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SIERRA NEVADA FOREST PROTECTION  
CAMPAIGN, *et al.*,

Plaintiffs,

v.

MARK REY, in his official capacity as Under  
Secretary of Agriculture, *et al.*,

Defendants,

and

TUOLUMNE COUNTY ALLIANCE FOR  
RESOURCES & ENVIRONMENT, *et al.*;  
CALIFORNIA SKI INDUSTRY ASS'N; and  
QUINCY LIBRARY GROUP, *et al.*,

Defendant-Intervenors.

Case No: CIV-S-05-0205 MCE/GGH

Related Cases: CIV-S-05-0211 MCE/GGH  
CIV-S-05-0905 MCE/GGH  
CIV-S-05-0953 MCE/GGH

MEMORANDUM IN SUPPORT OF SIERRA  
NEVADA FOREST PROTECTION  
CAMPAIGN, *ET AL.*'S MOTION FOR  
SUMMARY JUDGMENT

Date: March 20, 2006

Time: 9:00 a.m.

Judge: Hon. Morrison C. England, Jr.

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- ALSE.....Areas of Late Successional Emphasis
- APA.....Administrative Procedure Act
- CASPO.....California Spotted Owl
- CEQ.....Council on Environmental Quality
- EA .....Environmental Assessment
- FAC.....Federal Advisory Committee
- EIS.....Environmental Impact Statement
- DEIS.....Draft Environmental Impact Statement
- DSEIS .....Draft Supplemental Environmental Impact Statement
- FEIS .....Final Environmental Impact Statement
- FSEIS .....Final Supplemental Environmental Impact Statement
- MIS .....Management Indicator Species
- NEPA .....National Environmental Policy Act
- NFMA.....National Forest Management Act
- PAC.....Protected Activity Center
- QLG .....Quincy Library Group
- SAR.....Species at Risk
- SEIS .....Supplemental Environmental Impact Statement
- SNEP.....Sierra Nevada Ecosystem Project
- SOHA.....Spotted Owl Home Area



## FACTUAL BACKGROUND

### The Collapse of Old Forest Ecosystems in the Sierra Nevada

Along the eastern edge of California, the Sierra Nevada rises from the floor of the Central Valley and turns a granite cheek to the Pacific storms. Stretching over 400 miles, from Lassen Peak south past Mount Whitney, the Sierra Nevada is the largest mountain range in the contiguous United States. FEIS Vol. 2, Ch. 3, pt 2 at 32. It is the keystone of Californian geography.

At mid-elevations, the Sierra Nevada is shrouded in forests of Douglas fir, ponderosa pine, and other conifers. FEIS Vol. 2, Ch. 3, pt 3.1 at 73-74. Left undisturbed by logging, clearing, or catastrophic fire, these forests develop over time the structural complexity and biodiversity that characterize “late successional” or “old” forests. SNEP Vol. I, Ch. 6 at 94. Although old forests defy easy definition, large old trees and snags and fallen logs derived from large old trees “are the most consistently present and arguably the most important structural element that characterizes old forests.” FEIS Vol. 2, Ch. 3, pt 3.2 at 113.

Historically, old forest conditions existed throughout as much as 90 percent of the mid-elevation coniferous forest in the Sierra Nevada. FEIS Vol. 2, Ch. 3, pt 3.2 at 149. However, 150 years of intensive logging throughout the Sierra Nevada has taken a heavy toll. “Timber harvest has removed trees, snags, and logs, especially of larger diameters, simplifying forest structure,” and “denser and less diverse stands have been purposely created following harvest to accelerate timber production.” SNEP Vol. I, Ch. 6 at 94. “This dense in-growth lacks the structural and ecological diversity of naturally disturbed forests and is vulnerable to high intensity, stand-destroying fire.” *Id.* In fact, “[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.” SNEP Vol. I, Ch. 4 at 62.

Today, “[o]ld forests are one of the most altered ecosystems in the Sierra Nevada, and they have declined in quality, quantity, and distribution.” FEIS Vol. 4 at E-47. Largely as a result of logging, as little as seven percent of the Sierra Nevada’s mid-elevation forest is currently in old forest conditions, and most is located in national parks. SNEP Vol. I, Ch. 6 at 95. National forests in the Sierra currently contain as little as two percent old forest. FEIS Vol. 2, Ch. 3, pt 3.2 at 149.

## 1 **The California Spotted Owl, the Pacific Fisher, and the American Marten**

2 Not surprisingly, the collapse of old forest ecosystems in the Sierra Nevada poses a grave  
3 threat to native species that inhabit those forests, including California spotted owls, Pacific fishers,  
4 and American martens.

5 The California spotted owl is one of three subspecies of spotted owl. According to the U.S.  
6 Fish & Wildlife Service, “[l]ate successional forests provide habitat attributes selected by California  
7 spotted owls, including large trees, high canopy closure, multi-layered canopies, snags, and logs.”  
8 SNFPA 1890. In general, the Forest Service has determined that forest stands suitable for owl  
9 nesting and roosting have “trees in the canopy averaging at least 24 inches in [diameter]” and “at  
10 least 70 percent total canopy cover.” FEIS Vol. 3, Ch. 3, pt 4.4 at 73. Forest stands suitable for owl  
11 foraging have “trees in the canopy averaging at least 11 inches in [diameter]” and “at least 40  
12 percent canopy cover;” however, owls find better forage in forest stands with trees 20 to 35 inches in  
13 diameter, and the Forest Service considers stands with less than 50 percent canopy cover “only  
14 marginally” suitable for owl foraging. *Id.* at 72-73. Although statistical estimates of California  
15 spotted owl population trends vary depending on the methodology employed, the Forest Service  
16 recognizes that “in general both methods show a declining trend in populations.” SNFPA 3214. In  
17 light of the owl’s precarious status, the Fish & Wildlife Service recently determined that the species  
18 may warrant listing under the Endangered Species Act. 70 Fed. Reg. 35607 (June 21, 2005).

19 The Pacific fisher is a forest carnivore related to the mink. Fishers “are habitat specialists  
20 associated with mature and late-successional forests with an abundance of large trees, snags and  
21 logs, conifers and oaks with broken tops and cavities, coarse woody-debris, multiple canopy layers,  
22 high canopy closure, and few openings.” SNFPA 447. Thus, a recent study of fisher habitat in the  
23 southern Sierra found that the majority of the forest stands within fisher home ranges have at least 60  
24 percent canopy cover. FEIS Vol. 3, Ch. 3, pt 4.4 at 11. According to the Forest Service, “[f]ishers  
25 in the Sierra Nevada currently appear to occupy less than half of their historic range,” and they are  
26 “absent from their former range for a distance of almost 240 miles in the central and northern Sierra,  
27 from Yosemite National Park northward.” FEIS Vol. 3, Ch. 3, pt 4.4 at 4. The Fish & Wildlife  
28 Service therefore regards the remaining southern Sierra Nevada fisher population as “essential for

1 the survival and recovery” of the species:

2 The southern Sierra Nevada population is . . . the population with the highest potential to  
3 re-colonize the central and northern Sierra Nevada. Range expansion to previously  
4 occupied habitat, reestablishment of connectivity with California’s northwestern  
Sierra Nevada population.

5 SNFPA 00449-50. The Fish & Wildlife Service concluded in 2004 that the fisher warrants listing  
6 under the Endangered Species Act. 69 Fed. Reg. 18770 (Apr. 8, 2004). “Given the current low  
7 density of fishers in the Sierra Nevada,” the Forest Service cautions that “the loss of even a small  
8 number of individuals . . . could significantly impact the population.” FEIS Vol. 3, Ch. 3, pt 4.4 at 9.

9 Like their close relative the fisher, “[m]artens prefer coniferous forest habitat with large  
10 diameter trees and snags, large down logs, moderate-to-high canopy closure, and an interspersion of  
11 riparian areas and meadows.” FEIS Vol. 3, Ch. 3, pt 4.4 at 19. According to the Forest Service,  
12 “[t]he combination of relatively low, natural population sizes and association with habitat that is  
13 vulnerable to additional losses (old-forest conifer ecosystems) makes martens particularly vulnerable  
14 to activities that decrease canopy closure or remove large-diameter standing and downed material  
15 from forest lands.” SNFPA 1748-49. According to marten experts, the best available science  
16 suggests that marten distribution in the northern Sierra has been significantly reduced, particularly  
17 outside of national parks and wilderness areas. BASIN 675. The apparent absence of martens from  
18 a significant portion of their historic range in the northern Sierra is a cause for substantial concern,  
19 increasing the likelihood that remaining marten populations will become isolated and extirpated. *Id.*

## 20 THE NATIONAL FOREST MANAGEMENT ACT

21 Congress enacted the National Forest Management Act (“NFMA”), 16 U.S.C. § 1600 *et seq.*,  
22 in 1976 “to improve the management of forest resources of the National Forest System.” S. Rep.  
23 No. 94-893, at 1 (1976). To this end, “NFMA establishes a two-step process for forest planning.”  
24 *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 957 n.1 (9th Cir. 2005). “First,  
25 NFMA requires the Forest Service to develop and maintain a forest plan for each unit of the National  
26 Forest System.” *Id.* (citing 16 U.S.C. § 1604(a)). Second, “the Forest Service implements each  
27 forest plan by approving or disapproving site specific actions. All proposed projects must be  
28 consistent with the overall forest plan.” *Id.* (citing 16 U.S.C. § 1604(i)).

1 “NFMA also requires that the Forest Service adopt regulations specifying guidelines for  
2 forest plans.” *Id.* (citing 16 U.S.C. § 1604(g)(3)). Among other things, the regulations must include  
3 guidelines to “provide for diversity of plant and animal communities.” 16 U.S.C. § 1604(g)(3)(B).  
4 Consistent with this statutory duty, the Forest Service promulgated planning regulations under  
5 NFMA in 1982. *See* 36 C.F.R. Part 219 (2000).<sup>1</sup> To satisfy NFMA’s biodiversity requirement, the  
6 1982 regulations require the Forest Service “to maintain viable populations of existing native and  
7 desired non-native vertebrate species in the planning area.” 36 C.F.R. § 219.19. A “viable  
8 population” is defined as “one which has the estimated numbers and distribution of reproductive  
9 individuals to insure its continued existence is well distributed in the planning area.” *Id.*

10 There are two separate mechanisms designed to ensure that forest management maintains  
11 viable populations of plant and animal species. First, the Forest Service has “interpreted the  
12 requirements of 36 C.F.R. § 219.19 to require that [forest] plans should identify or be amended to  
13 identify known sensitive species.” Forest Service Manual (“FSM”) § 2622.01 (available online at  
14 <http://www.fs.fed.us/im/directives/>). “Sensitive species are plants and animals identified by a  
15 Regional Forester for which population viability is a concern, as evidenced by significant current or  
16 predicted downward trend in population numbers or density, or habitat capability.” *Sierra Club v.*  
17 *Martin*, 168 F.3d 1, 3 n.4 (11th Cir. 1999) (citing FSM § 2670.5(19)).

18 The Forest Service’s duty to maintain viable populations applies with special force to  
19 sensitive species, and the Forest Service Manual requires that sensitive species of  
20 native plant and animal species must receive special management emphasis to ensure  
their viability and to preclude trends toward endangerment that would result in the  
need for Federal listing [under the Endangered Species Act].

21 *Friends of Clearwater v. Dombeck*, 222 F.3d 552, 556 n.2 (9th Cir. 2000) (citing FSM § 2672.1).

22 Second, the 1982 NFMA regulations require the Forest Service to identify “management  
23 indicator species” within each forest whose “population changes are believed to indicate the effects  
24

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25 <sup>1</sup> On January 5, 2005, the Forest Service adopted new NFMA regulations. 70 Fed. Reg. 1022.  
26 However, the 1982 NFMA regulations “are applicable here because they were in effect when the  
27 plan revisions challenged in this lawsuit were prepared.” *Natural Res. Def. Council v. U.S. Forest*  
*Serv.*, \_\_\_ F.3d \_\_\_, 2005 WL 1845097 at \*1 n.3 (9th Cir. Aug. 5, 2005). *See also* SNFPA 4056  
28 (“The 2004 [Framework] was prepared under the NFMA and the 1982 implementing regulations of  
the NFMA.”). For the convenience of the Court, the 1982 NFMA regulations are attached as Exhibit  
A to the Declaration of Gregory C. Loarie (“Loarie Dec.”), submitted herewith.

1 of management activities.” 36 C.F.R. § 219.19(a)(1). “A species chosen as a management indicator  
2 species is used as a bellwether – a class representative, if you will – for the other species that have  
3 the same special habitat needs or population characteristics.” *Inland Empire Pub. Lands Council v.*  
4 *U.S. Forest Serv.*, 88 F.3d 754, 762 n. 11 (9th Cir. 1996). Accordingly, “[i]n order to estimate the  
5 effects of forest management on fish and wildlife populations,” the 1982 NFMA regulations provide  
6 that “[p]opulation trends of the management indicator species will be monitored and habitat changes  
7 determined.” 36 C.F.R. § 219.19(a)(1), (6).

## 8 **PROCEDURAL BACKGROUND**

### 9 **The History of Inconsistent Management Under the Original Sierra Nevada Forest Plans**

10 The Sierra Nevada’s eleven national forests encompass over 11.5 million acres – about 40  
11 percent of the entire Sierra Nevada region. FEIS Vol. 2, Ch. 3, pt 3.1 at 12, 49. *See also* SNEP Vol.  
12 II, Ch. 19, Fig. 19.5 (mapping the eleven national forests). Pursuant to NFMA and the 1982 NFMA  
13 regulations, forest supervisors adopted forest plans for each of the Sierra Nevada national forests in  
14 the 1980s and early 1990s. Around that same time, the Regional Forester identified California  
15 spotted owls, Pacific fishers, and American martens as sensitive species. However, because forest  
16 supervisors developed their forest plans in response to local priorities and pressures, the original  
17 forest plans rarely shared common management strategies for these species. For example, “[s]ome  
18 original forest plans . . . had management provisions pertaining to forest carnivores, specifically the  
19 fisher and marten, while other plans did not specifically address forest carnivores.” FEIS Vol. 1,  
20 Ch. 2 at 77. Even when the original forest plans shared a common management strategy, they often  
21 lacked consistent standards and guidelines necessary to implement the strategy effectively. Thus,  
22 the original forest plans designated a network of spotted owl habitat areas (“SOHAs”) to protect  
23 habitat for the California spotted owl, but management within SOHAs was largely left up to the local  
24 district rangers. *Id.*

25 In 1990, an interagency team of scientists concluded that the SOHA strategy for managing  
26 northern spotted owl habitat in the Pacific Northwest had resulted in “a lack of consistent,  
27 comprehensive management planning based on the biological requirements of spotted owls” and  
28 amounted to a “prescription for extinction.” SNFPA 1316. Based on the scientists’ report, a federal

1 judge in Seattle enjoined the Forest Service from awarding any timber sales in the Pacific Northwest  
2 and ordered the agency to submit “revised standards and guidelines to ensure the northern spotted  
3 owl’s viability.” *Seattle Audubon Soc. v. Evans*, 771 F. Supp. 1081, 1096 (W.D. Wash. 1991).

