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UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

EUGENE DIVISION

CASCADIA WILDLANDS, and **OREGON WILD**,

Plaintiffs,

vs.

BUREAU OF LAND MANAGEMENT, a federal agency,

Defendant,

and

SENECA SAWMILL COMPANY, an Oregon Corporation.

Defendant-Intervenor.

Civil No. 6:19-cv-00247-MC

DEFENDANT-INTERVENOR'S MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION TO PLAINTIFFS' MOTION (Dkt. 16)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

ACRONYMS

APA – Administraive Procedure Act

ASQ – Allowable Sale Quantity

BLM – Bureau of Land Management

DR – Decision Record

ERMA – Extensive Recreation Management Area

EA – Environmental Assessment

FEIS – Final Environmental Impact Statement

FLPMA – Federal Land Policy & Management Act

FONSI – Finding of No Significant Impact

HLB – Harvest Land Base

IBLA – Interior Board of Land Appeals

IDT – Interdisciplinary Team

MITA – Moderate Intensity Timber Area

MMBF – Million Board Feet

NEPA – National Environmental Policy Act

RMP – Resource Management Plan

RMZ – Recreation Management Zone

ROD – Record of Decision

SRMA – Special Recreation Management Area

SYU – Sustained Yield Unit

WPRD – Willamalane Park and Recreation District

CERTIFICATE OF COMPLIANCE WITH LR 7-1(a)(1)

Counsel for Defendant-Intervenor Seneca Sawmill Company certifies that the parties made a good faith effort through conferences to resolve the dispute addressed in this Motion and have been unable to do so. Accordingly, a ruling from the Court is required.

MOTION

Pursuant to LR 56-1 and Fed. R. Civ. P. 56(a), Defendant-Intervenor Seneca Sawmill Company (Seneca) hereby moves the Court for summary judgment. The Court should grant Seneca's motion, and thereby uphold the Bureau of Land Management's (BLM) Thurston Hills Non-Motorized Trails and Forest Management Project, including the Pedal Power Timber Sale, because the project and the sale comply with applicable environmental laws. Specifically, the project complies with the Federal Land Policy and Management Act, the National Environmental Policy Act, and the Administrative Procedure Act, and is designed to comply with BLM's obligations under the O&C Act.

In support of this motion, Seneca relies on the following Memorandum in Support of Defendant-Intervenor's Cross-Motion for Summary Judgment, the administrative record lodged by Federal Defendants (ECF No. 9), the pleadings and papers on file in this case, and such oral argument as the Court may entertain.

WHEREFORE, Seneca requests that the Court grant this Motion, grant BLM's Motion, deny plaintiffs' Motion for Summary Judgment (ECF No. 16) and, thereby, enter summary judgment in favor of all defendants.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

One of the legacies of the western settlement of Oregon is a vast landscape, over 2.1 million acres, of O&C lands, originally granted for construction of the Oregon & California Railroad or Coos Bay Wagon Road. The lands returned to federal ownership a century ago and Congress subsequently directed they "shall be managed . . . for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the princip[le] of sustained yield . . . ." 43 U.S.C. § 2601. Accordingly, as this Court recently recognized, "courts have repeatedly held the O&C Act is a 'primary' or 'dominant' use statute for sustained-yield timber production." *Pac. Rivers v. U.S. Bureau of Land Mgmt.*, No. 6:16-CV-01598-JR, 2018 WL 6735090, at *17 (D. Or. Oct. 12, 2018), *rept. and recommendation adopted*, 2019 WL 1232835 (D. Or. Mar. 15, 2019) (McShane, J.), *appeal docketed*, No. 19-35384 (9th Cir. May 3, 2019); *Headwaters, Inc. v. Bureau of Land Mgmt., Medford Dist.*, 914 F.2d 1174, 1184 (9th Cir. 1990) (holding "the O & C Act envisions timber production as a dominant use"). [1]

The Thurston Hills Non-Motorized Trails and Forest Management Project is designed to contribute to this sustained-yield timber production through the Pedal Power Timber Sale. The sale abuts trails that are popular for local mountain bikers, and where the BLM's governing resource management plan indicates that non-motorized recreation is an appropriate secondary use. BLM innovatively coupled the Pedal Power Timber Sale with construction of 8.5 miles of mountain bike trails after timber harvest is complete. These trails will connect with the trail system being developed by the Willamalane Park and Recreation Department (WPRD) in the adjacent Thurston Hills Natural Area.

[1] The O&C Act is the Oregon and California Railroad and Coos Bay Wagon Road Grant Lands Act of 1937, 43 U.S.C. § 2601 (transferred from 43 U.S.C. § 1181a).

Pedal Power will harvest 100 acres, a small fraction of the area encompassing the over 1,000-acre Willamalane Extensive Recreation Area, AR3609, that are a designated part of the Harvest Land Base (HLB) for timber production. These 100 acres are less than 0.2% of the HLB managed by BLM's Upper Willamette Field Office. AR3614. Not only will the timber sale further the goal of sustained-yield timber production, it also will support local employment, provide revenue for essential public services in Lane County and other O&C Counties, and will create a substantial "Asset for the Community." Decl. of Scott Keep ¶¶ 8-10, 14 (ECF No. 11), Ex. B (ECF No. 11-2).

Thus, BLM has used this opportunity to create a new resource for the community, a much-desired recreational trail system, while also supporting the local economy and working toward its timber mandate. Because of this far-thinking approach, the timber sale and trails project has gained a wide array of public support, including recreational groups like the "Disciples of Dirt" mountain-bike group. Keep Decl., Ex. B.

Plaintiffs' brief (Pls.' MSJ, ECF No. 16) describes an entirely different project and an entirely different planning process, one where BLM worked surreptitiously to tack a timber sale onto a recreation-focused project. But plaintiffs have not described the actual proposal or process for Thurston Hills and Pedal Power. Contrary to plaintiffs' statements depicting the project area as a "predominantly natural" or "scenic" landscape that will be degraded by timber harvest, the Thurston Hills Project will occur in an area that already had various land use modification, with powerlines and previous timber harvest located within the project area. In an area where BLM can and must intensively harvest, it has worked tirelessly with local stakeholders to produce a win-win outcome. Taking into account that public input, BLM selected an alternative that prioritized the placement of trails in Riparian Reserves, which are

unaltered by timber harvest, reduced the size of the timber harvest by one-third (from 155 to 100 acres), and increased aggregated retention trees along the trails to screen harvest areas from recreational users.

Plaintiffs' legal challenge fails on its own terms, as BLM complied with the governing management plan and thus any requirements under the Federal Land Policy and Management Act (FLPMA) and the requirements of the National Environmental Policy Act (NEPA). Plaintiffs' claims seek to substitute their judgment for that of the agency charged with administering these lands, which is not permitted under governing Ninth Circuit caselaw. Accordingly, the Court should uphold the Thurston Hills Project and Pedal Power Timber Sale on all counts.

II. BACKGROUND

A. The Thurston Hills Non-Motorized Trails Project and Pedal Power Timber Sale.

The Thurston Hills Project encompasses two independent but complementary actions. One of the actions is the development of a new non-motorized trail system for mountain biking and hiking. AR3609. In its 2016 Resource Management Plan (RMP), BLM designated Extensive Recreation Management Areas (ERMAs), which are administrative units that require specific management considerations to address recreation use. AR11638. In its Proposed RMP/Final Environmental Impact Statement (PRMP/FEIS), BLM identified recreation demands within its planning area and determined that there is an unmet demand for mountain biking and hiking trails in close proximity to the greater Eugene area. AR12691-94. To meet these needs, the plan established the Willamalane ERMA and designated it for mountain biking and hiking trails. AR3609. BLM also responded to a request from WPRD to cooperate on a joined trail system. AR0974-76. In 2012, WPRD taxpayers approved a $20 million bond measure with ten

priority projects, one of which was the purchase of the Thurston Hills Ridgeline to develop mountain biking and hiking trails. AR1553. WPRD developed plans for mountain biking and hiking trails in a 176-acre parcel, located west of the BLM Willamalane ERMA, that could connect to BLM lands Sections 1 and 31. AR3609. For that reason, BLM considered lands adjacent to WPRD lands for recreational development in a collaborative effort with WPRD to integrate their trail systems. AR11374, 0949.

