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IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

SACRAMENTO DIVISION

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

Plaintiffs,

v.

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

Federal Defendants,

and

TUOLUMNE COUNTY ALLIANCE FOR RESOURCES & ENVIRONMENT, *et al.*,

Defendant-Intervenors,

and

///

No. CIV-S-05-0205 MCE/GGH

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

///

CALIFORNIA SKI INDUSTRY ASSOCIATION,

Defendant-Intervenor,

and

QUINCY LIBRARY GROUP, *et al.*,

Defendant-Intervenors.

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Fed. Defs.' Exhibit A	Earth Island Institute v. U.S. Forest Serv., No. Civ. S 05-1608 MCE PAN (E.D. Cal. Aug. 25, 2005).
Fed. Defs.' Exhibit B	Executive Office of the President, Council on Environmental Quality *Guidance on the Consideration of Past Action in Cumulative Effects Analysis* (June 24, 2005).
Fed. Defs.' Exhibit C	Declaration of Cindy Roberts

ACRONYMS AND ABBREVIATIONS

APA	Administrative Procedure Act
BA/BE	Biological Assessment/Biological Evaluation
CEQ	Council on Environmental Quality
CWHR	California Wildlife Habitat Relationship
dbh	Diameter at Breast Height
DFPZ	Defensible Fuel Profile Zone
EA	Environmental Assessment
EIS	Environmental Impact Statement
EPA	United States Environmental Protection Agency
ESA	Endangered Species Act
FEIS	Final Environmental Impact Statement
FONSI	Finding of No Significant Impact
FWS	United States Fish and Wildlife Service
FSEIS	Final Supplemental Environmental Impact Statement
HFQLG	Herger-Feinstein Quincy Library Group Forest Recovery Act
LRMP	Land and Resource Management Plan
MIS	Management Indicator Species
MRR	Management Review and Recommendations
NEPA	National Environmental Policy Act
NF	National Forest
NFMA	National Forest Management Act
NFS	National Forest System
NWFP	Northwest Forest Plan
PNF	Plumas National Forest
ROD	Record of Decision
SAT	Scientific Analysis Team
SCR	Science Consistency Review

SEIS	Supplemental Environmental Impact Statement
SNFPA	Sierra Nevada Forest Plan Amendment

PREFACE REGARDING ADMINISTRATIVE RECORD CITATIONS

The following citation conventions are used when referring to administrative record materials:

1. Citations to the eight-volume administrative record for the 2004 and 2001 Sierra Nevada Framework are referenced as "SNFPA xxxx," where "xxxx" is the bates-stamped number at the bottom of the page in that record.

   a. The final environmental impact statement ("EIS") for the 2001 Sierra Nevada Forest Plan Amendment ("2001 Framework") is on a compact disc ("CD") found at SNFPA 957, and is referenced by volume, chapter, part, and page (e.g., 2001 EIS, Vol. 3, Ch. 3, Part 4.4 at 79).

   b. The EIS for the Herger-Feinstein Quincy Library Group Recovery Act Pilot Project is on a CD found at SNFPA 986, and is referenced by volume and page (e.g., HFQLG EIS Glossary -12).

2. The eight volume SNFPA record also contains material on CDs, which were originally found at SNFPA 4338-4360. Following the original lodging of these materials, some errors were discovered in the numbering and organization of the material on some of these CDs. Amended copies of these CDs were provided to the parties and are also being lodged with the Court. The material on these amended CDs is referenced by the bates-stamped number at the bottom of the appropriate page, typically: "SEIS_aa_xxxxxx," where "aa" is the CD volume, and "xxxxxx" is the page number.

3. Citations to the ten-volume administrative record for the Basin Project Decision, which is challenged in Sierra Nevada Forest Protection Campaign v. Rey, No. CIV-S-05-205 MCE GGH, are referenced as "BASIN xxxx," where "xxxx" is the bates-stamped number at the bottom of the page in that record.

4. Also included in the ten-volume administrative record for the Basin Project Decision is a CD found at BASIN 2917, which contains the forest plan (also known as the land and resources management plan ("LRMP")) for the Plumas National Forest. Citations to that document are referenced as "BASIN 2917 (LRMP at x-xx)", where "x-xx" represents the chapter and page number of the forest plan.

5. Several additional volumes of administrative record materials are also associated with three of the cases. Those materials are referenced as follows:

a. One additional binder is associated with California ex rel. Lockyer v. U.S. Department of Agriculture, No. CIV-S-05-211 MCE GGH. Any pages cited in that volume are referenced as "CA xxxx," where "xxxx" is the bates-stamped number at the bottom of the page in that record.

b. Two additional binders are associated with California Forestry Association v. Bosworth, No. CIV-S-05-905 MCE GGH. Any pages cited in those volumes are referenced as "CFA xxxx," where "xxxx" is the bates-stamped number at the bottom of the page in that record.

c. One additional binder is associated with Pacific Rivers Council v. U.S. Forest Service, No. CIV-S-05-953 MCE GGH. Any pages cited in that volume are referenced as "PRC xxxx," where "xxxx" is the bates-stamped number at the bottom of the page in that record.

6. An index to the materials identified in paragraphs 3 and 4 above is included at the beginning of the first volume of each set of materials. An index to the materials in paragraphs 1 and 2 was originally included at the front of the first volume of the eight-volume SNFPA record set. After errors were discovered in the numbering on the CDs mentioned above, an amended index was prepared and provided to the parties. That amended index is also being lodged with the Court.

INTRODUCTION

This is one of four related cases challenging an amendment by the United States Forest Service ("Forest Service" or "Agency") to the forest plans for eleven national forests in the Sierra Nevada region. The challenged 2004 Sierra Nevada forest plan amendment ("SNFPA"), commonly known as the 2004 Framework, replaces a prior 2001 amendment and provides a new balance of natural resource uses. The 2004 Framework remains protective of wildlife, but emphasizes a more effective reduction of hazardous fuels in order to decrease the risk of stand-replacing wildfire. See SNFPA 2995 ("One of the most difficult balancing tasks has been to find the best way to protect old forest dependent species and to increase and perpetuate old forest ecosystems, while we face a desperate need . . . to reduce the fuel loads feeding catastrophic fires."). As these four cases demonstrate, the Agency faces a difficult task balancing conflicting resource uses of the National Forest System ("NFS") lands when adopting a new plan amendment. The 2004 Framework is a reasoned choice that both complies with the law and is well within the Agency's discretion to manage for multiple uses.

Plaintiffs here are a collection of environmental organizations challenging the 2004 Framework and a forest management project, Basin, under the National Forest Management Act ("NFMA"), the National Environmental Policy Act of 1969 ("NEPA"), and the Administrative Procedure Act ("APA"). As an initial matter, Plaintiffs' NFMA challenges to the Basin Project should fail because the regulations upon which they are based are no longer in existence, having been superseded by a new planning rule in January 2005. Even if the old regulations apply, both the 2004 Framework and the Basin Project address the habitat needs for the relevant species in light of current science and reasonably conclude that viability would be maintained. Long-term habitat is projected to increase under the 2004 Framework for the owl, fisher, and marten. Also, short-term effects from the Basin Project would not be significant, given that the project avoids owl protected activity centers ("PACs") and would undertake little harvest within a designated network for fisher and marten.

Plaintiffs' argument that the Forest Service was required to obtain population data for management indicator species ("MIS") and "species-at-risk" is without merit. There is no duty under NFMA to obtain such data prior to approving a forest plan amendment, and the category of species-

at-risk is one that is not found either in the 1982 regulations or in the current rule. The Forest Service complied with any responsibility to monitor MIS by analyzing information on habitat, sometimes in combination with population and survey data, for the 15 species identified in the Plumas forest plan. Plaintiffs' argument that the Forest Service failed to comply with its duties for other MIS analyzed in the 2004 Framework and the 2001 Framework, is based upon the misperception that simply by analyzing the species on a region wide basis, the Frameworks somehow expanded the list of MIS in individual forest plans. That is not the case. Consequently, there is no duty for the Basin Project to include an analysis of MIS not identified in the forest plan.

The 2004 Framework complies with NEPA. The final supplemental environmental impact statement ("SEIS") for the 2004 Framework adequately discusses scientific uncertainty and opposing scientific viewpoints. The SEIS fully analyzed the effects (including short-term effects and cumulative effects) of changed management direction upon old forest species, including the owl, fisher, and marten. The SEIS considered a reasonable range of alternatives, including nine alternatives considered in detail that meet the purpose and need of addressing five problem areas identified by the 2001 Framework, and several areas where the Agency found room for improvement upon the existing direction. Moreover, the alternatives carried forward from the 2001 environmental impact statement ("EIS") were adequately analyzed, especially in light of the analysis already prepared in the 2001 EIS and considering the NEPA regulations that encourage reduction of unnecessary paperwork. See, e.g., 40 C.F.R. §§ 1500.4, 1502.1 ("Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork . . . .").[1/]

The environmental assessment ("EA") for the Basin Project complies with NEPA. Plaintiffs claim that the Forest Service violated NEPA by not circulating a draft EA for public comment, and allege that the Forest Service failed to take a "hard-look" at the cumulative impacts of the Basin Project with other logging projects. However, NEPA does not require circulation of a draft EA for public comment, and the Agency otherwise satisfied NEPA's public involvement requirements.

