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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
SACRAMENTO DIVISION

SIERRA NEVADA FOREST PROTECTION CAMPAIGN, et al., Plaintiffs, v. LAURIE TIPPIN, et al., Defendants, and SIERRA PACIFIC INDUSTRIES, Defendant-Intervenor.	Case No: 2:06-CV-00351-FCD-DAD MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT DATE: August 4, 2006 TIME: 10:00 a.m. JUDGE: Hon. Frank C. Damrell, Jr. PLACE: Courtroom No. 2, 15th Floor

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GLOSSARY OF ACRONYMS

APA.....Administrative Procedure Act

BBS .....Breeding Bird Survey

CEQ.....Council on Environmental Quality

CWHR.....California Wildlife Habitat Relationships

DEIS.....Draft Environmental Impact Statement

DFPZ.....Defensible Fuel Profile Zone

EA .....Environmental Assessment

EIS.....Environmental Impact Statement

EPA .....Environmental Protection Agency

FEIS .....Final Environmental Impact Statement

HRCA .....Home Range Core Area

LRMP.....Land and Resource Management Plan

MIS .....Management Indicator Species

NEPA .....National Environmental Policy Act

NFMA .....National Forest Management Act

OFEA .....Old Forest Emphasis Area

QLG .....Quincy Library Group

ROD .....Record of Decision

SNEP.....Sierra Nevada Ecosystem Project

SNFPA .....Sierra Nevada Forest Plan Amendment

CITATIONS TO THE ADMINISTRATIVE RECORD

Federal defendants filed the administrative record on April 20, 2006, including volumes 1 to 11 and pages 1 to 3952, and a supplement to the administrative record on May 25, 2006, including volumes 12 to 13 and pages 3953 to 5323. Plaintiffs will cite all documents in both the administrative record and supplement by "CR" followed by the page number, e.g., CR259. The administrative record also includes a number of CDs, which contain files with separately paginated documents. In citing those documents, plaintiffs will cite the page number that contains the CD, followed by the separate pagination within the document, e.g., CR42, Vol. 4, App. E at 24. There is one additional document for which the record includes a flawed version. Plaintiffs have included the relevant pages from this document as Exhibit 1 to the Declaration of David B. Edelson (May 26, 2006).

INTRODUCTION

Plaintiffs, the Sierra Nevada Forest Protection Campaign *et al.*, challenge the Forest Service's decision to approve the Creeks Forest Health Recovery Project on the Lassen National Forest in California's northern Sierra Nevada. The Creeks project authorizes over 10,000 acres of logging, including habitat for sensitive and imperiled species like the California spotted owl and the American marten. The Forest Service underestimated and overlooked the project's adverse environmental consequences and failed to consider whether less intensive logging could achieve the project's goals. The decision to approve the Creeks project needs to be reconsidered based upon a more careful analysis of environmental impacts and reasonable alternatives.

Plaintiffs challenge the Creeks project on several grounds. First, the decision to approve the project is contrary to the National Environmental Policy Act (NEPA) because the Creeks environmental impact statement (EIS) failed to consider reasonable alternatives involving less intensive logging. Second, the decision is also contrary to NEPA because the EIS failed to take a "hard look" at significant environmental issues, particularly the relationship between logging and wildfire and the project's impacts to wildlife that inhabit old forests. Third, the Forest Service's conclusion that the Creeks project will insure the viability and distribution of old forest wildlife is based upon flawed analysis and insufficient evidence, contrary to the National Forest Management Act (NFMA). Finally, the Creeks project is legally infirm because the Forest Service failed to obtain and analyze required wildlife monitoring data prior to approving the project, contrary to NFMA.

For the reasons set forth in detail below, plaintiffs are entitled to summary judgment and the Forest Service's decision to approve the Creeks project should be set aside.

FACTUAL BACKGROUND

The Forest Service asserts that the Creeks logging project is necessary to reduce the risk of catastrophic wildfire and that the proposed logging is consistent with the agency's legal duties to

insure viable populations of old forest wildlife. This section offers a brief context for addressing and understanding these central issues.

I. Old Forests and Wildlife

The history of logging of old growth forests in the Pacific Northwest, with its attendant ill consequences for imperiled species such as the northern spotted owl, is well documented. *See, e.g., Northwest Ecosystem Alliance v. Rey,* 380 F. Supp.2d 1175, 1181-84 (W.D. Wash. 2005). The fate of old forests in the Sierra Nevada, though less publicized, has been similar.

As the Forest Service has acknowledged, "[o]ld forests are one of the most altered ecosystems in the Sierra Nevada, and they have declined in quality, quantity, and distribution." CR42, Vol. 4, App. E at E-47. According to Forest Service estimates, between 50-90 percent of Sierra Nevada coniferous forests were historically in an old forest condition. CR42, Vol. 2, Chap. 3, part 3.2 at 149. By contrast, the Forest Service estimates that only 10 percent of the Lassen National Forest, and 15 percent of national forests throughout the Sierra Nevada, currently meets old-growth criteria. *Id.* at 138.

Given this substantial reduction in the amount and quality of old forests in the Sierra Nevada, it is not surprising that the wildlife that inhabit these forests, such as the California spotted owl, the Pacific fisher, and the American marten, are imperiled. The Forest Service has designated each of these as "sensitive" species that are closely associated with late-successional, old forests. CR3966-72. "Sensitive species are 'those species whose viability is of concern because they have significant current or predicted downward trends in numbers or density, or because there is a significant downward trend in their current or predicted habitat that would reduce their distribution.'" *Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 555 (9th Cir. 2000)(quoting *Friends of the Wild Swan v. U.S. Forest Service,* 966 F. Supp. 1002, 1009 (D. Or. 1997)).

The California spotted owl is the subspecies of spotted owl that inhabits the Sierra Nevada. The owl nests and forages in old forests characterized by large trees, relatively dense canopy cover and large snags (i.e., standing dead trees) and down wood. CR42, Vol. 3, Chap. 3, part 4.4 at 72-73. Logging has resulted in "a reduction in the amount and distribution of mature and older forests, and specific habitat elements such as large trees, snags, and downed logs, used for nesting and foraging by California spotted owls." *Id.* at 80. Dr. Jennifer Blakesley, a leading spotted owl biologist, has documented an "alarming decline in the number of owls within the Creeks project area," CR3906, which contributes to "significant concern regarding the viability of the California spotted owl population in the northern Sierra Nevada, including the [Creeks] project area." CR1656.

The Pacific fisher is a furbearing mammal or forest carnivore that is related to the mink. "Numerous studies have documented that fishers in the western United States utilize stands with certain forest characteristics for resting and denning such as large trees and snags, coarse woody-debris, dense canopy closure and multiple-canopy layers." 69 Fed. Reg. 18770, 18774 (April 8, 2004)(CR4785). The Fish and Wildlife Service concluded in 2004 that the west coast population of the fisher warrants listing under the Endangered Species Act and added the fisher to the list of candidate species. *Id.* at 18792 (CR4803). Although a small fisher population remains in the southern Sierra Nevada, the fisher has apparently been extirpated from the central and northern Sierra, including the Creeks project area, due in significant part to logging of old forest habitat. *Id.* at 18778 (CR4789). However, "[s]cientists agree that ensuring the viability of the fisher in the Sierra Nevada requires that the fisher recolonize the central and northern Sierra." Complaint for Declaratory and Injunctive Relief ("Complaint"), ¶ 16; Federal Defendants' Answer ("Answer"), ¶ 16. A recent analysis by leading Forest Service researchers shows that the Creeks project area currently provides moderate to moderately high habitat quality for the Pacific fisher. CR3900-02.

The American marten, a smaller relative of the fisher, is also closely associated with old forests and has been detected in the Creeks project area. According to the Forest Service, "[t]he combination of relatively low, natural population sizes and association with habitat that is vulnerable to additional losses (old-forest conifer ecosystems) makes martens particularly vulnerable to activities that decrease canopy closure or remove large-diameter standing and downed material from forest lands." CR4073-74. Forest Service researchers have found that there have been "substantial changes" in the marten's distribution in the Sierra Nevada, including "large gaps between contemporary detections that were not present historically" in the northern Sierra Nevada and southern Cascades, in the vicinity of the Creeks project area. CR5231. The researchers concluded that "loss of mature forest habitat" has likely contributed to this gap. CR5222-23.

As described below, the record demonstrates that the Creeks project will adversely affect habitat for the owl, fisher, and marten – as well as the pileated woodpecker, another species associated with old forests – by logging medium and large trees (20" diameter and greater), reducing canopy cover to 40 percent or below, and reducing the amount of large snags and down wood.

II. Fire and Fuels

Prior to European settlement, the Sierra Nevada's forests were characterized by frequent, low-intensity wildfires which facilitated the development of large, fire-resistant trees. However, over a century of logging in the Sierra Nevada, together with efforts to suppress wildfires, have dramatically changed the Sierra's forests. According to the Congressionally-mandated report of the Sierra Nevada Ecosystem Project (SNEP), "[t]imber harvest, through its effects on forest structure, local microclimate, and fuel accumulation, has increased fire severity more than any other recent human activity." CR4009, Vol. 1, Chap. 4 at 62. As a result of logging and fire suppression, many forests in the Sierra today lack "the structural and ecological diversity of naturally disturbed forests and [are] vulnerable to high intensity, stand-destroying fire." *Id.,* Vol. 1, Chap. 6 at 95.

