UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FEDERAL FOREST RESOURCE COALITION; **AMERICAN FOREST RESOURCE COUNCIL**; **BLUERIBBON COALITION**; **CALIFORNIA ASSOCIATION OF 4 WHEEL DRIVE CLUBS**; **PUBLIC LANDS COUNCIL**; **NATIONAL CATTLEMEN'S BEEF ASSOCIATION**; **AMERICAN SHEEP INDUSTRY ASSOCIATION**; **ALASKA FORESTRY ASSOCIATION**; **RESOURCE DEVELOPMENT COUNCIL FOR ALASKA, INC.**; **MINNESOTA FOREST INDUSTRIES, INC.**; **MINNESOTA TIMBER PRODUCERS ASSOCIATION**; **CALIFORNIA FORESTRY ASSOCIATION;** and **MONTANA WOOD PRODUCTS ASSOCIATION, INC.**

Plaintiffs,

vs.

THOMAS J. VILSACK, Secretary of Agriculture, and **UNITED STATES FOREST SERVICE**,

Defendants

and

KLAMATH-SISKIYOU WILDLANDS CENTER; OREGON WILD; THE WILDERNESS SOCIETY AND DEFENDERS OF WILDLIFE

Defendant-Intervenors

Civil No. 1:12-cv-01333-KBJ

MOTION FOR RECONSIDERATION UNDER FED.R.CIV.P. 59(E), MOTION FOR CLARIFICATION AND MEMORANDUM IN SUPPORT OF MOTIONS

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Plaintiffs Federal Forest Resource Coalition, *et al*. move under Fed.R.Civ.P. 59(e) for reconsideration of the Court's Memorandum Opinion filed April 28, 2015 and for clarification of the Memorandum Opinion as explained below. Pursuant to LCvR 7(m) Plaintiffs have consulted with Federal Defendants regarding these motions and they have indicated that they oppose the motions. Defendant-intervenors take no position on the motions.

I. Motion for Reconsideration Under Fed.R.Civ.P. 59(e)

A. Rule 59(e) standards.

The standards applicable to a motion for reconsideration under Rule 59(e) have been summarized:

> There is no Federal Rule of Civil Procedure that expressly addresses motions for reconsideration. *E.g., Computerized Thermal Imaging, Inc. v. Bloomberg, L.P.*, 312 F.3d 1292, 1296 n. 3 (10th Cir. 2002); *Lance v. United Mine Workers of Am. Pension Trust*, 400 F.Supp.2d 29, 31 (D.D.C. 2005). Courts typically treat motions to reconsider as motions to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). *E.g., Emory v. Sec'y of Navy*, 819 F.2d 291, 293 (D.C. Cir. 1987); *Lance*, 400 F.Supp.2d at 31; see also *Hall v. Cent. Intelligence Agency*, 437 F.3d 94, 97 (D.C. Cir. 2006). " 'A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.' " *Ciralsky v. Cent. Intelligence Agency*, 355 F.3d 661, 671 (D.C. Cir. 2004) (quoting *Firestone v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)); *see also Mobley v. Cont'l Cas. Co.*, 405 F.Supp.2d 42, 45 (D.D.C. 2005) ("A motion for reconsideration ... will not lightly be granted."). A Rule 59(e) motion "is not simply an opportunity to reargue facts and theories upon which a court has already ruled." *New York v. United States*, 880 F.Supp. 37, 38 (D.D.C. 1995). Nor is it "a vehicle for presenting theories or arguments that could have been advanced earlier." *Burlington Ins. Co. v. Okie Dokie Inc.*, 439 F.Supp.2d 124, 128 (D.D.C. 2006); see also *Kattan v. District of Columbia*, 995 F.2d 274, 276 (D.C. Cir. 1993).

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Howard v. Gutierrez, 503 F.Supp.2d 392, 394 (D.D.C. 2007). While these cases delineate the circumstances where a Rule 59(e) motion "need ... be granted," it is also true that "the court has considerable discretion in ruling on a Rule 59(e) motion." *Rann v. Chao,* 209 F.Supp.2d 75, 78 (D.D.C. 2002); *Piper v. U.S. Dept. of Justice,* 312 F.Supp.2d 17, 20 (D.D.C. 2004).

B. <u>Plaintiffs seek reconsideration based on two factors that the Court did not address in its Memorandum Opinion</u>:

1. Plaintiffs respectfully suggest that the Court failed to explain why, if Plaintiffs here have suffered no Article III injury-in-fact, other courts found Article III injury-in-fact and reached the merits in all seven of the prior cases that challenged a Forest Service planning rule or a comparable Forest Service regulation – both before and after the Supreme Court's decision in *Summers v. Earth Island Institute*, 555 U.S. 488 (2008).

a. <u>2000 Plan Development Rule</u>:

i. *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 972 (9th Cir. 2003) ("Citizens correctly assert that the 2000 Plan Development Rule decreases substantive environmental requirements (thus injuring their concrete interest in enjoying the national forests) as compared to the 1982 Plan Development Rule.").

ii. *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 481 F.Supp.2d 1059 (N.D. Cal. 2007) (reaching merits of challenge to 2005 Rule replacing 2000 Plan Development Rule without discussing standing).