4 Concerned that these same events could unfold in the Sierra Nevada with the California spotted owl,  
5 the Forest Service formed a scientific committee to study the SOHA strategy as it related to  
6 California spotted owls and recommend necessary changes. SNFPA 1316.

7 The California spotted owl committee published its lengthy assessment, usually referred to as  
8 the CASPO Report, in July 1992. SNFPA 1010. The CASPO Report found that “key elements of  
9 spotted owl nest and roost stands, under current [forest plans], will decline sharply over most of the  
10 Sierra Nevada in the next few decades” and concluded, “a SOHA strategy is not a workable strategy  
11 to assure long-term maintenance of spotted owls.” SNFPA 1028, 1032. The CASPO Report  
12 therefore recommended that the Forest Service supplement the existing SOHA strategy with interim  
13 management guidelines to protect California spotted owls pending the development of a  
14 comprehensive strategy capable of maintaining viability over the long term. SNFPA 1037. In  
15 particular, the CASPO Report recommended that the Forest Service establish 300-acre Protected  
16 Activity Centers (“PACs”) around all known California spotted owl nest sites and prohibit logging  
17 within these areas, prohibit logging of trees over 30 inches in diameter in all habitat suitable for owl  
18 nesting and foraging, and prohibit logging that would reduce canopy cover below 40 percent in  
19 habitat preferred by owls for nesting. SNFPA 1037-40. According to Dr. Jared Verner, the primary  
20 author of the CASPO Report, these interim guidelines “were developed to provide a strategy to  
21 maintain population viability for the owl over the short term. *They were not intended to provide for*  
22 *long-term viability.*” BASIN 1168 (emphasis added).

### 23 **The Dawn of Ecosystem-Based Management in the Sierra Nevada**

24 In early 1993, the Forest Service amended the Sierra Nevada forest plans to include the  
25 interim CASPO guidelines. SNFPA 1298. Two months later, the Forest Service announced its  
26 intent to prepare an environmental impact statement for amendments that would “establish standards  
27 and guidelines for maintaining viable populations of California spotted owls.” 58 Fed. Reg. 14554  
28 (Mar. 18, 1993).

1           Meanwhile, responding to significant public and scientific concern about the health and  
2 sustainability of the Sierra Nevada, Congress appropriated for the Forest Service almost \$7 million  
3 over fiscal years 1993, 1994, and 1995 to fund the Sierra Nevada Ecosystem Project (“SNEP”).  
4 SNFPA 1670. Involving more than 100 scientists from universities, public agencies, and the private  
5 sector, SNEP was intended to provide Congress with a comprehensive and objective assessment of  
6 the entire Sierra Nevada. SNFPA 1645. In so doing, “SNEP developed a number of strategies to  
7 address problems found in the assessments.” SNFPA 1660.

8           “SNEP analyzed six strategies to counter the major declines in high-quality late successional  
9 forests [*i.e.*, old forests] and to enhance forest late successional conditions throughout middle  
10 elevation conifer forests of the Sierra.” SNFPA 1661. All six strategies were similar in that they  
11 rejected the Forest Service’s traditional forest-by-forest approach to management in favor of a  
12 coordinated, ecosystem based approach. SNEP Vol. I, Ch. 6 at 101. For example, one strategy  
13 developed in considerable detail proposed a range-wide network of “areas of late successional  
14 emphasis” (“ALSEs”) that would encompass and connect existing old forest stands. *Id.*

15           Management of ALSEs would emphasize treatments to maintain, enhance, and  
16 protect high-quality late successional conditions. Active management within ALSEs  
17 is anticipated in at least some areas, with prescribed fire being the primary tool.  
Mechanical fuel treatment (timber harvest) could be allowed if limited in intensity  
and extent so as to maintain conditions as near natural as possible.

18 *Id.* According to SNEP, “[t]he strength of the ALSE strategy . . . is that it clearly delineates a  
19 spatially explicit range-wide strategy for retaining late successional forest conditions.” *Id.* at 102.

20           The SNEP team submitted its findings and recommendations to Congress in June 1996. That  
21 fall, the Secretary of Agriculture halted the release of the Forest Service’s draft proposal for long-  
22 term management of the California spotted owl and formed a Federal Advisory Committee to review  
23 the draft “and make recommendations on how the [draft] integrates the information recently  
24 published in [SNEP] with the forest planning alternatives.” 61 Fed. Reg. 59400 (Nov. 22, 1996).

25           The Federal Advisory Committee published the results of its review in December 1997.<sup>2</sup> In  
26 a scathing report, the Advisory Committee concluded that the Forest Service’s draft proposal “did  
27

28 <sup>2</sup> Federal defendants are supplementing the administrative record to include the Federal Advisory  
Committee (“FAC”) Report. It is available online at <http://www.fs.fed.us/outernet/pnw/owl.htm>.

1 not incorporate much of the information produced by the SNEP” and was generally inadequate, both  
2 as a California spotted owl habitat management plan and as a broader ecosystem management plan.  
3 FAC Report at Ch. 2. The Advisory Committee was particularly critical of the Forest Service’s  
4 decision to make the draft proposal “a descriptive document” rather than “a set of prescriptions.” *Id.*  
5 at Ch. 3.

6 [I]t is very difficult and in some cases impossible to determine what specific resource  
7 management actions will occur, how the landscape will look, or which measures will  
8 be used to determine the consistency and quality of implementation. This problem is  
9 directly related to the lack of standards and guidelines or other specific direction.

10 *Id.* The Advisory Committee recommended that the Forest Service revise the draft to “provide  
11 tangible performance measures somewhere in the document . . . either through the addition of more  
12 specific standards and guidelines or through the display of measures in the monitoring plan that  
13 more specifically focus performance in relation to the goals.” *Id.*

14 The Federal Advisory Committee’s findings proved too much for the Forest Service to  
15 ignore. In 1998, the Forest Service shelved its draft proposal and began a new planning process it  
16 called the Sierra Nevada Framework for Conservation and Collaboration. 63 Fed. Reg. 64452 (Nov.  
17 20, 1998). In so doing, the Forest Service finally recognized:

18 Given the science that recently emerged concerning issues that go beyond the  
19 individual forest and ownership boundaries, there is an urgent need to amend the  
20 [forest] plans to reflect this new information and achieve range-wide consistency.

21 *Id.* Accordingly, the Forest Service announced its intent to amend all 11 Sierra Nevada forest plans  
22 “to improve forest management direction for five broad problem areas: (1) conservation of old  
23 forest ecosystems, (2) conservation of aquatic, riparian, and meadow ecosystems, (3) increased risk  
24 of fire and fuels buildup, (4) introduction of noxious weeds; and (5) sustaining hardwood forests.”

25 *Id.* at 64453. In so doing, the Forest Service promised to “develop both processes and management  
26 standards and guidelines for the California spotted owl, and forest carnivores to be integrated with  
27 strategies for old forests, aquatic ecosystems, and fire and fuel.” *Id.* at 64455.

### 28 **The 2001 Framework**

On January 12, 2001, after an extensive process of public participation and collaboration  
involving the full range of affected stakeholders, Regional Forester Bradley Powell issued his record

1 of decision for the Sierra Nevada Framework forest plan amendment (the “2001 Framework”).  
2 SNFPA 224, 283. To address the five problem areas identified by the Forest Service in 1998, the  
3 2001 Framework began by establishing a network of land allocations – much like a city general plan  
4 establishes zoning – across all eleven Sierra Nevada national forests. SNFPA 309. Each land  
5 allocation was described by its own set of “desired future conditions,” which established  
6 management goals. SNFPA 236-39.

7 Many of the land allocations included in the 2001 Framework formed the basis of the  
8 conservation strategy for old forest ecosystems and associated species such as California spotted  
9 owls, fishers, and martens. SNFPA 288. Specifically, the 2001 Framework established:

- 10 • A network of “old forest emphasis areas,” modeled after the areas of late successional  
11 emphasis recommended by the SNEP scientists, across about 40 percent of all national forest  
12 land in the Sierra Nevada. SNFPA 290. Old forest emphasis areas were delineated to  
13 encompass the largest remaining old forest stands, and their goal was to “provide a network  
14 of large, relatively contiguous landscapes distributed across the Sierra Nevada where old  
15 forest conditions and associated ecological processes predominate.” SNFPA 236.
- 16 • An “urban wildland intermix,” which extended 1½ miles from homes and businesses in the  
17 Sierra Nevada and consisted of two zones: an inner ¼ mile “defense” zone and an outer 1¼  
18 mile “threat” zone. SNFPA 297. The goal of the urban wildland intermix was to “provide a  
19 buffer between developed areas and wildlands” sufficient to “protect human communities  
20 from wildland fires as well as minimize the spread of fires that might originate in urban  
21 areas.” SNFPA 237.
- 22 • California spotted owl protected activity centers (“PACs”), described as the best 300 acres of  
23 owl habitat surrounding each known nest, SNFPA 320, and “home range core areas”  
24 surrounding each PAC, which varied in size from 600 to 2,400 acres depending on their  
25 place in the Sierra Nevada. SNFPA 330. The goal of both PACs and home range core areas  
26 was to promote successful owl reproduction by protecting the habitat closest to established  
27 nests. SNFPA 267-68.
- 28 • A “southern Sierra fisher conservation area” in Sierra and Sequoia national forests, which

1 encompassed the fisher’s remaining known occupied range. SNFPA 332. The goal of this  
2 land allocation was to support “a core or reservoir [fisher] subpopulation that expands  
3 northward to re-establish connection with the west coast metapopulation.” SNFPA 236.

- 4 • A “general forest” land allocation, which was comprised of lands outside of the other land  
5 allocations. SNFPA 236. Management of general forests was intended to increase the  
6 density of large old trees and the continuity and distribution of old forests across the  
7 landscape. SNFPA 236-37.

8 Although the range-wide land allocations and corresponding management goals described  
9 above formed the basis for the 2001 Framework’s ecosystem-based strategy for addressing old  
10 forests and associated species, the 2001 Framework did more than simply articulate management  
11 goals. Consistent with the Federal Advisory Committee’s recommendations, the 2001 Framework  
12 also established specific standards and guidelines that scientists judged necessary to ensure that  
13 management within each forest would be consistent with the attainment of those goals. SNFPA 309.  
14 In this way, the 2001 Framework ensured that its strategy would be implemented.

15 Some of the 2001 Framework’s standards and guidelines applied forest-wide across all land  
16 allocations. SNFPA 312. However, to achieve the breadth of desired future conditions described  
17 above, the 2001 Framework also prescribed unique standards and guidelines to particular land  
18 allocations. SNFPA 320. For example, to protect old forest conditions within old forest emphasis  
19 areas and owl home range core areas, the 2001 Framework generally prohibited logging that would  
20 remove trees over 12 inches in diameter or reduce canopy cover by more than 10 percent. SNFPA  
21 328. And to promote the growth of old forest conditions within “general forest” areas, the 2001  
22 Framework prohibited logging of trees over 20 inches in diameter. SNFPA 336. But to promote  
23 wildfire buffer conditions in the urban wildland intermix defense zone, the 2001 Framework allowed  
24 logging of trees up to 30 inches in diameter and imposed no canopy restrictions. SNFPA 333, 315.

25 The 2001 Framework’s conservation strategy and standards and guidelines for old forests and  
26 associated species applied to all eleven national forests in the Sierra Nevada, including those  
27 portions of Lassen, Plumas and Tahoe national forests subject to the Herger-Feinstein Quincy  
28 Library Group Forest Recovery (“QLG”) Act, Pub. L. 105-277, Div. A, § 101(e) [Title IV, § 401],

1 Oct. 21, 1998, 112 Stat. 2681-305 (16 U.S.C. § 2104 note). The QLG Act directs the Forest Service  
2 to conduct a logging pilot project to demonstrate the effectiveness of fuel-breaks and individual tree  
3 and group selection logging in preventing wildfire, but only “to the extent consistent with applicable  
4 Federal law and the standards and guidelines for the conservation of the California spotted owl as set  
5 forth in the [interim CASPO guidelines] or the subsequently issued guidelines, whichever are in  
6 effect.” *Id.* at § 401(c)(3). Consistent with the Forest Service’s earlier determinations regarding the  
7 QLG Act, Regional Forester Powell concluded that “the entire level of management activity  
8 specified in the [QLG Act] cannot be implemented without degrading owl habitat [and] increasing  
9 risk to owl viability.” SNFPA 279. Accordingly, the Regional Forester declined to exempt the QLG  
10 pilot project from the 2001 Framework’s old forest conservation strategy. SNFPA 278.

### 11 **The Decision to Review the 2001 Framework**

12 Despite the fact that the 2001 Framework reflected almost a decade of painstaking scientific  
13 study and public consensus building, the Forest Service had hardly begun to implement the plan  
14 when – following a change of administrations – it abruptly changed course. On December 31, 2001,  
15 the new Regional Forester, Jack Blackwell, instructed a team of six staff with no background in  
16 ecology to “initiate a broad review of the elements of and basis for the [2001 Framework].” SEIS 1  
17 at 698. Among other things, Blackwell directed the review team to “re-evaluate the [2001  
18 Framework] for possibilities of more flexibility in aggressive fuels treatments while still providing  
19 appropriate short-term and long-term protection for wildlife and other resource values.” SEIS 1 at  
20 700. He did so even though his predecessor had considered alternatives to the 2001 Framework that  
21 “provide the flexibility to intensively manage fuels,” but rejected them on the grounds that they  
22 “pose higher levels of uncertainty and risk for sustaining old forest ecosystems.” SNFPA 257.

23 In February 2003, the Framework review team provided the country’s leading California  
24 spotted owl scientists with a draft proposal for changes to the 2001 Framework to permit more  
25 aggressive fuel treatments. SEIS 1 at 197. In short, the review team suggested replacing the diverse  
26 array of management standards and guidelines prescribed by the 2001 Framework to implement its  
27 owl conservation strategy with a uniform set of weak standards and guidelines that would apply an  
28 essentially “one-size-fits-all” strategy across the entire Sierra Nevada – even the QLG pilot project

1 area. SEIS 1 at 211-15. For example, the review team proposed allowing logging of large trees up  
2 to 30 inches in diameter within old forest emphasis areas, spotted owl home range core areas,  
3 general forest areas, and the urban wildland intermix alike. SEIS 1 at 217-18. The 2001  
4 Framework, by contrast, allowed logging of trees up to 30 inches in diameter only within the ¼-mile  
5 defense zone of the urban wildland intermix, and it imposed a 12- or 20-inch diameter limit in other  
6 land allocations. SNFPA 333, 315.

7 On February 22, 2003, the owl scientists advised Regional Forester Blackwell, “*we do not*  
8 *support the proposal.*” BASIN 250 (emphasis in original). They explained:

9 It is a substantial (if not radical) departure from the [2001 Framework], and it is not  
10 clear to us that the [2001 Framework] is incompatible with all of the objectives  
11 aspired to in both the [2001 Framework] and the proposal. Further, the proposal is  
12 the application of untested hypotheses, assumptions, or modeling (without estimates  
of uncertainty) which imposes a highly artificial forest structure or management  
activities on the Sierran landscape.