The second part of the Thurston Hills Project is the Pedal Power Timber Sale. AR3609. Approximately 55 percent (or 581 acres) of the Willamalane ERMA is designated as HLB, which BLM must manage for sustained-yield manner according to its RMP, under the sub-allocation called the Moderate Intensity Timber Area (MITA). AR3609, 3539, 10262, 11393 (noting that "the BLM offers this sustained-yield volume of timber only from the [HLB], which has specific objectives for sustained-yield timber production"). Because the underlying HLB land use allocation implements a statutory mandate for "permanent forest production" as a dominant use, the HLB management direction always controls. *See* AR11241 (clarifying that ERMA direction applies "to the extent it is consistent with the management direction for the underlying Land Use Allocation").

There are two purposes and needs for the timber sale component of the Thurston Hills Project. First, there is a need "to adjust the age class distribution [of stands] within the Upper Willamette Field Office." AR3613. "Limited regeneration harvest on BLM-administered lands over the past 20 years has resulted in a disproportionate age class distribution across the HLB . . . ." AR3613. In order for BLM to produce the required sustained yield of timber, the agency must have a well-distributed mix of age classes across the HLB, and must adjust those ages to maintain the distribution. AR3613. Currently, only 0.8 percent (438 acres) of the Upper

Willamette portion of the Sustained Yield Unit (SYU) has stands within the 0-10 age class. AR3614, 3613 (Figure 2). To better adjust the un-balanced stand age distribution, BLM proposed harvest of stands within the 70-year age class (which has twice as many acres than any other age class). AR3614. Without redistribution of stands in the region, BLM concluded that "the cycle of growth and harvest expected for sustained yield in the RMP will not be possible." AR3614.

Second, there is a need to "contribute to the Eugene sustained-yield [unit's] annual declared Allowable Sale Quantity." AR3614. Unlike lands administered by the U.S. Forest Service, the 2.1 million acres of O&C lands are not managed for multiple use. Under the O&C Act, all O&C lands must be managed for "permanent forest production" on the O&C lands based on the principle of "sustained yield" and "the annual sustained yield capacity when the same has been determined and declared, shall be sold annually." 43 U.S.C. § 2601.[2] Fifty percent of the net receipts from timber sales on O&C lands go to western Oregon counties to support public services such as road improvements and law enforcement. AR12803; 43 U.S.C. § 2605(a).

BLM declared an Allowable Sale Quantity (ASQ) of 53 million board feet (mmbf) for its Eugene SYU, which can only be achieved by meeting annual target levels and harvesting timber within the HLB. AR3614, 11683, BLM's MSJ at 28, 30 (ECF No. 22).[3] In its PRMP/FEIS,

[2] BLM implies that the forest-production mandate is limited to HLB acres. BLM's MSJ at 8, 14-14. BLM's position is incorrect, as the O&C Act's mandate has no such limitation and pending litigation challenges the RMP's designation of only 20 percent of the O&C lands as HLB. *Am. Forest Res. Council v. Hammond*, No. 1:16-CV-01599-RJL (D.D.C., Compl. filed Aug. 5, 2016); *Ass'n of Or. & Cal. Counties v. Hammond*, No. 1:16-CV-01602-RJL (D.D.C., Compl. filed Aug. 5, 2016). Since this project occurs entirely within HLB, Seneca agrees with BLM's characterization of BLM's management obligations.

[3] BLM asserts that it has discretion to fall short of the declared ASQ by up to 40 percent. Seneca does not agree that such departure is consistent with the O&C Act's requirement that it sell annually "not less than the annual sustained yield capacity when the same has been determined

BLM modeled a variety of silvicultural practices to ensure that the agency could manage for a sustained-yield harvest over the long-term. AR3614, 12323-88. BLM determined that deferring commercial harvest in the Thurston Hills Project area would "forego the opportunity to contribute timber volume toward meeting the declared ASQ" from 2018 to 2023. AR3615.

BLM had substantial engagement with the public during the development of the Thurston Hills Project. BLM initiated a 30-day public scoping period in March 2017. AR3615. BLM also held two public meetings in cooperation with WPRD. AR3616. The first meeting, in April 2017, was a public scoping meeting, with 37 individuals, one business, and one organization in attendance. *Id.* After BLM developed a preliminary range of alternatives, the agency held a second public open house in November 2017. *Id.* In addition, BLM engaged a "public involvement specialist" to conduct an "in-depth public engagement" for this project, including in-person and phone interviews with various stakeholders. *Id.*; *see* AR0396. BLM's Interdisciplinary Team (IDT) reviewed all public comments, and internally generated issues regarding the project, to help develop a range of alternatives that would meet the purpose and need for the project's actions. AR3616. BLM also released the Environmental Assessment (EA) and draft Decision Record (DR)/Finding of No Significant Impact (FONSI) for comment with five alternatives: no action (Alternative 1), trails development only (Alternative 2), trail development and 155-acre regeneration harvest (Alternative 3), trail development and 105-acre regeneration harvest (Alternative 4), and 155-acre regeneration harvest only (Alternative 5). AR3628-37. BLM received six comment letters in response to the EA. AR3616.

In May 2018, BLM issued a decision adopting Alternative 3, which included 155 acres of regeneration timber harvest and development of 8.3 miles of recreational trails. AR4608-19.

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and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market." 43 U.S.C. § 2601.

After this decision issued, several protests were filed, and BLM engaged in further dialogue and clarification with the City of Springfield and WPRD about the project's design. AR0158-59, 11239, 10445-47. BLM elected to take another look at Alternative 4, which involved 105 acres of timber harvest and 8.5 miles of trail development. AR0106, 3636. The agency ultimately adopted a modified version of Alternative 4, which involves 100 acres of timber harvest (reducing the size of the timber harvest by one-third compared to Alternative 3) and 8.5 miles of trail development. AR3636, 3536. The modified Alternative 4 increased green tree retention levels in the harvested acres from 10 to 15 percent. AR3536. There will be 11 acres of aggregate retention trees to reduce the loss of canopy along the trail corridors and screen harvest areas from recreational areas. AR3549, 3646, 3527. BLM held a public meeting about the modified plan and met with interested neighbors. AR3547. These modifications addressed the concerns of the vast majority of stakeholders, including the City of Springfield and WPRD.

In September 2018, Seneca bid over $1 million for the timber offered in the Pedal Power Timber Sale. Keep Decl. ¶ 9; AR16428. The Pedal Power Timber Sale will be implemented over a two-year period, with harvest currently planned to commence in mid-August 2019. AR3538. The timber sale will generate approximately 4.0 mmbf and will benefit Seneca, its employees, and hired contractors, as well as the economy and community of Lane County since 50 percent of the receipts will be sent to the O&C Counties. AR3537, 3651; Keep Decl. ¶¶ 4, 11. The biking and hiking trail development may begin outside of, or subsequent, to the timber harvest and would take around five years to fund and construct. AR3538.