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iii. *Citizens for Better Forestry v. U.S. Dept. of Agric.*, 632 F.Supp.2d 968, 978-79 (N.D. Cal. 2009) (2007 version of 2005 Rule; deciding after *Summers* to adhere to Circuit precedent finding standing).

b. 2001 Roadless Rule requiring forest plans to protect existing roadless areas.

i. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1109 (9th Cir. 2002). ("Here, both sets of [environmental] intervenors have demonstrated injury in fact. FSEEE's members work in the National Forests containing the roadless areas and regularly use them for a variety of outdoor recreation and nature appreciation, as found by the district court. Similarly, ICL's staff and members hunt, hike, fish and camp in roadless areas. These areas were to be protected by the Roadless Rule but will have less protection from development if the district court's injunction is sustained. This is sufficient to establish an injury in fact.").

ii. *Wyoming v. U.S. Dept. of Agric.*, 277 F.Supp.2d 1197, 1215 (D. Wyo. 2003) (finding Article III standing), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).

iii. *California ex rel. Lockyer v. U.S. Dept. of Agric.*, 459 F.Supp.2d 874, 888-889 (N.D. Cal. 2006) (upholding Article III standing for challenge to 2005 State Petition rule that replaced 2001 Roadless Rule), *aff'd*, 575 F.3d 999, 1011 (9th Cir. 2009) (not addressing Article III standing after *Summers* but finding challenge to Rule is ripe).

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iv. *Organized Village of Kake v. U.S. Dept. of Agric.*, 776 F.Supp.2d 960, 968-69 (D. Alas. 2011) (finding Article III standing), *rev'd on merits without addressing standing*, 746 F.3d 970 (9th Cir. 2014).

By ignoring these Ninth Circuit decisions and finding no standing in this case, the Court has created a conflict between the D.C. Circuit and Ninth Circuit, contrary to the rule that the D.C. Circuit (like other courts) tries "to avoid 'direct conflict with other circuits.'" *Crandall v. Paralyzed Veterans of Am.*, 146 F.3d 894, 897 (D.C. Cir. 1998); *Noble v. U.S. Parole Com'n*, 82 F.3d 1108 (D.C. Cir. 1996) (avoiding circuit conflict); *Hale v. Arizona*, 993 F.2d 1387, 1393 (9th Cir.1993) (en banc) ("For prudential reasons, we avoid unnecessary conflicts with other circuits ...."); *Phillips v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 795 F.2d 1393, 1400 (8th Cir. 1986) ("[W]e observe that the federal appellate courts, in the absence of precedent in their own circuit, tend to rely on precedent in other circuits. Ordinarily, then, in deciding a case of this kind, we would defer to the opinion of another circuit … and avoid creating a conflict within the circuits."); *Rockford League of Women Voters v. U.S. Nuclear Regulatory Com'n*, 679 F.2d 1218, 1221 (7th Cir. 1982) ("we much prefer where possible to avoid creating a conflict among circuits").

2. In finding that the 2012 Planning Rule causes no injury-in-fact because it has no on-the-ground effects, the Court overlooked two undisputed facts:

First, the Forest Service conceded the Planning Rule significantly affects the quality of the human environment by preparing an environmental impact statement (EIS) for the Planning Rule under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332. An EIS is required only for federal agency actions "significantly affecting the

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quality of the human environment," 42 U.S.C. § 4332(2)(C). *See* Deft. MSJ at 5-6 (noting publication of draft and final EIS). The Forest Service's claim in its brief that the Planning Rule has no on-the-ground impact is contradicted by its preparation of the EIS.

Second, the Forest Service conceded the Planning Rule by itself (without any plan or project implementation) "may adversely affect" threatened and endangered species or their habitats. It did so by initiating and completing formal consultation under the Endangered Species Act (ESA), 16 U.S.C. § 1536, on the Planning Rule. *See* PR_0121723-24 (National Marine Fisheries Service Biological Opinion concluding ESA consultation). Formal ESA consultation is required only for federal agency actions that "may adversely affect" protected species or habitats. 50 C.F.R. § 402.14(a) and (b). Conducting this formal consultation contradicts the Forest Service litigation position that the Planning Rule has no on-the-ground effects.

For these reasons, the Court should reconsider its ruling that Plaintiffs lack Article III standing to challenge the 2012 Planning Rule, and on reconsideration should find that the Plaintiffs have Article III standing in this case.

II. Motion for Clarification

Plaintiffs' motion for clarification addresses the portion of Section IV(A)(2) of the Memorandum Opinion beginning on the 21st line of page 34 ("Here, Plaintiffs …") and ending at the end of the 11th line of page 37. Plaintiffs respectfully move the Court to delete this section of the Memorandum Opinion.