Even though logging has contributed substantially to the present vulnerability of the Sierra's forests to catastrophic wildfire, the Forest Service's approach to reducing the risk of stand-replacing wildfires relies heavily on continued logging, often described by the agency with euphemisms such as "fuels reduction" and "forest health recovery." This approach has not escaped criticism, including from the courts. *See, e.g., Sierra Club v. Eubanks,* 335 F. Supp.2d 1070, 1078 (E.D. Cal. 2004)(enjoining proposed logging based on finding that research does "not appear to support the fuel reduction approach being advocated" by Forest Service); *Sierra Club v. Bosworth,* 199 F. Supp.2d 971, 981 (N.D. Cal. 2002)(enjoining proposed logging where Forest Service failed to consider scientific opposition to agency's view that logging "will reduce the intensity of future wildfires in the project area"); *cf. Earth Island Institute v. U.S. Forest Service,* 442 F.3d 1147, 1160 (9th Cir. 2006)(enjoining proposed logging based on plaintiffs' argument "that many more trees will be cut than are necessary to meet the legitimate [fuels reduction] objectives"). In particular, the criticism has focused on the Forest Service's emphasis on logging larger trees in the name of fuels reduction, rather than removing the smaller trees and woody debris that contribute most to the risk of stand-replacing wildfire. *Sierra Club v. Eubanks,* 335 F. Supp.2d at 1074, 1077-78.

According to Dr. Dennis Odion, a fire ecologist whose views the court in *Eubanks* found "appear to have support in the scientific literature," *id.* at 1078, removing medium and large trees and substantially reducing canopy cover is not only unnecessary to achieve fuels reduction goals, but may actually exacerbate the risk of catastrophic wildfire. CR1724-27. Similarly, fire ecologist Carol Rice concluded in her detailed literature review that the Forest Service's fuels reduction goals "can be met by treatments that limit diameter of trees removed to 20 inches and maintain a canopy closure greater than 50%." CR3912. Such logging, which is considerably less intense than that

proposed in the Creeks project, would also significantly reduce adverse impacts to habitat for the California spotted owl and American marten. CR1824; CR3888.

III. The Creeks Project Area

The Creeks project is located in the Lassen National Forest in the northern Sierra Nevada, south of Lassen Volcanic National Park. CR1882. The project area is ecologically important for several reasons. First, most of the project area is within the Forest Service's old forest emphasis area (OFEA) land allocation, which are areas "containing the best remaining large blocks or landscape concentrations of old forest and areas that provide old forest functions (such as connectivity of habitat over a range of elevations to allow migration of wide-ranging old-forest-associated species)." CR83. The Creeks project will log approximately 8,828 acres within OFEAs. CR1790.

Second, the project area contains thousands of acres designated by the Forest Service as home range core areas (HRCAs) for the California spotted owl. The Forest Service established HRCAs to "encompass the best available California spotted owl habitat in the closest proximity to the owl activity center." CR90. HRCAs are especially valuable to owls because of their high habitat value and proximity to owl nests and, as the Forest Service has recognized, research suggests "that removing suitable habitat within the vicinity of a nest tend[s] to reduce the productivity and survivorship of the resident owls." CR124 at 270. According to the Forest Service, the Creeks project will log over 3,000 acres of HRCAs and will render much of this acreage unsuitable as habitat for the California spotted owl. CR2037 (Table 3-45).

Third, the project area provides ecologically important habitat for the American marten and Pacific fisher. The project authorizes logging within habitat management areas that were set aside for these species in the Lassen forest plan "to provide breeding areas and travel corridors to facilitate movement of individuals and genetic interchange throughout the length of the Forest." CR23, App. T at T-1. As stated in the Lassen plan, "there is no research data or other empirical evidence to

suggest that we can harvest within furbearer areas and still maintain suitable habitat conditions." *Id.* at T-2. Based on a landscape analysis, the Creeks project area "likely plays an important role in ensuring north-south habitat connectivity for marten," CR3903, and, according to marten expert Dr. Thomas Kucera, "potentially serves as an important biological corridor connecting marten populations to the north and south that might otherwise become isolated from one another." CR3876.

The Creeks project will adversely affect habitat for the California spotted owl, American marten, Pacific fisher, and pileated woodpecker. According to the Forest Service, the project will affect approximately 28 percent of the existing habitat for the spotted owl and marten in the analysis area, and will reduce suitable habitat for these species by approximately 15 percent. CR1859. However, according to experts who have reviewed the Creeks project, these figures underestimate the actual amount of habitat degradation that will occur if the Creeks project is implemented. CR3885; CR3878. In addition, the Creeks project will log and degrade areas that provide habitat connectivity for the marten. CR3876-77. In sum, the Creeks project is likely to threaten the viability and distribution of the owl and marten in the planning area and to degrade habitat connectivity for these species and the Pacific fisher. CR3884; CR3876-78.

PROCEDURAL BACKGROUND

The Forest Service utilizes a two-stage approach to forest planning pursuant to the National Forest Management Act (NFMA), 16 U.S.C. § 1600 *et seq.*, and the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.* At the first stage, the Forest Service develops a land and resource management plan (LRMP) for each national forest, accompanied by an environmental impact statement (EIS). Once the LRMP is approved, plan implementation occurs at a second stage, when site-specific projects, such as timber sales, are planned and approved. These site-specific projects must be consistent with the LRMP, and their environmental impacts must be further

considered pursuant to NEPA. *See generally Inland Empire Public Lands Council v. U.S. Forest Service,* 88 F.3d 754, 757-58 (9th Cir. 1996).

The Forest Service adopted the Lassen National Forest LRMP in 1993 and subsequently amended the plan on several occasions. In 1999, the Forest Service adopted the Herger-Feinstein Quincy Library Group (QLG) record of decision (ROD), CR41, which amended the LRMP for the Lassen National Forest and other national forests in the northern Sierra Nevada.[1] In 2001, the Forest Service approved the Sierra Nevada Forest Plan Amendment (SNFPA), also known as the Sierra Nevada Framework, which amended the LRMPs for all national forests in the Sierra Nevada. CR4208-4333. Finally, in 2004, the Forest Service replaced the 2001 Framework with a new plan, referred to as the 2004 Framework, which also amended the LRMPs for all Sierra national forests.[2] CR50. The Creeks project was "designed to implement and be consistent with" the 1993 Lassen LRMP, as amended by the QLG ROD, the 2001 Framework, and the 2004 Framework. CR1855.

The Forest Service initiated the scoping process for the Creeks project in June 2004. CR169. Plaintiffs submitted detailed comments in response to the scoping notice, describing the kind of information, analysis, and alternatives that should be included in the environmental analysis for the project. CR273-93; CR241-52. In February 2005, the Forest Service initiated a second scoping process and announced that an EIS would be prepared in connection with the project. CR300. Plaintiffs also submitted comments in response to the second scoping period. CR378-83; CR360-73.

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[1] The QLG ROD implemented the Herger-Feinstein Quincy Library Group Forest Recovery Act. Pub. L. 105-277, Div. A, § 101(e) [Title IV, § 401], 112 Stat. 2681-2305 (Oct. 21, 1998), codified at 16 U.S.C. § 2104 note. The QLG Act requires the Forest Service to conduct a five-year pilot project to implement and demonstrate the effectiveness of certain resource management activities, including defensible fuel profile zones (DFPZs) and group selection, on 1.5 million acres of federal land in the Plumas and Lassen National Forests and the Sierraville Ranger District of the Tahoe National Forest. *Id.* § 401(b). However, such activities are to be carried out only "to the extent consistent with applicable Federal law" and applicable standards for the California spotted owl. *Id.* § 401(c)(3). In 2003, Congress "extend[ed] the expiration of the Quincy Library Group Act by 5 years." Pub. L. 108-7, Div. F, Title III, § 338, 117 Stat. 278 (Feb. 20, 2003), codified at 16 U.S.C. § 2104 note.

[2] Plaintiffs have challenged the Forest Service's decision to adopt the 2004 Framework on several grounds, including failure to insure the viability of old forest wildlife as required by NFMA. *Sierra Nevada Forest Protection Campaign v. Rey,* 2:05-cv-00205-MCE-GGH (E.D. Cal.).

In particular, plaintiffs urged that the EIS consider all reasonable alternatives, including alternatives that would protect trees 20" diameter and greater and maintain canopy cover at 50 percent or greater, and specifically including an alternative consistent with the 2001 Framework. CR378-83.

In May 2005, the Forest Service issued a draft EIS for the Creeks project, including a proposed action. Other than the proposed action and "no action," the DEIS failed to consider in detail any alternatives. CR1378-79. Plaintiffs filed comments on the draft EIS, together with critiques from experts in the fields of wildlife biology and fire ecology. CR1758-1847. In their comments, plaintiffs argued that the Forest Service had failed to disclose important information about environmental impacts, failed to analyze all significant issues, and failed to consider reasonable alternatives. Wildlife biologists who reviewed the plan concluded that the Creeks project would adversely affect the spotted owl, marten, and fisher, potentially threatening the viability and distribution of these species. CR1628-34 (Dr. Kucera); CR1660 (Dr. Blakesley).

In September 2005, the Forest Service issued a record of decision (ROD) and final EIS approving the Creeks project. The FEIS included a new alternative, Alternative 14, which differs in only minor respects from Alternative 1, the proposed action in the DEIS. The FEIS failed to consider in detail any alternatives other than Alternative 14, Alternative 1, and no action. CR1892. In the ROD, the Forest Service chose to adopt Alternative 14. CR1855.

The Creeks project authorizes approximately 10,376 acres of logging, including 5,905 acres of defensible fuel profile zones (DFPZs), 3,285 acres of area thinning, and 1,186 acres of group selection. CR1857. DFPZs are a network of linear strips that are logged intensively to create "an open, single-canopy stand." CR1975-76. Within DFPZs, trees up to 30" diameter would be removed, and forest canopy cover would be reduced to as low as 30-40 percent, depending upon the precise logging prescription. CR1892-95. Within area thinning units, trees up to 30" diameter

would be removed, and forest canopy could be reduced to as low as 40 percent. CR1895-97. Group selection units are similar to small clearcuts. Within group selection areas, all trees under 30" diameter would be removed from ½ to 2 acre areas, all snags would be removed, and no minimum canopy cover requirement would apply. CR1897-98.