B. BLM Analyzed the Potential Fire Hazard to Adjacent Communities.

During the scoping period, members of the public submitted comments expressing concern about how the project may affect fire hazard in the area. The governing land

management plan thoroughly considered how management designations would affect fire hazards across the landscape BLM manages. *See* AR13469-521. The Thurston Hills Project EA tiers to the PRMP/FEIS. AR3618. In addition, BLM expressly acknowledged and addressed the public's concerns about fire risk:

> • Potential effects on fire hazard from harvest/reforestation activities are within the scope and scale of effects analyzed in the FEIS. Relative to current conditions, alternatives with regeneration/reforestation actions (Alternatives 3, 4, and 5) would create an increase in fire hazard at the stand level for the next 40 years as stands regrow and transition through progressive structural stages. Within 50 years, areas that were regeneration harvested would be at a mature single-layer stage with a fire hazard rating of low, similar to the current conditions.
> . . . . .
>
> • The 6th field subwatershed around the project encompasses 33,737 acres and is 91 percent private lands. The Thurston Hills proposed harvest area (approximately 105-155 acres) *would affect less than ½ of a percent of this watershed acreage* (0.5 percent). The 2016 FEIS analyzed fire hazard where BLM controlled a small proportion of the total acreage . . . . Similarly, BLM's effects on fire hazard patterns within the Thurston Hills vicinity *are diminished because fire hazard accrues from all landscape areas and this project would affect less than ½ of one percent of the landscape*.

AR3618-19 (emphasis added); *see* AR2294-98. In the PRMP/FEIS, BLM concluded that "within the planning area[,] [BLM] is unable to provide more than slight variation to fire hazards within the planning area due to the checkerboard pattern of the landscape within the planning area and the small [HLB] . . . . " AR13510.

C. BLM Carefully Considered Effects on Recreation.

Recreational values vary depending on the setting. BLM categorizes a recreational setting through a Recreational Setting Classification System based on a combination of "physical, operational, and social setting characteristics" and considers "the social and physical setting characteristics of remoteness and naturalness" of the area because "they provide the most direct measure of resource management effects . . . ." AR14477. BLM determines the "remoteness" of an area based on its proximity to road and road types and the "naturalness"

based on the landscape quality, level of disturbance, forest structural complexity and age. AR14478-79.

The Willamalane ERMA's Recreational Setting Classification is Front County, meaning that it is a "[p]artially-modified landscape with more noticeable modifications." AR14479, 11375. Sections 1 and 31 of the Willamalane ERMA, where the Thurston Hills Project will occur, have had various land use modifications on the landscape. For example, Section 1 has a well-used road (the extension of 79th Street), houses and driveways to the north, and a high-voltage powerline corridor that runs north and south through the eastern portion of the area. AR3642. The project area also had timber management fairly recently, with the Cedar Flats Timber Sale implemented in 2001-2005. AR3609. The PRMP/FEIS notes that "[t]imber management activities would affect the naturalness aspects of the recreation setting (i.e., forest stand structure and age)[,]" which "in turn affects where visitors recreate based on their setting preferences." AR14479. However, BLM acknowledges that "[o]verlapping designations for other resources are less problematic with ERMAs than with [Special Resource Management Areas], because BLM designs recreation objectives and management direction for ERMAs to be commensurate with, and considered in the context of, the management of other resources and resource uses." AR14481.

The Thurston Hills Project was carefully designed to accommodate recreational experiences for mountain bikers and hikers. AR4126 (noting that the "recreational experiences" were focused on hikers and mountain bikers, not other recreationalists like bird watchers or nature appreciators), 2352. The recreational experience for mountain biking varies depending on the setting, ranging from "play" to "escape." AR3643. Escape often means "getting away from the urban environment"; whereas, "play" means "seeking features to enhance, alter the

experience, rather than simply riding from point to point." *Id.* According to the trail consultant, during the trail development it was determined that "[g]iven the smaller size and location of Sections 1 and 31 it would be more difficult to provide solitude and escape, so the focus was changed to providing play as the primary experience. . . . Even if there is traffic noise or visual obtrusions such as powerline corridors, the level of play can be increased to distract riders from these conditions." AR2343; *see also* AR3643 (distinguishing trail experience for mountain bikers from many other trail user goals like hikers, nature seekers), AR3642.

To provide a better trail experience and "long-term" protection of the trail corridor, the trails were placed within several Riparian Reserve areas within Sections 1 and 31, since these areas "are unlikely to be modified through future development or harvest activities." AR2344. Riparian Reserves would also provide for mature canopy and screening from surrounding development. *Id.* The modified Alternative 4 also includes 11 acres of aggregate green tree retention along the trails, "to reduce the loss of canopy along trail corridors" and to "preserve some of the characteristics that provide high quality tread and enhance the play and challenge experiences." AR3646.

Some of the trails will be located in units proposed for regeneration harvest. Although the regeneration harvest could degrade some of the potential recreational experience, BLM took these potential effects into account. AR2348. BLM noted that trail layout and construction would be modified to address the loss of mature tree canopy, open trail exposure, and presence for new roads. AR3645. For example, design and construction would "amplify the play and challenge experiences for riders" to "engage and distract users from the post-harvest landscape." AR2352, 2353, 3645. The reduced canopy cover will result in increased exposure to rainfall, wind, and sun, reducing the ability of mountain bikers to use the trails throughout the year.

AR2353, 3645. To counter those effects, BLM will add additional construction practices to amend the soil with crushed rock and accommodate more variable drainage conditions. *Id.*

Overall, the Thurston Hills Project finds a way to provide both sustained-yield timber management and recreation, creating a new community asset. There has been strong public support for the Thurston Hills Project from diverse stakeholders, including the Mayor of Springfield and the Disciples of Dirt. *See, e.g.*, AR0094 (a letter from WPRD and the City of Springfield stating, "We believe Alternative #4 constitutes an appropriate balance of meeting both the recreation needs of our community, as well as the Bureau of Land Management's obligations to achieve timber harvest quotas from its Resource Management Plan"); Keep Decl, Ex. B (in a press release, the Disciples of Dirt, stated that it is "excited for the opportunity to develop more urban trails for multiple user groups. This opportunity will allow the development of a new trail network, provide additional biodiversity, riparian and late-succession reserves to be established within our local environment").

D. Procedural History.

While BLM's selection of Modified Alternative 4 fully addressed almost all stakeholders' concerns and ensured widespread project support, plaintiffs were not satisfied. They filed an administrative protest with BLM. AR10168-206. After BLM denied it in October 2018, plaintiffs appealed to the Interior Board of Land Appeals (IBLA) and sought a stay of the sale. AR10059-71 (denial of protest), 16367-425 (appeal). Seneca intervened in the administrative appeal pursuant to 43 C.F.R. § 4.406 because its interests in the timber from Pedal Power Timber Sale and timber supply from BLM-administered lands. Decl. of Lawson Fite, Ex. A (ECF No. 12-1) (order granting intervention in IBLA case).

In December 2018, IBLA denied plaintiffs' request for a stay, finding that the plaintiffs

"have not shown error in the protest decision" and "have merely repeated arguments from their protest, raised issues that they did not present to BLM during their protest, or made unsupported or conclusory allegations none of which is sufficient to show error in BLM's decision . . . ." AR16289. IBLA also found that BLM's decision adequately explained that the "Pedal Power Timber Sale conforms to the direction in the governing RMP; meets the purpose and need for forest management action, including the attainment of allowable sale quantity of timber and adjustment of forest stand age-class distribution for sustained-yield management; and accommodates the development of a hiking and mountain biking trail system in the ERMA." AR16298.

On February 25, 2019, after the IBLA appeal was fully briefed on the merits, plaintiffs changed course, electing to voluntarily dismiss their pending appeal. AR16158. Plaintiffs now bring their challenge to the Thurston Hills Project and Pedal Power Timber Sale before this Court.

III. STANDARD OF REVIEW

A. Judicial Review Under the Administrative Procedure Act.

A challenge to an agency's land management decision is reviewed under the Administrative Procedure Act's (APA) arbitrary and capricious standard of review. 5 U.S.C. § 706(2)(A) (setting aside an agency decision only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"); *Lands Council v. McNair*, 537 F.3d 981, 987 (9th Cir. 2008), *abrogated in part on other grounds by Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046 (9th Cir. 2009). The arbitrary and capricious standard of review under the APA applies to challenges under FLPMA and NEPA. 5 U.S.C. § 706(2)(A). Under this standard, a court should not substitute its judgment for that of the agency. *Lands Council*,

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 quotation marks omitted).