13 *Id.*

14 Notwithstanding the owl scientists’ lack of support, in March 2003 the Framework review  
15 team released a final report in which it recommended that the Forest Service adopt its proposed  
16 changes to the 2001 Framework’s standards and guidelines for the owl, along with a host of  
17 additional changes that would allow increased livestock grazing, off road vehicle use, and other  
18 harmful activities throughout the Sierra Nevada. SNFPA 1914. Regional Forester Blackwell  
19 promptly accepted the review team’s recommendations, and on April 7, 2003, the Forest Service  
20 announced its intent to prepare a supplemental environmental impact statement (“SEIS”) analyzing  
21 the review team’s proposals. SEIS 1 at 1034.

22 The response to the Forest Service’s June 13, 2003 draft SEIS (“DSEIS”), SEIS 6 at 1, was  
23 uniformly critical. Owl scientists faulted the Forest Service for failing to address their already stated  
24 concern that the proposed uniform set of relaxed standards and guidelines would be insufficient to  
25 maintain California spotted owl viability. Dr. Verner, the lead author of the CASPO Report and a  
26 retired Forest Service biologist, wrote:

27 I see little evidence that the various concerns and suggestions brought forth by the owl  
28 scientists are reflected in the draft. In terms of my expertise, the question before me  
relates strictly to whether or not implementation of the draft, as presently written, may

1 lead to a trend toward listing the California spotted owl. It's my professional opinion  
2 that it may do so. *Consequently, I cannot support the DSEIS in its present form.*

3 BASIN 338 (emphasis added). Other owl scientists echoed Dr. Verner's concerns. *See, e.g.,* BASIN  
4 189 (“[T]he proposed changes to the Sierra Framework will contribute to the decline of the  
5 California spotted owl, strengthening the need to list the subspecies under the [Endangered Species  
6 Act].”); BASIN 186 (“[T]he DSEIS fails to meet the legal requirements of the NFMA and the  
7 professional requirements of responsible stewardship.”); BASIN 285 (“[T]he proposed action is  
8 likely to adversely affect spotted owls in their habitat in the Sierra Nevada as well as increase the  
9 likelihood that the California spotted owl will be listed as a threatened species under the Endangered  
10 Species Act.”). Not a single owl scientist supported the Forest Service's proposal.

11 Fisher and marten scientists were also highly critical of the draft. Dr. Reginald Barrett, the  
12 Goertz Distinguished Professor of Wildlife Management at U.C. Berkeley, advised the Forest  
13 Service that the proposed changes to the 2001 Framework “would significantly weaken protection  
14 for old forests and forest carnivores throughout the Sierra Nevada.” He explained:

15 [T]he proposed plan would threaten the viability of the southern fisher population,  
16 thereby threatening the imperiled fisher population throughout California, Oregon,  
17 and Washington and contributing to a trend towards federal listing under the  
18 Endangered Species Act. Similarly, by greatly increasing the amount and intensity of  
19 logging in the northern Sierra, the proposed plan would threaten the viability of the  
20 American marten in that area, potentially leading to local extirpation and further  
21 reduction in the marten's current distribution.

22 BASIN 174. Other forest carnivore experts shared Dr. Barrett's concerns. *See, e.g.,* BASIN 283  
23 (“[T]he proposal . . . would further threaten the precarious status of the fisher in the Sierra Nevada,  
24 contributing to the present trend towards extinction.”); BASIN 236 (concluding that the proposal  
25 “can reasonably be foreseen to bring the fisher closer to extinction in the Pacific states”). Not a  
26 single forest carnivore expert supported the Forest Service's proposal.

27 Agency wildlife experts were equally critical of the Forest Service's proposal. In its  
28 comments to the Forest Service, the U.S. Fish & Wildlife stated:

29 We have concerns about projected declines in owl habitat under [the proposal],  
30 especially declines in preferred nesting habitat within the first 20 years of  
31 implementation. Treatment to the forest-wide standards and guidelines for fuels  
32 treatments would increase uncertainty that the amount and quality of habitat available  
33 will be enough to provide for viable owl populations.

1 SNFPA 3922. Quoting from a study published shortly before the Fish & Wildlife Service listed the  
2 northern spotted owl under the Endangered Species Act, the agency warned: “the lack of a well-  
3 coordinated, biologically based management plan, applied consistently throughout the range of  
4 spotted owls [] is unacceptable and contributes to a high risk that spotted owls will be extirpated  
5 from significant parts of their range.” SNFPA 3924.

6 The U.S. Environmental Protection Agency advised the Forest Service that the proposed  
7 changes “appear inconsistent with the underlying [2001 Framework] purpose and need to address  
8 fuels, restore old forest habitat, and prevent listings of old forest-dependent species.” SNFPA 3911.  
9 And the Forest Service’s own *Washington D.C. office* stated:

10 Collectively, these standards in [the proposal] provide less owl habitat conservation  
11 than the [interim CASPO guidelines] in effect since 1993. It is also over this same  
12 period that [four] demographic studies and census studies have documented owl  
13 population declines. *One can only conclude that standards in [the proposal] are a  
14 prescription for continued owl population declines.*

15 SNFPA 2477 (emphasis added).

16 In early fall of 2003, the Forest Service’s science consistency review teams submitted their  
17 assessments of the DSEIS. The first team, tasked with assessing those portions of the draft that did  
18 not pertain to the California spotted owl, “generally agreed that the DSEIS was difficult to read,” and  
19 “some opined that it was difficult to determine whether consistency with available science was able  
20 to be evaluated.” SNFPA 2487. *See also* SNFPA 2533 (“[T]here is so much lacking and the  
21 organization is so difficult to follow that I have felt like I have been spinning my wheels in trying to  
22 accomplish anything on this.”); SNFPA 2549 (“Large sections contain no reference to primary  
23 scientific literature, and it is difficult as a reviewer to determine whether the generalizations offered  
24 are supported by credible data.”). “Several reviewers commented on specific concerns associated  
25 with the element of fisher and marten ecology and responses of those species to management.”  
26 SNFPA 2490. *See, e.g.,* SNFPA 2550 (“I did not find the analysis of potential impacts on rare forest  
27 carnivores of the greatly modified standards and guidelines . . . complete or convincing.”). The  
28 California spotted owl review team had similar trouble. *See, e.g.,* SNFPA 2581 (“Overall, we  
believe the documents . . . could be presented more clearly.”); SNFPA 2581 (“The effects of the  
[proposed] prescription are difficult to quantify or interpret.”); SNFPA 2582 (“The effects analysis is

1 confusing and potentially misleading.”); SNFPA 2583 (“Certain portions of these documents include  
2 speculations that have no scientific evidence presented in support of the assertions.”).

3 Despite the poor quality of analysis in the DSEIS, both science consistency review teams  
4 determined that the Forest Service’s proposal placed sensitive species in the Sierra Nevada at  
5 significantly greater risk. For example, the owl team stated:

6 [The proposal] likely incurs greater risk to owl persistence because of: (1) potential to  
7 treat more PACs []; (2) canopy cover reduction in PACs (3) more aggressive  
8 vegetation treatments compared to [the 2001 Framework] (lower canopy cover  
9 retention, increased harvest of mid-sized trees < 30 [inches in diameter]; (4) full  
10 implementation of the [Quincy Library Group pilot project]; and (5) unquantified  
11 amounts of forest health treatments.

12 SNFPA 2587. At the same time, the science consistency teams recognized that the Forest Service’s  
13 decision to accept this additional risk was purposeful. In the words of one reviewer:

14 The [DSEIS] clearly has a different philosophy of risk, uncertainty and resource  
15 management from the [2001 Framework]. Where the [2001 Framework] was  
16 conservative regarding management and sensitive species, the [DSEIS] uses a few  
17 recent studies (highly selective — not a comprehensive suite of studies relevant to  
18 management of Sierra Nevada ecosystems) as well as a set of social, economic, and  
19 political considerations to justify a much more aggressive approach to fuel  
20 management and an easing of standards and guidelines to incorporate more local  
21 decision authority.

22 SNFPA 2554. *See also* SNFPA 2530 (“Most of the changes I see in the [DSEIS] are changes in  
23 management practices that reflect a different philosophy than the [2001 Framework], rather than a  
24 differing interpretation of scientific information. In particular, the [DSEIS] accepts more risk.”).

25 Like the 1997 Federal Advisory Committee, the science consistency review teams were  
26 concerned that affording local forest supervisors excessive flexibility to manage their respective  
27 forests would frustrate the implementation of ecosystem-based conservation strategies. As one  
28 reviewer noted:

While I am generally supportive of giving local managers latitude in carrying out fuels  
treatments, I am afraid that flexibility in local resource management has a high  
probability of leading to further decline of many of these species. Almost all sensitive  
species issues need to be addressed on a regional scale, and species management must  
be coordinated across ranger districts and national forest boundaries.

SNFPA 2526. However, the science consistency teams observed, “the justification to proceed with  
actions that pose greater risks rides, in part, on a commitment to learn from subsequent management  
actions on those topics and at a rate that will appreciably inform subsequent decisions.” SNFPA

1 2606. *See also* SNFPA 2554 (“The [DSEIS] clearly acknowledges that a more aggressive fuels  
2 strategy, with its associated increase in uncertainties for sensitive species and habitats, as well as the  
3 easing of standards and guides to allow for more local decision authority, necessitates a  
4 comprehensive adaptive management approach and an even greater commitment of resources to  
5 adaptive management than the [2001 Framework].”).

6 But even accepting the merits of an adaptive management approach to forest management,  
7 the science consistency reviewers determined that the proposal in the DSEIS lacked an adaptive  
8 management strategy of any kind. One reviewer stated:

9 Although the broad components of an adaptive management approach are identified  
10 (*e.g.*, implementation monitoring, cause and effect research etc.) and the elements of a  
11 comprehensive adaptive management approach are presented . . . the specifics of this  
12 monitoring program are not well developed. What exactly is to be monitored? What  
13 monitoring results and thresholds will trigger changes in management? Who will  
14 determine these thresholds? Who will do this monitoring and how will it be funded?

15 SNFPA 2557. Other reviewers agreed. *See, e.g.*, SNFPA 2531 (“[The DSEIS] fails to call for the  
16 monitoring and adaptive management (or I can’t find it) that would be necessary to discover effects  
17 in a timely fashion should they be found to be unsatisfactory.”); SNFPA 2551 (“The DSEIS does not  
18 address the design issues for adaptive management adequately.”); SNFPA 2587 (“Currently, the  
19 adaptive management program is not defined and there is scientific uncertainty regarding whether or  
20 not a valid program will be developed to accompany the greater risk perceived with [the  
21 proposal].”). Accordingly, the science consistency teams concluded their assessments with the  
22 following recommendation:

23 Anything the planning team can do to more precisely state how monitoring and/or  
24 research will be done and how treatments will be modified in response to monitoring  
25 will be appropriate and will bolster the rationale for taking an adaptive management  
26 approach to this whole management decision.

27 SNFPA 2606-07.

## 28 **The 2004 Framework**

On January 30, 2004, Regional Forester Blackwell adopted a new forest plan amendment  
(the “2004 Framework”) that replaces the 2001 Framework decision “in its entirety.” SNFPA 3005.  
Notwithstanding the complete lack of support from scientists across the board, the 2004 Framework  
prescribes the same uniform set of weak standards and guidelines that were proposed in the DSEIS.

1 Thus, with the one exception of spotted owl protected activity centers that are outside of the Urban  
2 Wildland Intermix, SNFPA 3050, the 2004 Framework allows logging of large trees up to 30 inches  
3 in diameter that leaves just 40 percent canopy cover or less throughout the entire Sierra Nevada –  
4 regardless of land allocation or desired future conditions. SNFPA 3040-41. In addition, the 2004  
5 Framework calls for full implementation of the QLG pilot project, despite the Forest Service’s  
6 earlier conclusion that doing so would threaten the owl’s viability. SNFPA 3001. According to the  
7 Final SEIS (“FSEIS”) that accompanies the 2004 Framework, these changes will result in an over  
8 *fivefold* increase in logging across the Sierra Nevada in the first two decades. SNFPA 3389.

9 In adopting the 2004 Framework, Regional Forester Blackwell acknowledged:

10 One key finding in the science consistency review [for the DSEIS] was that there is a  
11 degree of uncertainty in a number of areas, especially related to the relationship  
12 between management activities [under the 2004 Framework] and their effects on  
13 wildlife habitat and populations. *A strong recommendation in that report was to use  
14 an adaptive management approach to move forward with some level of management  
15 coupled with experimentation and learning.*

16 SNFPA 3002 (emphasis added). Despite the science consistency teams’ “strong recommendation,”  
17 however, Blackwell did not include any specific requirements for adaptive management in the 2004  
18 Framework. For example, the 2004 Framework does not “identify ‘triggers’ or ‘milestones’ at  
19 various geographic scales for species and ecosystem conditions and acceptable ranges of variation  
20 from those triggers or milestones that would inform the public and decision makers of the need for  
21 course corrections,” which the Forest Service identified as a “key” component of any adaptive  
22 management strategy. FEIS Vol. 1, Ch. 2 at 30. Instead, Blackwell stated:

23 It sounds good to say that we can create a feedback loop that will inform us about  
24 when to stop or modify activities that are showing signs of adverse impact, or are  
25 taking us off the path of these stated goals for desired conditions, but, in reality,  
26 knowing when and how to respond to trigger points is difficult.

27 SNFPA 3002. Accordingly, “rather than add a lot more to existing obligations,” Blackwell simply  
28 asked local foresters to continue with existing monitoring and directed a team “to complete an  
assessment of the cost of initiating” new monitoring work. SNFPA 3002-03.

Just two months after Blackwell adopted the 2004 Framework, the Fish & Wildlife Service  
found that the Pacific fisher warrants protection under the Endangered Species Act. 69 Fed. Reg.  
18770 (Apr. 8, 2004). In so finding, that agency recognized, “[t]he [2004 Framework] includes

1 standards and guidelines which apply to fishers.” *Id.* at 18782. However, it determined that those  
2 standards and guidelines “would provide little protection to fishers or their habitat.” *Id.* at 18782.  
3 The Fish & Wildlife therefore concluded, “existing regulatory mechanisms are not sufficient to  
4 protect the [species] as a whole from the acknowledged habitat pressures.” 69 Fed. Reg. at 18789.

### 5 **The 2004 Framework Appeals Decision**

6 On November 18, 2004, the Forest Service Chief, Dale Bosworth, denied 6,241 separate  
7 administrative appeals of the 2004 Framework. SNFPA 3998. In so doing, Chief Bosworth stated:

8 I find that managing habitat to maintain viable populations of the California spotted  
9 owl, the Pacific fisher, and American marten can only be assured by using subsequent  
10 site-specific evaluations and the adaptive management and monitoring strategy. The  
11 strategy emerges as a centerpiece of the decision.

