No. 23-55801

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Los Padres ForestWatch, *et al.*,

Plaintiffs-Appellants,

vs.

United States Forest Service, *et al.*,

Defendants-Appellees,

APPEAL FROM DENIAL OF MOTION FOR SUMMARY JUDGMENT

By the United States District Court, Central District of California
Honorable John F. Walter, U.S. District Judge

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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Acronym	Definition
CE	Categorical Exclusion
EA	Environmental Assessment
EIS	Environmental Impact Statement
FWS	U.S. Fish and Wildlife Service
HFRA	Healthy Forests Restoration Act
IRA	Inventoried Roadless Area
NEPA	National Environmental Policy Act
WUI	Wildland Urban Interface

INTRODUCTION

Defendants' decision to approve the Reyes Peak Project ("Project") through Categorical Exclusions ("CEs") without adequate analysis violated the National Environmental Policy Act ("NEPA"), Healthy Forests Restoration Act ("HFRA"), and Roadless Area Conservation Rule ("Roadless Rule").

The Project area is the ancestral homeland of the Chumash People and contains numerous culturally sacred sites. Chumash ancestors inhabited the Project area for thousands of years, leaving behind culturally sensitive artifacts like grinding bowls and ritual trail systems and shrines. Today, Chumash collect medicinal plants for traditional healing practices and use Reyes Peak (the highest point along Pine Mountain ridge) for prayer and religious ceremonies. Defendants do not acknowledge the existence of these cultural sites, let alone rationally explain how impacts will be less than significant. This violates NEPA.

In their Answering Brief, Defendants argue the Project does not violate any laws because no large trees (greater than twenty-four inches diameter) are "planned" to be logged. *E.g.* Answering Brief ("ABr.") 33; 2-ER-55. Defendants, however, ignore three open-ended exceptions that permit logging of large trees for safety, when "impacted" by dwarf mistletoe, and for "overall forest health," and nowhere analyze the environmental impacts of logging large trees. Defendants' analysis in the Decision Memo operates as if the exceptions simply do not exist. To

remedy this shortcoming, Defendants rely on a post-decision declaration from Forester Gregory Thompson to argue the exceptions will be "sparingly" applied. ABr. 38. Not only does the declaration fail to resolve the Project's impact of logging large trees, the declaration was also not before the agency when it approved the Project. As *post-hoc* evidence prohibited by the Administrative Procedure Act ("APA"), Defendants cannot rely on the declaration to rectify their failure to consider the impacts of the exceptions.

Defendants likewise neglected to comply with the requirements of the HFRA CEs. The Forest Service failed to identify old-growth, account for large tree logging, collaboratively develop the Project, or show the Project occurs within Condition Classes 2 or 3 in Fire Regime Groups I, II, or III. This violates HFRA.

Approximately forty percent of the Project area occurs in the Sespe-Frazier Inventoried Roadless Area ("IRA"). Despite the Roadless Rule's prohibition on logging large trees, the Project permits the felling of trees as large as sixty-four inches. This violates the Roadless Rule.

This is not a case of Plaintiffs disagreeing with the scientific determinations of the agency reached after careful consideration of the relevant factors and supported by a rational explanation. Instead, Defendants flat out neglected to analyze key issues related to the Project's impacts. Plaintiffs therefore respectfully ask this Court to vacate and remand the Reyes Peak Project decision.

ARGUMENT

I. Defendants Failed to Adequately Consider "Extraordinary Circumstances" Resource Conditions.

CEs allow agencies to forego the core requirements for preparing an environmental assessment ("EA") or environmental impact statement ("EIS")—there is no analysis of alternatives, and no opportunity for the public to comment on draft analyses or participate in an administrative objection process. As a safeguard to ensure application of a CE does not circumvent the purpose of NEPA, the Council on Environmental Quality ("CEQ") requires agencies to "provide for extraordinary circumstances in which a normally excluded action *may* have a significant environmental effect." 40 C.F.R. § 1508.4 (1978) (emphasis added). In approving the Reyes Peak Project via CEs, Defendants failed to consider potential environmental impacts to cultural resources, IRAs, and potential wilderness areas.

A. Defendants' "Extraordinary Circumstances" Regulations Require an EIS if a Project May have a Significant Environmental Effect or an EA if such Effect is Uncertain.

The Forest Service promulgated regulations to implement CEQ's extraordinary circumstances safeguard that requires consideration of several "resource conditions." 36 C.F.R. § 220.6(b)(1). These include tribal "religious or cultural sites," "IRA[s]," and "potential wilderness." *Id*. The plain text of the Forest Service's implementing regulations demonstrates there is no required showing a project *will* cause significant impacts for extraordinary circumstances to

exist. Rather, it is "the degree of the *potential effect* of a proposed action on these resource conditions that determines whether extraordinary circumstances exist." 36 C.F.R. § 220.6(b)(2) (emphasis added). If the Forest Service determines "a proposed action *may* have a significant environmental effect," then an EIS is required. 36 C.F.R. § 220.6(c) (emphasis added). If the Forest Service "is *uncertain* whether the proposed action *may* have a significant effect on the environment," then an EA must be prepared. *Id*. (emphasis added); *W. Watersheds Project v. U.S. Forest Serv.*, No. CV-11-09128-PCT-NVW, 2012 WL 6589349, at *2 (D. Ariz. Dec. 17, 2012), aff'd, 603 F.App'x 612 (9th Cir. 2015) ("[T]he plain text of the Forest Service's policy states that if the agency is uncertain as to whether the action *could* have a significant impact" then an EA must be prepared.) (emphasis added). If it's a close call, a CE is not appropriate because CEs are defined as categories of actions that "*do not* individually or cumulatively have a significant effect." 40 C.F.R. § 1508.4 (emphasis added).