Plaintiffs filed timely administrative appeals of the ROD and FEIS. CR3840-3917; CR3795-3809. By letter dated December 19, 2005, the Appeal Deciding Officer denied the appeals and affirmed the Forest Supervisor's decision to approve the Creeks project. CR3942. This decision constituted the final administrative determination of the Department of Agriculture. CR3947. In January 2006, the Forest Service awarded logging contracts to Sierra Pacific Industries to implement the project. The contracts authorize Sierra Pacific Industries to commence logging activity after the Forest Service's written approval of an operating plan for each sale. Complaint, ¶ 25; Answer, ¶ 25. On February 17, 2006, plaintiffs filed this lawsuit challenging the Creeks project and seeking to have the project set aside. Subsequently, the Forest Service agreed "that no logging or other ground disturbing activities will occur to implement the Creeks project until 14 days after this Court issues a final judgment." Joint Status Report at 3 (April 20, 2006).

STANDARD OF REVIEW AND STANDING

Review of agency action under NEPA and NFMA is governed by the Administrative Procedure Act (APA), 5 U.S.C. § 706. *See Native Ecosystems Council v. U.S. Forest Service,* 418 F.3d 953, 960 (9th Cir. 2005). Under the APA, an agency's actions, findings, and conclusions will be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* (quoting *The Wilderness Society v. U.S. Fish and Wildlife Service,* 353 F.3d 1051, 1059 (9th Cir. 2003)(en banc)). "An agency's action is arbitrary and capricious if the agency fails to consider an important aspect of a problem, if the agency offers an explanation for the decision that is contrary to the evidence, if the agency's decision is so implausible that it could not be ascribed to a

difference in view or be the product of agency expertise, … or if the agency's decision is contrary to the governing law." *The Lands Council v. Powell,* 395 F.3d 1019, 1026 (9th Cir. 2005). In reviewing the adequacy of an EIS, the court uses a "'rule of reason' standard, which requires 'a pragmatic judgment whether the EIS's form, content, and preparation foster both informed decision-making and informed public participation.'" *Native Ecosystems Council,* 418 F.3d at 960 (quoting *California v. Block,* 690 F.2d 753, 761 (9th Cir. 1982)).

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). Summary judgment is generally appropriate in cases such as this involving judicial review of administrative action where review is based upon an administrative record. *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service,* 373 F. Supp.2d 1069, 1078 (E.D. Cal. 2004).

Plaintiffs have standing to bring this action based on the allegations in ¶¶ 7-10 of Plaintiffs' Complaint and the attached standing declarations of Craig Thomas, Patricia Puterbaugh, and Terry Preston.

ARGUMENT

I. The Forest Service Failed to Consider Reasonable Alternatives, Contrary to NEPA.

The Creeks DEIS failed to consider in detail any alternatives other than the proposed action and no action. CR1378. The FEIS included one additional alternative, Alternative 14, which differs only slightly from Alternative 1, the proposed action in the DEIS. [3] Plaintiffs and numerous other

[3] The differences between Alternative 14 and Alternative 1 are minor. "All DFPZ fuel treatments for Alternative 14 are similar to Alternative 1," except that Alternative 14 includes a new prescription, Prescription E, which retains slightly higher canopy cover for 612 acres of DFPZs, CR1900 – this amounts to approximately 10 percent of the total DFPZ acreage. "All area thinning fuel treatments for Alternative 14 are similar to Alternative 1 except that 53 acres of group selection would not be implemented within this treatment type." CR 1901. Group selection logging would be identical except for the reduction of 59 acres, CR1901 – less than 5 percent of the total group selection acreage under Alternative 1. Throughout the FEIS, the two alternatives are described as having "similar" or "very similar" environmental impacts. *See, e.g.,* CR2034 (impacts of the two alternatives to owl breeding territories "very similar"), CR2062 (Alternative 14 "very similar" to Alternative 1 with respect to impacts on marten habitat), CR1993 (differences between alternatives with respect to fire and fuels "very minimal").

commenters on the EIS urged the Forest Service to consider a broader range of reasonable alternatives, including alternatives involving less intensive logging and, in particular, an alternative based upon the 2001 Framework. The Forest Service's failure to consider reasonable alternatives in the Creeks EIS violates NEPA.

A. NEPA Requires that EISs Analyze All Reasonable Alternatives.

NEPA and the CEQ regulations require that the Forest Service "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. § 1502.14(a). The requirement that agencies consider all reasonable alternatives "is at the heart of the environmental impact statement." 40 C.F.R. § 1502.14. The purpose of this requirement is to "sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public." *Id.*; *see Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1120 (9th Cir. 2002). "The existence of a viable but unexamined alternative renders an [EIS] inadequate." *Natural Resources Defense Council v. U.S. Forest Service,* 421 F.3d 797, 813 (9th Cir. 2005)(quoting *Citizens for a Better Henderson v. Hodel,* 768 F.2d 1051, 1057 (9th Cir. 1985)). "The 'touchstone' for courts reviewing challenges to an EIS under NEPA 'is whether an EIS's selection and discussion of alternatives fosters informed decision-making and informed public participation.'" *Westlands Water Dist. v. U.S. Dep't of Interior,* 376 F.3d 853, 872 (9th Cir. 2004)(quoting *California v. Block,* 690 F.2d 753, 767 (9th Cir. 1982)).

B. The EIS Failed to Consider Alternatives Involving Less Intensive Logging.

The purpose and need for the Creeks project is to implement the QLG pilot project through DFPZs, group selection, and area thinning in a way that will reduce the risk of catastrophic wildfire and promote forest health. CR1855. At the same time, the project is intended to address significant public concerns regarding impacts on the California spotted owl, American marten, and old forest habitat. According to the ROD, the Creeks project "was developed to address that issue and assure

that those habitat characteristics would be maintained, while meeting the purpose and need for treatments." CR1858.

The central issue raised by the Creeks FEIS is how to balance the Forest Service's fuels reduction goals with the need to protect old forests and provide for viable and well-distributed populations of wildlife that inhabit old forests. The FEIS entirely fails to consider whether the Forest Service's fuels objectives can be attained with less intensive logging that will have fewer adverse impacts to wildlife habitat. This failure to consider reasonable alternatives violates NEPA:

> There can be little dispute that fire poses a threat to [wildlife] and must be considered in an environmental analysis. However, the proper question given all the available science is not only whether a project protects the Forest from catastrophic fire, but also whether it does so in a manner that has the least impact on sensitive species. For example, a reasoned analysis likely would revisit the original canopy cover and tree diameter restrictions to determine … whether restrictions set at other levels would still protect the forest from fire while better protecting important habitat features.

Sierra Club v. Bosworth, 2005 WL 2204986 at *9 (N.D. Cal. 2005)(emphasis added).

Numerous commenters on the DEIS, including experts in fire ecology and wildlife biology, argued that the Forest Service's fuels objectives can be met with less adverse impacts to old forest wildlife by retaining higher canopy cover (e.g., 50 percent, rather than 30-40 percent as in the Creeks project) and by not logging medium and large trees (e.g., trees larger than 12-20" diameter, rather than the 30" diameter in the Creek project). *See, e.g.,* CR1658-59 (Dr. Blakesley); CR1632 (Dr. Kucera); CR1730-31 (Dr. Odion); CR1697-1701. These same experts urged the Forest Service to analyze such alternatives in the EIS. *Id.* Thus, for example, Dr. Blakesley stated in her comments:

> Failure of the DEIS to consider viable alternatives other than the proposed action and no action sets up a false dichotomy between the preferred alternative and doing nothing. It is generally acknowledged by foresters, wildlife biologists and other professionals, that some thinning of the forest within the Creeks Project area is warranted. The choice to be made should not be whether to do *one* thing or do nothing. Rather, a variety of treatment options should be presented, including at least one that retains at least 40-50% canopy cover in all suitable owl foraging habitat, at least one option that limits the diameter of harvested trees to 20" or less, and at least one that does not include group selection harvesting. In particular, the EIS should model an alternative based upon the 2001 SNFPA, which incorporates several of these features. This would allow decision makers and the

> public to fairly evaluate a variety of timber harvest alternatives with respect to fire, insect pests, mistletoe, wildlife, recreational, and other considerations.

CR1659. The FEIS failed to take a hard look at this issue. Instead, the FEIS simply assumed, without any analysis, that providing greater canopy cover or leaving more medium and large trees "would compromise the effectiveness of the DFPZs." CR1914. Based on this flawed assumption, the EIS dismissed alternatives involving less intensive logging without detailed consideration. This summary dismissal of an important environmental issue does not comply with NEPA.[4]

In *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service,* 373 F. Supp.2d 1069 (E.D. Cal. 2004), this Court reviewed a challenge to the adequacy of a Forest Service environmental assessment (EA) for failure to include an adequate range of alternatives. As in this case, the Forest Service considered only the "no action" alternative and two action alternatives, which the court described as being "nearly identical." *Id.* at 1088. In both cases, the Forest Service asserted that other alternatives would not meet the project's purpose and need, without providing any detailed analysis to support this assertion. This Court found that the Forest Service had failed to take "a hard look at reasonable alternatives" or "to explain sufficiently why other alternatives would not accomplish the project's purpose and need," contrary to NEPA.[5] *Id.* at 1088-89. *See also Muckleshoot Indian Tribe v. U.S. Forest Service,* 177 F.3d 800, 812-14 (9th Cir. 1999)(holding that EIS that "considered only a no action alternative along with two virtually identical alternatives" failed to comply with NEPA).

[4] In addition to failing to study reasonable alternatives, the EIS's failure to address and respond to contrary scientific information and opinion indicating that fuels reduction can be achieved with less intensive logging independently violated NEPA. *See* Section II.A, below.

[5] Given that *Klamath-Siskiyou* involved an EA rather than an EIS, and that "an agency's obligation to consider alternatives under an EA is a lesser one than under an EIS," *Native Ecosystems Council v. U.S. Forest Service,* 428 F.3d 1233, 1246 (9th Cir. 2005), this case presents an even more compelling violation of NEPA.