[1/] The regulations implementing NEPA, 40 C.F.R. pt. 1500, were promulgated by the Council on Environmental Quality ("CEQ") and are "entitled to substantial deference." Andrus v. Sierra Club, 442 U.S. 347, 358 (1979).

Furthermore, the Forest Service's analysis of cumulative effects in the Basin Project EA was reasonable. As demonstrated below, Federal Defendants are entitled to summary judgment.

FACTUAL BACKGROUND

I. MANAGEMENT OF NATIONAL FOREST LANDS IN THE SIERRA NEVADA

Together with the Modoc Plateau, the Sierra Nevada includes 11.5 million acres of NFS land and encompasses "dozens of complex ecosystems each with numerous, inter-connected social, economic and ecological components." SNFPA 1920. In the late 1980s, the Forest Service began developing a comprehensive strategy for managing the various resources and complex systems in this region. This strategy has included the development of two significant forest plan amendments which amended the forest plans for eleven National Forests, as well as legislatively mandated forest management direction in the Herger-Feinstein Quincy Library Group Forest Recovery Act, Pub. L. No. 105-277, 112 Stat. 2681-231 (codified as 16 U.S.C. § 2104 note) ("HFQLG Act"). The background for this comprehensive, plan-level approach to managing NFS lands in the Sierra is described below.

A. The 2001 Sierra Nevada Forest Plan Amendment

In 1995, the Regional Forester for the Pacific Southwest Region of the Forest Service issued a draft EIS on a proposal for comprehensive management direction covering NFS lands in the Sierra. See SNFPA 229. After extensive public participation and a final EIS, the Regional Forester issued a decision in January 2001 to amend the forest plans for eleven national forests. That decision, the 2001 record of decision ("ROD"), adopted a management direction related to five major topics: old forest ecosystems; aquatic, riparian, and meadow ecosystems; fire and fuels; noxious weeds; and, hardwood ecosystems on the lower westside of the Sierra. See id. at 231-235. Among other things, the 2001 ROD attempted to "balance the treatment of excessive fuels buildups, with the need to conserve key habitats for species at risk associated with old forest ecosystems . . . ." Id.

B. Management Review of the 2001 Framework

Following the issuance of the 2001 ROD, the Forest Service received approximately 200 administrative appeals. The Chief of the Forest Service ("Chief") affirmed the 2001 ROD but directed the Regional Forester to review it in light of several concerns, including increased levels of

wildfires, the relationship between the 2001 ROD and national firefighting efforts, and the relationship between the 2001 ROD and the Forest Service's responsibilities under the QLG Act. SNFPA 1918.

The Regional Forester assembled a management review team ("Team") which conducted a year-long public review that culminated in the issuance of management recommendations in March 2003.[2]/ The public review included open community meetings, workshops and field trips held with Forest Service employees, interest groups, scientists, other government agencies, journalists and others. Id. "The Team sponsored three field trips devoted specifically to fire and fuels to learn more about how the standards and guidelines from the [2001] ROD were being interpreted at the field level and to begin to assess where improvements could be made based on additional analysis and review." SNFPA 1926. The Team concluded that the 2001 ROD's "cautious approach" to active fuels management had limited its effectiveness in many treatment areas.[3]/ SNFPA 1926. In response, the Team determined that a revised set of vegetation management rules would increase the effective implementation of the fuels reduction strategy while protecting critical wildlife habitat. SNFPA 1918.

The Team also evaluated the California spotted owl ("owl") analysis upon which the 2001 ROD relied and found that a new analysis was warranted. In analyzing the effects to the owl resulting from full implementation of the Herger-Feinstein Quincy Library Group Forest Recovery Act ("HFQLG") Act, the 2001 ROD relied upon the analysis in the HFQLG biological assessment/biological evaluation ("BA/BE"), which the Team found "took a worst case approach

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[2]/ The Team's report, known as the Management Review and Recommendation ("MRR"), "documents a myriad of reasons to consider changes to existing management direction" and forms the basis for the proposed action in the 2004 Framework. SNFPA 3650; see also SNFPA 3569. The SEIS incorporate the MRR by reference. SNFPA 3098; see 40 C.F.R. 1502.21 (encouraging incorporation by reference where appropriate).

[3]/ For example, the Team found that under the 2001 ROD, the dense forest stands that were "key components to sensitive wildlife species habitat and most vulnerable to wildfire loss – will be treated either lightly (ineffectively) or not at all." The Team went on to state "[o]ur conclusion is that the standards and guidelines in the ROD will not allow for the placement and intensity of area treatments needed to effectively reduce the spread and intensity of wildland fires at the landscape scale." SNFPA 1927. This led the Team to conclude that the "area treatments" necessary for effective reduction of wildfire spread and intensity at the landscape level would not be conducted in the appropriate place or at the proper intensity under the 2001 ROD. Id.

to estimating effects" on the owl. SNFPA 1968. In particular, the HFQLG BA/BE assumed that "[a]ll group selection and DFPZ [Defensible Fuel Profile Zone ("DFPZs")] construction that was projected to occur within owl habitat" would render 100 percent of that habitat unsuitable. Id. The Team found that the HFQLG BA/BE described past fuel reduction thinnings and DFPZ construction in owl nesting habitat as having "actually reduced that habitat by less than one percent of the acreage treated," not the 100 percent that the analysis assumed. Id. Thus, the analysis in the BA/BE was determined to be unnecessarily conservative. See id. The Team further found an important substantive discrepancy between the 2001 Framework and the Hunsaker et al. (2002) study relied upon by the Forest Service,. In evaluating this discrepancy the Team concluded that "the assessment of owl home range condition in the FEIS [final EIS ("FEIS")] is not consistent with the research findings upon which it is based and may not be representative of the current status of owl habitat." SNFPA 1951.[4]/

In addition, numerous practical difficulties in implementing the direction for owl standards and guidelines were identified. In particular, the Team found technical problems regarding the 2001 Framework's application of California Wildlife Habitat Relationship ("CWHR") classifications at an unmanageably small scale, and in using unmanageably small increments of canopy closure to differentiate management classes. SNFPA 1947. The 2001 Framework's extensive reliance on canopy cover[5]/ at the stand level was determined to be another technical difficulty preventing consistent and effective implementation. SNFPA 1947-48; see also SEIS_04_000426 (email from Lassen National Forest ("NF") Forest Supervisor) ("We have struggled with using canopy closure

[4]/ The Review Team documented numerous instances where the 2001 FEIS relied upon the notion that there was a threshold of percent habitat in moderate to dense canopy cover that was determinative of owl productivity and/or viability. SNFPA 1951-52 (citing and excerpting passages from pages 79, 83, 92, and 95 of the 2001 FEIS, Vol. 3, Ch. 3, Part 4.4).

[5]/ When talking about an individual tree, canopy cover is the ground area covered by a tree crown, as shown by the vertical projection of its outermost perimeter. SNFPA 1947. In the Framework, percent canopy cover means the cumulative coverage of all trees in a stand. Id. The Review Team documented many instances where the 2001 EIS incorrectly assumed that there was a threshold of percent habitat in moderate to dense canopy cover, that was determinative of Owl productivity and viability. SNFPA 1951-52 (citing 2001 EIS. Vol. 3, Ch. 3, Part 4.4, pages 79, 83, 92, 95).

as a measurement of habitat condition in the field because there are no good consistent methods to measure canopy.").[6]/

C. Addressing Issues Raised in the Review of the 2001 Framework

In response to the Team's findings, the Regional Forester directed the development of alternative management strategies than selected in the 2001 ROD. A draft supplemental environmental impact statement ("DSEIS") was released for public comment in April 2003. A Final SEIS ("FSEIS") was released to the public in January 2004. See 69 Fed. Reg. 4512 (Jan. 30, 2004). The purpose of the SEIS is to address the management of the same five identified problem areas addressed by the 2001 Framework FEIS: old forest ecosystem and their associated species; aquatic, riparian and meadow ecosystems; fire and fuels management; noxious weeds; and lower westside hardwood ecosystems. SNFPA 3583. The SEIS analyzed nine alternatives in detail,[7]/ including the no action alternative (S1)--which would continue management under the 2001 ROD; the proposed action alternative (S2); and seven alternatives which had been previously considered in the 2001 FEIS (alternatives F2-F8). In addition, the SEIS discussed the affected environment and analyzed the potential environmental effects of each alternative on a wide range of resources, including old forest ecosystems, (SNFPA 3264-3268), forest and vegetation health (id. 3269-3276), aquatic, riparian and meadow ecosystems (id. at 3277-3284), fire and fuels (id. at 3285-3296), wildlife (id. at 3304-3385), socio-economic effects and effects related to commercial forest products (id. at 3386-3392), and recreation (id. at 3396-3397).