B. An EIS or EA was Required.

In this case, ample information demonstrated the potential for significant environmental effects on cultural resources, the Sespe-Frazier IRA, and potential wilderness. As such, Defendants should have prepared an EIS or, at minimum, prepared an EA to address any uncertainty. Instead, they failed entirely to consider key aspects of the enumerated resource conditions, and certainly did not offer a

rational explanation sufficient to determine the Project "may" not have potential significant effects.

1. Defendants Ignored Substantial Evidence of Cultural and Religious Sites in the Project Area.

When there is substantial evidence in the record of extraordinary circumstances, "the agency must at the very least explain" why no potential for significant impacts exists. *Cal. v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002). In this case, Defendants summarily concluded that "there are no Native American religious or cultural sites within the Project area." 2-ER-57. In their Brief, Defendants argue that evidence identified by the Chumash and ethnohistorian experts does not merit consideration because it is not sufficiently specific. The agency is wrong.

Native American tribes submitted evidence of discrete areas and artifacts in the Project area that are threatened by the proposed actions. For example, the Coastal Band of Chumash Indians ("Coastal Band") submitted a letter stating "[w]e have evidence of grinding bowls which can easily be destroyed by heavy mechanical machinery." 2-ER-234. A grinding bowl is a discrete artifact that cannot be expressed in more specific terms. Defendants' own cultural resources report confirms the existence of grinding bowls. 2-ER-94. Indeed, the cultural resources report recommended another search for these artifacts prior to implementation of the Project. *Id*. No such search occurred. Similarly, the Coastal

Band put Defendants on notice of "evidence of medicinal plants throughout the project site." 2-ER-234. Defendants' response letter made no attempt to address these resources or implement design features to protect them. *See* FER-9.

Additionally, both the Coastal Band and the Barbareño/Ventureño Band of Mission Indians submitted evidence of the cultural, religious, and ceremonial importance of Reyes Peak—the highest point of Pine Mountain. The Tribes regard Reyes Peak as a "well-known central observation point, saturated with cultural and ceremonial significance" which is still used today "for prayer and ceremony." 3-ER-357; 2-ER-234. Reyes Peak is a discrete and identifiable location in the Project area. In briefing, Defendants attempt to obfuscate this point by mischaracterizing the Tribe's letter as stating "the *Project area* 'is a well-known central observation point . . .'" ABr. 27 (emphasis added). The Tribe's letter actually states: "*Reyes Peak/Opnow* is a well-known central observation point, saturated with cultural and ceremonial significance." 3-ER-357 (emphasis added). There is no analysis of the Project's impact on Reyes Peak in the cultural resource report or Decision Memo; nor is there any explanation why Defendants could not have incorporated design features into the Project narrowly tailored to protect Reyes Peak—such as limiting proposed activities like mastication and the logging of large trees in a defined area around Reyes Peak.

Ethnohistorian and archeologist experts also submitted evidence confirming the presence of cultural sites in the Project area, referencing "numerous historical and ethnohistoric records attesting to the cultural significance of the area." 2-ER-236. Those records specifically identify Reyes Peak as one of three "sacred peaks" significant to the spiritual and religious beliefs of the Chumash, and often invoked in ceremonial songs and prayers. 2-ER-237. Evidence also documented a "Chumash trail system connecting coastal villages with the Cuyama River and interior villages," which runs directly through the Project area. *Id*. Chumash trail systems incorporate "ritualized forms of prayer, offerings, trail shrines, as well as possessing potent cosmographic and spiritual significance." *Id*. Despite overwhelming evidence that they exist, Defendants failed to identify or discuss the cultural significance of *any* trail systems in the Project area. Absent such analysis, the ethnohistorian experts concluded the Project "will likely result in damage to, or loss of, unique and significant heritage resources." *Id*. Defendants argue the ethnohistorian experts failed to "identify any specific cultural sites." ABr. 28. There is no explanation, however, of why discrete trail systems, provided in relation to identifiable landmarks (i.e., trails connecting "coastal villages with the Cuyama River and interior villages"), do not constitute specific cultural sites. Defendants were obligated to analyze these documented cultural sites and resources.

Defendants argue they fulfilled their requirement to consider cultural sites through their cultural resource report. ABr. 25-26. However, as noted above, the cultural resource report provides no analysis of the cultural sites identified by the tribes and ethnohistorian experts. There is no discussion of impacts to grinding bowls, sacred trail systems or trail shrines, medicinal plants, Pine Mountain, or Reyes Peak. *See W. Watersheds*, 2012 WL 6589349, at *16 ("Archaeological Survey underlying the Decision Memo" was not sufficient to support agency usage of CE when "nothing in the administrative record hints that the Forest Service made any reasoned determination on the issue [of cultural sites]").