The heading of Section IV(A)(2) is "Plaintiffs Have Failed To Identify A Specific Land Management **Plan** Promulgated Pursuant To the 2012 Planning Rule That Threatens To Harm Their Economic Interests." Mem. Op. at 33 (bold added). Plaintiffs

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are not asking the Court to reconsider that conclusion. Rather, the reason for this motion is that the Court's discussion in the pages 34-37 segment is not relevant to that conclusion. Instead, this segment addresses a completely different point that was not argued by the parties nor presented in this case: whether a challenge to a prohibitory agency decision in a land management plan that is based on economic injury must identify the exact geographic location of a specific agency project that would perform the prohibited agency action. The Court asserted that "under *Summers*' reasoning, Plaintiffs do not have standing to challenge the 2012 Planning Rule unless and until they have been – or certainly will be – **harmed by a specific land management action, that was made pursuant to a land management plan**, which was (in turn) developed pursuant to the 2012 Planning Rule," Mem. Op. 36-37 (bold added). This assertion is erroneous *dictum* that is not relevant to the facts of this case.

Respectfully, it appears the Court may have misunderstood Plaintiffs' argument presented on page 15 of their Reply Brief and quoted by the Court on pages 34-35 regarding *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). *Summers* is inapposite for two reasons: 1) *Summers* addressed the need for geographic specificity for **environmental or recreational** injury, and *Summers* does not state or imply that comparable geographic specificity is required for **economic** injury; and 2) *Summers* did not involve agency action that directly or indirectly **prohibits or limits land management**, as does the 2012 Planning Rule.

In the passage quoted by the Court, Plaintiffs' were arguing that there is no requirement in *Summers* or anywhere else for a party alleging **economic** injury to prove the geographical location of the federal agency action that caused the economic injury. It

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was plain error for the Court to assert (page 35, lines 5-7) that economic injury requires "precisely" the same showing as environmental or recreational injury because *Summers* neither holds nor implies that such equivalence exists.

Indeed, there is no logical way the location of economic injury could be definitively determined. For example, a lumber manufacturing plaintiff might reasonably conclude that economic injury occurs at the location of the plaintiff's **manufacturing facility** because that is where the logs would have been cut (and the profit earned) if the logs had been made available for harvest. Or the lumber manufacturer might believe that the injury occurs at the location of its **accounting office** because that is where the manufacturer calculates its profitability. And any plaintiff with economic injury could also fairly decide that economic injury, like venue, occurs wherever the federal official who made the decision **is located**, in this case Washington, D.C.

Any of these locations is plausible, but the geographical location where an agency action **did not occur** is not a plausible location for economic injury because it is by definition impossible to determine. In a case like this, where a challenged federal action **prohibits or limits** categories of conduct by the agency or the public, no plaintiff can prove the exact geographic location where the prohibited conduct would have occurred if it had not been prohibited. That is why in *Ohio Forestry v. Sierra Club*, 523 U.S. 726 (1998), the Supreme Court ruled that "[a]n agency decision that precludes an action – for example, a forest plan decision to prohibit timber sales in a particular area – is immediately ripe for review," *id*. at 738-39 – without having to wait for approval of an individual project based on the forest plan – for the obvious reason that there **will never be** an individual project offering timber in the prohibited area.

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It is literally impossible for any person to identify where on a national forest a timber sale or grazing lease would have been made that was prohibited or restricted by a federal agency decision such as the 2012 Planning Rule. Not even the Forest Service knows precisely where it **would have offered** timber sales or grazing leases that it **is not allowed to offer**. Article III standing does not require non-existent proof of a decision that will never be made. When an agency planning decision directly or indirectly reduces timber harvest or grazing leases on a national forest, the sales or leases that are foregone could have been located **anywhere** on the forest – because timber can be harvested wherever there are trees, and livestock can be grazed wherever there is grass. Thus, a challenger with economic injury has no precise geographical location to point to in order to prove that the economic injury occurred.

No case before *Summers* ever held that a plaintiff suffering economic injury must prove the geographical location where the economic injury occurs, and no case has ever applied the *Summers* geographical specificity rule to economic injury. The government made that argument in *Douglas Timber Operators v. Salazar*, 744 F.Supp.2d 244 (D.D.C. 2011), but Judge Bates rejected the argument. *Id*. at 252. In this case, the government **never argued** that proof of economic injury requires Plaintiffs to establish the exact geographical location of a timber sale or grazing lease that was never offered. *See* Deft. MSJ at 12; Deft. Reply at 7. Their argument was merely that Plaintiffs should challenge a specific forest plan after the plan is adopted. *Id*.

Because the Court's discussion of geographical specificity is both erroneous and unnecessary to the Court's conclusion, Plaintiffs respectfully ask the Court to clarify the

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Memorandum Opinion by deleting the portion of Section IV(A)(2) beginning on the 21st line of page 34 ("Here, Plaintiffs …") and ending at the end of the 11th line of page 37.

III. Conclusion

The motions for reconsideration and clarification should be granted.

Dated this 21st day of May, 2015.

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