The SEIS further contained a comprehensive response to comments addressing concerns raised by interested parties during the comment period, including specific concerns, as noted by

[6]/ The Team also found that the 2001 ROD management direction would adversely affect permitted grazing operations. SNFPA 2006-2007. Under the management direction of the 2001 ROD, the Team determined the results would include the closure of meadows to grazing. SNFPA SEIS_01_000064. The Team found that the standards and guidelines under the 2001 ROD could be altered to provide more flexibility while maintaining equivalent levels of protection to riparian species, and thereby allow grazing operations to continue. SNFPA 2006-07. Finally, the Team recognized that the 2001 ROD management direction created an unstable business environment having adverse and unintended impacts on recreational businesses, their clients, and the communities that support recreation. SNFPA 2006-07.

[7]/ Seven additional alternatives, in addition to the nine alternative considered in detail, were also considered but eliminated from detailed consideration because they were found inconsistent with the purpose and need of the SEIS. SNFPA 3163-65.

Plaintiff, raised by the U.S. Fish and Wildlife Service ("FWS"), U.S. Environmental Protection Agency ("EPA"), California resources protection agencies, and the Science Consistency Review ("SCR") team.[8]/ SNFPA 3563-3933. For example, the Forest Service responded to specific questions regarding: owl nesting habitat and Yosemite toad, as raised by the FWS (SNFPA 3607-3608, 3619-3620 respectively),[9]/ and willow flycatcher population as raised by the California Department of Fish and Game (SNFPA 3619-3621). In addition, the Forest Service responded in detail to those issues identified by the SCR. SNFPA 3503-3524. As a result of the SCR and discussions with the SCR team improvements were made to the SEIS. Id at 3503.

On January 21, 2004, the Regional Forester issued a decision adopting the proposed action from the SEIS. SNFPA 2987-3061. The 2004 ROD replaces the direction in the 2001 ROD and amends the forest plans for National Forests in the Sierra Nevada. SNFPA 2995. The rationale for the decision is that the 2001 Framework "prescribed technical solutions that do not produce needed results, or offered methods we often dare not attempt in the current Sierra Nevada." Id. The 2001 Framework's methods and standards "cannot reverse the damage, and growing threat, of catastrophic fires quickly enough." Id. The selected alternative seeks to improve effectiveness and implementation of the 2001 ROD's fuels strategy while protecting habitat components important to sensitive wildlife species. Id.

On November 18, 2004, the Chief affirmed the 2004 ROD with direction to submit to him within six months additional details of the ROD's adaptive management strategy. SNFPA 3997-4305. The Regional Forester submitted that supplemental information to the Chief on March 31, 2005. See SNFPA 4319-4332. Pursuant to 36 C.F.R. § 217.7(d)(2) (2000), the Under Secretary for

[8]/ The SCR Team consisted of eleven scientists convened by the Pacific Southwest Research Station in Davis, California, and included experts in fire and fuels management, forest ecology, and species viability. SNFPA 3503. The SCR Team reviewed the draft SEIS according to a standardized set of criteria to determine whether relevant scientific information had been considered and accurately interpreted. See SNFPA 3503-04. The final SEIS includes, in an appendix, the Forest Service's response to comments raised by the SCR Team. See SNFPA 3504-3524.

[9]/ As the SEIS explains, the FWS decided not to list the California spotted owl pursuant to the Endangered Species Act, and understood in making that decision that the 2004 Framework establishes the management direction on National Forests across the Sierra Nevada. SNFPA 3218.

Natural Resources and Environment of the Department of Agriculture undertook discretionary review of the Chief's decision on December 23, 2004 and affirmed the decision on March 21, 2005. SNFPA 4316-4317.

II. THE BASIN PROJECT

A. Site Characteristics

The Basin Group Selection Project ("Basin Project") is located within the Plumas National Forest ("PNF"), Feather River and Mount Hough Ranger Districts. BASIN 3663. The Basin Project area encompasses 38,893 acres south and west of Bucks Lake and north of the Middle Fork Feather River. BASIN 3665. Vegetation within the Basin Project area include four forest types: mixed conifer/hardwood, mixed conifer, mixed conifer/white fir, and red fir. BASIN 3750. From 1970 through 2003, fire records show that a total of 71 fires occurred within the Basin Project area. BASIN 3750. Of these 71 fires, 47 were caused by lightning, and 24 caused by humans. Id. The largest fire to occur in the Basin Project area occurred in 1999 covering 55,832 acres. Id.

B. Project Description/ Purpose and Need

The Basin Project includes vegetation treatments designed to fulfill the management direction of the PNF land and resource management plan ("LRMP") as amended by the HFQLG Pilot Project ROD. BASIN 3663. The HFQLG Act requires the Forest Service to conduct a pilot project on the Lassen and Plumas National Forests to demonstrate the effectiveness of specific resource management activities (including construction of a strategic system of fuel breaks, group selection, individual tree selection), all while avoiding or protecting particular species. BASIN 3666. It will provide information needed to reduce scientific uncertainty regarding environmental outcomes of certain forest management activities. BASIN 3672-3673. Individual-tree selection will enhance the health and vigor of forest stands. Id. For example, sanitation individual-tree selection harvest will prevent the spread of insects and disease, reduce overstocking, and remove trees that are susceptible to disease and insect attack. Id. In the aspen component of the Project, individual tree sections will restore aspen vigor by the removal of encroaching conifers. Id.

Within the project area, group selection would occur on about 1,215 acres and individual-tree selection on 80 acres, in which high-risk or crowded trees would be individually harvested while

meeting established canopy-cover standards. Id. Conifers encroaching upon 9 aspen stands would be removed on about 100 acres. In all treatment areas, conifers >30" in diameter at breast height ("dbh") and black oaks >23" at the stump would be retained. Id.

Road system improvements are also a component of the Basin Project. They include: decommissioning of 38 miles of existing roads, closure of 23 miles of existing roads, construction and then closure of 3 miles of permanent new roads, reconstruction of 17 miles of existing roads, and construction and then decommissioning of 6 miles of temporary roads. Id. Provisions have been made to improve road-stream crossings to reestablish fish passage and restore watershed connectivity. Id. Project activities would be implemented over a 5 year period. BASIN 3136.

C. Environmental Review of the Project

A scoping letter for the Basin Project was sent to interested parties on December 19, 2003. BASIN 3044, 3673. Those interested parties were asked to sign up on the project's mailing list with the Feather River Ranger District. BASIN 3675.

On March 3, 2004, the Forest Service initiated a formal 30-day notice and comment period by publishing a notice in the *Feather River Bulletin,* Quincy, California. BASIN 3155. On that same date, a detailed description of the proposed action (BASIN 3134-3148) was sent to interested parties listed on the project's mailing list, or that had otherwise requested notification in response to the PNF's quarterly schedule of proposed actions. Id at 3078-3099. The opportunity for comment period closed on April 2, 2004. Id. Five comment letters were received. Id; 3174-76; 3177-3179, 3180-3196; 3197-3200; 3209-3210, 3238, 3274-94. The Forest Service prepared a substantive analysis of the comments. Id. at 3240-3257. On May 18, 2004, the Forest Service announced a public open house to discuss local projects including the Basin Project (BASIN 3213), and the all-day public open house was held on June 16, 2004. BASIN 3230.

The Forest Service prepared an Environmental Assessment ("EA") for the Basin Project. BASIN 3657-3749. The EA considered two alternatives in detail: the no action alternative and the proposed alternative. BASIN 3677. Seven other alternatives were considered but eliminated from

detailed consideration.[10]/ The EA describes the affected environment by resource, such as wildlife, hydrology, etc., and then analyzes the environmental effects of each alternative by resource. BASIN 3683-3722.

Forest Supervisor James Pena issued his Decision Notice ("DN") and Finding of No Significant Impact ("FONSI") on August 25, 2004. BASIN 3638- 3656. The decision implements the Proposed Action as set forth in the EA issued August 2004. Id. The rationale for the decision is described in the DN including: to implement group selection as directed in the HFQLG Act; to enhance the health and vigor of forest stands through individual tree selection and aspen restoration; and, to reduce impacts of the transportation system on forest resources. Id. at 3644-3645. Consideration of issues raised by the public is also explained in the DN. Id. at 3646-3649.

On October 12, 2004, Plaintiff, Sierra Nevada Forest Protection Campaign, appealed the Basin Project decision. BASIN 2713. The Forest Service Appeal Reviewing Officer reviewed the appeal, considering each issue raised by appellants, and on November 24, 2004, the Appeal Deciding Officer affirmed the Forest Service decision to approve the Basin Project. BASIN 2901, 2906.

LEGAL BACKGROUND

I. NATIONAL ENVIRONMENTAL POLICY ACT

In 1970, Congress enacted NEPA, 42 U.S.C. § 4321 *et seq.* to establish a consistent process for federal agencies to consider the environmental impacts of proposed major federal actions. Vermont Yankee Nuclear Power v. NRDC, 435 U.S. 519, 558 (1978). That goal is "realized through a set of 'action-forcing' procedures that require that agencies take a 'hard look' at environmental consequences." Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 350 (1989). The statute imposes procedural rather than substantive requirements. So long as "the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." Id.