Defendants similarly fail to acknowledge the relevance of *Te-Moak Tribe of Western Shoshone of Nevada v. U.S. Dep't of Interior*, 608 F.3d 592 (9th Cir. 2010) ("*Te-Moak*") on the question of what constitutes a cultural site or resource. There, the Western Shoshone had a special connection specifically with the "top of Mount Tenabo," which the Tribe used "for prayer and meditation." *Id*. at 597. This is identical to the Chumash's special connection with Reyes Peak—the highest point of Pine Mountain—which the Chumash use for "for prayer and ceremony." 2-ER-234; *see also Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 772 (2006) (BLM violated NEPA by failing to take a hard look at impacts to cultural sites, including "Medicine Lake and the highlands surrounding [which] are of great spiritual significance" to the Tribes, whose members "continue to use numerous

important spiritual and cultural sites within the highlands."). This case is also similar to *Te-Moak* because of the presence of plants that have cultural or religious significance. 608 F.3d at 597; 2-ER-234.

Defendants argue *Te-Moak* is inapposite because it is not a CE case, and NEPA does not require a cumulative effects analysis in CE cases. ABr. 29-30. However, Plaintiffs do not cite *Te-Moak* for its substantive holding related to BLM's failure to take a "hard look" at cumulative impacts to cultural sites, but rather for the threshold question of what constitutes a religious or cultural site in the first place. Here, Defendants ignored the information demonstrating the existence of religious and cultural resources and categorically concluded "there are no Native American religious or cultural sites within the Project area." 2-ER-57. Given the evidence in the record, no rational person could reach such a conclusion. At minimum, Defendants were required to specifically explain why none of the discrete areas and artifacts submitted by the tribes and ethnohistorian experts constitute religious and cultural sites or resources.

Defendants "failed to conduct any analysis that could possibly allow it to be certain, as required by the Forest Service [extraordinary circumstances] policy, that no significant effect would occur." *W. Watersheds Project*, 2012 WL 6589349, at *16. Based on evidence of the Project's impact on grinding bowls, medicinal plants, and Reyes Peak, Defendants should have prepared an EIS. 36 C.F.R. §

220.6(c). If the Court finds that there is uncertainty whether "proposed actions may have a significant effect on the environment," Defendants should have at least prepared an EA. *Id.*

2. Defendants Failed to Analyze the Impact of Logging Large Trees on the Sespe-Frazier IRA.

Defendants' analysis of the Project's impact on the Sespe-Frazier IRA contains zero analysis of the effect of logging large trees because "[n]o trees in the greater than 24-inch-diameter classes are planned to be removed." 2-ER-55. Yet the Decision Memo acknowledges large trees may be logged under three exceptions—for safety reasons, if "impacted" by dwarf mistletoe, or for the abstract purpose of "overall forest health." 2-ER-44. As this Court has recognized, logging in roadless areas is "environmentally significant" because of the impact on special ecological attributes "such as water resources, soils, wildlife habitat, and recreation opportunities." *Lands Council v. Martin*, 529 F.3d 1219, 1230 (9th Cir. 2008), citing *Smith v. U.S. Forest Serv.*, 33 F.3d 1072, 1078-79 (9th Cir. 1994). In addition, the record confirms that large trees with dwarf mistletoe play an important ecological role in the Project area. *See, e.g.*, 3-ER-403-411. Indeed, the Roadless Rule itself is structured to protect large trees by only allowing logging of "generally small diameter timber." 36 C.F.R. § 294.13; 66 Fed. Reg. 3,244, 3,273 (Jan. 12, 2001).

Defendants were obligated to analyze and explain why the Project's impacts to large trees "may" not rise to the level of significant impacts. Absent a hard prohibition on logging large trees in the Sespe-Frazier IRA, some consideration of the Project's impact was required. Much like the Decision Memo's analysis of cultural sites, this is not a circumstance where Defendants acknowledged and analyzed the impacts highlighted by Plaintiffs, but ultimately explained why there is no potential for significant impacts. Instead, there is zero analysis of the effect of logging large trees in the Sespe-Frazier IRA.[1] Nor did Defendants even attempt to disclose how many large trees may be logged pursuant to the exceptions. Defendants therefore failed to "to consider an important aspect of the problem" and consequently their decision was arbitrary and capricious. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[1] Defendants downplay the logging of large trees by asserting that "the Decision Memo does not contemplate removal of any trees simply because they contain dwarf mistletoe." ABr. 31-32. The Decision Memo, however, explicitly states that trees "impacted by dwarf mistletoe" can be cut (2-ER-44), and nowhere in the administrative record do Defendants explain or limit what "impacted" means. Moreover, Plaintiffs raised this specific issue during public comment, explaining there is "no way of knowing where and how this exception will be used to remove trees greater than 24" DBH." 3-ER-260. Yet, Defendants approved the Project without first clarifying what "impacted by dwarf mistletoe" means or limiting how many "impacted" large trees could be cut. This is not harmless error, as even Defendants acknowledge "that dwarf mistletoe is common in the region." FER-5; SER-083, 085.