Courts must defer to an agency's interpretation of its own regulations, as well as its interpretations of land management plans. *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9th Cir. 2005); *Oregon Nat. Desert Ass'n v. Bureau of Land Mgmt.*, No. 2:10-CV-01331-SU, 2014 WL 4832218, at *30 (D. Or. Sept. 29, 2014) (so stating); *All. for the Wild Rockies v. Bradford*, 856 F.3d 1238, 1242 (9th Cir. 2017) (holding the Forest Service's interpretation of its own land management plans "is entitled to substantial deference") (internal quotation marks omitted). A deferential approach is "especially appropriate where, as here, the challenged decision implicates substantial agency expertise." *Mt. Graham Red Squirrel v. Espy*, 986 F.2d 1568, 1571 (9th Cir. 1993). To the extent a land management plan is viewed as a regulation, BLM's interpretations of it in developing the Project are entitled to "*Auer*" deference. *See Kisor v. Wilkie*, No. 18–15, slip op. at 15-18, 2019 WL 2605554 at *9-10 (U.S. June 26, 2019) (explaining circumstances when courts should defer to agency constructions of their own regulations).

B. Legal Standard Under NEPA.

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 also directs federal agencies, among other goals, to "enhance the quality of renewable resources . . . ." 42 U.S.C. §

4331(b)(6). 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, 40 C.F.R. §§ 1500-1508, provide guidance for implementing NEPA, as does BLM's Handbook on NEPA. AR15973-16156.

IV. ARGUMENT

A. Pedal Power Is Consistent with the Governing Land Management Plan.

Plaintiffs' claim under FLPMA asserts the project's timber sale component is not consistent with the governing RMP. This claim fails. BLM explained Pedal Power Timber Sale's conformance with the RMP in the record:

> The proposed harvest action is specifically provided for in the RMP because the underlying land use in the timber harvest areas is Harvest Land Base (HLB), and on HLB lands, the RMP directs the BLM to implement timber harvest activities in a manner that, repeated over time, results in a sustainable harvest level (RMP, p. 296).

AR3529. BLM's description of its plan is correct; the RMP's "management direction for both the Low Intensity Timber Area and the MITA *require* BLM to conduct both regeneration harvest and commercial thinning for producing timber to contribute to the attainment of the declared ASQ, among other reasons." AR11491 (emphasis added). The IBLA agreed, ruling in its stay order that plaintiffs had not shown a likelihood of success on this claim. AR16295.

The RMP's provisions for the HLB include direction to "[c]onduct silvicultural treatments to contribute timber volume to the Allowable Sale Quantity," as well as authorizing "regeneration harvest for any of" nine different reasons. AR1446-47. One of these reasons is to "[a]djust the age class distribution in each sustained-yield unit," which is the second purpose of the timber harvest within the project. AR11446; *cf.* AR3548. In other words, the two purposes

of the harvest, meeting the ASQ and adjusting age class distribution, track with two specific elements of the RMP's management direction.

FLPMA provides that "[t]he Secretary shall manage the public lands under principles of multiple use and sustained yield, in accordance with the land use plans . . . ." 43 U.S.C. § 1732(a) (FLPMA § 302). Land use plans are tools by which "present and future use is projected." 43 U.S.C. § 1701(a)(2). A BLM action "shall be clearly consistent with the terms, conditions, and decisions of the approved plan or plan amendment." 43 C.F.R. § 1601.0-5(b). Here, the overriding objective in the HLB is to "[m]anage forest stands to achieve continual timber production that can be sustained through a balance of growth and harvest" and [o]ffer for sale the declared Allowable Sale Quantity of timber." AR11446. However, because the Pedal Power sale area consists of O&C lands, compliance with the O&C Act and its timber-production mandate is paramount. The O&C Act supersedes FLPMA "insofar as [the two statutes] relate to management of timber resources." 43 U.S.C.A. § 1701 Note (West), FLPMA § 701(b), 90 Stat. 2743, 2786 (1976). Thus, the "multiple use" provision of FLPMA section does not apply. Nor does the RMP have the authority to override BLM's statutory mandate. As such, the RMP provides that "[i]n land use allocations where management of other resources is dominant," the agency will "provide recreational opportunities where they can be managed consistent with the management of these other resources." AR11475. To the extent the ERMA framework could be read, as plaintiffs urge, to limit BLM's ability to harvest timber in the project area, it must yield.

BLM clarified this point in issuing an addendum to the RMP framework on August 22, 2018, during the administrative protest period. AR11241.[4] The addendum states that the framework will apply "*to the extent* it is consistent with the management direction for the

[4] The addendum was prepared pursuant to BLM's plan maintenance authority, 43 C.F.R. § 1610.5-4, as it merely clarifies the existing decision. *See* AR11500 (describing the process).

underlying Land Use Allocation." *Id.* (emphasis added). On the HLB, actions may be taken to "*consider* project design features that would minimize or avoid adverse effects to the recreational resources identified in the RMP's ERMA Planning Framework *to the extent* consistent with [HLB] management direction." *Id.* (emphasis added). That is what BLM did here, providing for recreational opportunities to the extent consistent with HLB direction. Plaintiffs' contention, which boils down to prioritizing the ERMA framework over the plan, would in BLM's words be a "mistaken interpretation." AR11242. As stated in the Plan Record of Decision, Appendix A, BLM "will not defer or forego timber harvest of stands in the [HLB] for reasons not described in the management direction or this appendix [A]." AR11492. The ERMA framework is in Appendix G, so it cannot provide a lawful reason for deferral of harvest in the HLB. AR11638-49. The addendum also clarifies that restricting timber management due to the ERMA framework would be "contrary to the BLM policy to manage ERMAs commensurate with the management of other resources and resource uses . . . ." AR11242.

Plaintiffs allege that BLM's approval of the project violates the management framework for the recreation area, because in their view, the framework permits "'vegetation modifications' (e.g. commercial logging) . . . only to the extent they are 'compatible' with 'meeting recreation objectives, not interfering with recreation opportunities, and maintaining setting characteristics.'" Pls.' MSJ at 20 (quoting AR11376). Plaintiffs assert the use of regeneration harvest rather than thinning will interfere with the opportunity to provide high-quality outdoor recreational experiences. Pls.' MSJ at 20. They claim BLM failed to evaluate the impact of harvest on the recreational experience. *Id.* at 21-22.

BLM determined the two aspects of the project were compatible in this instance and found no conflict between the HLB and ERMA direction. The sequencing of the timber harvest

was designed to accommodate trail development. AR4573. Indeed, the "development of a hiking and mountain biking trail system in the ERMA would provide the new recreation opportunity to meet the demand for hiking and mountain biking that the RMP designated these lands to address." AR3612-13. This is consistent with the ERMA framework's statement encouraging vegetation management to be "compatible with meeting recreation objectives, not interfering with recreation opportunities, and maintaining setting characteristics." AR11376.

Contrary to plaintiffs' allegations, BLM candidly assessed and disclosed the impacts of harvest activity on the recreation experience. AR3644-47. It acknowledged that where trails will be constructed in regeneration units, "[t]he loss of tree canopy associated with the timber harvest would result in a loss of natural variation in vegetation type and terrain, and loss of the natural 'drift' feeling of the trail tread derived from the organic layer of soil found below dense canopies." AR3645. Further, "trail segments in the regeneration harvest areas would be subject to increased direct rainfall, wind erosion, freeze-thaw, and seasonal over-drying." *Id.* BLM included measures and modifications to mitigate these effects, AR3645-46, and the final decision defers harvest in 61 acres, including increasing retention of green trees. AR3548-49 (modifications to Alternative 4), 3527. Thus, BLM adequately explained how the project is consistent with both the HLB management direction and the ERMA framework, and its explanation is entitled to deference.