[10]/ See SNFPA 3677-78 (alternative 1 - construct DFPZz together with group selection and individual tree selection; alternative 2 - implement more extensive individual tree selection, including thinning; alternative 3 - eliminate exception to upper diameter limit for operability; altenrative 4 - modify management strategy for spotted owls; alternative 5- smaller group selection openings; alternative 6- exclude CWHR class 5 stands from group selection; and alternative 7 - modify aspen strand treatment to preserve micro-conifer habitat.).

Under NEPA, agencies must prepare the detailed, comprehensive Environmental Impact Statement ("EIS") only if a proposal is a "major Federal action[] significantly affecting the quality of the human environment." 42 U.S.C. 4332(2)(c). Not every federal action or proposal requires an EIS. Under NEPA regulations promulgated by the Council on Environmental Quality ("CEQ") agencies may prepare an EA, defined as a "brief" and "concise" document, and a Finding of No Significant Impact (known as a "FONSI") where the proposed action `would not have a significant effect on the environment. 40 C.F.R. §§ 1501.4(e); 1508.9; 1508.13.

II. NATIONAL FOREST MANAGEMENT ACT

The Forest Service's management of the NFS is governed by NFMA. NFMA directs the Forest Service to develop a land and resource management plan ("LRMP" or "Forest Plan") for each unit of the system to provide for multiple uses and sustained yield of the various forest resources, including timber and wildlife. See 16 U.S.C. § 1604(a)(e); Forest Guardians v. Dombeck, 131 F.3d 1309, 1312 (9th Cir. 1997). Forest planning and management occurs at two levels: National Forest and project. Ohio Forestry Ass'n v. Sierra Club, 523 U.S. 726, 729-30 (1998). The Forest Service develops a Forest Plan, which is a broad, long-term programmatic planning document for an entire National Forest. Forest Plans establish goals and objectives for units of the National Forest System and provide standards and guidelines for management of forest resources, ensuring consideration of both economic and environmental factors. 16 U.S.C. §1604(g)(1)-(3); 36 C.F.R. §§ 219.1, 219.4(b)(3). Implementation of the Forest Plan occurs through site-specific projects. Each proposed site-specific project may proceed only if it is consistent with the Forest Plan. Inland Empire Public Lands Council v. United States Forest Service, 88 F.3d 754, 757 (9th Cir. 1996).

STANDARD OF REVIEW

The Ninth Circuit has endorsed the use of motions for summary judgment in reviewing agency decisions under the limitations imposed by the APA. See, e.g., Northwest Motorcycle Assn. v. U.S. Dept. of Agric., 18 F.3d 1468, 1471-72 (9th Cir. 1994) (discussing standard of review under the APA and Fed. R. Civ. P. 56). Pursuant to Rule 56, the moving party is entitled to summary judgment where, "viewing the evidence and the inferences arising therefrom in favor of the nonmovant, there are no genuine issues of material fact in dispute." Id. at 1472. The court's role in

cases involving agency action, however, "is not to resolve contested fact questions which may exist in the underlying administrative record," but to determine whether the decision was arbitrary and capricious. Gilbert Equipment Co., Inc. v. Higgins, 709 F. Supp. 1071, 1077 (S.D. Ala. 1989), aff'd, Gilbert Equipment Co. Inc. v. Higgins, 894 F.2d 412 (11th Cir. 1990); see Occidental Eng'g Co. v. INS, 753 F.2d 766, 769 (9th Cir. 1985); Lead Indus. Ass'n, Inc. v. EPA, 647 F.2d 1130, 1160 (D.C.Cir.), cert. denied, 449 U.S. 1042 (1980) ("That the evidence in the record may support other conclusions, even those that are inconsistent with the [Secretary's], does not prevent us from concluding that his decisions were rational and supported by the record."); Krichbaum v. Kelly, 844 F. Supp. 1107, 1110 (W.D. Va. 1994) ("To survive summary judgment, then, plaintiff must point to facts in the administrative record--or to factual failings in that record--which can support his claims under the governing legal standard").

Because NEPA does not create a private right of action, the standard of review is provided by the APA. See Marsh v. ONRC, 490 U.S. 360, 377 n.23 (1989); Ecology Ctr., Inc. v. U.S. Forest Serv., 192 F.3d 922 (9th Cir. 1999). The APA imposes a narrow and highly deferential standard of review limited to determining whether the agency acted in a manner that was "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law." 5 U.S.C. §706(2)(A); see Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971); Friends of the Earth v. Hintz, 800 F.2d 822, 830-31 (9th Cir. 1986). This standard is a narrow one whereby "[t]he court is not empowered to substitute its judgment for that of the agency." Overton Park, 401 U.S. at 416. The Court is not to determine whether it would make an administrative decision differently; instead, it is to determine whether "the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." Id. Furthermore, the APA directs the court to "review the whole record or those parts of it cited by a party." 5 U.S.C. § 706. Thus, the court's review is limited to the administrative record before the agency at the time of its decision. Florida Power & Light Co. v. Lorion, 470 U.S. 729, 743 (1985); Camp v. Pitts, 411 U.S. 138, 143 (1973).[11]/

[11]/ In the event that the Court finds that Federal Defendant violated any of the statutes involved in this case, further proceedings are necessary to determine the proper remedy. See Amoco Production Co. v. Village of Gambell, 480 U.S. 531, 542 (1987) (noting courts must balance the equities before entering injunctive relief); Forest Conservation Council v. U.S. Forest Service, 66 F.3d 1489, 1496 (9th Cir.1995) (injunction for violation of NEPA or NFMA "will not

ARGUMENT[12]/

I. THE 2004 SEIS COMPLIES WITH THE REQUIREMENTS OF NFMA FOR PROVIDING FOR SPECIES DIVERSITY AND DOES NOT VIOLATE THE APA

A. The 1982 Regulations Upon Which Plaintiffs' First and Second Claims Rely Do Not Apply to the Basin Project

Courts must periodically consider whether a newly enacted statute or newly promulgated regulation should be applied to a pending case *in lieu* of the statute or regulation which was formerly effective. It is well established that courts favor the judicial application of the law that is in effect at the time the court renders its decision. Bradley v. School Bd. of City of Richmond, 416 U.S. 696, 711 (1974). This is at odds with the another well accepted principle that "statutory retroactivity," *i.e.*, the application of the new law to an old case which raises claims under the superceded law is disfavored absent a clear indication that the new law was intended to apply to pending cases. Bowen v. Georgetown Univ. Hospital, 488 U.S. 204, 208 (1988). The courts have considered on a case-by-case basis which principle should be applied in a given case. Landgraf v. USI Film Products, 511 U.S. 244 (1994); Southwest Ctr. for Biological Diversity v. USDA, 314 F.3d 1060 (9th Cir. 2002).

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automatically issue"). Federal Defendants "should be allowed to present evidence to the court that 'unusual circumstances' weigh against the injunction sought, and to present evidence to assist the court in fashioning the appropriate scope of whatever injunctive relief is granted." Forest Conservation, 66 F.3d at 1496. Given the factual complexity of the four cases challenging to the Framework--including the potentially broad implications for projects that may be in various stages of planning and implementation on eleven national forests--further proceedings would be especially appropriate here. See Northwestern Ecosystem Alliance v. Rey, 380 F.Supp.2d 1175, 1197 (W.D. Wash. 2005) (finding in the context of a challenge to a regionwide forest plan amendment that "the Court cannot engage in this traditional balancing of harms analysis based on the parties' summary judgment briefs.").

[12]/ A number of claims in Plaintiffs' amended complaint are not argued at all in their summary judgment brief. See Pls.' Am. Compl. ¶¶ 98-101 (Third Claim); ¶¶ 120-26 (Seventh Claim); ¶¶ 127-31 (Eighth Claim); ¶¶ 137-139 (Tenth Claim); ¶¶ 140-143 (Eleventh Claim). Because Plaintiffs have abandoned those claims by not raising them in their brief, the Court should grant summary judgment in favor of Federal Defendants on those claims. See Ohio Valley Coalition v. Horinko, 279 F. Supp. 2d 732, 746 n.17 (S.D. W.Va. 2003) ("Claims raised in a complaint but not argued to the court are deemed to be waived."); Am. Lands Alliance v. Kenops, 1999 WL 672213, at *2 (D. Or. Aug. 24, 1999); Mountain States Legal Found. v. Espy, 833 F. Supp. 808, 813 n.5 (D. Idaho 1993) (deeming claims not raised in summary judgment motion abandoned and granting judgment for defendants). Nor is Plaintiffs' fourth claim, an independent claim under the APA, argued separately in their brief. To the extent that Plaintiffs have incorporated their fourth claim into their other arguments, the Court should consider Federal Defendants to have done the same here.