Although the Creeks EIS failed to analyze an alternative that would maintain higher canopy cover and utilize a lower diameter limit for logging, information presented in the EIS supports the reasonableness of such an alternative. The EIS modeled the effectiveness in modifying fire behavior of the three principal DFPZ prescriptions utilized in the Creeks project: Prescription A, in which logging would generally be limited to trees up to 12" diameter; Prescription B, in which trees up to 30" diameter would be logged and canopy cover could be reduced to 30 percent; and Prescription C, in which trees up to 30" diameter would be logged but canopy cover would be retained at 40-50 percent. CR1892-95. The EIS modeled all three approaches and found that predicted wildfire behavior would be virtually identical regardless of which of the three prescriptions was utilized. CR1983, Table 3-25. Specifically, for the modeled forest stands that provide the best old forest habitat (CWHR class 4M and 4D),[6] all of the measured parameters of fire behavior – flame length, rate of spread, crown base height, and canopy bulk density – were identical under all three DFPZ prescriptions. *Id.* This modeling clearly implies that utilizing a lower diameter limit, as under Prescription A, or utilizing a higher canopy cover retention standard, as under Prescription C, would still achieve the Forest Service's fuels reduction goals. Therefore, the Forest Service's rationale for dismissing alternatives utilizing less intensive logging – that providing greater canopy cover or leaving more medium and large trees "would compromise the effectiveness of the DFPZs," CR1914 – is contradicted by the agency's own modeling analysis.[7]

[6] CWHR ("California Wildlife Habitat Relationships") refers to a system of classifying forest stands as wildlife habitat. The number refers to the average size of trees in the stand, with larger numbers indicating larger trees and 6 representing the largest size. The letter refers to the average canopy cover, with D representing dense cover (60 percent or greater), M representing medium cover (40-59 percent), P indicating open cover (25-39 percent), and S indicating sparse cover (less than 24 percent). CR124 at 398-99. In general, mature forest habitat consists of CWHR types 4M, 4D, 5M, 5D, and 6, CR101, with 5M, 5D, and 6 representing the largest trees and therefore the highest quality old forest habitat. Of the stands modeled for fuels purposes in the Creeks EIS, 4M and 4D represent the highest quality old forest habitat.

[7] The EIS also states that the effects on fire behavior of proposed area thinning (Prescriptions F, G and H) "would be similar" to those for proposed DFPZs, CR1982, despite the fact that area thinning units would retain greater canopy cover than the DFPZs. CR1895-97.

There is substantial evidence in the record indicating that it is not necessary to reduce canopy cover to 40 percent or below or to remove trees up to 30" dbh, as proposed in the Creeks project, to reduce the risk of catastrophic wildfire.[8] CR4873-81; CR3908-13. Similarly, the record demonstrates that less intensive logging would have fewer adverse impacts to old forest wildlife.[9] By failing to analyze in detail alternatives based on such an approach in the Creeks FEIS, and by limiting its analysis to the no action alternative and two virtually identical alternatives, the Forest Service violated NEPA's requirement that all reasonable alternatives be considered.

C. The FEIS Failed to Consider an Alternative Based Upon the 2001 Framework.

The Creeks EIS should have included an alternative that implements the 2001 Framework, which is one specific example of an alternative that would reduce the risk of catastrophic wildfire while minimizing adverse impacts to old forest wildlife by protecting medium-large trees and maintaining higher canopy cover. Plaintiffs, in their comments on the DEIS, explained in detail why such an option is a reasonable alternative that must be included in the EIS. CR1773-75. In response, the FEIS states that the 2001 ROD has been "superceded" by the 2004 ROD and that an alternative based on the 2001 ROD "would not be consistent with the 1993 Lassen LRMP, as amended by the 2004 SNFPA ROD." CR1912. This assertion, unsupported by any analysis, does not withstand scrutiny.

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[8] Thus, for example, Stephens and Moghaddas studied a range of treatments (e.g., logging and prescribed fire) on the Blodgett Forest in the north-central Sierra Nevada as part of the Forest Service's National Fire and Fire Surrogate study. They found that all studied treatments "were effective in modifying fire behavior and predicted tree mortality," CR5301, despite the fact that "[a]verage post-treatment canopy cover remained above 50% in all treatments," CR5294. Similarly, in a different study in the same area, the authors concluded that thinning from below was "more effective at reducing predicted tree mortality" from wildfire than other logging approaches, CR5305, despite the fact that canopy cover after the logging was 57 percent. CR5310. *See* CR3910 (studies summarized by fire ecologist Carol Rice).

[9] For example, with respect to the owl, it is important to retain 50 percent canopy cover, rather than 40 percent, because 40 percent is at best "marginally" suitable as owl habitat, whereas 50 percent is recognized as the minimum canopy cover for suitable owl foraging habitat. CR702; CR42, Vol. 3, Chap. 3, part 4.4 at 73. Similarly, marten generally prefer forests with a minimum of 50-60 percent canopy cover. CR2049. For both owl and marten, 20-30" diameter trees are an important element of suitable habitat. CR5085 (Dr. Kucera); CR5008-09 (owl biologist Monica Bond).

The FEIS does not explain how or why an alternative based on the 2001 Framework would be inconsistent with the Lassen LRMP. With limited exceptions, the QLG pilot project can be implemented consistent with the 2001 ROD. CR4262-63. Although the 2004 Framework amended the 2001 Framework to provide the Forest Service with increased flexibility, nothing in the 2004 Framework mandates a particular level or intensity of logging. Thus, for example, the 2004 Framework establishes "minimum" canopy cover requirements, but does not forbid the Forest Service from utilizing a higher canopy cover limit in individual cases; similarly, it requires that projects retain all trees larger than 30" diameter, but does not prohibit the Forest Service from utilizing lower diameter limits in individual cases. CR119-20. For example, some of the DFPZ prescriptions for the Creeks project utilize a lower diameter limit.

An alternative based on the 2001 Framework is a reasonable alternative that should have been analyzed in the Creeks EIS. First, as numerous experts pointed out in their comments on the Creeks project, such an alternative would address the project's purpose and need by reducing the risk of catastrophic wildfire while better protecting old forest habitat. CR1815 (Dr. Blakesley); CR1824 (Dr. Kucera); CR1836 (Dr. Odion). Second, there is strong support for the 2001 Framework within the scientific community, federal and state agencies, and the public, as evidenced by the number of prominent scientists who continue to support the plan. *See, e.g.,* CR4819-20 (citing owl scientists), CR4838 (citing forest carnivore experts). The U.S. Environmental Protection Agency, in its scoping comments on similar projects, has specifically requested that the Forest Service evaluate an alternative that would implement the 2001 Framework and "[i]nclude a description of the various environmental, social and economic issues, and the pros and cons of each management approach." CR5215. As noted by EPA, "public debate continues regarding the scientific basis for; the fuel management, environmental and social benefits of; and the adverse effect associated with the 2004

SNFPA ROD versus the [2001] Sierra Nevada Framework." *Id.* Finally, numerous commenters on the Creeks DEIS specifically requested that an alternative based on the 2001 Framework be considered. *See, e.g.,* CR1815; CR1824; CR1836; CR1773-75; CR1705.

In sum, the Forest Service's failure to analyze reasonable alternatives involving less intensive logging, including in particular an alternative modeled upon the 2001 Framework, violated NEPA.

II. The Forest Service Failed to Take a Hard Look at Significant Environmental Impacts, Contrary to NEPA.

"NEPA requires that a federal agency consider every significant aspect of the environmental impact of a proposed action … [and] inform the public that it has indeed considered environmental concerns in its decisionmaking process." *The Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). In particular, NEPA requires that EISs "present complete and accurate information to decision makers and to the public to allow an informed comparison of the alternatives considered in the EIS." *Natural Resources Defense Council v. U.S. Forest Service,* 421 F.3d 797, 813 (9th Cir. 2005). EISs must respond to contrary scientific opinion and information, *Center for Biological Diversity v. U.S. Forest Service,* 349 F.3d 1157, 1167 (9th Cir. 2003), and must "adequately explain the basis" for key assumptions and conclusions, *Ecology Center v. Austin,* 430 F.3d 1057, 1067-68 (9th Cir. 2005). In sum, NEPA requires that federal agencies take a "hard look" at the environmental consequences of their actions. *California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002).

The Creeks EIS failed to take a hard look at the project's significant environmental impacts in a number of important respects, contrary to NEPA.

A. The EIS Failed to Take a Hard Look at Fire and Fuels Issues and to Disclose and Respond to Contrary Scientific Information and Opinion.

The FEIS is based on the assumption that the intensity of proposed logging is necessary to achieve the Forest Service's fuels objectives and that maintaining higher canopy cover or utilizing a lower logging diameter limit "would compromise the effectiveness of the DFPZs." CR1914.

However, the EIS failed to respond to contrary scientific opinion and information directly challenging this assumption or to provide analysis to support this key assumption, contrary to NEPA.

Numerous commenters on the DEIS, including several experts, offered scientific information and opinion challenging the Forest Service's assumption that the intensity of proposed logging is necessary to reduce the risk of catastrophic wildfires. For example, Dr. Dennis Odion, a fire ecologist at the University of California, Santa Barbara,[10] concluded in his comments that the EIS "is inaccurate and misleading in its depiction of this project and fire ecology in general." CR1829. Specifically, Dr. Odion cited research indicating that fuels reduction goals can be met by logging only small trees and by retaining canopy cover at 50 percent or greater, and that reducing canopy cover can actually increase fire hazard. CR1830-32. An appendix in the FEIS quotes his comments, CR2263-64, but neither the appendix nor the text of the EIS discusses the basis for his scientific opinion or responds to the scientific information provided in his comments.

Similarly, Chad Hanson, a Ph.D. student at the University of California, Davis with a research focus on fire ecology in forest ecosystems,[11] submitted detailed comments on the DEIS, citing specific research which demonstrates that "severe fire could be prevented" by logging only small trees (e.g., less than 10" diameter). CR1697-98. Again, an appendix in the FEIS quotes his comments, CR2266-68, but neither the appendix nor the text of the EIS acknowledges or addresses his opinion and the scientific information in his comments. Another commenter specifically requested that the Forest Service model the fire behavior of alternatives involving less intensive logging; despite this request, "no fire behavior modeling was done" on such alternatives. CR2258 (comment 17-28). Finally, other commenters on the DEIS similarly challenged the EIS's

[10] Several courts have relied upon Dr. Odion's expert testimony in cases such as this. *See, e.g., Sierra Club v. Eubanks,* 335 F. Supp.2d at 1078; *Northwest Ecosystem Alliance v. Rey,* 380 F. Supp.2d 1175, 1195-96 (W.D. Wash. 2005).