Although plaintiffs purportedly "do not contend all logging in this ERMA is prohibited outright," Pls.' MSJ at 20, they do assert that regeneration harvest should be prohibited as it is inconsistent with the ERMA framework. *Id.* They contend that any regeneration harvest does not give "commensurate" status to recreational objectives, thus allegedly violating the framework guidance that ERMAs are to be managed "commensurately" with other resources.

Id. (emphasis omitted); *see* AR11638 (defining ERMAs). Plaintiffs' argument is, essentially, that in every acre of an ERMA, particular recreation goals must be on equal footing with other priorities. This is an unrealistic and cramped view. "Commensurate" generally means "proportionate" rather than "coextensive."[5] In the EA, BLM explained that "[t]o manage the ERMA commensurate with management of other resources, the BLM needs to observe the RMP management direction for the underlying land use allocations . . . in each ERMA." AR3610. In the planning process, BLM found it permissible to place ERMAs on O&C lands because "management for recreation values in [ERMAs] is intended to be done in a manner that is compatible with other resource uses, such as sustained-yield timber production[.]" AR13265. Thus, it found ERMA designation "would not necessarily conflict with sustained-yield timber production." *Id*. BLM noted "impacts of regeneration harvest and other types of harvest in the HLB were anticipated in the RMP" with specific findings that timber harvest "'*would change landscapes or result in temporary closures*'" in and around recreation areas. AR10263 (quoting AR12683).

The RMP envisions what BLM has done here, structuring required timber harvest in such a way as to be compatible over the project area with identified recreation goals. Of the total 394-acre project area, 100 acres (25%) will be harvested, with other acres deferred or in reserves, while 8.5 miles of trails will be developed over time across virtually the whole project area.[6] AR3556, 3615. By any definition, BLM has given appropriate consideration to recreation objectives.

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[5] *See* https://www.merriam-webster.com/dictionary/commensurate (last visited June 14, 2019).
[6] BLM refers to a project area of 1,058 acres rather than the 394-acre project area identified in project documents. *Compare* BLM's MSJ at 1, *with* 3615 (EA, describing project area of 394 acres). The entire Willamalane ERMA consists of 1,058 acres, and this project affects only a third of the ERMA.

BLM's recreation planning handbook gives further context. It distinguishes ERMAs from *Special* Recreation Management Areas (SRMAs) where "recreation and visitor services management is recognized as the *predominant* land use plan focus[.]" AR15698 (emphasis added). "[I]n ERMAs, recreation is managed commensurately with other resources and resource uses, and recreation opportunities may even be constrained by decisions to benefit other resources." AR15703. Further, "[s]ince management of ERMAs is commensurate with the management of other resources and resource uses, all [recreation and visitor services] decisions *must* be compatible with other resource objectives." AR15712 (emphasis added). BLM has so acted with Pedal Power.

Plaintiffs further claim that the timber component will lead to classifying the area as "Rural" rather than "Front Country," and it does not "maintain" the setting characteristics of the area as required by the ERMA framework. Pls.' MSJ at 23. Plaintiffs do not cite to any agency document that forecasts this classification change, but only to the RMP and framework documents. The record indicates that BLM views the project as consistent with the Front Country designation, where there is a "partially modified landscape" that will undergo "high levels of change" and where the Front Country designation recognized the areas "limitations" regarding scenic resources. AR10261-62. Plaintiffs' interpretation of the fuels report as finding changes to the recreation setting, *see* Pls.' MSJ at 23, is merely an impermissible attempt to substitute their judgment for that of the agency.

Plaintiffs finally contend that BLM inappropriately failed to designate Recreation Management Zones (RMZs) to buffer the eventual trails. Pls.' MSJ at 23-24. BLM's final decision does not designate any RMZs because there have not yet been any trails designated. AR10262; *see* AR11376. "While generally unnecessary, ERMAs may be subdivided into RMZs

to ensure [recreation and visitor services] are managed commensurate with the management of other resources and resource uses." AR15699. Plaintiffs contend that mapping of potential trails equals designation, but this does not square with the purpose of an RMZ, which is to mitigate harvest impact on active recreation areas. It makes no difference that BLM initially and erroneously suggested it would designate an RMZ, as courts are generally empowered to review only an agency's final action. *Nat'l Mining Ass'n v. Zinke*, 877 F.3d 845, 868 (9th Cir. 2017).

Plaintiffs' RMZ claim was not raised in their initial protest, so it was waived, as the IBLA found. AR16297; 43 C.F.R. § 4.410(c). Claimants are responsible to "structure their participation so that it is meaningful, so that it alerts the agency to the [plaintiffs'] position and contentions." *Citizens for Clean Air v. U.S. E.P.A.*, 959 F.2d 839, 846 (9th Cir. 1992) (internal quotation marks omitted). Failing to do so, plaintiffs waived their belatedly-raised claim regarding an RMZ. "The waiver rule protects the agency's prerogative to apply its expertise, to correct its own errors, and to create a record for [judicial] review." *Portland Gen. Elec. Co. v. Bonneville Power Admin.*, 501 F.3d 1009, 1024 (9th Cir. 2007). The RMZ claim fails procedurally, and it does so on its merits.

B. The Thurston Hills Project EA Complies with NEPA.

1. BLM Took a Hard Look at the Potential Fire Hazard.

NEPA requires an agency to take a "hard look" at the potential environmental consequences of its contemplated actions before making a final decision to proceed. *Robertson*, 490 U.S. at 350-51. Plaintiffs contend that the Thurston Hills Project EA failed to take a "hard look" at the fire hazard to adjacent communities. Pls.' MSJ at 26. However, BLM analyzed the potential fire hazard due to the project activities both in its governing land management plan and in the site-specific EA.

The Thurston Hills Project EA has a section devoted to addressing concerns raised during the public scoping period but were eliminated from detail analysis because BLM had either: (1) conducted prior analysis on that issue on a similar project; or (2) determined that there would be negligible effects from the project. AR3618. BLM addressed public concern about how the proposed action would affect potential fire hazard. *See* AR3618-19. Fire hazard means "the ease of ignition, potential fire behavior, and resistance to control of the fuel complex." AR3618. BLM analyzed the potential fire hazard at two scales: programmatic and site-specific level.

First, BLM thoroughly analyzed the effect of harvest in the HLB on fire hazard in its PRMP/FEIS. *See generally* AR13469-522, 13499 ("*How would the alternatives affect fire hazard within close proximity to developed areas?*"). BLM noted that much of the planning area "has a checkerboard pattern of ownership, with square mile sections alternating between private and BLM-administered lands." AR13501. In analyzing the affected environment, including the project area, BLM determined that in 50 years, "all alternatives and the Proposed RMP would result in a decrease of stand-level fire hazard for the 298,441-forested acres within close proximity to Wildland Development Areas . . . in the coastal/north (Figure 3-35)." AR13506. Although BLM acknowledged that the alternatives and Proposed RMP "would increase the acres of Low hazard, relative to current conditions," "[t]he BLM's management within the planning area is unable to provide more than slight variations to fire hazards within the planning area *due to the checkerboard pattern of the landscape within the planning area and the small [HLB] relative to a larger Late-Successional Reserve*." AR13510 (emphasis added).

In the PRMP/FEIS, BLM also analyzed the number of acres at risk from residual activity fuels associated with timber management. AR13510. BLM noted that "[t]he size of the [HLB] and the timber management type and intensity are factors influencing the amount of acres in each

risk category by alternative and the Proposed RMP." AR13515, 13512 (identifying types of timber management types), AR13513 (identifying risk categories). Thus, so long as BLM manages the HLB within the timber management type and intensity that is described in the PRMP/FEIS, then the corresponding risk category would apply to that treatment.