Defendants rely on a post-decisional declaration by Gregory Thompson to argue their extraordinary circumstances analysis passes muster because the number of large trees to be removed would be very small, and potentially zero. ABr. 32.[2] However, the Thompson Declaration was not before the Forest Service when it made its decision and is not part of the administrative record for this case. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (courts are limited to reviewing agency actions based on the evidence before it at the time of decision); *see also* 5 U.S.C. § 706. As *post-hoc*, extra-record evidence prohibited under the APA, the agency may not rely on the declaration to remedy its lack of analysis of the Project's impact on the Sespe-Frazier IRA.[3] Moreover, like the Decision Memo, the Thompson Declaration too acknowledges that some large trees may be removed. SER-064.

Without any analysis of the Project's impact of logging large trees in the Sespe-Frazier IRA, it is uncertain whether the "proposed actions may have a

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[2] Defendants assert that Plaintiffs never moved to strike the declaration at the district court, ABr. 32, but fail to mention that Defendants did not submit a motion, or any legal basis at all, to support their submission of the declaration.

[3] *Post-hoc* rationalizations are prohibited in administrative record cases. *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1909 (2020) ("Considering only contemporaneous explanations for agency action also instills confidence that the reasons given are not simply convenient litigating position[s]. … The basic rule here is clear: An agency must defend its actions based on the reasons it gave when it acted."); *Ass'n of Pac. Fisheries v. Env't Prot. Agency*, 615 F.2d 794, 811-12 (9th Cir. 1980) (parties may not use "post-decision information as a new rationalization either for sustaining or attacking the Agency's decision").

significant effect on the environment." 36 C.F.R. § 220.6(c). As a result, a CE is not appropriate, and Defendants must conduct some form of environmental review.

3. Defendants Did Not Analyze the Project's Impact on "Potential Wilderness."

The Decision Memo contains no analysis of the Project's impact on "potential wilderness," instead dismissing this issue with one sentence: "No potential wilderness areas are identified within the forest plan for the project area." 2-ER-53. The Decision Memo does not discuss Defendants' own factors that indicate potential wilderness, including "wilderness proposals pending before Congress." Forest Service Handbook 1909.12, § 71.3 (2015), https://www.fs.usda.gov/cgi-bin/Directives/get_dirs/fsh?1909.12.

Congress put forth two bills proposing designation of the Project area as wilderness.[4] Although these bills have not been enacted into law, the same was true in *Wildlands Defense v. Bolling*, in which the Forest Service considered a roadless area's potential for wilderness designation in its CE determination, based in part on Congress proposing the area as wilderness, despite lack of final action by Congress

[4] H. R. 2546, "Protecting America's Wilderness Act," passed by the U.S. House of Representatives on February 12, 2020, three months prior to the Reyes Peak scoping period, and H.R. 2500, "National Defense Authorization Act for Fiscal Year 2020," passed by the House on July 12, 2019, nearly a year prior to the scoping period.

or a recommendation by the Forest Service to designate the area as wilderness. No. 4:19-CV-00245-CWD, 2020 WL 5042770, n. 6 *8 (D. Idaho Aug. 25, 2020).

Defendants dismiss this fact by arguing "Potential Wilderness" is a "term of art" that, under the agency's interpretation, denotes only areas "recommended" by the Forest Service as wilderness through the agency's official processes. ABr. 34. Defendants then attempt to rely on an internal "briefing paper" that cursorily recounts how in 2014 the Forest Service concluded that the Sespe-Frazier IRA should not be designated as "Recommended Wilderness." *Id*. (citing 2-ER-108).

Defendants' interpretation of "Potential Wilderness" was not made in any authoritative context such as a regulation[5] and thus deserves no deference. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019). Moreover, the CE regulation (36 C.F.R. § 220.6) speaks to "potential" wilderness, not "recommended" wilderness, and nowhere do Defendants explain why the Project area's attributes do not amount to *potential* wilderness. That failure is highlighted by the fact that Defendants also nowhere explain why the House of Representatives (one of the entities with the actual authority to designate wilderness) was somehow wrong when it determined that the Project area meets wilderness standards and therefore introduced and passed bills to designate the area as wilderness.

[5] The Forest Service's interpretation of "Potential Wilderness" is completely absent from the Decision Memo, instead being made for the first time in briefing. *See* 2-ER-53.

Defendants cannot rely on an *ad hoc* interpretation to remedy their failure to analyze the Project's impact to potential wilderness. The lack of analysis is particularly concerning here because the Project will occur in the Sespe-Frazier IRA. As this Court held, a component of what makes roadless areas so environmentally significant is their potential for wilderness designation. *Lands Council*, 529 F.3d at 1230, citing the Wilderness Act of 1964, 16 U.S.C. §§ 1131-1136; *see also Smith*, 33 F.3d at 1077-78. IRAs share many of the attributes found in the statutory definition of wilderness in the Wilderness Act. *See* 16 U.S.C. § 1131. The presence of the Sespe-Frazier IRA is thus a strong indication of the Project area's potential for wilderness.