12 SNFPA 4076-77. The Chief continued: “[w]hile the initial steps of the adaptive management and  
13 monitoring strategy is [sic] outlined through the questions and hypotheses in the [final] SEIS, the  
14 Regional Forester must communicate more fully how he intends to address these questions.”

15 SNFPA 4077. Accordingly, the Chief instructed Regional Forester Blackwell “to fully develop and  
16 provide me with the adaptive management and monitoring component of [the 2004 Framework]  
17 within 6 months of this decision, clarifying how the timing of treatments and the feedback and  
18 adjustment loops will occur.” SNFPA 4005. Despite the Chief’s direction, the Forest Service has  
19 yet to adopt an adaptive management strategy for the 2004 Framework.

20 Six months after the Chief issued his appeals decision the Fish & Wildlife Service announced  
21 that the California spotted owl may warrant listing under the Endangered Species Act. 70 Fed. Reg.  
22 35607 (June 21, 2005). Just two years earlier, the Fish & Wildlife Service had determined that  
23 listing the owl was not warranted due to the protections afforded by the 2001 Framework. SNFPA  
24 1884,1900-10. However, the Forest Service’s changes to the 2001 Framework forced the Fish &  
25 Wildlife Service to reconsider its earlier decision:

26 A number of changes have taken place during the last two years that may affect  
27 California spotted owl habitat and effect corresponding changes in California spotted  
28 owl populations. *These include: revisions to the 2001 [Framework] in the 2004  
[Framework].*

70 Fed. Reg. at 35612 (emphasis added). The Fish & Wildlife Service concluded, “these changes  
constitute substantial information that the threatened destruction, modification, or curtailment of the

1 species' habitat or range may be a factor that threatens the continued existence of the [species].” *Id.*

## 2 **The Basin Group Selection Project**

3 Even before the Chief of the Forest Service issued his appeals decision, the Forest Service  
4 began implementing the 2004 Framework and the QLG pilot project. For example, on August 25,  
5 2004, the Forest Supervisor for the Plumas National Forest approved the Basin Group Selection  
6 Project (“Basin project”) on 38,893 acres of Plumas National Forest southwest of the town of  
7 Quincy.<sup>3</sup> BASIN 3642. The purpose of the Basin project is to “implement group selection as  
8 directed in the [QLG] Act” and “implement direction in the [2004 Framework] for [individual tree  
9 selection.]”) SNFPA 3672-73. Accordingly, the Basin project calls for 800 one-to-two-acre group  
10 selection cuts totaling 1,215 acres, in which all trees less than 30 inches will be removed, as well as  
11 logging of about 80 acres of individual trees less than 30 inches in diameter. BASIN 3643.

12 According to the Forest Service’s biological evaluation, the Basin project will impact many  
13 sensitive species, including the California spotted owl, Pacific fisher, and American marten. BASIN  
14 3521. In particular, group selection logging will render unsuitable 943 acres of California spotted  
15 owl nesting habitat and 247 acres of foraging habitat, including 405 acres that fall within spotted owl  
16 home range core areas. BASIN 3571. The Basin project will also log over 400 acres of habitat used  
17 as a movement corridor by forest carnivores such as fishers and martens. BASIN 3575. Despite  
18 these impacts, the Forest Service prepared an environmental assessment (“EA”) for the Basin project  
19 and concluded that the project would not have a significant impact on these species. BASIN 3643.

20 On November 24, 2004, Regional Forester Blackwell denied the Campaign’s administrative  
21 appeal of the Basin project and authorized its implementation. BASIN 2906. Consequently, no  
22

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23 <sup>3</sup> Numerous other logging projects implementing the 2004 Framework have been approved or are in  
24 the process of approval. For example, on April 16, 2004, the Forest Service issued a final decision  
25 approving the Meadow Valley logging project on the Plumas National Forest (6,443 acres to be  
26 logged), and on August 20, 2004, the Forest Service issued a final decision approving the North 49  
27 logging project on the Lassen National Forest (over 16,000 acres to be logged). *See* Fed. Defs’  
28 Answer to Pltfs’ Amended Compl. (“Answer”) ¶ 59. Hundreds of additional logging projects  
implementing both the 2004 Framework and the QLG pilot project are in the planning process,  
including the Empire project on the Plumas National Forest (12,208 acres to be logged), the Sawmill  
project on the Sequoia National Forest (3,240 acres), the Watdog project on the Plumas National  
Forest (4,021 acres), the Creeks Forest Health Recovery Project on the Lassen National Forest  
(11,375 acres), and the Freds Fire project on the Eldorado National Forest (3,065 acres). *See*  
Answer ¶ 60; BASIN 2657-77.

1 legal obstacle now prevents the Forest Service from awarding timber sale contracts pursuant to the  
2 Basin project, after which logging can begin at any time.<sup>4</sup>

### 3 **STANDARD OF REVIEW**

4 “Because neither NEPA nor NFMA contains provisions allowing a private right of action, a  
5 party can obtain judicial review of alleged violations of NEPA and NFMA only under the waiver of  
6 sovereign immunity contained within the Administrative Procedure Act (“APA”), 5 U.S.C. § 701-  
7 706.” *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1077 (E.D. Cal. 2004). *See also Earth Island*  
8 *Institute v. U.S. Forest Serv.*, 351 F.3d 1291, 1300 (9th Cir. 2003) (reviewing NEPA and NFMA  
9 claims under the APA). Under the APA, courts must set aside agency actions found to be “arbitrary,  
10 capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

11 An agency’s action is arbitrary and capricious if the agency fails to consider an  
12 important aspect of a problem, if the agency offers an explanation for the decision  
13 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.

14 *The Lands Council v. Powell*, 395 F.3d 1019, 1026 (9th Cir. 2005). Judicial review must be  
15 “searching and careful,” and courts “must not rubber stamp administrative decisions that [are]  
16 inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.”  
17 *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 858-59 (9th Cir. 2005).

### 18 **ARGUMENT**

19 There can be no genuine dispute as to any of the material facts in this case, all of which are  
20 contained in the administrative records for this case.<sup>5</sup> Since the records demonstrate that both the  
21 2004 Framework and the Basin project are arbitrary, capricious, and otherwise not in accordance  
22 with law, summary judgment in favor of the Campaign is appropriate. *See Fed. R. Civ. P. 56(c);*  
23 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (articulating summary judgment standard).<sup>6</sup>

24  
25 <sup>4</sup> The Forest Service has agreed to provide the Campaign with 15 days written notice prior to  
awarding any timber sale contracts for the Basin Project. *See* April 4, 2005 Joint Status Report at 5.

26 <sup>5</sup> Because the facts in the record are not in dispute, the parties requested that the Court waive the  
requirement under Local Civil Rule 56-260(a) for a separate Statement of Undisputed Facts. *See*  
27 Joint Status Report and Proposed Schedule at 5 (Aug. 15, 2005).

28 <sup>6</sup> The Campaign has standing to bring this action. *See Bennett v. Spear*, 520 U.S. 154, 162 (1997)  
(articulating standing requirements) and Declarations of Craig Thomas, David Noah Greenwald,  
Nathaniel Lawrence, Daniel Smuts, and Barbara Boyle, submitted herewith.

1 **I. The Forest Service’s Determination that the 2004 Framework Will Maintain Viable**  
2 **Populations of California Spotted Owls, Pacific Fishers, and American Martens Is at**  
3 **Odds With the Overwhelming Evidence in the Record.**

4 As discussed above, the 1982 NFMA planning regulations “were promulgated pursuant to  
5 the directive of NFMA to provide for diversity of plant and animal communities.” *Seattle Audubon*  
6 *Soc’y v. Evans*, 952 F.2d 297, 301 (9th Cir. 1991) (citing 16 U.S.C. § 1604(g)(3)(B)). To this end,  
7 the 1982 NFMA planning regulations require the Forest Service to manage fish and wildlife habitat  
8 “to maintain viable populations of existing native and desired non-native vertebrate species in the  
9 planning area.” 36 C.F.R. § 219.19. *See also Oregon Natural Desert Ass’n v. U.S. Forest Serv.*,  
10 2004 WL 1592606 at \*2. (D. Or. 2004) (“[NFMA] imposes a substantive duty on the Forest Service  
11 to provide sufficient habitat to maintain viable, well-distributed populations of wildlife species  
12 throughout their existing ranges.”).

13 In this case, there is no evidence in the record to support the Forest Service’s determination  
14 that implementing the 2004 Framework “will provide the fish and wildlife habitat and other  
15 ecological conditions necessary to maintain well-distributed viable populations of vertebrate species  
16 in the planning area.” SNFPA 3011. To the contrary, the record demonstrates that the 2004  
17 Framework is inadequate to maintain California spotted owl, Pacific fisher, and American marten  
18 viability and has in fact already pushed these imperiled species further down the path towards listing  
19 under the Endangered Species Act. The 2004 Framework is therefore arbitrary and capricious, and  
20 logging projects approved pursuant to the 2004 Framework – including the Basin project – must be  
21 set aside. *See Idaho Sporting Congress v. Rittenhouse*, 305 F.3d 957, 966 (9th Cir. 2002) (“If the  
22 forest plan’s [viability] standard is invalid . . . then the timber sales that depend upon it to comply  
23 with [NFMA] are not in accordance with law and must be set aside.”).

24 **A. The Record Demonstrates that the 2004 Framework’s Standards and Guidelines**  
25 **Are Inadequate to Maintain Owl, Fisher, and Marten Viability.**

26 The record in this case demonstrates that scientists both inside and outside of federal  
27 agencies warned the Forest Service that the 2004 Framework’s weak standards and guidelines would  
28 be inadequate to maintain California spotted owl, fisher, and marten viability. After Regional  
Forester Blackwell adopted the 2004 Framework, Dr. Verner – the recently retired Forest Service

1 California spotted owl expert and author of the CASPO Report – wrote:

2 We owl scientists were convened at your request on three occasions to share with you  
3 and your team our professional judgments about habitat associations of spotted owls  
4 in the Sierra Nevada. In spite of our oft-repeated concerns that many of the proposed  
5 standards and guidelines would tend to move forest conditions to a marginal status, or  
6 worse, for the owl I see little, if any change in a positive direction from the DSEIS to  
7 the FSEIS.

8 BASIN 904. As detailed above, owl scientists have identified a host of problems associated with the  
9 standards and guidelines in the 2004 Framework. “Perhaps one of the most poorly justified  
10 components of the [2004 Framework] is the allowance for harvesting trees up to 30 inches [in]  
11 diameter.” BASIN 808. Owl scientists have been clear all along that “20-30 inch trees constitute an  
12 important component of spotted owl habitat and that removing significant numbers of these trees  
13 could have a negative effect on spotted owl population viability.” BASIN 824. Owl scientists have  
14 also expressed concern that “the [2004 Framework] allows canopy removal down to 40%,” despite  
15 evidence “that 50% canopy closure may be a critical threshold.” BASIN 688. In fact, “[a]t three  
16 separate meetings with [the Framework review team] and other scientists studying owls in California  
17 for more than a decade,” owl scientists “cautioned the Forest Service to avoid removing too much  
18 canopy cover from forest stands used by spotted owls for foraging, roosting, and nesting.” BASIN  
19 688. *See also* BASIN 830 (“[T]he significant reductions in canopy cover allowed under [the 2004  
20 Framework] . . . will have negative impacts on viability.”).

21 The owl scientists’ lack of support for the 2004 Framework’s standards and guidelines could  
22 not have come as a surprise to the Forest Service. The agency’s own Washington D.C. office  
23 pointed out that the 2004 Framework’s standards and guidelines “provide less owl habitat  
24 conservation than the [interim CASPO guidelines] in effect since 1993.” SNFPA 2477. For  
25 example, the interim CASPO guidelines prohibited logging in spotted owl PACs – the 300-acre  
26 areas immediately surrounding owl nests – while the 2004 Framework allows logging of trees *up to*  
27 *30 inches in diameter* in PACs located within the Urban Wildland Intermix. *Compare* SNFPA 1299  
28 *with* SNFPA 3050, 3040. Moreover, as the Forest Service’s DSEIS acknowledged, “[t]he CASPO  
interim guidelines were designed to maintain owl habitat elements most at risk for a short period of  
time; they were not designed, nor intended, to increase effectiveness of suitable habitat by protecting

1 and concentrating high quality habitat.” SEIS 6 at 198-99. According to their principal author, Dr.  
2 Verner, the interim guidelines “fail[] to provide a long-term management solution for the California  
3 spotted owl and do[] not ensure that a sufficient amount of suitable nesting and foraging habitat  
4 would exist within the home ranges of spotted owls to support replacement-rate reproduction across  
5 the landscape.” SNFPA 988, Doc. 650 at 4. To maintain viable owl populations, the record reveals  
6 that both the Forest Service and the Fish & Wildlife Service recognize the need for standards and  
7 guidelines that are more – not less – restrictive than the interim CASPO guidelines. *See, e.g.,*  
8 BASIN 1408 (Forest Service) (“[T]he [interim] guidelines permit the manipulation, and partial  
9 degradation, of suitable owl habitat. Specifically, the interim . . . guidelines permit timber  
10 harvesting that reduces the quality of suitable nesting and foraging habitat.”); SNFPA 1908 (Fish &  
11 Wildlife Service) (“[The interim guidelines] allowed degradation of suitable nesting and roosting  
12 habitat by allowing timber harvest . . . to reduce canopy cover to 40 percent in timber types selected  
13 by owls and below 40 percent in other types used by owls.”).

14 The standards and guidelines included in the 2004 Framework are likewise inadequate to  
15 maintain fisher and marten viability. For example, Dr. Barrett advised Regional Forester Blackwell  
16 in April of 2004:

17 [T]he new plan will allow logging to remove medium-large trees, reduce canopy  
18 cover, and remove large snags and logs to levels below those utilized by fisher for  
19 denning and resting. Moreover, the FSEIS cites no research, and I am aware of none,  
20 to support the assertion that areas logged pursuant to the new standards and  
21 guidelines ‘should provide suitable habitat for fisher population expansion.’ To the  
22 contrary, *the likely impact of the new plan will be to degrade suitable fisher habitat,*  
23 *contributing to habitat fragmentation and reducing the likelihood that the fisher*  
24 *population will be able to expand to the central and northern Sierra Nevada.*

25 BASIN 671 (emphasis added). *See also* BASIN 794 (“The new plan would weaken the critical  
26 elements of fisher denning and resting habitat by allowing removal of medium and large trees,  
27 reduction in canopy cover, simplification of multi-storied canopies, and reduction of large snags and  
28 down logs.”). According to marten scientists, these same impacts “would further degrade marten  
habitat in the northern Sierra, leading to a significant risk of adverse impacts to marten reproduction,  
survival, and occupancy of the area.” BASIN 791.

In short, there is no evidence that would support the Forest Service’s determination that the

1 2004 Framework’s weak standards and guidelines are adequate to maintain owl, fisher, or marten  
2 viability. Because there is overwhelming evidence in the record to support the opposite conclusion,  
3 the Forest Service’s determination was arbitrary and capricious. *See, e.g., Home Builders Ass’n of*  
4 *Northern Cal. v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1222 (E.D. Cal. 2003) (holding  
5 that an agency’s failure to articulate a rational reason for its determination “in the face of the  
6 evidence to the contrary” violates the APA).