Second, despite plaintiffs' claims to the contrary, BLM conducted a site-specific analysis in its Fuels Specialist Report. *See generally* AR2284-2301. In order to assess the potential fire hazard, BLM used baseline fuel data, as well as data on historic conditions, biophysical settings, and vegetation condition class from the PRMP/FEIS. AR2288. In addition, BLM conducted site visits during the spring of 2017 and, during that site-specific assessment, analyzed existing and predicted fuel loading and models. *Id.* The Fuels Specialist "examined site-specific data to ensure that there were no data anomalies or extraordinary circumstances which would pose significant effects from the proposed actions beyond those disclosed in the 2016 RMP FEIS." AR4603.

The Fuels Specialist Report noted that, according to the PRMP/FEIS, fire hazards are ranked at the stand level, and for Sections 1 and 31 (where the project will occur) the stands are categorized as mixed to low fire hazard. AR2287 (citing AR13500). The ranking of stand-level hazard was determined using Table 3-34 from the PRMP/FEIS. AR2289. BLM then analyzed the fire risk at two spatial scales—harvest area and the sub-watershed scale—and a temporal scale of 50 years. AR2289; *see also* AR2284 (noting that the project is located in the Walterville Canal Sub-Watershed (6th Field Watershed)).

BLM evaluated the direct, indirect and cumulative effects on fuels under the no action alternative and, at the harvest area scale, determined, "In 50 years, stands would transition from a mature to a structurally complex stage, therefore, the *no action alternative would result in a*

slight increase of stand level fire hazard from low to mixed on the 400 acres of BLM land in sec 1 and 31." AR2291 (emphasis added). Within the 6th Field Watershed, which encompasses 33,737 acres and is 91 percent private lands, "the shift of 400 acres from low to mixed fire hazard represents a 1% change at the sub water shed level." *Id*. BLM also analyzed the effects of Alternative 4, which were similar to Alternative 3. AR2291-94. BLM acknowledged that the regeneration harvest and reforestation would result in an establishment of homogenous Douglas-fir plantations and that the change in structure from mature to early successional would move the stand level fire hazard from low to moderate/high for a period of time. AR2292. That said, BLM noted that there are post-harvest fuels treatments that would "reduce activity fuels and potential fire behavior," like whole tree harvesting and slash piling, chipping and burning. *Id.* In 50 years, the stands "will be transitioning from young stands back to a mature structural stage" and the fire hazard would return to a low/mixed rating. AR2293.

The Thurston Hills Project EA summarized and incorporated the findings of both the PRMP/FEIS and the Fuels Specialist Report. *See* AR3618-19. Plaintiffs claim that BLM attempted to "dodge its obligation to analyze" the site-specific consequences of its action by improperly tiering to the programmatic-level FEIS. Pls.' MSJ at 26. Under these circumstances, however, it is appropriate for BLM to tier to the PRMP/FEIS. NEPA regulations encourage agencies to avoid repetitive discussion of previously analyzed environmental issues by "tiering" their NEPA documents to other EISs. 40 C.F.R. § 1502.20; *All. for the Wild Rockies v. United States Forest Serv.*, 907 F.3d 1105, 1118 (9th Cir. 2018) (noting tiering is "expressly permitted" by the regulations). To cut down on the bulk of an EIS, NEPA regulations also encourage agencies, where possible, to incorporate material by reference. 40 C.F.R. § 1502.21. BLM's handbook on NEPA also encourages tiering: "Tiering is appropriate when the analysis for the

proposed action will be a more site specific or project-specific refinement or extension of the existing NEPA document." AR16009. Here, tiering was appropriate because the PRMP/FEIS assumed that there would be regeneration harvest in the HLB-MITA, including the lands in the project area, and that there would be non-motorized trails for mountain bikers and hikers in the Willamalane ERMA. AR3529.

The cases relied on by plaintiffs, *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 997 (9th Cir. 2004); and *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999), are distinguishable. In *Klamath-Siskiyou*, the court determined that BLM could not solely rely on an RMP-EIS, which "contain[ed] general statements about the cumulative effects" of logging in the watershed, because there was no site-specific information about impacts due to the four timber sales in the EA. 387 F.3d at 997. Similarly, in *Muckleshoot*, the court determined that the EIS for a land exchange improperly tiered to the EIS for the applicable resource management plan because neither the exchange EIS nor the RMP EIS analyzed the cumulative impacts of the increased logging on lands that would be exchanged. 177 F.3d at 810-11. Here, BLM's PRMP/FEIS included data applicable to the project site. The agency also conducted site-specific analysis and, given the small geographic scale of the proposed action, determined that it did not need to be analyzed in any detail since "there is no potential for significant effects from the proposed actions on fire hazard beyond those disclosed in the [PRMP/FEIS]." AR3619.

Nor is the Thurston Hill Project EA deficient for relying on the analysis in the Fuels Specialist Report. Pls.' MSJ at 29-30 (asserting that the underlying analysis was not included in the EA for public review). The agency incorporated this by reference into its final decision: "The EA, PRMP/FEIS, the FONSI, and all documents contained in the Thurston Hills EA

project file are incorporated by reference into this Decision Record." AR4572. All that is required to incorporate by reference into an EA is that the agency "sufficiently summarizes the relevant portions of those documents . . . ." *Center for Envtl. Law & Policy v. U.S. Bur. of Reclamation*, 715 F. Supp. 2d 1185, 1192 (E.D. Wash. 2010), *aff'd*, 655 F.3d 1000 (9th Cir. 2011); *see also WildEarth Guardians v. Montana Snowmobile Ass'n*, 790 F.3d 920, 925 (9th Cir. 2015) (in the EIS context, "the agency may incorporate publicly available data underlying the EIS by reference"). The material that is incorporated by refence does not need to be circulated to the public for comment, it only needs to be made available. 40 C.F.R. § 1502.21. It is appropriate for the court to consider the documents, moreover, because review under the APA addresses "the whole record" before the agency. 5 U.S.C. § 706.

Plaintiffs' reliance on *Pacific Rivers Council v. U.S. Forest Service*, 689 F.3d 1012, 1031-32 (9th Cir. 2012), *vacated*, 570 U.S. 901 (2013), is misplaced. That case was vacated and has no precedential value. And in any event, *Pacific Rivers* held that biological assessments that were intended to serve as the analysis for the environmental consequences for fish were not properly incorporated by reference, holding that "brief description cannot fulfill the purpose of the EIS if the substance of what is incorporated is an important part of the environmental analysis." *Id.* at. 1031-32. No such issue is present here. Plaintiffs have failed to point to any analysis in the Fuels Specialist Report that should have been included in the EA. *See All. for the Wild Rockies*, 907 F.3d at 1119 (noting that "[u]ltimately, when reviewing for NEPA compliance, we look to whether the agency performed the NEPA analysis on the subject action").

Accordingly, BLM took a hard look at the potential fire hazard risks in the Thurston Hills Project EA.

2. BLM Analyzed the Project's Effects on Scenic Quality and the Recreational Experience.

Next, plaintiffs claim that BLM failed to take a hard look at the effects of the regeneration harvest to the area's scenic quality and other recreational values. Pls.' MSJ at 31. The Ninth Circuit employs a rule of reason standard to determine whether an EA "contains a 'reasonably thorough discussion of the significant aspects of probable environmental consequences.'" *Or. Natural Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). Under this standard, "review consists only of insuring that the agency took a 'hard look.'" *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1071-72 (9th Cir. 2002). "The rule of reason analysis and the review for an abuse of discretion are essentially the same." *Id.* Here, the Thurston Hills Project EA complies with the RMP management direction for recreation and scenic values, and BLM did a reasonably thorough analysis of the project's effects on scenery and recreational experiences. *See* AR3642, 3644-47.

According to its RMP, BLM determines the "naturalness" of an area based on the landscape quality, level of disturbance, forest structural complexity and age. AR14479. An area's naturalness is "defined by the level of an area's influence by human modifications other than roads and trails." AR12672. BLM's analysis of naturalness uses forest structural stage class as a proxy to measure changes in recreation opportunity spectrum classes for naturalness. AR12672,12673 (Figure 3-121), AR12674 (Table 3-122). However, BLM *does not* manage naturalness characteristics in ERMAs and manages naturalness in SRMA commensurate with other resource conditions. AR12676.