Despite the Congressional consideration and the presence of substantial IRA, Defendants failed to analyze the Project's impact on the wilderness characteristics of the Project area or provide a reasoned explanation for why the Project may not cause potential significant impacts. As such, Defendants' finding that the Project will have no effect on potential wilderness was arbitrary and capricious.

II. Defendants Failed to Comply with the Requirements of the Healthy Forests Restoration Act Categorical Exclusions.

HFRA contains two statutory CEs that the Forest Service may use to address (1) insects and disease (16 U.S.C. § 6591b) and (2) hazardous fuels (16 U.S.C. § 6591d). However, when creating these CEs, Congress included specific restrictions

to ensure these CEs would not be abused. Here, Defendants took advantage of these CEs to avoid producing an EA or EIS, but failed to comply with three of the CEs' underlying mandates.

First, the Reyes Peak Project does not "maximize the retention of old-growth" because Defendants never identified where old-growth exists in the Project area; nor does the Project "maximize the retention of … large trees" because Defendants authorized the logging of an unknown number of large trees that Defendants do not account for or address. 16 U.S.C. §§ 6591b(b)(1)(A), 6591d(b)(1)(A). Further, Defendants did not develop and implement the Project through a collaborative process—Plaintiffs were not included in Project development and none of Plaintiffs' comments regarding how to improve the Project were incorporated into the Project. 16 U.S.C. §§ 6591b(b)(1)(C), 6591d(b)(1)(C)). Finally, the Forest Service failed to establish that the Project is located "in Condition Classes 2 or 3 in Fire Regime Groups I, II, or III." 16 U.S.C. §§ 6591b(c)(2), 6591d(c)(2). All three of these requirements must be met to invoke these CEs.

A. Defendants Failed to Rationally Explain How the Project "Maximizes Retention of Old-Growth and Large Trees."

1. Old-Growth

Plaintiffs' Opening Brief explained that Defendants failed to meaningfully address the Project's retention of old-growth because the Forest Service never

identified where old-growth exists within the Project area. Br. 25-29. Defendants counter that "Plaintiffs primarily fault the Forest Service for not identifying where old-growth stands *less* than 24 inches DBH exist," and further contend that "this claim is forfeited." ABr. 38. Both arguments are wrong.

First, Defendants mischaracterize Plaintiffs' old-growth arguments. Plaintiffs relied entirely on Defendants' definition of "old-growth" as "[o]ld forests, which often contain several canopy layers, variety in tree sizes, species, decadent old trees, and standing and dead woody material." Br. 27-28, citing 2-ER-81. Plaintiffs explained that nowhere in the record had Defendants addressed whether any of the Project area met that definition. Br. 26. Instead, Defendants wrongly relied on the retention of large trees as a false equivalent to meet their old-growth obligations. However, even if the Project retained all large trees (which it does not), old-growth could still be harmed because, per its definition, old-growth is made up of multiple ecological attributes, not just large trees. Br. 27-28. Defendants never analyzed where "several layers of canopy," a "variety in [tree] sizes [and] species," "decadent old trees," and "standing and dead woody material" occurs in the Project area.

Recognizing their failure, Defendants now belatedly assert that no old-growth can possibly exist in the Project area because "[t]he oldest Jefferey pine cored during reconnaissance of the Reyes project area was 120 years old." ABr.

39-40, citing 2-ER-82. This argument actually supports Plaintiffs' position. Specifically, Defendants' Brief failed to explain to the Court that the cored, 120-year-old tree was "31.5 [inches] diameter breast height." 2-ER-82.[6] In other words, if larger trees had been cored, such as any of the trees in the Project area between thirty-two and sixty-four inches diameter,[7] trees older than 120 years would have been identified. The Project area has an average of thirteen trees per acre larger than thirty-six inches diameter, and some parts of the Project area even contain up to 80 trees per acre larger than thirty-six inches diameter. 2-ER-83, Table 2. This means that a substantial portion of the trees in the Project area are larger than the cored tree, and therefore the Project area contains many trees older than 120 years. Defendants nowhere explain why the areas that contain these older trees do not fall under the definition of old-growth. That is especially true with respect to the Project areas containing trees as big as sixty-four inches in diameter, as those trees are likely hundreds of years old. It is therefore imperative that Defendants go back and analyze old-growth attributes in the Project area to determine where old-growth exists.

[6] Defendants also failed to divulge their methodology for coring. For example, as far as Plaintiffs are aware (because the administrative record does not explain otherwise), this was the only tree cored in the entire Project area.

[7] "Within the Project area, trees range between 1 inch up to 64 inches diameter." 2-ER-45.