[11] Mr. Hanson has published in peer reviewed journals on issues relating to fire and fuels. *See, e.g.,* Hanson, C.T., and North, M.P., Post-fire epicormic branching in Sierra Nevada *Abies concolor* (white fir). 15 *International Journal of Wildland Fire* 31-35 (2006).

assumption that the intensity of proposed logging was necessary to achieve fuels reduction goals, but the EIS failed to provide a reasoned response. *See, e.g.,* CR2271 (comment 32-48).

NEPA requires that EISs disclose and respond to contrary scientific information and opinion. *See, e.g., Center for Biological Diversity v. U.S. Forest Service,* 349 F.3d 1157, 1167 (9th Cir. 2003); *Sierra Club v. Eubanks,* 335 F. Supp.2d at 1076, 1079; *Sierra Club v. Bosworth,* 199 F. Supp.2d 971, 980-81 (N.D. Cal. 2002); 40 C.F.R. § 1502.9(b). For example, in *Center for Biological Diversity,* environmental groups challenged a Forest Service EIS for failing to disclose and respond to scientific opinion and evidence that contradicted the agency's assumption that the northern goshawk was a habitat generalist. The Ninth Circuit overturned the EIS, holding that "[b]ecause the commenters' evidence and opinions directly challenge the scientific basis upon which the Final EIS rests and which is central to it," the Forest Service was "required to disclose and respond to such viewpoints" in the EIS. 349 F.3d at 1167. The facts in this case are essentially similar.

Likewise, in *Sierra Club v. Eubanks,* environmental groups challenged a Forest Service EIS for failing to acknowledge and respond to scientific opinion – specifically, the views of Dr. Odion – indicating that proposed logging was likely to exacerbate, rather than reduce, the risk of catastrophic wildfire. This District Court issued a preliminary injunction against the project, holding that the EIS lacked "proper analysis of all the available scientific literature" relating to wildfire risk and that there was no evidence that contrary scientific opinion and information were "duly weighed" in the EIS as required by NEPA. 335 F. Supp.2d at 1078-79.

In sum, the EIS's failure to respond to contrary scientific opinion and information and to justify its assumption that the intensity of proposed logging is necessary to achieve fuels reduction objectives violated NEPA.

B. The EIS Failed to Take a Hard Look at the Project's Impacts on the American Marten and Its Habitat.

The FEIS acknowledges that the Creeks project will render unsuitable several thousand acres of habitat for the American marten, CR2064, reducing the amount of marten habitat by approximately 15 percent. CR1859. However, the EIS fails adequately to analyze and disclose the project's likely adverse impacts to the marten and its habitat.

To begin, the FEIS is based on the erroneous premise that "marten appear to occupy much of its historic range … in the Sierra Nevada (Kucera et al. 1995)," CR2047, implying that the marten's population status is secure. However, this assumption is based upon an outdated study that has been superseded by more recent research. As explained by forest carnivore expert Dr. Thomas Kucera – the lead author of the earlier study – the new research concludes that the marten is a species "with substantial changes in distribution," including "large gaps between contemporary detections that were not present historically" in the northern Sierra Nevada in the vicinity of the Creeks project area. CR3876. This new research indicates that the marten's population status in the northern Sierra is far more precarious than assumed in the FEIS. *Id.* The failure of the FEIS to disclose the marten's imperiled status, based on the most recent data, violates NEPA. *See, e.g., Seattle Audubon Society v. Espy,* 998 F.2d 699, 703-05 (9th Cir. 1993) (holding that EIS's failure to address new information indicating "that the spotted owl population is declining more substantially and more quickly than previously thought" violated NEPA); *Northwest Ecosystem Alliance v. Rey,* 380 F. Supp.2d at 1195-96 (overturning EIS based on "stale data" regarding wildfire); 40 C.F.R. § 1500.1(b) (NEPA requires "high quality" information and "accurate" scientific analyses).

Second, the Creeks EIS fails adequately to analyze and disclose the project's adverse impacts to marten habitat, particularly habitat connectivity. The Lassen forest plan, as amended by the QLG ROD, requires that "habitat connectivity … be maintained to allow movement of old forest …

dependent species between areas of suitable habitat." CR41 (ROD) at 8-9. According to recent research, the marten's apparent absence from much of the northern Sierra is likely linked to "loss of mature forest habitat" due to logging. CR5222-23; *see* CR3875-76 (Dr. Kucera). There is ample evidence that the kind of logging proposed in the Creeks project, including thousands of acres of DFPZs and group selection, will further degrade marten habitat. CR1822-24 (Dr. Kucera); CR5085-86 (Dr. Kucera); CR4951-56 (Dr. Reginald Barrett).

The record demonstrates that the Creeks project area provides the best remaining habitat that connects higher quality habitat and marten populations to the north and south.[12] *See* CR3903[13] (visually depicting how Creeks area serves as connecting habitat). Based on this analysis, Dr. Susan Britting concludes that:

> The Creeks Project occurs within the area directly between two areas of high quality marten habitat and includes the best habitat between those areas. Based on this information, the Creeks Project area likely plays an important role in ensuring north-south habitat connectivity for marten and reducing the possibility that marten populations to the north and south will become isolated from one another.

Id. (emphasis added). Similarly, Dr. Kucera concludes that the Creeks project area "potentially serves as an important biological corridor connecting marten populations to the north and south that might otherwise become isolated from one another." CR3876. The fact that marten have been detected in the Creeks project area, despite their apparent absence in surrounding lands, provides further evidence of the project area's importance as connecting habitat. *Id.*

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[12] Habitat connectivity is a particularly serious concern because the private lands to the south and east of the project area have been heavily logged in the aftermath of the Storrie fire, CR2060-61, and the Forest Service lands to the west will soon be logged pursuant to the Willow project, which is expected to have "similar results" as the Creeks project, CR2004. As the Forest Service has acknowledged, the Storrie fire severely impacted portions of the forest carnivore network and habitat corridors, which "increases the importance of maintaining remaining corridors and linkages between large areas of suitable habitat." CR4628-29 (emphasis added).

[13] The supplement to the administrative record (Vol. 12) includes color versions of this and related maps, which are easier to decipher than the black and white versions included with the original administrative record (Vol. 11).

The Creeks DEIS acknowledged that Alternative 1 would adversely affect marten habitat connectivity by "reduction of habitat value within areas serving as travel corridors (connectivity)," so that "north-south carnivore movement would be affected." CR1343 at 126-27. The FEIS claims that Alternative 14, despite being described as "very similar to Alternative 1 in terms of the effects to [marten] habitat within the project area," CR2062, would maintain habitat connectivity for marten. However, the FEIS fails adequately to disclose the basis for this conclusion or provide the underlying data that supports this assumption, as required by NEPA.

The FEIS claims that DFPZ Prescription E, which applies only to 612 acres or less than 6 percent of the total area that will be logged, will "better address the connectivity needs for the marten." CR2062. According to the FEIS, Prescription E was "placed strategically to link the areas of highest habitat quality," *id.,* and its standards would provide that "connectivity to areas of high quality habitat is maintained with minimal risk to individuals." CR2065. The problem with this conclusion is that it is essentially unsupported and undocumented. Nowhere in the EIS is there a map indicating the location of the Prescription E units in relationship to areas of high quality marten habitat, any information to support the choice of the areas where the prescription will be applied, or any analysis to support the assertion that minor changes in logging practices on a small number of acres will be sufficient to solve the habitat connectivity problem identified in the DEIS. As described by Dr. Kucera, the "meager information [in the EIS] is completely insufficient to allow a thoughtful analysis of the project's effects":

> In fact, the differences between the two alternatives are small indeed…. These changes would affect less than 10 percent of the proposed logging and are relatively minor. The assertion that these changes are sufficient to provide habitat connectivity for martens is unsupported by any analysis or data. The map (Figure 3-17, p. 187)[CR2063] purportedly showing "a review of potential connectivity routes addressed in this alternative" is meaningless, comprising a few arrows overlain on an outline of the project area. The descriptions of the areas planned for Prescription E state that they have "high amounts of down logs or large rock outcrops that provide ample hiding cover" (FEIS, p. 189)[CR2065],

> with no information on the amount of down logs or rock outcrops, or why this amount supposedly provides "ample" hiding cover.

CR3877-78.

NEPA requires that the Forest Service take a "hard look" at the project's impact on the area's importance as a biological corridor. *Marble Mountain Audubon Society v. Rice,* 914 F.2d 179, 182 (9th Cir. 1990). NEPA also requires that the Forest Service "provide the information that is necessary to understand and evaluate" its decision. *Ecology Center v. Austin,* 430 F.3d 1057, 1068 (9th Cir. 2005). Where, as here, the Forest Service's claims regarding habitat connectivity are essentially unsupported, the EIS fails to comply with NEPA. *See, e.g., Habitat Education Center v. Bosworth,* 381 F. Supp.2d 842, 854-55 (E.D. Wis. 2005)(holding that Forest Service's claim that logging project would maintain marten habitat connectivity and "would maintain a 'potential' dispersal corridor" was contrary to NEPA, where EIS "provides no quantification or detailed supporting information" to support its conclusions and "does not discuss whether the marten could in fact expand its habitat and whether marten could actually use the corridor"); *Environmental Protection Information Center v. Blackwell,* 389 F. Supp.2d 1174, 1190-92 (N.D. Cal. 2004)(ruling that Forest Service's summary conclusion that timber sale would provide "sufficient dispersal habitat" for wildlife, without adequate explanation or analysis, failed "to establish the hard look required" by NEPA).

In sum, by failing to disclose the marten's threatened status in the northern Sierra, and by failing to justify the claim that the project will maintain marten habitat connectivity, the Creeks FEIS falls short of NEPA's requirements.