There are six classes within the recreation opportunity spectrum (ranging from primitive to urban). AR12671. Although plaintiffs attempt to characterize the project area as a "predominantly natural appearing landscape," Pls.' MSJ at 15, the Willamalane ERMA's

Recreational Setting Classification is actually Front County, meaning that it is a "[p]artially-modified landscape with more noticeable modifications." AR14479, 11375. Sections 1 and 31 of the Willamalane ERMA, where the Thurston Hills Project will occur, have had various land use modifications on the landscape including a high-voltage powerline corridor and past timber management. AR3642, 3609. In the RMP, BLM also acknowledged that Visual Resource Management Class IV (which includes Front Country) allows for major modification of the existing character of the landscape and acknowledges "[m]anagement activities may dominate the view and will be the major focus of the viewer attention." AR11480-01.

One of the focuses of Thurston Hills Project is to provide recreational experiences for mountain bikers based on the current unmet recreational demands, whereas hikers' recreational interests are less of a priority because of the wide array of alternative sites. AR4126, 2352. The values for mountain bikers differ from other types of recreationalists. AR3643 (noting that playfulness is a hugely important characteristic in mountain bike trails and distinguishes trail experience from many other trail user goals like hikers and nature appreciators). The recreational experience for mountain biking varies depends on the setting, ranging from "play" to "escape." AR3643. During the trail development, BLM determined that "[g]iven the smaller size and location of Sections 1 and 31 it would be more difficult to provide solitude and escape, so the focus was changed to providing play as the primary experience. . . . Even if there is traffic noise or visual obtrusions such as powerline corridors, *the level of play can be increased to distract riders from these conditions*." AR2343 (emphasis added), AR3642 (noting that play was targeted as the primary experience). Therefore, BLM targeted "play" as the primary experience instead of escape, given that the location of the project area is in close proximity to residences and the developing area of Springfield. AR3642-43. The project provided for one trail that was

focused on the "escape experience" since it could convey remoteness and would "provide a mature canopy with good ability for visual and auditory screen from surrounding development." AR3642. To provide a better trail experience and long-term protection of the trail corridor, the trails were placed within several Riparian Reserve areas and aggregate green tree retention was provided along the trails to reduce the loss of canopy cover. AR2344, 3646, 2351 ("The trails in the eastern portion of Section 1 are arguably the most valuable for trail users[.]").

BLM analyzed the direct and indirect effects, and cumulative effects that regeneration harvest would have on the recreational experience for mountain bikers and hikers. *See* AR3642-47. BLM noted that for Alternatives 3 and 4, the trail experiences through the Riparian Reserves would be similar to Alternative 2 (the trails only alternative) because "canopy and soil conditions would be unaltered by harvest." AR3645. BLM also notes that trails outside of the Riparian Reserves would need to be modified in response to the loss of "mature tree canopy, open trail exposure, and the presence of new roads constructed for use during harvesting." *Id.* BLM determined that "the loss of tree canopy associated with timber harvest would result in a loss of natural variation in vegetation type and terrain[.]" AR3645. To reduce the loss of canopy, aggregate tree retention along the trails was provided, as shown in Appendix A, to "preserve some of the characteristics that provide high quality tread and enhance the play and challenge experiences." AR3646.

Plaintiffs criticize BLM's analysis, alleging that the agency did not "provide basic information on the timber sale's direct effects to scenic quality[.]" Pls.' MSJ at 32. BLM adequately addressed this issue, particularly in light of the planning guidance on scenic values. Unlike some other recreation areas, the Willamalane ERMA (which identifies the important recreational values) does not include "scenic quality" as an outcome objective. *Compare*

AR11374-75 (Willamalane Non-Motorized Trails ERMA), *with* AR11279 (Eagles Rest Hiking/Biking Trail ERMA listing "scenic viewing" as an outcome objective). Instead, BLM focused its trail development and layout on enhancing the level of "play" and "challenge" experience, given the already modified landscape and how it is a "hugely important" characteristic for mountain biking trails. AR3642-43; *see also* AR2342. Moreover, the Willamalane ERMA is classified as Visual Resource Management Class IV, the lowest visual quality classification with no identified special visual or scenic resources. AR12937. In fact, the PRMP/FEIS already determined that "[r]egeneration timber harvest would not diminish the existing visual values of areas that are VRI Class IV." AR12937; *see also* AR12938 (noting that "the Proposed RMP, the largest designated VRI class of the [HLB] would be VRI Class IV; timber harvest would not degrade the overall visual values of these areas"). In response to public comments, BLM explained that "[b]ased on this [Visual Resource Management] classification, none of the proposed regeneration harvest alternatives and none of the proposed trail alternatives would have the potential to cause significant effects on visual or scenic resources and there would be no differences among alternatives to inform the decision maker." AR4606. This satisfied NEPA.

In its PRMP/FEIS, BLM analyzed how the alternatives and Proposed RMP would affect recreation opportunities, recreation setting characteristics, management of other resources, and the levels of recreation supply and demand. *See* AR12671-99. BLM expressly analyzed how timber management would affect visitor rates. *Compare* Pls.' MSJ at 32, *with* AR12683. BLM acknowledged that "[a]lthough some localized effects would occur within each of these five recreation opportunity spectrum classes, none of the change would be measurable enough to influence visitor use patterns that are associated with any single recreation activity within the

decision area." AR12683.

For the reasons mentioned above, BLM took a hard look at the direct, indirect, and cumulative effects of the timber harvest activities on the recreational experiences for mountain bikers and hikers.

3. BLM Analyzed a Reasonable Range of Alternatives.

Plaintiffs allege that BLM violated NEPA because it failed to consider a reasonable range of alternatives. Including the no-action alternative, BLM considered *five* separate alternative means of implementing the action. AR3628-37. It also explained why an additional five potential alternatives did not require detailed consideration. AR3638-41. NEPA requires federal agencies to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources." 42 U.S.C. § 4332(2)(E). Although this obligation applies to both the preparation of an EA and EIS, *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1229 (9th Cir. 1988), "[a]n agency's obligation to consider alternatives under an EA is a lesser one than under an EIS." *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 915 (9th Cir. 2012) (internal quotation marks omitted). "[W]hereas with an EIS, an agency is required to '[r]igorously explore and objectively evaluate all reasonable alternatives,' *see* 40 C.F.R. § 1502.14(a), with an EA, an agency only is required to include a brief discussion of reasonable alternatives." *Salazar*, 695 F.3d at 915 (quoting *N. Idaho Cmty. Action Network v. U.S. Dep't of Transp.*, 545 F.3d 1147, 1153 (9th Cir. 2008)) (brackets in original). There is no specific number of alternatives required, but for projects applying an EA, courts have often endorsed analysis of only the proposed action and a no-action alternative. *Native Ecosystems Council v. U.S. Forest Serv.*, 428 F.3d 1233, 1246 (9th Cir. 2005) ("The statutory and regulatory requirements that an agency must

consider 'appropriate' and 'reasonable' alternatives does not dictate the minimum number of alternatives that an agency must consider."); *Bark v. U.S. Forest Serv*., No. 3:18-CV-01645-MO (D. Or. June 18, 2019, ECF No. 64) ("There is no 'numerical floor on alternatives to be considered,' and it is usually sufficient to consider only the preferred and no action alternatives" in an EA). Plaintiffs have not cited any case involving an EA where *five* alternatives were deemed inadequate, likely for the reason that there is no such case.