Finally, Defendants allege that Plaintiffs' old-growth argument is forfeited because Plaintiffs "objected to possible removal of old-growth only in the context of asserting that the Project allows logging of trees *greater* than 24 inches DBH." ABr. 38 (emphasis in original). This assertion misstates Plaintiffs' position. At the district court, Plaintiffs made several arguments regarding old-growth, including arguments not specific to trees larger than twenty-four inches. For instance, Plaintiffs asserted that "the Project is void of any information regarding old-growth trees," and that the Forest Service "failed to provide any inventory or *tree stand data* concerning old-growth trees in the Project area." SER-032 (emphasis added). Plaintiffs further argued that "the Forest Service is required to assess the Project area for the presence of old-growth consistent with the definition contained in the Forest Plan[8] in order to determine how the Project can maximize retention of old-growth trees," and explained that "this definition is obviously not limited by size."[9] SER-088-89.

Plaintiffs' fundamental argument is straightforward—the Forest Service has defined "old-growth" for the Los Padres National Forest, yet never addressed or explained whether such ecological attributes exist within the Reyes Peak Project

[8] The definition of "old-growth" in the Forest Plan is the same as the definition in the Silvicultural Report. 2-ER-81.

[9] Defendants refer to Plaintiffs' second district court brief as a reply, but in fact, it was a combined opposition and reply, and therefore Defendants had the opportunity at the district court to respond to it in their reply brief.

area. There is simply zero analysis of old-growth attributes in the Decision Memo other than tree size. 2-ER-75. It is impossible to "maximize[] the retention of old-growth" without first identifying the old-growth in the Project area. 16 U.S.C. §§ 6591b(b)(1)(A), 6591d(b)(1)(A). Defendants should therefore be ordered to complete that task.

2. Large Trees

Because "nearly half" of the trees within the Project area are large (2-ER-54), Plaintiffs were understandably concerned about the Project's exceptions, which authorize the logging of large trees under vaguely-defined conditions. *See* Br. 29-30. Plaintiffs submitted scoping comments stating that the ambiguity of the exceptions, such as for trees "impacted by dwarf mistletoe," could result in the logging of many large trees. 3-ER-260.

Despite Plaintiffs' comments, Defendants chose to approve the Project without first clarifying what "impacted by dwarf mistletoe" means or limiting how many "impacted" trees could be cut.[10] Nor did Defendants explain how many large trees might be logged under any of the other vague exceptions, such as for "safety" or "overall forest health." 2-ER-44.

[10] As noted above (FN 1), Defendants failed to disclose how they will determine which trees are "impacted" by mistletoe, or what that term even means. Accordingly, there is no possible way to know how many large trees will be removed pursuant to this exception.

Despite failing to explain how the exceptions maximized retention of large trees *prior* to approving the Project, Defendants nonetheless now attempt to rely on a *post-hoc* declaration to claim that exceptions will be applied "sparingly" (ABr. 38, 49) and that "few" large trees will be logged (SER-064). As discussed above (*see supra*, I.B.2.), this declaration was not before the agency when it made its decision, is not part of the administrative record, and is an illegal *post-hoc* rationalization. Moreover, the declaration does not identify where, in the administrative record, an explanation or limit exists regarding the logging of large trees, or explain how many trees a "few" is. Thus, even if the declaration were legal, which it is not, it still fails to address Plaintiffs' argument because there continues to remain an unknown number of large trees that may be felled, and that impact must be accounted for and explained.

B. The Reyes Peak Project was Not "Developed and Implemented Through a Collaborative Process."

The Reyes Peak Project was not "developed and implemented through a collaborative process" because Plaintiffs were not included in the development of the Project, and the Forest Service failed to make any meaningful changes to the Project to address Plaintiffs' concerns. Br. 30-35.

Defendants admit that Plaintiffs were not included in Project development, stating that the Forest Service only reached out to the Ventura County Fire

Department and federally recognized Tribes prior to Project scoping in May 2020. ABr. 43.[11] The HFRA CEs, however, require broader collaboration with "multiple interested persons representing diverse interests." 16 U.S.C. §§ 6591b(b)(1)(C), 6591d(b)(1)(C). Defendants nonetheless argue that including Plaintiffs in Project development was not required because Defendants complied with their scoping duties. ABr. 44. This argument wrongly conflates Defendants' scoping obligations with their separate collaboration obligations.

The HFRA CEs explicitly require collaboration *in addition* to scoping. 16 U.S.C. §§ 6591b(b) and (f), 6591d(b) and (f). In fact, the HFRA CEs refer to their projects as "*Collaborative* restoration project[s]," and that is part of the reason these projects are allowed to proceed without an EA or EIS—because they involve collaboration. 16 U.S.C. §§ 6591b(b), 6591d(b) (emphasis added). Separately, the HFRA CEs also require Defendants to "conduct public notice and scoping for any

[11] Defendants assert that Plaintiffs must have been aware of the Project prior to scoping in May 2020. ABr. 44. This is a misunderstanding of the facts. Due to information received from a FOIA request, Plaintiff Los Padres ForestWatch was aware in 2019 that *something* was going to occur in the Reyes Peak area. However, because the Forest Service had not reached out to Los Padres ForestWatch (and only provided documents in response to Los Padres ForestWatch's FOIA request), Los Padres ForestWatch only knew the general location of a *potential* project in the Reyes Peak region. Importantly, Los Padres ForestWatch did not know that the Forest Service intended to use the HFRA CEs to authorize the Project, and therefore did not know in 2019 that the future project would require collaboration.

project or action proposed in accordance with this section."[12] 16 U.S.C. §§ 6591b(f), 6591d(f). Because "statutes should not be construed in a manner which robs specific provisions of independent effect," the HFRA CEs are best understood to require collaboration independently of scoping. *See Cnty. of Santa Cruz v. Cervantes (In re Cervantes)*, 219 F.3d 955, 961 (9th Cir. 2000). Consequently, Defendants cannot meet their collaboration duties under the HFRA CEs by merely complying with Defendants' scoping duties.