In Landgraf, the Supreme Court considered whether a statute[13]/ enacted after the events in a lawsuit should apply to the case. Landgraf, 511 U.S. at 244.[14]/ The Court found that concerns about retroactivity do not arise merely because a statute "is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." Id. at 269 (internal citation omitted). Rather, courts "must ask whether the new provision attaches new legal consequences to events completed before its enactment" by considering several criteria, described *infra*. Id. The Court applied these criteria and declined to apply the 1991 Civil Rights Act to the pending case. Id. at 280-86.

Applying the Landgraf principles to the instant case, this court should apply the current 2005 forest planning regulations instead of the superceded 1982 planning regulations, because application of the new regulations would not impair any vested rights, increase the liability for past conduct or impose new duties on Federal Defendants. This case is analogous to a recent case considered by the Ninth Circuit, Southwest Center, 314 F.3d 1060, in which the court considered whether to apply a newly enacted statute that allowed the National Park Service to withhold information on the location of endangered species from responses to requests under the Freedom of Information Act. Id. The court determined that the new statute should apply because the plaintiff had not taken any action in reliance on the prior law that qualified under Landgraf. Id. at 1062. The court explained that the plaintiff's "action" of merely requesting or suing for information did not amount to reliance on existing law that would result in prejudice when the law was changed. Id. The court further remarked

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[13]/ Although Landgraf dealt with a statute, courts have applied a similar standard in the context of administrative regulations. See, e.g., Nat'l Min'g Ass'n v. Dep't of Labor, 292 F.3d 849, 859 (D.C. Cir. 2002) (holding that "a rule is retroactive if it 'takes away or impairs vested rights acquired under existing law, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past.'") (quoting Ass'n of Accredited Cosmetology Schools. v. Alexander, 979 F.2d 859, 864 (D.C.Cir. 1992)).

[14]/ Petitioner Barbara Landgraf had sued for relief under the Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq*., which limited victims of sexual harassment to equitable relief. Id. Because the court found that her employment was not terminated in violation of Title VII, Plaintiff Landgraf was awarded no relief. Id. Thereafter, during the pendency of her appeal, the President signed into law the Civil Rights Act of 1991 which amended the 1964 Civil Rights Act. Id. Plaintiff then sought to bring her case under the provisions of the 1991 Civil Rights Act which allowed the award of damages and a trial by jury. Id.

that a plaintiff's "expectation of success in its litigation is not the kind of settled expectation protected by Landgraf's presumption against retroactivity." Id. at 1062 n.1.

The only provision in the new regulations that deals with MIS is Section 219.14(f) which states that for NFS units with plans developed under the 1982 planning rules, "the Responsible Official may comply with any obligations relating to management indicator species by considering data and analysis relating to habitat unless the plan specifically requires population monitoring or population surveys for the species." Given the repeal of provisions of the 1982 regulations and the absence of any comparable directives in the 2005 regulations, the Forest Service's former duties under the 1982 regulations for those species have been eliminated.[15]/

There is no provision in the 2005 regulations that expressly states whether the regulations should be applied in lieu of the 1982 regulations to previously authorized projects.[16]/ Accordingly, to determine whether the 2005 regulations should be applied to the Basin Project, this Court must consider the three criteria described *infra*. See Landgraf, 511 U.S. at 280; see also INS v. St. Cyr, 533 U.S. 289, 321 (2001) ("A statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past . . . .") (citation and internal quotation marks omitted). The application of the new 2005 regulations here is consistent with the Landgraf criteria. Landgraf, 511 U.S. at 244. First, the new regulations would not impair the rights

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[15]/ The duties that remain regarding MIS are those imposed by individual forest plans, not the 1982 regulations. The 2005 Regulation provides that the Forest Service may comply with those duties in its forest plans by "considering data and analysis relating to habitat unless the plan specifically requires population monitoring or population surveys for the species." 36 C.F.R. § 219.14(f) (2005). In those cases where the forest plan requires monitoring, the regulations do not require site-specific monitoring prior to approving projects or conducting project activity. See id. Here, the 2001 Framework and the 2004 Framework both adopt a monitoring plan that contemplates a region wide population monitoring for some species. Nevertheless, there is no requirement in the forest plan to conduct population monitoring prior to approving either a forest plan amendment like the SNFPA or a site-specific decision like Basin. SNFPA 3241-42 (Table 3.2.3b).

[16]/ In contrast, the 2005 regulations do expressly speak to pending forest plan revisions and plan amendments, and allow the National Forests the discretion to continue to apply the 1982 regulations for forest planning purposes in those limited situations. 70 Fed. Reg. at 1060 at § 219.14(e)(Forest Plan development, amendments, or revisions "initiated before the transition period[] may continue to use the provisions of the planning regulations in effect before November 9, 2000 . . . or may conform to the requirements" of the new rule).

of a party because Plaintiffs here do not possess any on-the-ground permits entitling them to occupy the Plumas National Forest, or any other valid existing rights. See generally, Pls.' Am. Compl. Plaintiffs' mere "expectation of success in its litigation [is not] the kind of settled expectation protected by Landgraf's presumption against retroactivity." Southwest Ctr. for Biol. Diversity, 314 F.3d at 1062 n.1. Additionally, the 2005 Regulations do not increase the Agency's liability for past conduct or impose new duties regarding MIS. With the exception of Section 219.14(f), MIS are not included in the new rule at all. See 70 Fed. Reg. at 1048 ("The concept of MIS . . . is not in the final rule, except for transition provisions at § 219.14 "). Thus, neither the second nor third factors in Landgraf prevent the court from applying the new regulations here. INS v. St. Cyr, 533 U.S. at 321; Southwest Center, 314 F.3d at 1062 n.1. Thus, under Landgraf, the 2005 regulations are applicable to the Basin Project.[17]/

B. Even if the 1982 Regulations Apply, the 2004 Framework and the Basin Project Comply with the Requirements for Viability

1. The Forest Service Reasonably Concluded that the 2004 Framework Maintains Viability for Owl, Fisher, and Marten

a. The Agency Has Broad Discretion to Maintain Viability Consistent with Other Multiple Uses

Plaintiffs' first claim alleges that the 2004 Framework and the Basin Project would not maintain viability of the owl, fisher, and marten. Pls.' Am. Compl. ¶¶ 66-82. Even if the Court were to determine that the 1982 regulations were to apply to the Basin Project, the Forest Service reasonably concluded that both the Basin Project and the 2004 Framework would provide habitat sufficient to maintain viability. As a preliminary matter, the Forest Service has broad discretion to balance the multiple uses of resources on its lands, even when maintaining viability. Because the 2004 Framework would reduce hazardous fuels and the risk of stand-replacing wildfire while providing increased habitat in the long-term, the Agency reasonably concluded it would meet any

[17]/ In a recent case, the Ninth Circuit applied the 1982 regulations to a forest plan challenge and in a footnote explained that it was doing so because "the former regulations. . . were in effect when the plan revisions challenged in this lawsuit were prepared." Natural Res. Def. Council v. Forest Serv., 421 F.3d 797, 800 n.3 (9th Cir. 2005). The court cited to the regulations issued in 2000, which have since been repealed, and did not mention the 2005 regulations. Id. The court's opinion also did not analyze the caselaw which generally requires courts to apply the regulations in existence at the time of the lawsuit. Federal Defendants do not contend that the 2005 regulations apply to the 2004 Framework, only that they apply to the Basin Project.

duty to maintain viability for old-forest species. Plaintiffs' first claim must therefore fail, and Federal Defendants are entitled to summary judgment.

The Forest Service has broad discretion to balance the multiple use of resources in a combination that best meets the public interest. See 16 U.S.C. § 529 (directing Secretary of Agriculture to administer the NFS for multiple uses and sustained yield); Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979). Indeed, the concept of multiple use is at the heart of the forest management statutes, including NFMA, and is incorporated into forest planning. See 16 U.S.C. § 1604(e)(1) (forest plans are to "provide for multiple use and sustained yield of the products and services obtained therefrom"); Sierra Club v. Espy, 38 F.3d 792, 795 (5th Cir. 1994) (principles of multiple-use sustained-yield are "incorporated into the statutory and regulatory scheme of NFMA"); Citizens for Envtl. Quality v. United States, 731 F. Supp. 970, 976 (D. Colo. 1989).

The balancing of multiple uses is accomplished through the development, revision, and amendment of forest plans. See 16 U.S.C. § 1604(e)(1) (requiring forest plans to "provide for multiple use and sustained yield of the products and services obtained therefrom in accordance with the Multiple-Use Sustained-Yield Act of 1960 . . . ."). The NFMA allows a forest plan to be amended "*in any manner whatsoever* after final adoption." 16 U.S.C. § 1604(f)(4) (emphasis added). In doing so, the Forest Service has very broad discretion to decide upon the appropriate mix of uses that best meets the multiple use mandate. See Perkins, 608 F.2d at 806 (the mandate to manage for multiple uses 'breathes discretion at every pore.'") (citation omitted)); Intermtn. Forest Ass'n v. Lyng, 683 F. Supp. 1330, 1337-38 (D. Wyo. 1988) (Forest Service need only consider the various uses, multiple use mandate does not direct how to allocate those uses).