C. The EIS Entirely Failed to Consider the Project's Impacts on the Pacific Fisher and Its Habitat.

The Creeks EIS entirely fails to analyze the potential impacts of the project on the Pacific fisher and its habitat. The EIS dismisses the Pacific fisher from detailed consideration on the

grounds that "the project area provides little or no habitat potential for this species." CR2049. However, this conclusion is flatly inconsistent with a recent analysis by leading Forest Service researchers, which indicates that the project area provides moderate to moderately-high potential habitat for the fisher. CR3902 (color version). Because the record also demonstrates that the project's impacts on fisher habitat may be substantial, the Forest Service's failure to address this "significant aspect of the environmental impact" of the Creeks project is contrary to NEPA. *The Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005).

The Forest Service has acknowledged that "[t]o conserve fishers in the Sierra Nevada will require the retention or restoration of sufficient habitat and habitat connectivity" throughout the Sierra Nevada, CR42, Vol. 3, Chap. 3, part 4.4 at 5, including the central and northern Sierra where fisher has apparently been extirpated. For this reason, the U.S. Fish and Wildlife Service has concluded that implementation of the QLG project – which includes the Creeks project area – "poses a significant threat to the long-term viability" of the Pacific fisher, "due to the loss, degradation, and fragmentation of suitable habitat." CR4201. The Service expressed particular concerns about construction of DFPZs in the QLG area, which may fragment habitat and limit fisher movement and dispersal, "limiting population expansion and colonization of unoccupied habitat …, thus precluding future recovery options." CR4197.

Forest carnivore expert Dr. Thomas Kucera, in his comments on the Creeks DEIS, concluded that the Creeks project "would degrade fisher habitat by logging medium and large trees, reducing canopy cover, removing large snags and down logs, and fragmenting the remaining forest." CR1824. Despite this expert opinion, the Forest Service entirely failed to analyze the project's impacts on the fisher, claiming that "the project area provides little or no habitat potential for this species." CR2049. However, this claim is flatly inconsistent with recent analysis by leading Forest

Service researchers. CR3890 *et seq*. (color versions). These Forest Service researchers produced "a map of predicted fisher habitat suitability" in the northern Sierra Nevada based upon a model of habitat utilized by fisher elsewhere in California. CR3891; see CR3897. By overlaying the Creeks project boundary onto the map of fisher habitat suitability, it is apparent that the Creeks project will log areas determined to be "of moderate to moderately-high quality for fisher conservation and reintroduction." CR3902.

The reasons offered in the EIS for dismissing the fisher from consideration do not withstand close scrutiny. First, the FEIS states that "fisher do not appear to overlap with marten" and therefore, because the project area provides habitat for marten, it should not be considered suitable for fisher. CR2048. This assertion is simply incorrect. The Forest Service acknowledged in the 2001 Framework EIS that "martens … co-occur with fishers" in the Sierra Nevada. CR42, Vol. 3, Chap. 3, part 4.4 at 31. Moreover, "research from the Sierra Nevada and elsewhere has repeatedly documented the fact that fisher and marten … can and do occur in the same area." CR3879-80. *See, e.g.,* CR3162 (documenting "overlap zones" in California with both fisher and marten detections); CR3415 (documenting that fisher and marten "coexist"). In short, as Dr. Kucera finds, "the dismissal of fisher from consideration in the EIS on this basis is unwarranted." CR3880.

Second, the FEIS also cites snow depth in the project area as a reason "to preclude the project area from being considered suitable habitat" for fisher. CR2048-49. However, as Dr. Kucera explains, "the literature does not support the proposition that snow depth renders the project area unsuitable for fisher." CR3880. For example, the research by Krohn et al. cited in the FEIS emphasized that their "small-scale analyses … do not prove that deep snows limit fishers," CR3176, and that "there is no absolute line between suitable and unsuitable habitats, but instead an ever-shifting zone of varying degrees of suitability." CR3172.

In sum, the Forest Service's failure to assess the project's impacts on the Pacific fisher and its habitat was unwarranted and contrary to the best available information, and the failure to address this significant issue in the EIS is contrary to NEPA. Given that the Fish and Wildlife Service has determined that the fisher warrants listing under the Endangered Species Act, 69 Fed. Reg. 18770 (April 8, 2004), and that logging such as that proposed in the Creeks project may "preclude[e] future recovery options" for the fisher, FWS 1999 at 11-12, the failure to consider the project's impacts on the fisher was contrary to law.

D. The EIS Failed to Take a Hard Look at the Project's Impacts on the California Spotted Owl and Its Habitat.

The Forest Service acknowledges that implementing the Creeks project will render thousands of acres of habitat unsuitable for the California spotted owl. According to the ROD, the project will affect approximately 28 percent of existing habitat for the California spotted owl and will reduce existing owl habitat by approximately 15 percent. CR1859. However, the Creeks EIS fails adequately to disclose the project's adverse impacts to the California spotted owl and its habitat in important respects, contrary to NEPA.

At the outset, the EIS underestimates the owl's imperiled status in the project area. The EIS cites a 2003 analysis of owl population trends throughout the Sierra Nevada to support the conclusion that the owl's population is "either stable or only slightly declining." CR2012. However, more recent data on owl site occupancy, not highlighted in the EIS, indicates that "the rate of decline may be much steeper in the Creeks analysis area." CR3906. Specifically, analysis by owl expert Dr. Jennifer Blakesley of actual site occupancy by owls in the Creeks area over time shows that "the number of territories occupied by resident spotted owls has declined from 11 in 1992 to 5-6 in 2002-2004," which she describes as an "alarming decline in the number of owls within the Creeks project area." CR3906. By painting an overly rosy picture of the owl's status and relying on

outdated data, the Forest Service violated NEPA's full disclosure requirement. *See, e.g., Seattle Audubon Society v. Espy,* 998 F.2d 699, 703-05 (9th Cir. 1993).

The EIS compounded this error by underestimating how logging will affect the owl's use of habitat at several geographic scales, including home ranges and nest core areas. With respect to owl home ranges, the Forest Service has previously acknowledged that "[l]and management actions that reduce habitat suitability within home ranges can accelerate [owl] population declines." Declaration of David B. Edelson (May 26, 2006)(hereinafter cited as "Edelson Dec."), Exh. 1 at AA-42. The QLG EIS analyzed that plan's impacts to owl home ranges based on the assumption that home ranges need to include at least 50 percent suitable habitat. According to the QLG EIS, reducing suitable habitat below 50 percent "results in an increased risk of a potential decrease in owl population," in which case the "likelihood of long term viability is questionable." *Id.* Conversely, if "habitat remains above 50 percent, it is assumed that no population change will occur." *Id.*

The Creeks FEIS inexplicably waters down this 50 percent standard and instead bases its analysis on the assumption that *30 percent* suitable habitat within each home range is "the minimum threshold." CR2019; *see also* CR2029-30 (referring to a 30-50 percent threshold with 30 percent as the "minimum" threshold). This unwarranted change significantly reduced the project's predicted adverse impacts to owl territories.[14] Using the assumption that 50% suitable habitat – 2250 acres – is required within each 4500 acre home range produces results very different from those included in the Creeks FEIS. Utilizing the 2250 acre figure, 10 of the 21 owl territories currently lack sufficient habitat, and 16 of the 21 areas would lack sufficient habitat after the project is implemented (i.e., 6 territories would be rendered unsuitable and 76 percent would fail to meet the minimum after project

[14] The Creeks EIS cites a 1995 study by Bart to support the use of a 30 percent threshold. However, Bart's study was cited and discussed in the QLG FEIS, Edelson Dec., Exh. 1 at AA-40, and therefore does not constitute new information that would justify changing the 50 percent assumption. Moreover, plaintiffs offered unrebutted evidence from owl biologists indicating that Bart's study cannot reasonably be interpreted as establishing less than a 45-50 percent suitable habitat threshold. CR3886; CR3906.

implementation). CR3886. By contrast, by using a 30% threshold (1350 acres), the FEIS suggests that only 5 of the owl territories currently lack sufficient habitat, and that none of the owl territories would be rendered unsuitable as a result of project implementation. CR3886-87. Thus, as owl biologist Monica Bond concluded in her critique, "based on the best available research, the FEIS and BE significantly underestimate the likely adverse impacts to owl territories of implementing the Creeks project."[15] CR3887.

Native Ecosystems Council v. U.S. Forest Service, 418 F.3d 953 (9th Cir. 2005), involved a NEPA challenge by environmental groups to the methodology used by the Forest Service to calculate elk hiding cover. In that case, like here, the Forest Service changed its methodology to reduce the project's predicted impacts to wildlife. The district court found the change to be "convenient, or even suspicious," but declined to overturn the EIS. *Id.* at 959. The Ninth Circuit reversed, finding that "[t]he Forest Service has not presented any rational explanation for its calculation change." *Id.* at 964. Because the EIS utilized the new methodology without providing a rational basis for the change, the Ninth Circuit held that the EIS failed to take a "hard look" at the project's likely impacts, contrary to NEPA. *Id.* at 964-65. *See also Northwest Ecosystem Alliance v. Rey,* 380 F. Supp.2d at 1192-93 (finding EIS inadequate where assumption in EIS was "inconsistent with [the Forest Service's] own prior analysis" and where Forest Service failed "to disclose and explain" its change in approach).

In addition to failing adequately to assess impacts at the home range scale, the Creeks EIS also underestimates the project's adverse effects to owl nest core areas. These 500 acre areas are especially important because they are the "areas immediately surrounding the activity center (including nest sites)." CR2021. The EIS based its analysis on the assumption that providing only

[15] The Ninth Circuit relied upon Ms. Bond's expert testimony in its recent ruling that the Forest Service failed to take a "hard look" at the impacts of logging on the California spotted owl. *See Earth Island Institute v. U.S. Forest Service,* 442 F.3d 1147, 1169-73 (9th Cir. 2006).