Here, the HFRA CEs require the Forest Service to include "multiple interested persons representing diverse interests," and to be "transparent and nonexclusive" when conducting collaboration. 16 U.S.C. §§ 6591b(b)(1)(C), 6591d(b)(1)(C). That did not occur during the Project's development, which was completed by May 8, 2020 (3-ER-370), prior to publication of the scoping notice. *Cf. Greater Hells Canyon Council v. Stein*, No. 2:17-cv-00843-SU, 2018 WL 3966289, *13-14 (D. Or. June 11, 2018) (collaboration occurred independently of scoping through actions by the Forest Service, including before the scoping process began).

[12] Scoping is defined in the NEPA regulations as the "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.

Despite this failure, Defendants argue that "Plaintiffs, moreover, had every opportunity during the scoping period to offer their views." ABr. 45. Not only did scoping occur *after* project development, Plaintiffs did in fact offer their views during the scoping period, and yet Defendants refused to change the Project to address Plaintiffs' views, or any of the views from the other nearly 16,000 commenters who opposed aspects of the Project (such as the City of Ojai, County of Ventura, Native American leaders, scientists, and historians).[13] Cf. *Greater Hells Canyon Council*, 2018 WL 3966289, at *15 (in which the Forest Service "altered Project design to address feedback"). Moreover, Defendants' argument fails to address Plaintiffs' point that collaboration must start *prior* to scoping because that is when many important details are determined such as the project's specific location, size, design measures, limitations, etc. As a result, Defendants plainly violated the HFRA CEs' collaboration mandate.

C. Defendants Failed to Establish that the Project's Location Complies with the HFRA CEs.

The HFRA CEs contain strict location requirements that Defendants failed to meet for the Reyes Peak Project. Br. 35-40. Defendants admit that twelve percent of the Project area is not within "Condition Classes 2 or 3 in Fire Regime

[13] Defendants claim that "the Forest Service invited Plaintiff Los Padres ForestWatch on a site visit, but they declined." ABr. 45. This is not true— Los Padres ForestWatch responded to this invitation *twice*, yet did not receive further communication from the Forest Service. FER-10-11.

Groups I, II, or III," and similarly admit that additional portions of the Project area fall outside this location. ABr. 46. Defendants nonetheless ask the Court to ignore this clear violation of the HFRA CEs because the "[Project] areas within Fire Regime Groups IV and V are unlikely to be subject to treatment, as they do not contain any conifers (which are needed to use the insect and disease category) and the acreage within Fire Regime Group V is not forested at all." ABr. 46. The HFRA CEs contain no exception to their location mandates, however. *See* 16 U.S.C. §§ 6591b(c)(2), 6591d(c)(2). Furthermore, Project areas within Fire Regime Group IV contain native chaparral that is important to the wildlife of the region and which the Forest Service intends to masticate if the Project goes forward, even though Plaintiffs pointed out to the Forest Service that mastication can *increase* fire risk, not decrease it. 3-ER-283.

Defendants complain that they need not provide a "*singular* map showing the overlap of the Vegetation Condition Classes and Fire Regime Groups" (ABr. 47), but Plaintiffs do not ask for a "singular map"—rather, Defendants must in some way clearly establish that the Project exists within the HFRA CE location requirements, and the Forest Service has not done so here. Br. 36-37. Moreover, contrary to Defendants' characterization of *All. for the Wild Rockies v. Higgins*, the Court there determined that the Forest Service must be able to point to something "that connects the dots and thereby would support Defendants' position that the

categorical exclusion under HFRA applies to the Project." 535 F.Supp.3d 957, 977 (D. Idaho 2021), vacated on other grounds, *All. for the Wild Rockies v. Petrick*, 68 F.4th 475, 489 (9th Cir. 2023). Here, Defendants' maps and tables only confirm that the Project meets *one* of the two location criteria—a Fire Regime Area *or* Vegetation Class, whereas to be covered by HFRA, the Project area must be shown to clearly meet *both* criteria. Accordingly, Defendants' decision to apply the HFRA CEs to this Project is arbitrary and capricious.