7 **B. The Record Is Clear that Full Implementation of the Quincy Library Group**  
8 **Pilot Project Threatens Owl, Fisher, and Marten Viability.**

9 As noted above, the 2004 Framework directs the Forest Service to “implement the [QLG]  
10 pilot project, consistent with the [QLG] Act and Alternative 2 of the [QLG] EIS.” SNFPA 3056.

11 However, the Forest Service’s biological evaluation that accompanied the QLG EIS in 1999 found:

12 Alternative 2 would reduce the amount of California spotted owl . . . nesting habitat  
13 by 7% over the life of the pilot project, and reduce the amount of foraging habitat by  
14 8.5%. Such reductions in suitable habitat would decrease the number of owl home  
15 ranges with more than 50% suitable habitat by 11% over the term of the project.

16 BASIN 1324. The Forest Service concluded “such impacts to owl habitat could pose a serious threat  
17 to the viability of the owl in the planning area, *thereby making the implementation of Alternative 2*  
18 *inconsistent with the National Forest Management Act and its implementing regulations.*” BASIN  
19 1324 (emphasis added).

20 “In order to minimize the threat to the viability of the owl in the planning area,” the Forest  
21 Service determined in 1999 that it was “necessary to add mitigation, beyond the minimum CASPO  
22 interim guideline[s].” BASIN 1324. Specifically:

23 At the site-specific project level, defensible fuel profile zones [*i.e.*, fuelbreaks], group  
24 selection harvest areas, and individual tree selection harvest areas will be designed  
25 and implemented to completely avoid suitable California spotted owl habitat,  
26 including nesting habitat and foraging habitat.

27 BASIN 1408. But despite the owl scientists’ repeated objections that “there is no new information  
28 that would warrant changing the earlier conclusion that full implementation of the [QLG] project  
would threaten the owl’s viability in the planning area,” BASIN 827, the 2004 Framework calls for  
full implementation of the QLG pilot project without any mitigation.

In its comments on the draft QLG EIS in 1999, the Fish & Wildlife Service advised the

1 Forest Service that the QLG pilot project would not only threaten California spotted owl viability,  
2 but also fisher and marten viability. *See* BASIN 1098 (“The [Fish & Wildlife] Service believes the  
3 implementation of alternative 2 poses a significant threat to the long-term viability of the California  
4 spotted owl, Pacific fisher, and American marten due to the loss, degradation, and fragmentation of  
5 suitable habitat.”). The record demonstrates that forest carnivore experts continue to concur with the  
6 Fish & Wildlife Service on this point. For example, Dr. Barrett informed the Forest Service in 2004:

7 [T]he proposal to fully implement the QLG plan will significantly reduce the  
8 likelihood of the fisher’s recolonization of the northern Sierra, which is essential to  
9 restoring connectivity of the fisher population in California and in the Pacific states.  
10 . . . I agree [with the Fish & Wildlife Service’s] conclusions, and am aware of no new  
11 information that would change the Fish and Wildlife Service’s finding that full  
12 implementation of the QLG project, as authorized by the new decision, would  
13 threaten the fisher’s viability in the Sierra Nevada.

14 BASIN 671. With respect to the marten, Dr. Barrett stated:

15 I have previously reviewed the QLG plan and concluded that the QLG plan may  
16 cause significant adverse impacts to the American marten and would threaten the  
17 viability of marten populations in eastside and red fir forests. To the best of my  
18 knowledge, there is no new information that would change these conclusions.

19 BASIN 675 (citations omitted).

20 In short, there is no new evidence that justifies the Forest Service’s decision to reverse course  
21 and implement the QLG pilot project consistent with Alternative 2 of the QLG EIS, despite the  
22 earlier views of its own biologists that doing so would threaten the owl’s viability. “The failure of  
23 the agency, despite the views of its own experts, to articulate a rational reason for its decision . . .  
24 establishes the arbitrary and capricious nature of the agency’s decision-making.” *Defenders of*  
25 *Wildlife v. Babbitt*, 958 F. Supp. 670, 684 (D.D.C. 1997).

26 **C. The 2004 Framework’s Nebulous Adaptive Management Strategy Is Inadequate  
27 to Maintain Owl, Fisher, and Marten Viability.**

28 As discussed above, the science consistency review teams that reviewed the 2004 Framework  
warned the Forest Service that the agency’s proposal to accept more risk by providing local  
managers with greater flexibility would “rise and fall” on the strength of the adaptive management  
strategy. SNFPA 2606. The Chief of the Forest Service agreed:

I find that managing habitat to maintain viable populations of the California spotted  
owl, the Pacific fisher, and American marten *can only be assured* by using subsequent

1 site-specific evaluations and the adaptive management and monitoring strategy. The  
2 strategy emerges as a centerpiece of the decision.

3 SNFPA 4076 (emphasis added). Nevertheless, the 2004 Framework does not contain an adaptive  
4 management strategy. “[R]ather than add a lot more to existing obligations,” Regional Forester  
5 Blackwell opted instead to identify a few “high priority, key questions” and directed a team to  
6 complete “an assessment of the cost of initiating” additional monitoring. SNFPA 3002-03. Thus,  
7 the Chief of the Forest Service observed, “[w]hile the initial steps of the adaptive management and  
8 monitoring strategy is [sic] outlined through the questions and hypotheses in the FSEIS,” the  
9 Regional Forester needed to “communicate more fully how he intends to address these questions.”  
10 SNFPA 4077. Scientists who reviewed the FSEIS came to the same conclusion as the Chief. *See,*  
11 *e.g.*, BASIN 906 (“[W]here is adaptive management in all of this? Have you really adopted the  
12 recommendations of the science consistency team for adaptive management? I see little evidence  
13 that this is the case.”); BASIN 807 (“[T]he concept of adaptive management is mentioned but there  
14 is no firm commitment to its implementation and full funding and no discussion of what it should  
15 entail.”); BASIN 687 (“[A]daptive management is *not* integrated into the current decision; the [2004  
16 Framework] stops short of a commitment to any specific adaptive management.”).

17 The Forest Service’s decision to rely on a yet-to-be-developed adaptive management strategy  
18 to “insure” the continued viability of spotted owls, fishers, and martens was nothing short of  
19 arbitrary and capricious. This is especially true because the record demonstrates that the Forest  
20 Service will be unlikely to develop an effective adaptive management strategy. The Forest Service  
21 itself recognizes:

22 To date, there are few examples of scientifically credible large-scale multi-resource  
23 monitoring plans that have been developed, implemented, and validated. . . .  
24 application of adaptive management to large, complex resource management  
25 problems has relatively few proven results.

26 SNFPA 3139-40. Given this poor track record, owl scientists were skeptical that the Forest Service  
27 would be able to develop an adaptive management strategy capable of maintaining viability. *See,*  
28 *e.g.*, SEIS 1 at 295 (“It’s easy to say be more flexible, use adaptive management, but it really is  
expensive and not easy to do.”). They therefore advised the Forest Service, “[a]daptive management  
needs to begin before the project – it needs to be a process not an add-on.” SNFPA 2433. In the

1 words of one of the reviewers on the science consistency review team: “The only way that this level  
2 of uncertainty [under the 2004 Framework] can be addressed is through adaptive management, and  
3 I’m afraid that [Forest Service] culture is not ready to embrace this approach seriously yet.” SNFPA  
4 2528. The evidence in the record indicates that this fear is well founded, for – despite the Chief’s  
5 direction – the Forest Service has yet to adopt an adaptive management strategy.

6 In sum, contrary to the Forest Service’s determination, the record in this case is clear that the  
7 2004 Framework will not maintain viable populations of California spotted owl, fishers, or martens  
8 in the Sierra Nevada. To the contrary, the record demonstrates that the 2004 Framework will  
9 guarantee these species’ continued decline and ultimately result in their listing under the Endangered  
10 Species Act – as indeed is happening already. *See* 69 Fed. Reg. 18770 (Apr. 8, 2004) (finding that  
11 the Pacific fisher warrants listing); 70 Fed. Reg. 35607 (June 21, 2005) (finding that the California  
12 spotted owl may warrant listing).

13 **II. The Forest Service Adopted the 2004 Framework and the Basin Project in the Absence**  
14 **of Required Information Regarding Management Indicator Species or Species at Risk.**

15 Under the 1982 NFMA regulations, “not only does the [Forest Service] have a duty to insure  
16 species viability, but it must also estimate and monitor the effect of forest management on  
17 populations of certain species in the forest, most specifically, MIS.” *Environmental Prot. Info. Ctr.*  
18 *v. Blackwell*, 2004 WL 2324190, at \*25 (N.D. Cal. 2004). The Forest Service designated  
19 management indicator species (“MIS”) for the Sierra Nevada planning area in Appendix E of the  
20 final EIS (“FEIS”) that accompanied the 2001 Framework. *See* FEIS Vol. 4 at E-64-66, 76, 98-100.  
21 The Forest Service re-adopted Appendix E from the 2001 FEIS when it approved the 2004  
22 Framework. *See* SNFPA 3060.

23 Under the 1982 NFMA regulations, the Forest Service is required to monitor population  
24 trends of each MIS. *See* 36 C.F.R. § 219.19(a)(6) (“Population trends of MIS “will be monitored  
25 and relationships to habitat changes determined.”). To do so, the Forest Service must perform  
26 population inventories of the MIS that consist of *quantitative* data. 36 C.F.R. § 219.26 (“Inventories  
27 shall include quantitative data making possible the evaluation of diversity in terms of its prior and  
28 present condition.”). This population trend analysis and quantitative data must be gathered and used

1 in the planning process – in this case in the preparation of the 2004 Framework. 36 C.F.R.  
2 §§ 219.1(a); 219.19(a); 219.10(f); 219.12(d); and 219.26.

3 In *Sierra Club v. Eubanks*, 335 F. Supp. 2d 1070, 1081 (E.D. Cal. 2004), this Court  
4 considered these regulatory monitoring requirements, noted their mandatory nature, and enjoined a  
5 timber sale for lack of the required data. Specifically, the Court held that the Forest Service is  
6 required to have MIS data from the specific timber project area. *Id.* at 1081-82. The Forest Service  
7 is also required to have MIS data for the entire planning area, *i.e.* there must be forest-wide data. *Id.*  
8 *See also Utah Environmental Congress v. Bosworth*, 372 F.3d 1219, 1225 (10th Cir. 2004) (“[T]he  
9 regulations anticipate application of § 219.19 to project level as well as to plan level management  
10 actions.”). Without MIS data, the Forest Service would be “don[ning] blinders to the overall  
11 condition of a national forest each time it approve[s] a sale, quite literally losing sight of the forest  
12 for the trees.” *Neighbors of Cuddy Mt. v. Alexander*, 303 F.3d 1059, 1069 (9th Cir. 2002).<sup>7</sup>

13 In addition to the regulatory requirements, Appendix E establishes requirements to monitor  
14 MIS. *See* FEIS Vol. 4 at E-64, 76, 98 (requiring population trend data); *Id.* at E-63, 75, 96 (requiring  
15 annual monitoring). Appendix E also contains monitoring requirements for other species, known as  
16 species-at-risk (“SAR”). *Id.* at E-61-64, 74-76, 95-98. This Court considered Appendix E in  
17 *Eubanks*, and found that these monitoring requirements are mandatory and enforceable. 335 F.  
18 Supp. 2d at 1081. Because the 2004 Framework revised the forest plans for each of the eleven Sierra  
19 Nevada National Forests, the monitoring requirements of Appendix E were also incorporated into  
20 the Plumas forest plan. That is significant, because timber projects must be consistent with the forest  
21 plan applicable to that particular national forest. *See* 16 U.S.C. § 1604(i); *Neighbors of Cuddy Mt. v.*  
22 *U.S. Forest Serv.*, 137 F.3d 1372, 1376-1377 (9th Cir. 1998).

23 **A. The Forest Service Failed to Comply with Monitoring Requirements When It**  
24 **Adopted the 2004 Framework.**

25 In *Eubanks*, this Court found that the Forest Service was not meeting MIS monitoring

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26 <sup>7</sup> Numerous other courts have enjoined Forest Service timber sales for failure to obtain MIS  
27 population data. *See, e.g., Bosworth*, 372 F.3d at 1226-27; *Idaho Sporting Congress*, 305 F.3d at  
28 971-72; *Martin*, 168 F.3d at 7; *Forest Guardians v. U.S. Forest Serv.*, 180 F. Supp. 2d 1273, 1281  
(D. N.M. 2001); *Utah Environmental Congress v. Zieroth*, 190 F. Supp. 2d 1265, 1271 (D. Utah  
2002).

1 requirements of the 1982 NFMA regulations and Appendix E. The Court based that finding on the  
2 Forest Service’s own documents for a timber sale in the Tahoe National Forest. The court found that  
3 those documents designated numerous MIS as “population trend unknown,” which indicated “the  
4 lack of the requisite population data.” 335 F. Supp. 2d at 1082. The Court also found that the 2001  
5 Framework admitted the lack of MIS data, stating:

6 Many uncertainties exist about the status and fate of MIS and species at risk. Basic  
7 information on distribution, population status, and habitat relationships is lacking for  
8 most MIS and species at risk, creating uncertainties about the adequacy and  
effectiveness of various conservation measures.

9 *Id.* (quoting FEIS Vol. 4 at E-62).

10 The Forest Service has not corrected the lack of MIS data that this Court found in *Eubanks*.  
11 In adopting the 2004 Framework, the Forest Service stated that it “evaluate[d] new information  
12 available since the adoption of the [2001 Framework].” SNFPA 3237-38. Therefore, if the Forest  
13 Service had corrected the absence of MIS data, it would have been evaluated in the 2004 Framework  
14 FSEIS. Instead, the Forest Service admits in the FSEIS that population data still exists only “for  
15 *some* of the species considered in the analysis” and is “*generally lacking*” for MIS. SNFPA 3242  
16 (emphasis added).

17 The record in this case further demonstrates the absence of MIS trend analysis and  
18 quantitative data. Although limited data exists for some MIS, it was not collected and population  
19 trends were not analyzed for all MIS. For instance, the Forest Service listed over 70 MIS for the  
20 Sierra Nevada planning area, but only identified trends for less than half of them. SNFPA 3238-42.  
21 The Forest Service admitted that there are “*insufficient data*” for six species including the northern  
22 goshawk, northern oriole, Lincoln’s sparrow, great gray owl, red-naped sapsucker, and willow  
23 flycatcher. SNFPA 3241 (emphasis added). This is directly analogous to the lack of MIS data this  
24 Court faced in *Eubanks*, where the Forest Service stated that certain MIS were “*population trend*  
25 *unknown*.” 335 F. Supp. 2d at 1082.