With regard to wildlife, NFMA gives the Forest Service substantial discretion to balance the need to maintain species viability with other multiple use objectives in a forest plan. See Seattle Audubon Soc'y v. Moseley, 80 F.3d 1401, 1404-05 (9th Cir. 1996) (upholding regional plan amendment in part because of the "inherent flexibility of the NFMA"). The Agency's substantial discretion in this regard is reinforced by the former planning regulations, which state that all management prescriptions shall:

> (6) Provide for adequate fish and wildlife habitat to maintain viable populations of existing native vertebrate species and provide that habitat for species chosen under § 219.19 is maintained and improved *to the degree consistent with multiple-use objectives established in the plan*;

36 C.F.R. § 219.27(a) (2000) (emphasis added); see also 36 C.F.R. § 219.19(a) (2000) (requiring maintenance and improvement of habitat for certain MIS "*to the degree consistent with overall multiple use objectives of the alternative*") (emphasis added); 36 C.F.R. § 219.26 (2000) (forest planning shall provide for diversity of animal communities "consistent with the overall multiple-use objectives of the planning area").

The Ninth Circuit's decision upholding another region-wide plan amendment, the Northwest Forest Plan ("NWFP"), demonstrates the discretion that the Agency has in managing for wildlife. See Moseley, 80 F.3d at 1404-05. In Moseley, the Ninth Circuit considered a challenge to the NFP for allegedly failing to comply with the viability regulation, 36 C.F.R. § 219.19. Plaintiffs argued that the NWFP did not maintain viability for northern spotted owl and other species because the plan "provides for only an 80% likelihood that listed species will continue to be viable after implementation of the selected alternative, and the resulting 20% likelihood of extinction is impermissible under the regulation." Id. at 1404. The Ninth Circuit disagreed and upheld the NWFP, affirming the lower court's finding that selecting an alternative with a higher likelihood of viability would "preclude any multiple use compromises contrary to the overall mandate of the NFMA." Id. (citing Seattle Audubon Soc'y v. Lyons, 871 F. Supp. 1291, 1315-16 (W.D. Wash. 1994)).

b. The Forest Service Reasonably Concluded that Owl Viability Would Be Maintained Consistent with Multiple Use Objectives

Just as the NWFP struck a reasoned balance and satisfied the viability regulation in Moseley, the Forest Service also reasonably determined that the 2004 Framework would provide for habitat adequate to maintain viability for the owl, fisher, and marten "to the degree consistent with multiple-use objectives established in the plan." 36 C.F.R. § 219.27(a)(6) (2000). For the owl, habitat is

projected to increase under the 2004 Framework. See SNFPA 3340 (net result in later decades is an "increase in the amount of [California Wildlife Habitat Relationship ("CWHR")] class 5M, 5D and 6 due to retention of 30-inch dbh and larger trees, as well as release and growth of treated CWHR size class 4 stands"); SNFPA 3340 (same). This includes large trees (>30" dbh),[18]/ which would increase by comparison to the 2001 Framework. See SNFPA 3346 (2004 Framework would result in "approximately 1.5% more large trees after 20 years, a 3.8% increase after 50 years, and a 9.2% increase by 130 years"); see also SNFPA 3316 (under both alternatives, a "trend toward higher numbers of large trees will develop," based on predicted growth and recruitment of large trees after thinning, and decreased loss of large trees to stand-replacing fire).

In addition to large-tree retention and re-growth, the 2004 Framework would also allow more effective fuels reduction compared to the 2001 Framework. In turn, there would be a greater decrease in the occurrence of stand-replacing fire, accompanied by a greater increase in suitable owl habitat. See, e.g., SNFPA 3316; SNFPA 3287, 3288 (showing reductions in wildland fire under 2004 Framework); SNFPA 3348 (a"potential subsequent decreased loss of spotted owl habitat due to wildfire is expected"under 2004 Framework). The projection of increased long-term suitable habitat therefore also supported the conclusion that viability would be maintained, consistent with multiple use objectives. 36 C.F.R. § 219.27(a)(6) (2000). Federal Defendants are therefore entitled to summary judgment on the claims related to owl viability. See Inland Empire, 88 F.3d at 760 (Forest Service's interpretation of its own regulations on how to maintain viability receives deference); Moseley, 80 F.3d at 1404-05.

c. The Forest Service Reasonably Concluded that Fisher Viability Would Be Maintained Consistent with Multiple Use Objectives

The SEIS addresses long-term viability for the fisher by reducing size and intensity of stand-replacing fires, which was "identified as a major concern"in the Science Consistency Review ("SCR"). SNFPA 3314. Many of the habitat attributes important to the owl are "important to the fisher as well," and thus a "lot of the protections for the owl will also benefit the fisher." SNFPA 2997; see also SNFPA 3315. Additionally, the ROD imposes special standards for the Southern

[18]/ While owls "preferentially select[]" large, old trees as nest sites, the average size of such trees is greater than 40" dbh, far greater than the 20-30" trees that concern Plaintiffs. See SNFPA 3346

Sierra Fisher Conservation Area ("SSFCA"), which is the only known occupied habitat in the planning area. SNFPA 3313; see SNFPA 3052 (requiring design measures to protect important habitat structures, e.g., large snags and oaks, patches of dense large trees, large trees with cavities); see also id. at 2297 (concluding that "Old forest habitat fragmentation will be minimized"). Outside the SSFCA, the greatest concern is the "risk of further fragmentation due to large stand replacing fire." SNFPA 4023, SNFPA 3315 (Areas burned by large, stand-replacing fires generally do not support fishers). To the extent the 2004 Framework reduces catastrophic wildfire, it will "avoid the creation of additional gaps and barriers to fisher movement and so become an important component of maintaining viability of fisher populations in the Sierra Nevada." Id. In absence of implementing the 2004 Framework, existing conditions over the long term presents increased risk to the fisher, and, thus, added uncertainty to viability of the fisher. Thus, the 2004 ROD's conclusion that fisher viability would be maintained was not arbitrary or capricious. See SNFPA 3011.

Because fisher "do not appear to inhabit" the HQLG Act Pilot Project area, it would be speculative to say whether treatments within that area would increase fragmentation and create barriers to fisher movement. Id.; see also SNFPA 3313 (numerous survey efforts "failed to find . . . this species on Forest Service lands in the area between Mount Shasta and Yosemite National Park"). The SEIS speculates that even if fisher were reintroduced to the Pilot Project area, it would still take several years before habitats would become occupied. Id. Even then, the proposed DFPZs--linear features up to 1/4 mile wide--would still retain sufficient habitat elements within the range of those used by fisher for foraging and dispersal so as to be "not likely to create large barriers to further expansion and connectivity for fisher." SNFPA 3313; see also id. at 3316 (noting that fisher can use stands of 25-40% canopy cover in some instances, and may have home ranges with 32-67% of habitat with less than 50% canopy cover). In sum, fisher viability was adequately addressed and reasonably determined to be maintained consistent with other multiple uses, including the objectives of the HQLG Act Pilot Project. See Inland Empire, 88 F.3d at 760; Moseley, 80 F.3d at 1404-05.

d. The Forest Service Reasonably Concluded that Marten Viability Would Be Maintained Consistent with Multiple Use Objectives

The Forest Service also reasonably concluded that viability of marten would be maintained. The Agency analyzed forest vegetation projections and, based upon habitat associations for the species, concluded that the quantity of habitat is projected to "increase modestly" under both the 2001 and 2004 Frameworks, with greater short-term increases projected under the 2001 Framework, and greater long-term increases under the 2004 Framework. SNFPA 3326. The Forest Service determined that effects to marten habitat may be less than anticipated because they "occupy habitats at higher elevation than the majority of proposed treatments." SNFPA 3325. Some studies have "shown that marten will use harvested areas," and while they "typically avoid" habitats having less than 30% canopy cover, at least one study has identified marten ranges having an "average of 20% canopy closure." Id. Although treatments under both the 2001 and 2004 Frameworks may reduce habitat quality for marten, the resulting habitats would still be within the range of conditions of suitable habitat, so long as adequate ground cover and down logs remain onsite. Id.

The SEIS also assesses the viability for the marten specifically within the Pilot Project area and reasonably concludes it would be maintained. The size of group selection units is "within the size range of openings used by marten, if suitable shrub and down log cover is available." SNFPA 3329. Additionally, a network of high quality habitat for forest carnivores, including fishers, has been delineated, which "provide[s] connectivity to marten populations to the north and south of the HFQLG" area. Id. Additionally, Scientific Analysis Team ("SAT") guidelines would be followed under the terms of the HFQLG Act. See 16 USCA § 2104 note, Sec. 401(c)(2)(a); SNFPA 3329**.** These guidelines establish treatment buffers around riparian areas, which are of "high importance to marten and are often used as corridors." Id. Finally, each proposed project area is surveyed for forest carnivores (including marten) using standard protocols. Id.; see also SNFPA 986 (HFQLG FEIS at 2-8) (for threatened, endangered, and sensitive species, the Agency would continue to survey "areas of suitable habitat, to protocols based on the best available science, to determine information relevant to implementation of site-specific resource management activities"). Given these and other factors, including the limited life of the Pilot Project, the SEIS reasonably concludes that the 2004

Framework would maintain marten viability. Inland Empire, 88 F.3d at 762; Moseley, 80 F.3d at 1404-05.