50 percent suitable habitat within these core areas is sufficient to support a viable owl pair. CR2022-24. The only basis for this assumption is the Forest Service's assertion that "Blakesley's data indicates that 50% habitat within the core area is an important threshold." CR2022. However, as explained by Dr. Blakesley, "[t]his statement is completely erroneous." CR3905. In fact, Blakesley's research shows that "83% suitable habitat within nest areas is a reasonable minimum target, whereas 50% is not," and that "[a]nything less than 71% … should be unacceptable as a management target." *Id.* As Dr. Blakesley concludes, by underestimating the amount of suitable habitat that should be included within owl nest core areas, the EIS underestimated the number of such areas that will be put at risk if the Creeks project is implemented. *Id.*

In sum, the Forest Service failed to take a hard look at the project's impacts on the California spotted owl and its habitat, contrary to NEPA.

E. The EIS Overlooked the Project's Impacts on the Pileated Woodpecker and Its Habitat.

The Lassen National Forest has designated the pileated woodpecker as a "management indicator species" (MIS) because of its association with large snags and dense canopy forests. CR3968. The pileated woodpecker is one "of the less common species" in the project area and is a species "of greater management concern due to [its] scarcity." CR5267. The FEIS asserts that the Creeks project "would have little impact" on pileated woodpecker habitat and "no effect to species or population trends." CR1918, 2083, 2176. This conclusion is based on outdated research and is contrary to the agency's previous findings that projects like Creeks will negatively affect the pileated woodpecker.

The Creeks project will adversely affect the pileated woodpecker and its habitat by logging large snags and by reducing future recruitment of such snags. Current snag densities within the project area are approximately 2-3 snags/acre, which is "below the Forest guidelines of 4 snags/acre

in mixed conifer communities and 6 snags/acre within red fir communities," and far below the estimated historic snag density. CR2006-07. Exacerbating this current shortage of snags, the project would result in "a general reduction in the number of snags within the areas treated" and the FEIS predicts that "snag recruitment may decline slightly within the treated stands" in the future. CR2008-09.

Research indicates that logging can have a "significant impact on [pileated woodpecker] habitat"; in particular, "[r]emoval of large-diameter live and dead trees, of downed woody material, and of canopy closure eliminates nest and roost sites, foraging habitat, and cover." CR3998. As acknowledged in the QLG EIS, reductions in number of snags can have "a detrimental effect on associated wildlife species," particularly "primary cavity nesters" such as the pileated woodpecker. Edelson Dec., Exh. 1 at AA-6. Therefore, the QLG EIS concluded that implementing the QLG project would significantly reduce habitat value for the pileated woodpecker, by 23-35 percent. *Id.* at AA-19. As wildlife biologist Terry Preston concluded in her critique, "[g]iven that the Creeks project implements the QLG pilot project, it is reasonable to assume that the site-specific impacts would be similar." CR3822. The FEIS fails to offer a rational explanation for its conclusion that the Creeks project would have no effect on the pileated woodpecker, despite prior findings to the contrary, contrary to NEPA. *See, e.g., Native Ecosystems Council v. U.S. Forest Service,* 418 F.3d at 964-65; *Northwest Ecosystem Alliance v. Rey,* 380 F. Supp.2d at 1192-93.

In addition, the analysis in the FEIS was based on outdated research. The FEIS's conclusion of "no effect" to pileated woodpeckers reflects the assumption that retaining one snag/acre over 20" dbh is sufficient "to meet suitability standards." CR2082. This assumption was based on a 1983 report by Schroeder, CR2081, and is not consistent with more recent research. The Lassen National Forest's 1992 wildlife habitat capability model for the pileated woodpecker describes areas

containing fewer than 3 snags/acre greater than 20" dbh as providing only "low" or "marginal" habitat for the woodpecker. CR23, App. O at O-17. Instead, according to the model, the pileated woodpecker requires habitat with greater than 3 large snags/acre. *Id.* A recent study on landbirds in the Lassen area, commissioned by the Forest Service, concluded that "snags are a critical component of forest ecosystems" and recommended that "as many snags as possible" be retained, with an "absolute minimum" of 4 snags/acre, with "priority given to the largest ones." CR5270. Thus, the assumption of "no effect" was based on outdated research, contrary to NEPA. *See, e.g., The Lands Council v. Powell,* 395 F.3d at 1031; *Seattle Audubon Society v. Espy,* 998 F.2d at 704-05.

III. The Creeks Project Fails to Insure Viable, Well Distributed Populations of the California Spotted Owl and American Marten.

The National Forest Management Act requires that the Forest Service "provide for diversity of plant and animal communities" in the national forests. 16 U.S.C. § 1604(g)(3)(B). The regulations that applied when the Forest Service adopted and amended the Lassen National Forest plan require the Forest Service to "maintain viable populations" of wildlife in the planning area.[16] 36 C.F.R. § 219.19 (1999). "For planning purposes, a viable population shall be regarded as one which has the estimated numbers and distribution of reproductive individuals to insure its continued existence is well distributed in the planning area." *Id.* "This duty to ensure viable, or self-sustaining, populations applies with special force to sensitive species," such as the California spotted owl and American marten. *Inland Empire Public Lands Council v. U.S. Forest Service,* 88 F.3d 754, 759 (9th Cir. 1996); *Friends of the Clearwater v. Dombeck,* 222 F.3d 552, 556 n.2 (9th Cir. 2000).

The duty to ensure viable, well distributed populations of wildlife is incorporated into the Lassen LRMP, which applies to the Creeks project. The 1993 Lassen plan generally requires that

[16] These regulations have since been revised. However, the Ninth Circuit has held that the version of the regulations that was in effect when the plan was developed remains applicable. *Natural Resources Defense Council v. U.S. Forest Service,* 421 F.3d 797, 800 n.3 (9th Cir. 2005). Moreover, given that plaintiffs allege violations of viability language in the Lassen forest plan which was based on the earlier regulations, those regulations remains pertinent. *Environmental Protection Information Center v. Blackwell,* 389 F. Supp.2d 1174, 1205 n.17 (N.D. Cal. 2004).

the Forest Service "maintain … viable populations of plants and wildlife," CR23 at 4-5, 4-30, and "[m]anage habitat for Sensitive wildlife species to insure that these species do not become Threatened or Endangered due to Forest Service actions," CR23 at 4-6, 4-38, and specifically requires that the Forest Service "provide for viable populations of spotted owls," CR23 at 4-6, 4-36, and "[c]ontribute toward the population viability of marten and fisher," CR23 at 4-6, 4-36. The 2001 Framework ROD, which amended the Lassen LRMP, similarly required the Forest Service "to provide environmental conditions that are likely to maintain viable populations of old forest associated species … well-distributed across Sierra Nevada national forests." CR4272. The 2004 Sierra Nevada Forest Plan Amendment, which also amended the Lassen plan, includes as one of its key elements "sustaining viable populations of at-risk species associated with old forest ecosystems well-distributed across Sierra Nevada national forests." CR82. NFMA requires that individual projects, such as the Creeks project, "be consistent with the land management plans." 16 U.S.C. § 1604(i); *see Inland Empire Public Lands Council v. U.S. Forest Service,* 88 F.3d at 757.

In this case, the Forest Service concluded that the Creeks project "may affect individuals but is not likely to result in a trend toward Federal listing or loss of viability" for the California spotted owl or the American marten. CR752. However, as demonstrated in Section II above, these findings were not based on a careful assessment of the best available scientific data, but rather were based on flawed analysis that overlooked or underestimated important impacts and that failed to reflect the imperiled status of these species in the northern Sierra Nevada. Because the underlying analysis is flawed, the Forest Service's findings that the Creeks project will insure species viability are unsupportable:

> Because the Forest Service failed to provide the factual basis for its analysis and failed to adequately explain its decision, we cannot be reasonably certain that the [logging] – which the Service concedes may harm individual black-backed woodpeckers – will not jeopardize the black-backed woodpeckers' viability. *Cf. Native Ecosystems Council v. U.S. Forest*

> *Service,* 418 F.3d 953, 964 (9th Cir. 2005)(finding NFMA violation where "we cannot reasonably determine that the Forest Service has complied with the [Forest] Plan").

Ecology Center v. Austin, 430 F.3d 1057, 1068 (9th Cir. 2005). In this case, like *Ecology Center*, the FEIS's analytic flaws invalidate the Forest Service's conclusion that the Creeks project will ensure viable and well distributed populations of marten and owl.

With respect to the owl, the record demonstrates that the Creeks project "will substantially reduce the amount of owl habitat within the project area and within owl territories and nest core areas." CR3885. The FEIS acknowledges that "this project adds further risk to reproduction and long-term territorial viability through a loss of habitat combined with a reduction in habitat value." CR2026. Yet, as demonstrated above, the FEIS assumes that the owl's status is "either stable or only slightly declining," CR2012, whereas the best available local information strongly suggests a steeper decline. CR3906. Furthermore, as described above, the FEIS systematically underestimates the project's adverse impacts to owl home ranges and nest core areas. As a result, the EIS does not reflect the actual level of risk that implementing the Creeks project poses to the California spotted owl and its habitat. Moreover, as explained by owl expert Monica Bond, the Forest Service has failed to undertake any analysis to demonstrate that these kind of significant risks are consistent with insuring the owl's viability in the Creeks project area:

> To what extent is the rate of reproduction expected to decline? How would this expected decline affect the viability of the owl population in the planning area? How many owl territories might become vacant? How will these empty territories affect the owl's current distribution in the planning area? This kind of information and analysis is necessary to a full and fair assessment of the project's likely impacts, yet the FEIS and BE fail to provide this analysis. <u>In the absence of such analysis, there is a serious risk that the Creeks project will further threaten the viability and distribution of the California spotted owl in the project area and in the northern Sierra Nevada, contributing to the present trend towards federal listing under the Endangered Species Act.</u>

CR3888 (emphasis added).