26 The absence of the requisite data is implicit in several sections of the FSEIS. *See, e.g.*,  
27 SNFPA 3378 (stating that “[g]iven the lack of information ... it is not possible to predict quantitative  
28 changes to populations as a result of implementing the proposed alternative”); SNFPA 3170-75

1 (containing cursory analysis of effects of alternatives on MIS). Indeed, the Forest Service has  
2 admitted that population trend data and current inventory data is lacking for “certain MIS.” Answer  
3 ¶ 89 (“[C]omplete baseline, trend and/or current inventory data do not exist for certain MIS.”).

4 **B. The Forest Service Failed to Comply with Monitoring Requirements When It**  
5 **Adopted the Basin Project.**

6 As noted above, the Basin project is located in Plumas national forest. MIS designated in the  
7 Plumas forest plan include the goshawk, bald eagle, golden eagle, peregrine falcon, prairie falcon,  
8 California spotted owl, Canada goose, woodpeckers, deer, gray squirrel, and marten. BASIN 2917  
9 at 3-40. The 2001 Framework amended the Plumas forest plan with Appendix E, which identifies  
10 these and many additional species as MIS for which population inventories are required. FEIS Vol.  
11 4 at E-64-66, 76-77, 98-100. As stated above, Appendix E was carried forward in the 2004  
12 Framework. However, neither the biological evaluation nor the EA that accompany the Basin  
13 project presents monitoring information as required by the NFMA regulations and Appendix E.

14 Appendix B of the Basin project biological evaluation purports to analyze the MIS, but it  
15 omits many species. *Compare* BASIN 3524-25 (listing all species analyzed in the Basin biological  
16 evaluation) *with* FEIS Vol. 4 at E-64-66, 76, 98-100 (listing many more MIS than are treated in the  
17 biological evaluation). The analysis of effects contained in Basin project EA is largely based on the  
18 biological evaluation, and similarly omits many MIS. *See* BASIN 3700-03. In fact, many MIS are  
19 not referenced at all in the Basin project EA or biological evaluation. These include the blue grouse,  
20 mountain quail, Williamson’s sapsucker, black bear, elk, pronghorn, sage grouse, bank-tailed  
21 pigeon, mallard, osprey, red-breasted sapsucker, and yellow warbler. BASIN 3524, 03701.

22 Where the Forest Service does address particular MIS, it provides only short narrative  
23 descriptions that evidence a lack of population trend data for these species. For example, the  
24 narrative for the golden eagle notes only that “many golden eagles have been observed, [but] nesting  
25 golden eagles have not been observed.” BASIN 3596. The narrative for the Canada goose simply  
26 notes that they “have been observed at a few locations within the Basin.” BASIN 3597. The only  
27 reference to population size and distribution for the pileated and hairy woodpeckers is that “[s]everal  
28 species of woodpeckers have been observed within the Basin analysis area.” BASIN 3596. The

1 narratives for several other species are also lacking population trend data. *See, e.g.*, BASIN 3594  
2 (discussing mule deer and gray squirrel without reference to population trends). These descriptions  
3 are no substitute for hard quantitative data. *See e.g., Forest Guardians*, 180 F. Supp. 2d at 1283  
4 (finding MIS monitoring violations where the record contained “little or no hard population data”  
5 but rather consisted of mere “descriptive or conclusory statements about the Forest Plan’s [MIS],  
6 with no formal references to population analysis or inventory reports.”).

7         Furthermore, as with MIS, the Forest Service did not even address many species at risk  
8 (“SAR”) that have annual population monitoring requirements, such as sage grouse, band-tailed  
9 pigeon, silver haired bat, long-eared owl, and Forster’s tern. *Compare* BASIN 3524-25  
10 (summarizing the species analyzed but omitting these SAR) *with* FEIS Vol. 4 at E-64-66, 76-77, 98-  
11 100 (containing monitoring requirements for these SAR). Evidence of the disregard for SAR  
12 monitoring requirements of Appendix E is found in that, for species that actually are addressed in the  
13 Basin project biological evaluation, the narratives include little or no population trend data. The  
14 narrative for the northern goshawk, for example, discusses habitat generally and discusses only one  
15 “stand search survey,” conducted in the summer of 2004. BASIN 3553. This is inadequate because  
16 while a single survey may provide evidence of a species’ current population, it does not establish a  
17 population trend over time for the entire forest. *See, e.g., The Lands Council*, 395 F.3d at 1036-37  
18 (noting that spot surveys “do not even begin to qualify as an accurate monitoring of population  
19 trends”). Similarly, for the Townsend’s big-eared bat, the analysis only considers two apparently  
20 unconnected surveys from 2001 and 2002. *See* BASIN 3555 (indicating lack of population trend  
21 data for the pallid bat and Townsend’s big-eared bat). Surveys for the Swainson’s thrush are  
22 similarly inadequate. *See* BASIN 3603 (suggesting that surveys for the Swainson’s thrush were not  
23 conducted between 1998 and 2004). Finally, the narratives for the American marten and Pacific  
24 fisher indicate that there is suitable habitat for the species within the Basin project area. BASIN  
25 3553. However, the only reference in this section to any population data for these species is a  
26 statement that, while the marten has been sighted in other parts of the forest, no sightings have  
27 occurred in the project area. *Id.*

1           **C.     The Forest Service May Not Rely on Habitat Analysis to Satisfy Its Monitoring**  
2           **Requirements.**

3           In lieu of full compliance with the MIS regulations, the Forest Service engaged in “habitat  
4 analysis” as the basis for the 2004 Framework. *See, e.g.*, SNFPA 3378. Habitat analysis involves  
5 the study of changes in forest habitat as a proxy for changes in populations of MIS, which  
6 themselves are proxies for the populations of all forest species. *See Bosworth*, 372 F.3d at 1224.  
7 The analysis of MIS habitat is, however, no substitute for full compliance with the MIS monitoring  
8 requirements. *See Idaho Sporting Cong.*, 305 F.3d at 971-73 (rejecting the Forest Service’s use of  
9 habitat analysis approach to MIS monitoring as a “proxy on proxy” approach in violation of 36  
10 C.F.R. 219.19); *Martin*, 168 F.3d at 4-6 (habitat analysis does not satisfy 36 C.F.R. § 219.26  
11 requirement for inventories with “quantitative” data); *Seattle Audubon Soc’y v. Lyons*, 871 F. Supp.  
12 1291, 1316 (D. Wash. 1994) (holding that the viability requirement requires the Forest Service to  
13 “look to species populations, not merely to habitat for hypothetical populations”).

14           This Court has previously considered – and rejected – the Forest Service’s habitat analysis  
15 approach. *See Eubanks*, 335 F. Supp. 2d at 1082. The Court noted that for many MIS, Appendix E  
16 requires population *monitoring*, as opposed to habitat analysis. *Id.* *See also* FEIS Vol. 4 at E-64-66,  
17 76-77, 98-100 (describing monitoring requirements). As the Court noted, Appendix E describes the  
18 need for this underlying data, and therefore the inappropriateness of habitat analysis. *Eubanks*, 335  
19 F. Supp. 2d at 1082. Additional language from Appendix E confirms this:

20           It is possible that, *after a period of annual population monitoring* (distribution and  
21 abundance), we will have sufficient understanding of important habitat characteristics  
22 that we can confidently monitor habitat without annual monitoring of species’  
distribution and abundance. *This is contingent, however, on a dedicated program of*  
*population monitoring* and careful analysis and testing of habitat models along the  
way.

23 FEIS Vol. 4 at E-63, 75, 96 (emphasis added). In addition, Appendix E identifies as a “Key Old  
24 Forest Information Gap” the following: “What are the habitat relationships of old forest associated  
25 MIS and species-at-risk?” *Id.* at E-70.

26           The discussion above on the lack of MIS and SAR monitoring in the administrative records  
27 for the 2004 Framework and the Basin project demonstrates that the lack of population monitoring  
28 has not been rectified. The Forest Service has not performed this “dedicated program of population

1 monitoring and careful analysis and testing of habitat models,” nor has it closed this “Information  
2 Gap.” Therefore, the habitat analysis underlying the 2004 Framework does not satisfy NFMA.

3 **III. The Forest Service Violated the National Environmental Policy Act When It Adopted**  
4 **Both the 2004 Framework and the Basin Project.**

5 The National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4221 *et seq.*, is “our basic  
6 national charter for protection of the environment.” *Klamath-Siskiyou Wildlands Ctr. v. U.S. Bureau*  
7 *of Land Management*, 387 F.3d 989, 993 (9th Cir. 2004). “Unlike NFMA, NEPA does not mandate  
8 that agencies achieve particular substantive environmental results.” *Native Ecosystem Council*, 418  
9 F.3d at 958 n.4. “Rather, NEPA imposes only procedural requirements on federal agencies with a  
10 particular focus on requiring agencies to undertake analyses of the environmental impact of their  
11 proposals and actions.” *Department of Pub. Transportation v. Public Citizen*, 124 S. Ct. 2204, 2209  
12 (2004). In short, “NEPA requires that federal agencies take a ‘hard look’ at the environmental  
13 consequences of their actions.” *California v. Norton*, 311 F.3d 1162, 1168 (9th Cir. 2002).<sup>8</sup>

14 To this end, NEPA requires federal agencies to prepare an environmental impact statement  
15 (“EIS”) for all “major federal actions significantly affecting the quality of the human environment.”  
16 42 U.S.C. § 4332(2)(C).

17 An EIS is a thorough analysis of the potential environmental impacts that provides [a]  
18 full and fair discussion of significant environmental impacts and informs decision  
19 makers and the public of the reasonable alternatives which would avoid or minimize  
20 adverse impacts or enhance the quality of the human environment.

21 *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 993 (citing 40 C.F.R. § 1502.1). “When an agency is  
22 unsure whether an action is likely to have ‘significant’ environmental effects,” an agency must  
23 prepare an environmental assessment (“EA”), the purpose of which is to “briefly provide sufficient  
24 evidence and analysis for determining whether to prepare an environmental impact statement.” *Id.*  
25 (citing 40 C.F.R. § 1508.9). “An EIS *must* be prepared if substantial questions are raised as to  
26 whether a project *may* cause significant degradation of some human environmental factor.” *Ocean*  
27 *Advocates*, 402 F.3d at 864 (emphasis in original).

28 <sup>8</sup> NEPA is accompanied by implementing regulations promulgated by the Council on Environmental  
Quality (“CEQ”), 40 C.F.R. §§ 1501.1-1508.28, which are “entitled to substantial deference.”  
*Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979).

1           **A.     The Final Supplemental Environmental Impact Statement for the 2004**  
2           **Framework Violates the National Environmental Policy Act.**

3           As detailed below, the FSEIS that accompanies the 2004 Framework does not contain a full  
4 and fair discussion of the significant environmental impacts that logging under the plan will have on  
5 old forest species. Nor does the FSEIS present reasonable alternatives that would avoid these  
6 impacts. Accordingly, the FSEIS violates NEPA, and the 2004 Framework must be set aside.

7           **1.     The Final Supplemental Environmental Impact Statement Does Not**  
8           **Include a Full and Fair Discussion of Impacts to Old Forest Species.**

9           **a.     The Final Supplemental Environmental Impact Statement Does**  
10           **Not Disclose Responsible Opposing Scientific Viewpoints**  
11           **Regarding Impacts to Old Forest Species.**

12           “NEPA requires that a federal agency consider every significant aspect of the environmental  
13 impact of a proposed action and inform the public that it has indeed considered environmental  
14 concerns in its decisionmaking process.” *The Lands Council*, 395 F.3d at 1026. Accordingly, the  
15 CEQ regulations require agencies to “discuss at appropriate points in the final [EIS] any responsible  
16 opposing view which was not adequately discussed in the draft [EIS] and . . . indicate the agency’s  
17 response to the issues raised.” 40 U.S.C. § 1502.9(b). “This disclosure requirement obligates the  
18 agency to make available to the public high quality information, including accurate scientific  
19 analysis, expert agency comments, and public scrutiny, before decisions are made and actions are  
20 taken.” *Center for Biological Diversity v. U.S. Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003).  
21 *See also Eubanks*, 335 F. Supp. 2d at 1076 (“Credible scientific evidence that contraindicates a  
22 proposed action must also be evaluated and disclosed.”).

23           The FSEIS the accompanies the 2004 Framework entirely fails to acknowledge – much less  
24 discuss or analyze – the fact that leading scientists believed the proposal would significantly degrade  
25 California spotted owl, fisher, and marten habitat. As discussed above, *all* of the California spotted  
26 owl biologists who commented on the DSEIS for the 2004 Framework expressed opposition to it, on  
27 numerous grounds. *See, e.g.*, BASIN 338 (concluding that the proposal “may lead to a trend toward  
28 listing of the California spotted owl”); BASIN 189 (“[T]he proposed changes to the Sierra  
Framework will contribute to the decline of the California spotted owl, strengthening the need to list  
the subspecies under the [Endangered Species Act].”); BASIN 186 (“[T]he DSEIS fails to meet the

1 legal requirements of the NFMA and the professional requirements of responsible stewardship.”);  
2 BASIN 285 (“[T]he proposed action is likely to adversely affect spotted owls in their habitat in the  
3 Sierra Nevada as well as increase the likelihood that the California spotted owl will be listed as a  
4 threatened species under the Endangered Species Act.”). The FSEIS nevertheless fails to  
5 acknowledge this overwhelming scientific opposition or provide a reasoned response, as the owl  
6 scientists themselves made clear to the Forest Service after it adopted the 2004 Framework. *See,*  
7 *e.g.*, BASIN 687 (“The FSEIS fails to adequately address many of the concerns we expressed in our  
8 letter to you of September 2003 . . . and meetings with you regarding the [DSEIS].”); BASIN 895  
9 (noting “little evidence that the various concerns and suggestions brought forth by the owl scientists  
10 are reflected” in the plan); BASIN 904 (“In spite of our oft-repeated concerns that many of the  
11 standards and guidelines would tend to move forest conditions to a marginal status, or worse, for the  
12 owl I see little, if any, change in a positive direction from the DSEIS to the FSEIS.”); BASIN 722  
13 (“[T]he final plan . . . is essentially identical to [the proposal] in the DSEIS.”).

14 Numerous forest carnivore experts also commented on the DSEIS, and all of them raised  
15 serious concerns that the Forest Service’s proposed changes to the 2001 Framework would have  
16 significant adverse impacts on fisher and marten habitat. *See, e.g.*, BASIN 177 (“The proposed plan  
17 . . . would allow significant degradation of fisher denning, resting, and foraging habitat.”); BASIN  
18 799 (“[T]he preferred alternative will significantly reduce the suitability of . . . habitats for fishers  
19 where they occur.”); BASIN 236 (“The proposed changes would substantively weaken protections  
20 for the fisher and for the American marten.”); BASIN 282 (“The proposed plan would weaken the  
21 critical elements of fisher denning and resting habitat.”); BASIN 280 (“[T]he proposed project  
22 would necessarily have adverse impacts to any martens that currently occur in the northern Sierra  
23 Nevada.”). But again, the FSEIS does not disclose, much less address, the overwhelming scientific  
24 opposition to its proposal.