2. The Forest Service Reasonably Concluded that the Basin Project Would Maintain Viability for Owl, Fisher, and Marten

The Forest Service also reasonably concluded that viability for owl, fisher, and marten would be maintained by the Basin Project. For all three species, the Forest Service relied upon the fact that forested habitats affected by the project would be relatively small (3.6% of the project area). SNFPA 3698, 3699. Timber harvesting and road construction would not occur in owl PACs or SOHAs, which constitute 7,244 acres (19% of the project area). SNFPA 3698. Nor would harvest or new road construction occur in goshawk PACs, which along with owl PACs encompass most of the habitat used by forest carnivores such as fisher and marten. SNFPA 3699. Surveys would be conducted for owl, fisher, and marten prior to project implementation. SNFPA 3698, 3699. If any new owl territories or fisher or marten dens are located, the Agency would develop a plan that could include applying limited operating periods ("LOPs"),[19]/ changing prescriptions, or excluding project activity from the harvest units. Id. Additionally, the Agency would determine whether activity should be delayed to prevent harm to the species. Id.

Other viability factors were considered as well. Outside of owl and goshawk PACs, only 4.1% of suitable owl nesting habitat and 3.2% of suitable foraging habitat would be altered by timber harvest. SNFPA 3698. Timber harvest would occur within even smaller percentages of the forest carnivore network ("FCN"),[20]/ a habitat system for fisher and marten. See SNFPA 3699 (0.1% of the 17,034 acre network is proposed for individual tree selection, and 2.4% for group selection). Additionally, some old forest structural elements would be retained in treated areas, including oaks > 21" dbh, conifers >30" dbh, and four snags per acre >15" dbh. SNFPA 3698, 3699. LOPs would be imposed for project units within 1/4 mile of active owl nest sites.

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[19]/ LOPs are designed to reduce potential harm to wildlife during critical seasons--such as nesting and fawning--when animals are most vulnerable to management activities that could result in failed nesting attempts. See SNFPA 3537.

[20]/ The FCN, designated in 1995, consists of old forest blocks connected by riparian corridors; it "provides for linkages across the landscape" for fisher, marten, and other species. SNFPA 3553.

The Basin Project also must be viewed against the larger context of the programmatic analyses conducted by the 2004 SEIS, 2001 EIS, and the 1999 HFQLG FEIS. As explained *supra* at 15-21, the 2004 SEIS thoroughly analyzed the effects upon viability for old forest species and reasonably concluded that its standards and guidelines would maintain viability consistent with multiple use objectives. The Basin EA expressly tiers to the 2004 Framework SEIS, and the project was determined to be fully consistent with the 2004 Framework. See BASIN 3645, 3663, 3683. The project therefore may properly rely upon the analysis in the SEIS and would also maintain viability by following the 2004 Framework standards and guidelines. See 40 C.F.R. § 1502.20 (encouraging tiering to "eliminate repetitive discussion about the same issues and to focus on the actual issues ripe for decision"); see also Portland Audubon Soc'y v. Lujan, 884 F.2d 1233, 1239 (9th Cir. 1989) ("PAS") (upholding EAs tiering to programmatic EIS).

Given the small percentage of suitable habitat that would be affected by the Basin project, as well as the projection that adequate habitat would exist in the long-term under the 2004 Framework, the Agency did not act arbitrarily or capriciously in determining that either decision would maintain species viability consistent with other multiple use objectives, and thereby satisfy NFMA. See Inland Empire, 88 F.3d at 762 n.10 ("We also doubt that the flammulated owl will be greatly affected by the timber sales," where owls only required 20 acres for territory, and sales would still leave 35 acres in smallest of three potential territories).

In sum, because the Forest Service reasonably concluded that both the 2004 Framework and the Basin Project would adequately maintain viability for owl, fisher, and marten, consistent with other multiple use objectives, Federal Defendants are entitled to summary judgment on Plaintiffs' first claim.

C. Even if the 1982 Regulations Apply, Plaintiffs' Claims that the Forest Service Failed to Comply with Monitoring Duties are Without Merit

1. NFMA Does Not Require Population Monitoring Prior to The Approval of Forest Plan Amendments

Plaintiffs allege that the 2004 Framework is invalid because it was allegedly adopted in the absence of sufficient information about MIS and species at risk. Pls.' Compl. ¶ 94. This argument is simply wrong, as there is no duty under NFMA or its implementing regulations to collect

quantitative population monitoring data *prior* to the promulgation of a forest plan amendment. Plaintiffs rely upon a provision that describes what should be contained in each of the alternatives that is evaluated in a forest plan process. See id. ¶ 93 (citing 36 C.F.R. § 219.19(a)(6) and other regulations).[21]/ Section 219.19(a)(6), is one of seven subparagraphs that are intended to meet the goal of paragraph (a), which--as explained *supra* at 17-19–requires multiple use balancing. See 36 C.F.R. § 219.19(a) (2000) . The provision states:

> (a) Each alternative shall establish objectives for the maintenance and improvement of habitat for management indicator species selected under paragraph (g)(1) of this section, *to the degree consistent with overall multiple use objectives of the alternative*. *To meet this goal*, management planning for the fish and wildlife resource shall meet the requirements set forth in paragraphs (a)(1) through (a)(7) of this section.

Id. (emphasis added). Nowhere does the provision state that population monitoring must be conducted prior to approving the forest plan alternative, only that population trends "will be monitored and relationships to habitat changes determined." 36 C.F.R. § 219.19(a)(6) (2000) (emphasis added). Indeed, the 2004 Framework includes an adaptive management study that is specifically designed to study such questions. See SNFPA 4325, 4326, 4327.

In sum, the population monitoring contemplated by subparagraph (a)(6) is designed to meet the goal of maintaining and improving habitat consistent with achieving other multiple use objectives of the alternative. See, e.g., Moseley, 80 F.3d at 1404-05. The 2004 Framework recognizes this and attempts to balance the uncertain short-term effects upon wildlife with other resource objectives, including the use of commercial timber sales to treat hazardous fuels across the landscape so as to reduce the likelihood of catastrophic wildfire, and therefore to increase wildlife habitat in the long-term. Nothing in NFMA requires population monitoring to occur prior to the adoption of a forest plan amendment. Consequently, the absence of additional monitoring information does not render the adoption of the 2004 Framework arbitrary and capricious under the APA. See ONRC v. Thomas, 92 F.3d 792, 798 (9th Cir. 1996) (whether an action violates the APA "turns on what a relevant substantive statute makes 'important'"); Preferred Risk Mut. Ins. Co. v. United States, 86 F.3d 789,

[21]/ As for other regulations cited by Plaintiffs, they also do not require actual collection of population data, but rather can be satisfied by analysis of habitat. See, e.g., Inland Empire, 88 F.3d 754 (9th Cir. 1996) ; NEC-Jimtown, slip op. at 15167 ("best available science" on habitat is a sound methodology under NFMA).

792 (8th Cir. 1996) ("[T]he plaintiff must identify a substantive statute or regulation that the agency action had transgressed and establish that the statute or regulation applies to the United States."). Because NFMA does not require collection of monitoring data prior to approving a forest plan, Federal Defendants are entitled to summary judgment on Plaintiffs' second claim.

2. The 2004 Framework and the Basin Project Comply With Requirements for Population Monitoring

a. Plaintiffs' Challenges Based Upon MIS Not Identified in the Plumas LRMP are not Ripe

Plaintiffs also allege that the Forest Service has violated NFMA by failing to monitor MIS and species-at-risk that are listed in Appendix E of the 2001 Framework EIS. Pls.' Am. Compl. ¶¶ 96, 97. Only a very limited set of these challenges are actually ripe for review, however, because species that are not listed in the Plumas forest plan are not required to be analyzed as part of the Basin Project. To determine the relevant MIS species for any particular project, the Court must first look to the original Plumas forest plan. The Plumas LRMP lists fifteen species and species groups as MIS: bald eagle, golden eagle, goshawk, peregrine falcon, prairie falcon, spotted owl, Canada goose, woodpecker group, deer group, gray squirrel, marten, trout group, largemouth bass, sensitive plant group, and willow-alder community. BASIN 2917 (LRMP 3-40). The allegation that the Basin Project must address population inventory data for all the species listed in Appendix E of the 2001 Framework is based upon a mistaken premise that the 2001 Framework expanded the list of MIS for the Plumas NF. In actuality, none of the subsequent forest plan amendments--the HFQLG ROD, the 2001 Framework, or the 2004 Framework--expanded the list of MIS species found in the original Plumas LRMP. First, while the HFQLG ROD amended the wildlife management direction, it did not add any new MIS. See BASIN 1410-11 (describing changes in management direction for wildlife).[22]/

