics of fire behavior for the project area pre- and posttreatment,” using a dataset that included information on elevation, slope aspect, fuel model, canopy cover, canopy height, canopy base height, and canopy bulk density within the landscape area. AR 21022; AR 18633 (Fuels Report discussing FlamMap). The Forest Service pointed to scientific studies by Agee and others (1996 and 2005), which determined that “canopy base height of a stand is an important factor in initiation of crown fire” and “canopy bulk density of stands is a primary influence for the ability of the stand to carry fire within the canopy.” AR 21022. In addition, the Fuels Report found that “Agee and others (2005) identified flame lengths approximately half the [canopy base height] may induce passive crown fire or torching. [Canopy base density] primarily acts as a carrier once a fire has entered the crown. While a wind or slope must be present to sustain the active canopy fire, *sufficient fuels must also be available.*” AR 18640 (emphasis added). Based on the science related to fuels reduction and fire behavior, and model outputs, the Forest Service concluded that “[s]ilvicultural treatments would increase the base height and reduce the canopy bulk density of the stand through removal of trees; thereby reducing the potential for crown fire.” AR 21022; AR 20285 (“In using FlamMap, a widely used program by federal land management agencies,” EA reviewed “crown fire, flame length, fire line intensity, and rate of spread . . . characteristics of fire behavior”).

When deciding whether to require an EIS, it is “pertinent that this is not a case in which the defendant is conducting a new type of activity with completely unknown effects on the environment.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23 (2008). Here, the Forest Service is employing the well-understood variable density thinning prescription, which allows for “flexible local density levels to achieve overall treatment objectives.” AR 20792. Thinning treatments have long been anticipated by management direction on the Forest, as the White River LSR Assessment’s silvicultural direction anticipates thinning to improve stand resiliency to fire. AR 04887-90; Int. MSJ at 25-29 (ECF No. 30).

The proposed action indicates that it will apply a thinning from below approach, focusing on “leaving the most vigorous, healthiest trees, and favoring shade-intolerant, more fire-tolerant species.” AR 20835 (citing Perry 2004). The prediction on effects of forest thinning is supported by the findings in the fuels specialist report. AR 18631-64. In addition, “[p]revious experience implementing thinning and fuels treatment projects across the Forest validates the results” of reducing high-intensity wildfires. AR 20302. For example, the Forest Service acknowledged that the pronounced reduction of rate of speed of fire in units is “evidence from two fires that have occurred in similar dry plant communities in the Billy Bob Fuels Reduction project area . . . and which thinning, mastication, and underburn[ing] treatments [were] completed.” AR 20848; *see also* AR 20291. Thus, the Forest Service combined modeling and literature with real-world experience and monitoring.

Plaintiffs have not established that the size, nature, or effects of the CCR Project may be highly controversial, and even if they had, this is not the unusual case where an EIS may be required based on one of ten separate factors. Accordingly, the Court should deny plaintiffs’ motion for summary judgment and grant the cross-motions of Defendant and Intervenor.

Dated this 1st day of May, 2019.

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**CERTIFICATE OF SERVICE**

I, Sara Ghafouri, hereby certify that I, on May 1, 2019, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated this 1st day of May, 2019.

/s/ Sara Ghafouri  
Sara Ghafouri