25 In short, “[b]ecause the commentators’ evidence and opinions directly challenge the  
26 scientific basis upon which the [FSEIS] rests and which is central to it,” the Forest Service was  
27 “required to disclose and respond to such viewpoints in the [FSEIS] itself.” *Center for Biological*  
28 *Diversity*, 349 F.3d at 1167.

1                                   **b.     The Final Supplemental Environmental Impact Statement Does**  
2                                   **Not Consider the Short-Term Impacts of Logging under the 2004**  
3                                   **Framework on Old Forest Species.**

4             Not only does the FSEIS fail to disclose the overwhelming scientific evidence that opposed  
5             the 2004 Framework, it also fails to consider the severe short-term impacts that the 2004 Framework  
6             will have on old forest species. Instead, the FSEIS focuses on the long-term (20-100 years) impact  
7             of the 2004 Framework. But according to the Forest Service’s science consistency review team:

8                             Short-term effects of management activities are probably more relevant to owl  
9                             population persistence than long-term projections in habitat change. The latter are  
10                            more uncertain and will undoubtedly be subject to subsequent changes in  
11                            management direction as well as unforeseen ecological circumstances.

12             SNFPA 2582. Thus, the DSEIS acknowledged that the proposed changes to the 2001 Framework  
13             would likely have significant, negative short-term (*i.e.*, less than 20 years) impacts on owl habitat.  
14             For example, the DSEIS acknowledged that the proposed changes to the 2001 Framework “could  
15             result in the removal of habitat attributes that provide quality nesting and foraging habitat,” “would  
16             reduce the amount of multi-story canopy, stand complexity and canopy closure which could affect  
17             owl reproductive output,” and would result “in reduced owl densities and reduction in distribution of  
18             owls and owl habitat” in geographic areas of concern, as well as “increased fragmentation” in these  
19             areas. SEIS 6 at 197-99. Overall, the DSEIS disclosed that the plan would likely have impacts that  
20             could reduce the viability and distribution of the owl population in the Sierra Nevada:

21                             [The proposal] tends to disrupt the continuity of habitat conditions (*i.e.* habitat  
22                             structure and distribution) over the 20 year time period. This disruption may lead to  
23                             increases in fragmentation and habitat patchiness. *The increases in fragmentation*  
24                             *and patchiness are likely to isolate subpopulations and limit the opportunity for*  
25                             *interactions across [national forest] lands.*

26             SEIS 6 at 204 (emphasis added). All of these conclusions were either weakened or eliminated  
27             entirely from the FSEIS, despite the fact that there was no new information or analysis to justify  
28             changing the conclusions in the DSEIS.

                  With respect to the fisher, the FSEIS declares, “[h]abitat attributes important to fisher – large  
trees, large snags, large down logs, and higher than average canopy closure – . . . would significantly  
trend upward over time.” SNFPA 3320. The FSEIS makes an oblique reference to “short-term  
tradeoffs in current habitat quality,” SNFPA 3314, and acknowledges that “some denning habitat

1 may be degraded,” SNFPA 3323, but it never analyzes the extent of this habitat degradation or how  
2 it may affect the fisher population in the southern Sierra. Dr. Barrett specifically noted the failure of  
3 the FSEIS to address this issue:

4       The FSEIS . . . baldly states that ‘treatments would create habitat conditions that are  
5       within the range of habitats used by fisher and would not therefore involve an  
6       irreversible or irretrievable commitment of resources.’ This conclusion is  
7       unsupported by the best available research and effectively ignores the likelihood that  
8       the plan will have a significant negative impact on fisher habitat in the short term.

9 BASIN 672 (citation omitted). The Forest Service’s own Washington D.C. Office agreed with Dr.  
10 Barrett: “there is no clear discussion of . . . short-term effects to current occupied habitat quality, nor  
11 to fisher viability within the [southern Sierra fisher conservation area].” SNFPA 2477.

12       The unfortunate result of the Forest Service’s failure to analyze the 2004 Framework’s short-  
13 term impacts in the FSEIS is that the magnitude of those impacts is only now being realized. For  
14 example, a recent Forest Service study concluded that logging practices like those prescribed by the  
15 2004 Framework “have significant short term impacts on fisher resting habitat quality, as well as  
16 canopy closure” and “significantly reduced fisher resting habitat suitability and average canopy  
17 closure.” Truex & Zielinski, *Short Term Effects of Fire and Fire Surrogate Treatments on Fisher*  
18 *Habitat in the Sierra Nevada*, Aug. 1, 2005 at 13 (Exh. B to Loarie Dec.).<sup>9</sup> As this Court has  
19 recognized, “NEPA emphasizes the importance of coherent and comprehensive up-front  
20 environmental analysis to ensure informed decision-making to the end that the agency will not act on  
21 incomplete information, only to regret its decision after it is too late to correct.” *Sierra Nevada*  
22 *Forest Prot. Campaign v. U.S. Forest Serv.*, 2005 WL 1366507, at \*5 (E.D. Cal. May 26, 2005)  
23 (quoting *Center for Biological Diversity*, 349 F.3d at 1166). Had the Forest Service taken the  
24 requisite hard look at the 2004 Framework’s short-term impacts in the FSEIS, the now-evident  
25 severity of those impacts might have been averted.

26 \_\_\_\_\_  
27 <sup>9</sup> Although this study, which post-dates the 2004 Framework, is not in the administrative record, the  
28 Court “may extend its review beyond the administrative record and permit the introduction of new  
evidence in NEPA cases where the plaintiff alleges that an EIS has neglected to mention a serious  
environmental consequence . . . or otherwise swept stubborn problems or serious criticism under the  
rug.” *National Audubon Soc’y v. U.S. Forest Serv.*, 46 F.3d 1437, 1447-48 (9th Cir. 1994).

1                                   c.       **The Final Supplemental Environmental Impact Statement Does**  
2   **Not Consider the Cumulative Impact of Logging Under the 2004**  
3   **Framework Together with Logging Under the Giant Sequoia**  
4   **National Monument Management Plan.**

5                   “NEPA requires an agency to consider the environmental impact that results from the  
6                   incremental impact of the action when added to other past, present and reasonably foreseeable  
7                   actions.” *Natural Res. Def. Council*, 2005 WL 1845097, at \*13 (quoting 40 C.F.R. § 1508.7).

8                                   [T]he general rule under NEPA is that, in assessing cumulative effects, the [EIS] must  
9                                   give a sufficiently detailed catalogue of past, present, and future projects, and provide  
10                                   adequate analysis about how these projects, and differences between projects, are  
11                                   thought to have impacted the environment.

12                   *The Lands Council*, 395 F.3d at 1028.

13                   In this case, the FSEIS that accompanies the 2004 Framework fails to analyze the cumulative  
14                   impact on old forest species – particularly the fisher – of logging under the 2004 Framework  
15                   together with logging under the Giant Sequoia National Monument (“GSNM”) management plan.  
16                   The Forest Service adopted the GSNM management plan in December 2003 – one month before the  
17                   2004 Framework. *See* Record of Decision, Giant Sequoia National Monument Plan (“GSNM  
18                   ROD”) at 1 (Exh. C to Loarie Dec.).<sup>10</sup> Much like the 2004 Framework establishes management  
19                   direction for the rest of the Sierra Nevada, the GSNM management plan establishes management  
20                   direction for GSNM, which was created by presidential proclamation in 2000 and covers 327,769  
21                   acres in the southern Sierra Nevada. *Id.* at 3. And like the 2004 Framework, the GSNM  
22                   management plan allows logging of trees up to 30 inches in diameter throughout GSNM. *Id.* at 6.  
23                   Not surprisingly, scientists including leading fisher expert Dr. Barrett informed the Forest Service  
24                   that the GSNM management plan “would further threaten the viability and distribution of the fisher  
25                   in the southern Sierra Nevada.” BASIN 680.

26                   The FSEIS mentions the GSNM management plan, but it lacks any analysis of the plan’s  
27                   likely adverse impacts. SNFPA 3322-23. In particular, it entirely fails to explore the extent to  
28                   

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10   Although the GSNM ROD is not included in the administrative record for this case, this Court has  
observed that “[i]n cases challenging the adequacy of agency review under NEPA, the Ninth Circuit  
has routinely admitted extra-record evidence to show that the agency failed to consider all relevant  
factors in assessing potential environmental effects.” *Sierra Nevada Forest Prot. Campaign*, 2005  
WL 1366507, at \*8 (citing Ninth Circuit caselaw).

1 which implementing the 2004 Framework and GSNM management plan may result in cumulative  
2 impacts to the Pacific fisher, California spotted owl, or other environmental resources. As Dr.  
3 Barrett concluded in his review of the FSEIS, “it is essential that the Forest Service consider the  
4 combined impacts of the GSNM plan and the Sierra Nevada Framework revisions in one document.”  
5 BASIN 673. Yet the FSEIS “only mentions ostensible environmental benefits of implementing the  
6 GSNM plan, without acknowledging the likelihood of cumulative adverse impacts.” BASIN 673.

7 The FSEIS’s treatment of the GSNM management plan falls far short of what NEPA  
8 requires. Absent from the FSEIS is any quantified or detailed assessment of the combined  
9 environmental impacts of implementing the GSNM management plan and the 2004 Framework.  
10 Nowhere does the FSEIS disclose the cumulative amount of owl or fisher habitat that will be  
11 degraded if both plans are implemented or how such habitat impacts will affect the species at a  
12 landscape scale. Instead, the FSEIS offers a generalized discussion of the GSNM management  
13 plan’s possible environmental benefits, without any disclosure or analysis of likely cumulative  
14 impacts. “General statements about possible effects and some risk do not constitute a hard look.”  
15 *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 993. Because the FSEIS fails to analyze the  
16 cumulative impacts of implementing the GSNM management plan, it fails to comply with NEPA.

## 17 **2. The Final Supplemental Environmental Impact Statement Does Not** 18 **Consider Reasonable Alternatives to the 2004 Framework.**

19 NEPA requires federal agencies “to produce an EIS that rigorously explores and objectively  
20 evaluates all reasonable alternatives so that the agency can sharply define the issues and provide a  
21 clear basis for choice among options by the decisionmaker and the public to consider alternatives to  
22 the proposed action.” *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1120 (9th Cir. 2002)  
23 (citing 40 C.F.R. § 1502.14). “NEPA regulations describe this alternatives requirement as the  
24 ‘heart’ of the EIS.” *Id.* Thus, “[t]he existence of a viable but unexamined alternative renders an  
25 [EIS] inadequate.” *Natural Res. Def. Council*, 2005 WL 1845097, at \*11. The FSEIS that  
26 accompanies the 2004 Framework fails to evaluate a full range of alternatives, and those alternatives  
27 that are described do not receive comparable treatment.

28 The FSEIS analyzes only two alternatives in any detail: “S1” (the “no-action” alternative of

1 retaining the 2001 Framework) and “S2” (the 2004 Framework). The DSEIS included a third  
2 alternative, “S3,” but it received only cursory treatment, as both the Forest Service’s Washington  
3 D.C. Office and the Fish & Wildlife Service pointed out. *See* SNFPA 2479 (“Although Alternative  
4 S3 is identified in Chapter 2 [of the DSEIS] as one of the alternatives analyzed in detail, the analysis  
5 of this alternative in Chapter 4 is contained within a single paragraph on page 240.”); SNFPA 3928  
6 (“[I]t does not appear that Alternative S3 is given fair treatment in the comparison of alternatives [in  
7 the DSEIS].”). In any event, the Forest Service dropped alternative S3 in the FSEIS.

8         The FSEIS purports to incorporate the full suite of alternatives considered in the original  
9 2001 Framework FEIS. SNFPA 3006-09. However, the 2001 Framework alternatives are  
10 infrequently discussed in the FSEIS, omitted from important tables and figures, and clearly not given  
11 equal consideration. *Compare* SNFPA 3117-60 (analyzing alternatives S1 and S2) *with* SNFPA  
12 3160-62 (analyzing the 2001 Framework alternatives).

13         Moreover, to compare alternatives S1 and S2 in the FSEIS with the alternatives in the 2001  
14 FEIS is to compare apples and oranges. First, the 2001 FEIS and the 2004 FSEIS rely on different  
15 assumptions and models to estimate the environmental consequences of the alternatives. For  
16 example, the 2001 FEIS assumed that logging small trees under six inches in diameter would be  
17 effective in reducing fire risk, FEIS Vol. 4 at B-44, 63, whereas the FSEIS assumes that logging  
18 small trees will not be effective. SNFPA 3471. *See also* SNFPA 606-08 (describing other  
19 differences between the alternatives analysis in the 2001 FEIS and the 2004 FSEIS). Second, the  
20 alternatives in the 2001 FEIS were developed to address a significantly different purpose and need  
21 than that identified in the FSEIS. According to Regional Forester Blackwell, the 2004 Framework  
22 “broadened” the 2001 Framework’s purpose and need “to include other management objectives such  
23 as reducing stand density for forest health, restoring and maintaining ecosystem structure and  
24 composition, and restoring ecosystems after severe wildfires and other large catastrophic disturbance  
25 events.” SNFPA 2994. The Chief of the Forest Service was clear that these issues were “outside the  
26 scope” of the 2001 Framework. SNFPA 581-82. In light of these differences, the Environmental  
27 Protection Agency advised the Forest Service that comparing the 2001 FEIS alternatives with S1 and  
28 S2 was impossible. *See* SNFPA 3912 (“[T]he analysis of [2001 FEIS] alternatives is conducted

1 through reference to the FEIS and does not appear to include an updated analysis based on the  
2 purpose and need and new information which triggered this review. . . . The FSEIS should include a  
3 comparative analysis of all the alternatives, with each alternative analyzed at the same level of  
4 detail.”). Nevertheless, the FSEIS continues to do lip service to NEPA by simply referring readers  
5 to the 2001 FEIS for “a full range” of alternatives.

6 During the public comment period on the DSEIS, numerous public agencies and scientists  
7 identified alternatives to the 2004 Framework, but the Forest Service declined to consider them. For  
8 example, the Environmental Protection Agency suggested that the Forest Service implement the  
9 2004 Framework “with a smaller diameter limit on tree removal and a less stringent limit (versus  
10 elimination of restrictions) on group selection treatments in the [QLG] pilot project area.” SNFPA  
11 3912. The owl scientists proposed a genuine adaptive management alternative that would apply to a  
12 much smaller area. BASIN 251. The California Resources Agency urged consideration of an  
13 alternative that would change particular standards and guidelines, rather than overhauling the entire  
14 plan, as well as alternatives focused on adaptive management and alternative funding mechanisms.  
15 SNFPA 3817-22. The State of California’s Attorney General’s Office also suggested a number of  
16 alternatives in their comments on the proposal. SNFPA 3772. The Forest Service made no attempt  
17 to analyze these or other suggested alternatives in the FSEIS.

18 Ultimately, the FSEIS considers only two alternatives: the 2001 Framework and the 2004  
19 Framework. This “yes/no” choice does not represent a reasonable range of alternatives and renders  
20 the FSEIS inadequate under NEPA.