Defendants further attempt to sidestep their violation of the HFRA CEs by asserting in a footnote that Plaintiffs' "argument [regarding the chaparral portion of the Project] is forfeited" because "Plaintiffs' briefs below did not raise this argument." ABr. 46, FN 7. In fact, Plaintiffs presented this issue in their comments (3-ER-271-272) and their complaint (FER-7-8), and then asserted in the district court that "[n]o maps, evidence or analysis were provided [by the Forest Service] to 'connect the dots' [demonstrating the Project is located in Fire Regime Groups I, II, or III]." SER-039.[14] Defendants never presented any evidence to establish that

[14] Even if Plaintiffs' argument is construed to be entirely new, this Court may address new claims on appeal in cases like this one where there are only legal issues being addressed, the record has been fully developed, and Defendants are not prejudiced. *See, e.g., Cold Mt. v. Garber*, 375 F.3d 884, 891 (9th Cir. 2004); *see also Emmert Indus. Corp. v. Artisan Assocs. Inc.*, 497 F.3d 982, 986 (9th Cir. 2007) ("[W]hen, as here, an appellee has a full and fair opportunity to address an issue raised for the first time on appeal in its appellate briefing, there is no prejudice.")

chaparral belongs in "Fire Regime Groups I, II, or III," and tellingly, nowhere in their Brief do Defendants contest the fact that the chaparral portion of the Project is actually located in Fire Regime Group IV. *See* Br. 37-39. Consequently, the Project cannot qualify for the HFRA CEs.

III. Defendants Violated the Roadless Area Conservation Rule.

The Roadless Rule prohibits logging in IRAs except for "generally small diameter timber" as necessary to promote roadless area character. 66 Fed. Reg. at 3,273. The "intent of the rule is to limit the cutting, sale, or removal of timber to those areas that have become *overgrown with smaller diameter trees*." *Id*. at 3,257 (emphasis added). Here, Defendants violated that mandate by allowing logging of trees up to sixty-four inches in diameter. Br. 39-44. No rational reading of "generally small diameter timber" can encompass the logging of trees up to sixty-four inches when the Los Padres Forest Plan defines large trees as starting at twenty-four inches dbh. 2-ER-45. Defendants argue that logging of large trees "will be exceedingly rare." ABr. 55.[15] However, the Rule is clear that logging is only appropriate for "generally small diameter timber"—there is no exception to this limitation based on the supposed volume of large trees to be logged. The modifier "generally" operates on "small diameter timber," indicating some

[15] Defendants rely on a *post-hoc* declaration that may not be considered by this Court as it was not before the agency when it made its decision. *See supra* I.B.2.

discretion in defining small diameter trees. "Generally" does not, however, operate on the limitation itself.

Plaintiffs acknowledge that this Court, in a recent unpublished memorandum, determined that the Forest Service complied with the Roadless Rule when the agency "determined that trees up to 21 inches dbh constitute 'generally small diameter timber' for the Tecuya Project because the dominant species in the project area, Jeffrey Pine, has a growth potential of 60–90 inches dbh." *Los Padres ForestWatch v. U. S. Forest Serv.*, No. 23-55054, 2024 WL 885130, at *1 (9th Cir. Mar. 1, 2024). The facts here, however, are substantially different from the Tecuya Project as Defendants seek to log trees up to sixty-four inches diameter, not twenty-one inches.

Defendants argue that the Decision Memo is consistent with the Regional Forester's approval (ABr. 55); however, the record shows the opposite—the Regional Forester only approved the logging of trees *less* than twenty-four inches diameter within the Sespe-Frazier IRA. 2-ER-106 (stating that trees "less than 1-inch up to 23.9-inch diameter at breast height class" can be logged while "[t]rees between the 24-inch and 64-inch diameter at breast height class would be retained"). Accordingly, Defendants violated the Roadless Rule by allowing logging of trees up to sixty-four inches diameter in a protected roadless area.

IV. The Appropriate Remedy is Vacatur.

Pursuant to the APA, courts "*shall*. . . hold unlawful and *set aside agency action*, findings, and conclusions found to be. . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (emphasis added); *see 350 Montana v. Haaland*, 50 F.4th 1254, 1273 (9th Cir. 2022) ("vacatur is the presumptive remedy under the APA"), citing *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121-22 (9th Cir. 2018).

Vacatur is the appropriate remedy here because (1) the seriousness of the agency's errors outweighs any disruptive consequences of an interim change that may itself be changed; (2) leaving the decision in place would risk environmental harm; and (3) fundamental flaws in the agency's decision make it unlikely the same determination would be made on remand. *NRDC v. U.S. EPA*, 38 F.4th 34, 51-52 (9th Cir. 2022).

Here, Defendants' egregious failure to consider the potential consequences of their action outweighs any delay caused by the required analysis under NEPA, HFRA, and the Roadless Rule. Second, leaving Defendants' decision in place would risk great and irreversible harm to environmental and cultural resources. Third, this is not a situation where the agency can simply correct a minor procedural error that will likely result in the same or similar decision. Rather, if Defendants comply with their requirements under NEPA, HFRA, and the Roadless

Rule, the likely result will be preparation of an EA or EIS, along with protections for important resources. It is imperative that Defendants consider the consequences of their action *before* proceeding with the Project, and that they protect cultural sites, roadless areas, and potential wilderness from logging operations.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' authorization of the Reyes Peak Project be vacated and remanded to the agency with instructions to comply with NEPA, HFRA, and the Roadless Rule.

Respectfully submitted this 17th day of April, 2024,

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