With respect to the marten, the FEIS acknowledges that "the potential exists that the local population numbers or the number of home ranges may decrease." CR2056. Despite this finding,

the FEIS somehow concludes that "it appears that sufficient habitat would be retained across the landscape to allow any existing home ranges to remain viable based on the current understanding of species habitat needs." As forest carnivore expert Dr. Kucera explains, this conclusion is not supported by any analysis in the FEIS:

> This assertion is not supported by any analysis of how the project is likely to affect the marten's viability or current distribution. Given that the marten's status in the area is precarious, and that the project area appears to play an important role in providing north-south habitat connectivity, further degradation of the marten's habitat will increase the risk to the marten's viability and distribution in the planning area.

CR3877. Similarly, the Creeks project will log "within the former habitat management area" that was set aside for forest carnivores, which "contains some of the highest quality habitat within the project area and is considered a likely corridor to access areas of late successional habitat," CR2047 – despite the Forest Service's previous finding that "there is no research data or other empirical evidence to suggest that we can harvest within furbearer areas and still maintain suitable habitat conditions." CR23, App. T at T-2. As Dr. Kucera concluded in his comments on the DEIS, "[t]o the best of my knowledge, there is no new scientific information that would change these conclusions." CR1631.

In sum, based on the analytic problems with the FEIS and the Forest Service's failure to explain or justify its conclusions, neither the public nor this Court can "reasonably determine that the Forest Service has complied" with the viability requirement. *Ecology Center,* 430 F.3d at 1068; *Native Ecosystems Council*, 418 F.3d at 964. Therefore, the agency's findings are arbitrary and capricious and contrary to NFMA. *Id.*

IV. The Forest Service Failed to Obtain and Analyze Monitoring Data for Management Indicator Species As Required by Law.

Under NFMA , "not only does the [Forest Service] have a duty to insure species viability but it must also estimate and monitor the effect of forest management on populations of certain species

in a forest, more specifically, MIS [management indicator species]." *Environmental Protection Information Center v. Blackwell*, 389 F. Supp.2d 1174, 1206 (N.D. Cal. 2004). As the Forest Service explained in the Lassen LRMP: "To insure that viable populations of all species occurring on the Forest are maintained, certain species – called Management Indicator Species (MIS) – were selected to act as barometers for wildlife communities." CR3966. "An MIS species is a bellwether, or class representative, 'for other species that have the same special habitat needs or population characteristics.'" *Earth Island Institute v. U.S. Forest Service,* 442 F.3d at 1173 (quoting *Inland Empire Public Lands Council v. U.S. Forest Service,* 88 F.3d at 762 n.11).

The Lassen LRMP, as amended by the 2001 and 2004 Framework, requires that the Forest Service acquire annual monitoring and population trend data for designated MIS. Because the Forest Service concedes that it has not gathered the required data, the decision to approve the Creeks project is contrary to NFMA. *See Earth Island Institute,* 442 F.3d at 1173-76; *Sierra Club v. Eubanks,* 335 F. Supp.2d 1070, 1081-82 (E.D. Cal. 2004).

The 2004 Framework incorporated the 2001 Framework's requirements for annual monitoring of selected MIS. CR121; *see Earth Island Institute,* 442 F.3d at 1176 (holding that 2004 ROD requires "annual monitoring of MIS species"). The plan lists numerous species, including the marten, pileated woodpecker, and black bear, as species for which population monitoring must occur on an annual basis. Thus, for example, for the marten the plan requires "annual population monitoring" of "the status and change in the geographic distribution of martens" in order to "provide information that will inform future decisions about management." CR42, Vol. 4, App. E at E-56. For other MIS, including the pileated woodpecker and black bear, the plan requires "a period of annual population monitoring." *Id.* at E-63. The type of monitoring data required for these species is "distribution" monitoring, *id.* at E-64, defined in the LRMP as data indicating "changes in the

presence of species across a number of sample locations" which are designed to reveal "the status and change of populations" of the target species. *Id.* at E-19. A key purpose of gathering such data is to help the agency determine "potential impacts of projects on sensitive species." *Id.* at E-63.

The Forest Service has failed to gather and analyze annual monitoring data as required by law. As a general matter, the Forest Service concedes that "[t]o date no specific information on the results of the monitoring have been made available." CR2320 (response to comment 32-46). With respect to the black bear, the FEIS acknowledges that "[l]ittle data is available on the current status of bear." CR2074. Lacking any annual monitoring data from the Lassen National Forest or even the Sierra Nevada, the FEIS instead reports a statewide estimate of bear populations and a one-time estimate of the bear's population in Plumas County. *Id.* This kind of generalized information is plainly inadequate to satisfy the plan's annual population monitoring requirement, as wildlife biologist Terry Preston concluded in her critique. CR3817-18; *see Earth Island Institute v. U.S. Forest Service,* 442 F.3d at 1176.

Similarly, for the pileated woodpecker, the EIS concedes "[t]here is no local data on population numbers." CR2080. Instead, the EIS cites breeding bird survey (BBS) data from 1966-1999 and a 1999 statewide estimate of pileated woodpecker population trends, both of which are at a far broader geographic scale than required and predate the LRMP's annual population monitoring requirement, which was adopted in 2001. For these reasons, the Ninth Circuit has held that the Forest Service cannot rely on BBS data to satisfy the Framework's annual monitoring requirement. *Earth Island Institute,* 442 F.3d at 1176.

For the marten, the FEIS cites "local survey data" that were obtained from 1993 until 2003. CR2047. However, given that the "most recent survey work within the project area was completed in 2003," *id.,* it is apparent that the Forest Service has failed to obtain and analyze the required

monitoring data on an annual basis since 2003. Moreover, the Forest Service acknowledges that the surveys "only offer presence data and cannot provide any estimation of population numbers." CR2048. A key purpose of the LRMP's marten monitoring requirement is to "monitor the status and change in the geographic distribution of martens" to detect a possible "decrease in distribution." CR42, Vol. 4, App. E at E-56. Because the FEIS fails to provide any information about potential changes in the marten's distribution and population over time, it falls short of the plan's requirement that annual population monitoring data be obtained and analyzed.

As the Forest Service has acknowledged, a key purpose of the annual monitoring requirement is to help the agency determine "potential impacts of projects on sensitive species." *Id.* at E-63. The agency's failure to obtain the required monitoring data is directly linked to the inadequate assessment of environmental impacts in the Creeks EIS. Because the Forest Service failed to obtain and analyze annual monitoring data for MIS as required by law, the decision to approve the Creeks project is contrary to NFMA. *See Earth Island Institute,* 442 F.3d at 1176.

V. Injunctive Relief Is Appropriate In This Case.

Plaintiffs seek an order setting aside the Forest Service's decision to approve the Creeks project and enjoining implementation of the decision until the Forest Service complies with NEPA, NFMA, and the Lassen forest plan. To determine whether injunctive relief is appropriate, this Court should apply "the traditional balance of harms analysis." *National Parks & Conservation Ass'n v. Babbitt,* 241 F.3d 722, 737 (9th Cir. 2001). The Supreme Court has held that "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is sufficiently likely, therefore, *the balance of harms will usually favor the issuance of an injunction to protect the environment.*" *Amoco Production Co v. Village of Gambell*, 480 U.S. 531, 545, 107 S. Ct. 1396, 1404 (1987)(emphasis added). "When the 'proposed project may significantly degrade some human

environmental factor,' injunctive relief is appropriate." *National Parks & Conservation Ass'n v. Babbitt*, 241 F.3d at 737 (quoting *Alaska Wilderness Recreation & Tourism Ass'n v. Morrison,* 67 F.3d 723, 732 (9th Cir. 1995)).

In this case, the record amply demonstrates that implementing the Creeks project will cause irreparable harm to old forests and the wildlife that inhabit the project area, including the California spotted owl, American marten, and pileated woodpecker. *See, e.g.,* CR3884-89; CR3875-83; CR3905-08. This District Court has issued injunctions to prevent harm from logging in similar cases, particularly when the Forest Service has proceeded in violation of NEPA. *See, e.g., Sierra Nevada Forest Protection Campaign v. Weingardt,* 376 F. Supp.2d 984, 993-94 (E.D. Cal. 2005); *Klamath-Siskiyou Wildlands Center v. U.S. Forest Service,* 373 F. Supp.2d 1069, 1093-94 (E.D. Cal. 2004); *Sierra Club v. Eubanks,* 335 F. Supp.2d 1070 (E.D. Cal. 2004).

"Absent 'unusual circumstances,' an injunction is the appropriate remedy for a violation of NEPA's procedural requirements." *Thomas v. Peterson,* 753 F.2d 754, 764 (9th Cir. 1985); *Forest Conservation Council v. U.S. Forest Service,* 66 F.3d 1489, 1496 (9th Cir. 1995); *Environmental Protection Information Center v. Blackwell,* 389 F. Supp.2d at 1221. No such "unusual circumstances" exist here. In particular, potential monetary damage either to the Forest Service or to a private company does not constitute the kind of "unusual circumstances" that would warrant denial of an injunction to prevent environmental harm. *See, e.g., National Parks*, 241 F.3d at 738; *Idaho Sporting Congress v. Alexander*, 222 F.3d 562, 569 (9th Cir. 2000); *Environmental Protection Information Center v. Blackwell,* 389 F. Supp.2d at 1221-22. As the Ninth Circuit held recently, the "loss of anticipated revenues … does not outweigh the potential irreparable damage to the environment." *Earth Island Institute,* 442 F.3d at 1177 (quoting *National Parks,* 241 F.3d at 738).

Finally, "[t]he preservation of our environment, as required by NEPA and the NFMA, is clearly in the public interest." *Earth Island Institute,* 442 F.3d at 1177. Therefore, the public interest in protecting the forest and wildlife habitat also supports an injunction in this case. *Id.*; *see also Earth Island Institute v. U.S. Forest Service,* 351 F.3d 1291, 1308-09 (9th Cir. 2003).

CONCLUSION

For the foregoing reasons, plaintiffs' motion for summary judgment should be granted. Plaintiffs respectfully request that the Court declare that the Creeks project and EIS are contrary to law, enjoin the Forest Service from implementing the project, and set aside the record of decision approving the project.

DATED: May 26, 2006

Respectfully submitted:

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