21 **B. The Forest Service Violated the National Environmental Policy Act When It**  
22 **Approved the Basin Project.**

23 As detailed below, the Forest Service never allowed the public an opportunity to comment on  
24 the environmental impacts outlined in the environmental assessment (“EA”) for the Basin project.  
25 Moreover, the Forest Service’s EA failed to take a hard look at the cumulative impacts to old forest  
26 species of logging under the Basin project together with past, present, and reasonably foreseeable  
27 future logging projects under the QLG Act. Accordingly, the Basin project EA violates NEPA, and  
28 the Basin project must therefore be set aside regardless of the deficiencies in the 2004 Framework.

1                   **1.       The Forest Service Failed to Provide for Public Comment on the Draft**  
2                   **Environmental Assessment for the Basin Project.**

3                   The Forest Service admits that the EA for the Basin project was never circulated for public  
4 comment, in either draft or final form. Answer ¶ 146. By failing to circulate the Basin project EA  
5 for public comment and to involve the public to the extent practicable in the assessment of the  
6 project’s environmental impacts, the Forest Service violated NEPA and the CEQ regulations.

7                   The Ninth Circuit has held that “[t]he public must be given an opportunity to comment on  
8 draft EAs and EISs.” *Citizens for Better Forestry v. U.S. Dept. of Agriculture*, 341 F.3d 961, 970  
9 (9th Cir. 2003) (*quoting Anderson v. Evans*, 314 F.3d 1006, 1016 (9th Cir. 2002)). The ruling in  
10 *Citizens for Better Forestry* has recently been followed by numerous district courts. *See Sierra*  
11 *Nevada Forest Prot. Campaign v. Weingardt*, 376 F. Supp. 2d 984 2005 (E.D. Cal. 2005);  
12 *Environmental Prot. Info. Ctr. v. Blackwell*, 2004 WL 2324190, at \*24 (N.D. Cal. 2004); *Montana*  
13 *Wilderness Ass’n v. Fry*, 310 F. Supp. 2d 1127, 1144 (D. Mont. 2004).

14                   “One of the twin aims of NEPA is active public involvement and access to information.”  
15 *Price Road Neighborhood Ass’n v. U.S. Dept. of Transportation*, 113 F.3d 1505, 1511 (9th Cir.  
16 1997). *See also California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982) (stating that NEPA’s  
17 purposes are to “foster both informed decision-making and informed public participation”). The  
18 CEQ regulations implement this fundamental NEPA policy by requiring that the public be  
19 “involved” in the agency’s preparation of an EA and its ultimate decision whether to prepare an EIS.  
20 40 C.F.R. § 1501.4(b.) This basic point is emphasized by other CEQ regulations, which require  
21 agencies to “encourage and facilitate” public involvement in decisions that affect the environment,  
22 40 C.F.R. § 1500.2(d), and make “diligent efforts” to involve the public in NEPA procedures, 40  
23 C.F.R. § 1506.6. The purpose of these and other provisions is to “insure that environmental  
24 information is available to public officials and citizens before decisions are made and before actions  
25 are taken. . . . Accurate scientific analysis, expert agency comments, and public scrutiny are  
26 essential to implementing NEPA.” 40 C.F.R. § 1500.1(b) (emphasis added).

27                   *Sierra Nevada Forest Protection Campaign v. Weingardt*, a very recent decision from this  
28 District Court, is on point. In that case, the plaintiffs challenged the process used by the Forest

1 Service to approve the North 49 logging project on the Lassen National Forest. *Weingardt*, 376 F.  
2 Supp. 2d at 984. As in this case, the Forest Service released the EA to the public only after the close  
3 of the public comment period – at the same time that it issued its decision notice approving the  
4 project. *Id.* Chief Judge Levi ruled that this process violated NEPA and the CEQ regulations. The  
5 court held that NEPA requires, at a minimum, that “the public be given as much environmental  
6 information as is practicable, prior to completion of the EA, so that the public has a sufficient basis  
7 to address those subject areas that the agency must consider in preparing the EA.” *Id.* at 991. As  
8 outlined by the court, the public must be given information about, among other things, a project’s  
9 environmental impacts – including cumulative impacts – *before* the comment period. *Id.*

10 In this case as well, the Forest Service failed to comply with NEPA’s information sharing  
11 and public participation requirements. The agency’s March 2, 2004 letter initiating the 30-day  
12 public comment period for the Basin project includes a brief summary of the proposed action and the  
13 project’s purpose and need, but it lacks any analysis or discussion of the project’s likely  
14 environmental impacts. BASIN 3134. In addition, the notice entirely fails to address cumulative  
15 impacts, alternatives, and other issues that must be disclosed in advance of the public comment  
16 period to allow the public an opportunity for meaningful comment. *See Weingardt*, 376 F. Supp. 2d  
17 at 991. As a result, the Forest Service unlawfully truncated the opportunity to comment required by  
18 NEPA and the CEQ regulations, and consequently the Basin project must be set aside.

19 **2. The Forest Service Failed to Take a Hard Look at the Cumulative Impact**  
20 **that the Basin Project, Together with Other Logging Projects, Will Have**  
21 **on Old Forest Species.**

22 As discussed previously, “NEPA always requires that an environmental analysis for a single  
23 project consider the cumulative impacts of that project together with past, present and reasonably  
24 foreseeable future actions.” *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 895 (9th Cir.  
25 2002). According to the Ninth Circuit:

26 A proper consideration of the cumulative impacts of a project requires some  
27 quantified or detailed information. . . . General statements about possible effects and  
28 some risk do not constitute a hard look absent a justification regarding why more  
definitive information could not be provided. The analysis must be more than  
perfunctory; it must provide a useful analysis of the cumulative impacts of past,  
present, and future projects.

1 *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 993-94 (internal quotations and citations omitted).  
2 Thus, the cumulative impact analysis must “identify or disclose the incremental impact that can be  
3 expected from each successive timber sale, or how these individual impacts might combine or  
4 synergistically interact with each other” to affect the environment. *Id.* at 997.

5 In this case, the record demonstrates that the Forest Service failed to take the requisite “hard  
6 look” at the cumulative impact that the Basin project, together with other logging projects under the  
7 QLG pilot project, will have on old forest species, including California spotted owls, fishers, and  
8 martens. The biological evaluation for the Basin project identifies eleven “[c]urrent and recent past  
9 timber sales and vegetation management projects in the Basin area,” four “future . . . projects  
10 planned for the Basin project area,” and ten additional QLG Act logging projects in its cursory  
11 discussion of cumulative effects. BASIN 3563-66. According to the biological evaluation, together  
12 these projects have logged or will log tens of thousands of acres. *Id.* Accordingly, the biological  
13 evaluation acknowledges that “[t]he [Basin] project may add to cumulative effects in a way that  
14 would affect individual California spotted owls and change the distribution of habitat because it is  
15 part of the larger pilot project for the [QLG Act].” BASIN 3573. In addition, the biological  
16 evaluation states, “[c]umulative effects on forest carnivores could occur with the incremental  
17 reduction of the quantity and/or quality of habitat for [these] species.” BASIN 3576.

18 Nevertheless, neither the Basin project EA nor the biological evaluation disclose the impact  
19 that these acknowledged cumulative effects will have – or already have had – on California spotted  
20 owls, fishers or martens. Rather, the Forest Service simply concludes without any analysis that there  
21 will be no significant cumulative impacts to these imperiled species. SNFPA 3654. Completely  
22 absent from the Basin project EA and biological evaluation is a “discussion of the connection  
23 between individual harvests and the prior environmental harms from those harvests,” *The Lands*  
24 *Council*, 395 F.3d at 1027, much less the “quantified or detailed information” required by NEPA,  
25 *Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 993.

26 This case is therefore distinguishable from this Court’s recent decision in *Sierra Nevada*  
27 *Forest Prot. Campaign v. U.S. Forest Serv.*, wherein the Court upheld the Forest Service’s analysis  
28 of cumulative impacts associated with the Meadow Valley logging project – another logging project

1 implementing the QLG pilot project – on the grounds that the Forest Service had “identified  
2 numerous timber projects within the analysis area, described the silvicultural system used, and the  
3 extent of anticipated effects.” 2004 WL 1366507, at \*12 n.8. Specifically, the Court found that the  
4 Forest Service had considered, “[t]he number of acres treated or otherwise affected . . . and the  
5 cumulative potential reduction on spotted owl habitat.” *Id.* (emphasis added). In this case, by  
6 contrast, neither the EA nor the biological evaluation for the Basin project make any mention of  
7 cumulative impacts to suitable California spotted owl, fisher, or marten habitat. Here, the Forest  
8 Service merely provides a list of other projects with the number of total acres harvested or to be  
9 harvested, but the agency offers no analysis of the impact that these logging projects have had on  
10 suitable habitat or populations. The Forest Service’s cumulative impacts analysis is therefore  
11 inadequate for purposes of NEPA. *See Klamath-Siskiyou Wildlands Ctr.*, 387 F.3d at 994-95 (“[A]  
12 tabulated list of five upcoming projects in the area and an estimate of the number of acres to be  
13 harvested” is “not a sufficient description of the actual environmental effects that can be expected  
14 from logging those acres.”).

15 In its biological evaluation for the Basin project, the Forest Service claims that “[t]he  
16 cumulative effect of [QLG] pilot project actions, such as the [Basin project], and other vegetation  
17 management actions in the Sierra Nevada was assessed in the [2004 Framework] FSEIS, to which  
18 this assessment is tiered.” BASIN 3720. However, the Forest Service may not rely on the range-  
19 wide estimate of cumulative impacts contained in the 2004 FSEIS. For example, as the Forest  
20 Service itself acknowledges in the 2004 FSEIS:

21 The [F]SEIS spatial analysis could only provide an approximation of potential  
22 treatments to [spotted owl home range core areas] because the exact location of  
23 treatment units (and the amount of treatment overlap with [home range core areas]  
and the amount of suitable spotted owl habitat affected) would only be known during  
site-specific planning.

24 SNFPA 3610. Therefore, the 2004 FSEIS anticipates that “[d]etailed cumulative effects analysis at  
25 the individual watershed scale [will be] conducted at the project level because of the site-specific  
26 data required for this type of analysis.” SNFPA 3596. *See also* SNFPA 3604 (“Each individual  
27 project must conduct NEPA analysis, including a biological evaluation of effects on fisher and a  
28 cumulative effects analysis of other projects.”). For this reason, the U.S. Environmental Protection

1 Agency advised the Forest Service that tiering to the FSEIS would not relieve the Forest Service of  
2 its duty to consider cumulative impacts in the Basin project EA at the site-specific level. BASIN  
3 3177 (“The [2004 Framework] and the [QLG] pilot project looked at the cumulative impacts of the  
4 actions in the Sierra Nevada on a broad scale. Identification of tiered project-specific actions present  
5 a good opportunity to evaluate cumulative impacts on a forest level.”).

6 In short, because the 2004 FSEIS states that cumulative impacts will be addressed at the site-  
7 specific level, “judicial estoppel will preclude the Service from later arguing that it has no further  
8 duty to consider the [impacts] of site-specific programs.” *Salmon River Concerned Citizens v.*  
9 *Robertson*, 32 F.3d 1346, 1357-58 (9th Cir. 1994). The record is clear that the Forest Service has  
10 never taken a hard look at the cumulative impacts that the Basin project, together with other logging  
11 projects under the QLG pilot project, will have on old forest species. Accordingly, the Basin project  
12 EA violates NEPA and must be set aside.

13 **IV. This Court Should Reinstate the 2001 Framework and Enjoin Any Ongoing Activities**  
14 **that Implement the 2004 Framework and Are Inconsistent with the 2001 Framework.**

15 According to the Ninth Circuit, “[t]he effect of invalidating an agency rule is to reinstate the  
16 rule previously in force.” *Paulsen v. Daniels*, 413 F.3d 999, 1008 (9th Cir. 2005). In this case,  
17 because the 2004 Framework violates NFMA and NEPA, the Court should set aside the 2004  
18 Framework and reinstate the 2001 Framework. In addition, because NFMA requires site specific  
19 projects to be consistent with the applicable forest plan, *see* 16 U.S.C. § 1604(i), this Court should  
20 enjoin the Forest Service from continuing with any activities – including the Basin project – that  
21 implement the 2004 Framework and are inconsistent with the 2001 Framework.

22 In the absence of an injunction, the Campaign will suffer irreparable harm due to the loss and  
23 degradation of old forests and associated species in the Sierra Nevada, including the California  
24 spotted owl, fisher, and marten. According to the Supreme Court:

25 Environmental injury, by its nature, can seldom be adequately remedied by money  
26 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.

27 *Amoco Production Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 545 (1987). Thus, the Ninth  
28 Circuit has “often held that a Forest Service logging plan may . . . fulfill the irreparable injury

1 criterion because of the long term environmental consequences.” *Earth Island Institute*, 351 F.3d at  
2 1299. *See also City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1314 (9th Cir. 1990) (“The  
3 environmental consequences on the old growth forest in the enjoined areas, were they to be opened  
4 up in a manner contemplated by the proposed action, would be irreversible for the foreseeable  
5 future”).

6 “[W]hen environmental injury is sufficiently likely, the balance of harms will usually favor  
7 the issuance of an injunction to protect the environment.” *Idaho Sporting Congress v. Alexander*,  
8 222 F.3d 562, 569 (9th Cir. 2000). Accordingly, where a party demonstrates the possibility of  
9 irreparable harm to the environment, an opposing party bears the burden of demonstrating that  
10 “unusual circumstances” exist that weigh against the request. *See Forest Conservation Council v.*  
11 *U.S. Forest Serv.*, 66 F.3d 1489, 1496 (9th Cir. 1995) (stating in the context of a challenge to forest  
12 management guidelines that timber companies have the burden “to present evidence to the court that  
13 ‘unusual circumstances’ weigh against the injunction sought”). There are no unusual circumstances  
14 that would counsel against issuing an injunction in this case.

15 Finally, the issuance of an injunction serves the public interest because it will prevent the  
16 unlawful destruction of publicly owned natural resources, prevent further violations of NFMA and  
17 NEPA, and further the important national policies embodied in those statutes. *See, e.g., Neighbors of*  
18 *Cuddy Mt.*, 137 F.3d at 1382 (noting that the old growth forests the plaintiffs sought to protect “will  
19 be enjoyed not principally by plaintiffs and their members but by many generations of the public”).  
20 Ultimately, this case is about “having government officials act in accordance with the law,” and  
21 “[t]his invokes a public interest of the highest order.” *Seattle Audubon Soc’y*, 771 F. Supp. at 1096.

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1 **CONCLUSION**

2 For the reasons above, the Campaign requests that the Court set aside the 2004 Framework  
3 and the Basin project, order the Forest Service to reinstate the 2001 Framework, and enjoin the  
4 Forest Service from continuing with any activities – including the Basin project – that implement the  
5 2004 Framework and are inconsistent with the 2001 Framework.

6 Respectfully submitted,

7  
8 Dated: September 9, 2005

/s/ Gregory C. Loarie

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Attorneys for plaintiffs  
Sierra Nevada Forest Protection Campaign, *et al.*