For an EA, an agency need not discuss "alternatives similar to alternatives actually considered, or alternatives which are infeasible, ineffective, or inconsistent with the basic policy objectives for management of the area." *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs*, 524 F.3d 938, 955 (9th Cir. 2008) (internal citation omitted). An agency need only provide "an appropriate explanation" in order to eliminate alternatives from detailed consideration. *Native Ecosystems Council*, 428 F.3d at 1246.

An alternative is considered reasonable only if it meets the purpose and need for the project. *Nat'l Parks & Conservation Ass'n v. Bureau of Land Mgmt*., 606 F.3d 1058, 1072 (9th Cir. 2010). Courts evaluate an agency's statement of purpose under a "reasonableness standard" and "must consider the statutory context of the federal action at issue." *HonoluluTraffic.com v. Fed. Transit Admin.*, 742 F.3d 1222, 1230 (9th Cir. 2014). Thus, "an agency should *always* consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C. Cir. 1991) (emphasis added). The Ninth Circuit "has afforded agencies considerable discretion to define the purpose and need of a project." *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1069 (9th Cir. 2012) (internal citations omitted). BLM projects must also follow

the applicable RMP. 43 U.S.C. § 1732(a); 43 C.F.R. § 1601.0-5(b).

BLM established two purposes for the timber harvest component of the Thurston Hills Project: (1) to conduct regeneration harvest to adjust the age class distribution in each sustain yield unit; and (2) to implement commercial harvest to provide timber and contribute to the attainment of the declared ASQ. AR3614. The agency carefully reviewed its obligations under the O&C Act and the governing 2016 RMP in crafting the purpose and need for the project. BLM determined that within Eugene SYU, only 490 acres (0.7 percent) of the HLB are in the 0-10 year age class. *Id*. Within the Thurston Hills Project area, there are zero acres of the HLB within the 0-10 age class or the 11-20 year age class. *Id*. For that reason, BLM proposed harvest of stands within the 70-year age class (which has twice as many acres than any other age class) because without the redistribution of stands in the region "the cycle of growth and harvest expected for sustained yield in the RMP will not be possible." *Id*. Thus, BLM considered three out of the five alternatives to include regeneration timber harvest as a component of the proposed action. AR3628-37.

Plaintiffs requested that BLM analyze a "thinning only" alternative where there would be no regeneration of stands. AR3866-71, 10500-07. However, plaintiffs' alternative was not viable, given the requirements of the governing 2016 RMP. BLM eliminated the "thinning only" alternative because "[t]hinning would not allow the BLM the opportunity to shift acres from the over-represented 70-year age class to the under-represented 0-10 year age class" and would, therefore, not meet the purpose and need. AR3640. This is an appropriate explanation for dropping the alternative from detailed consideration.

According to the PRMP/FEIS, BLM did extensive modeling on cycles of harvest and regrowth within the HLB to achieve sustain yield harvest levels, as required by the O&C Act.

AR12343-87. In the resulting RMP, BLM is directed to conduct regeneration harvest within the HLB for the purpose of "[a]djust[ing] the age class distribution in each sustained-yield unit." AR11446. Notably, adjusting the age class distribution is *not listed* as one of the eight reasons for conducting commercial thinning within the HLB. AR11447. In MITAs, where the Thurston Hills Project is located, BLM is further directed to retain 5-15 percent of pre-harvest stand basal area in live trees within each regeneration harvest unit. AR11450. Thus, to comply with its RMP, BLM was directed to conduct regeneration harvest with 5-15 percent retention in order to adjust age class distribution.

Another problem with plaintiffs' proposed alternative is that it is a different means to a different end. Plaintiffs contend because there is "no forests in the Upper Willamette portion of the SYU older than 130 years old," BLM should have considered a thinning-only alternative. Pls.' MSJ at 35. In support of their contention, plaintiffs point to the RMP where it states that for MITAs, a long-term objective at the landscape scale is to develop diverse late successional ecosystems and provide for a forest structural stage distributed temporally and spatially. Pls.' MSJ at 35 (citing AR11450). BLM's project is aimed at this objective, but at other goals of management in the MITA. Although plaintiffs might prefer BLM develop an entirely different project, the APA does not permit them to send the agency back to the drawing board based on their policy preferences.

This case is distinguishable from *League of Wilderness Defs. v. Marquis-Brong*, 259 F. Supp. 2d 1115, 1124 (D. Or. 2003), a fifteen-year-old district court case where the court found that BLM failed to consider a reasonable range of alternatives. In that case, the district court concluded that the EA unreasonably excluded an alternative that provided for reforestation of a burned area without salvage logging. *Id.* BLM had asserted that "a rehabilitation-only

alternative would be inconsistent with the 1985 RMP/EIS," but that assertion "was belied by undisputed testimony at the preliminary injunction hearing that indicated the Resource Management Plan does not preclude rehabilitation-only alternatives." *Id*. For the Thurston Hills Project, however, commercial thinning is not a permissible prescription to adjust the age class distributions for stands under the governing RMP. *See* AR11447. For that reason, BLM reasonably concluded that a thinning-only alternative would not meet the purpose and need for the Thurston Hills Project.

Plaintiffs also contend that the project violates NEPA because BLM "contrived" an unreasonably narrow purpose and need in order to conduct regeneration harvest within the Willamalane ERMA. Pls.' MSJ at 35, 36. Plaintiffs would have preferred that BLM include an *additional* purpose into the project—fuels reduction—which would have allowed for commercial thinning under BLM's governing RMP. Pls.' MSJ at 36. However, agencies are not required to analyze alternatives that do not meet the project's purpose and need. *See City of Angoon v. Hodel*, 803 F.2d 1016, 1021 (9th Cir. 1986) ("When the purpose is to accomplish one thing, it makes no sense to consider the alternative ways by which another thing might be achieved.").

Although the scoping notice for the project noted that the agency "*may* also propose timber harvest and fuel hazard reduction activities," AR0949 (emphasis added), the EA ultimately did not include fuels reduction activities as a purpose and need, focusing on the desire to meet the ASQ and adjust stand age class distribution.[7] AR3614-15. Plaintiffs fail to establish

[7] Plaintiffs contend that "while a thinning alternative would undeniably generate less timber volume than a regeneration harvest, the record shows the District expected to exceed its annual timber targets for this SYU." Pls.' MSJ at 37. However, BLM noted that the Eugene SYU was "754 MBF below target" and this could be "made up" from modification volume from operations. AR0104. This project is spread over multiple years and is aimed at long-term production of timber through age-class adjustment. And although BLM claims it may have some variance for meeting its ASQ, that variance is of questionable legal validity and provides limited

that BLM's expert judgment in determining that fuels reduction was not an objective for the project after site-specific review was somehow in error. *See* AR1490 (IDT notes stating "that the historic fire conditions indicate the site is in a high-risk area but ground conditions show less risk due to north-facing wet bowls"). BLM framed its purpose and need in a manner that addressed the site-specific needs of the project area, was consistent with the directions in its RMP, its governing land use plan, and complied with the statutory direction from the O&C Act to provide a sustained yield of timber production. Therefore, BLM was not unreasonable in identifying the purpose and need for the project and had reasonably exercised its discretion to not move forward with a fuel reduction objective.

In sum, because plaintiffs' proposed thinning-only alternative did not meet both of the purposes and needs for timber harvest, it was not a viable alternative and BLM reasonably eliminated it from its detailed analysis.

V. CONCLUSION

The Court should grant summary judgment to defendant-intervenor and should deny plaintiffs' motion.

Dated this 27th day of June, 2019.

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flexibility in any case; BLM must meet its ASQ by a variation of 40 percent annually or 20 percent each decade. AR11393. Deferring regeneration harvest now would negatively impact the agency's ability to meet its ASQ in the future.

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CERTIFICATE OF SERVICE

I, Lawson E. Fite, hereby certify that I, on June 27, 2019, I caused the foregoing to be served upon counsel of record through the Court's electronic service system.

Dated this 27th day of June, 2019.

/s/ Lawson E. Fite
Lawson E. Fite