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[22]/ Among other things, the HFQLG ROD provided that for threatened, endangered, and sensitive species and other species for which viability is a concern, the Forest Service would continue "[s]urveying of areas of suitable habitat, to protocols based on the best available science, to determine information relevant to implementation of site-specific resource management activities." HFQLG FEIS at 2-8. Surveys for these species were completed for the Basin Project. BASIN 3692, 3694, 4172, 4520, 3544, 3547, 3553, 3554-57. The HFQLG ROD also provided that LOPs should be applied to habitat that is suitable for any species for which viability may be a

Nor did the 2001 Framework expand the list of MIS identified by the Plumas forest plan. See Pls.' Am. Compl. ¶ 96 (alleging that the 2001 Framework required monitoring of certain MIS "in *all* Sierra Nevada national forests) (emphasis added). The 2001 EIS analyzed the effects upon MIS for all eleven national forests on a region wide scale. It also adopted a monitoring plan intended to generate region wide data on those species. The point of analyzing effects and proposing a monitoring plan at the region wide scale, however, was to better inform decisionmakers about the potential effects to species across national forests. See 2001 EIS Vol. 4, Appx. E-2 (explaining that the multi-forest monitoring plan would help the Agency "address information needs identified by this EIS"). Nothing in the 2001 Framework indicates that just because it analyzed data or included monitoring on a region wide scale, that it was also expanding the list of MIS for each particular national forest.[23]/

The 2004 Framework also does not expand upon the list of MIS in the original forest plans. As the SEIS explained, the "MIS are identified in the Land and Resource Management Plans of *each national forest* . . . ." SNFPA 3238. As with the 2001 Framework, the SEIS for the 2004 Framework analyzed effects to MIS by compiling the lists from each forest. See id. ("In order to evaluate the effects of the proposed alternatives on MIS, the MIS list from each affected forest was reviewed to develop the list of species to be addressed"). This was done in order to conduct a consistent analysis across the entire bioregion. See id. (describing how the "current lists of MIS in

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concern, and that suitable habitat for old forest and aquatic/riparian species shall not be reduced by more than 10% below 1999 levels. SNFPA 1411. The Basin Project complies with these requirements. BASIN 3646-48, 3670-71, 3681-82.

[23]/ The fact that the Framework monitoring plan did not expand the list of MIS makes sense, since the monitoring plan was included to meet the terms of the 2000 planning regulations. See SNFPA 957 (E-2) ("The new planning regulations . . . call for the development of a monitoring plan in association with the development, revision, or amendment of a Land Management Plan"). The 2000 planning regulation, which was never fully implemented, abandoned the concept of MIS and replaced it with two other management categories, focal species and species-at-risk. See 65 Fed. Reg. 67568, 67546 (Nov. 9, 2000) (explaining difference between MIS in the 1982 rule and other species categories used in the 2000 rule); see also SNFPA 957 (FEIS Vol. 4 at Appx. E-16)(noting that in the 2000 planning regulations, "MIS are replaced by focal species (i.e., indicators) and species-at-risk for assessment and monitoring"). The current revised planning regulation does not include either MIS or the other two management categories. 70 Fed. Reg. 1023, 1048 (Jan. 5, 2005) (final rule does not retain MIS or focal species, and it "changed the terms used" for the category of species-at-risk).

individual forest plans vary from forest to forest" in terms of habitat representation and other factors across the Sierra). As with the 2001 Framework, the 2004 Framework did not purport to expand the list of MIS for each of those individual forest plans. See SEIS _05_001973 to 002146 (forest plan lists). Thus, the Basin Project has no duty to obtain or consider population monitoring data for the MIS that are not found in the Plumas forest plan. See Forest Guardians v. U.S. Forest Serv., 329 F.3d 1089, 1098 (9th Cir. 2003) (courts must defer to the Forest Service's reasonable interpretation of its own forest plan); Native Ecosystems Council v. Dombeck, 304 F.3d 886, 900 (9th Cir. 2002) ("NEC-Gallatin") (deferring to Forest Service's "particular expertise in interpreting its own Forest Plan").

Because any duty to have population inventory data only extends to those MIS in the Plumas forest plan, Plaintiffs' challenge to the 2004 Framework on the basis of species not found in the individual plan is not ripe. Supreme Court and Ninth Circuit case law makes clear that in order for a challenge to a forest plan to be ripe, there must be some causal dependency of an actual on-the-ground project upon the forest plan standard actually being challenged. In Ohio Forestry, 523 U.S. 726, the Court rejected a challenge to a forest plan under NFMA that was unaccompanied by a project challenge. In finding that any resulting harm from the forest plan had yet to occur, the Court described the future circumstances when a challenge could be brought:

> The Sierra Club thus will have ample opportunity later to bring its legal challenge at a time when harm is more imminent and more certain. Any such later challenge might also include a challenge to the lawfulness of the present Plan if (but only if) the present Plan then matters, i.e., *if the Plan plays a causal role* with respect to the future, then-imminent, harm from logging.

Id. at 734 (emphasis added). Following Ohio Forestry, the Ninth Circuit emphasized the importance of ripeness in forest plan challenges. See Neighbors, 303 F.3d at 1067 ("not all forest-wide practices [such as monitoring] may be challenged on the coattails of a site specific action; there must be a relationship between the lawfulness of the site-specific action and the practice challenged.").

Here, the challenges to the Basin Project must fail, as there is no duty for the Basin Project to obtain monitoring information for the species not identified in the Plumas forest plan. Similarly, the challenges to the 2004 Framework must also fail, as the species not identified in the Plumas forest plan do not "play[] a causal role" in the Basin Project. Ohio Forestry, 523 U.S. at 734.

b. The Basin Project and the 2004 Framework Satisfy any Requirements for Population Inventory Information for the Species Identified in the Plumas LRMP

(1) The 2004 Framework Does Not Require Population Monitoring for All of the Species Identified by Plaintiffs, or at the Level of Intensity that Plaintiffs Prefer

Plaintiffs allege that the 2004 Framework has adopted annual monitoring requirements for numerous species that are listed in the 2001 Framework, which Plaintiffs claim was adopted in the 2004 Framework. Pls.' Am. Compl. ¶ 96. Plaintiffs' claim overstates the requirements of the 2004 Framework. The 2001 Framework included monitoring plans for species associated with old forests and other ecosystems. See SNFPA 957 (Appx. E-47 to E-106.) The 2004 Framework adopted the monitoring plan, but it also changed the priorities for what monitoring would occur. See SNFPA 3060 (directing the reader to "Chapter 2 of the Final SEIS for the focus of an priorities for monitoring . . . ."). The SEIS recognized that while Appendix E provided a comprehensive strategy for conducting monitoring to address scientific uncertainties, "[n]ot everything can be addressed at once." SNFPA 3143. Thus, the FEIS identified key areas that should be addressed first. Id.; see also SNFPA 3140 (SEIS identified priority questions that "represent the issues deemed most pressing at this time . . .").

The key areas that were identified as priorities for old forest ecosystem monitoring included owl and fisher. See SNFPA 3145-48. As for other monitoring issues regarding old forest species, the SEIS acknowledges that they may be addressed at a future date, but that they are not priorities. See SNFPA 3145 ("Certainly, many other issues will deserve investigation at some future date but the following discussion identifies those issues that require immediate attention.").

This Court has recently had the occasion to interpret what monitoring is required by the 2001 Framework and 2004 Framework. In Sierra Club v. Eubanks, 335 F. Supp. 2d 1070 (E.D. Cal. 2004), this Court found that the 2001 Framework required population monitoring for MIS. Eubanks, 335 F. Supp. 2d at 1081. Recently, however, this Court again considered the population monitoring plan of the 2001 Framework, as it was adopted by the 2004 Framework. See Earth Island Institute v. U.S. Forest Serv., No. Civ. S 05-1608 MCE PAN (E.D. Cal. Aug. 25, 2005) (Fed. Defs.' Ex. A).

The Court found that the level of monitoring contemplated for the species listed in Appendix E varied according to the vulnerability of the species. See id. at 11 (Framework "envision[s] a lower level of monitoring, and some flexibility, for birds with low vulnerability ratings . . . .").

As this Court recognized in Earth Island, the Framework provides the agency with flexibility for meeting the monitoring plan according to the species that have been identified as priorities. See SNFPA 3060, 3140, 3143. The 2001 EIS recognized that there are many uncertainties that exist with respect to our understanding of old forest species' habitat needs and population trends. Although the 2004 Framework includes a monitoring program to address those needs, it also recognizes that the necessary data cannot be collected all at once. SNFPA 3140-43. The Framework therefore establishes priorities[24]/ for monitoring, and is only the "beginning of an adaptive management process" for the region. SNFPA 3139. In sum, while the 2004 Framework adopts the monitoring strategy in Appendix E of the 2001 Framework, it focuses only upon the most significant uncertainties identified in the SEIS.[25]/

(2) The Basin Project Complies With the Forest Plan Requirements By Addressing Habitat for Applicable MIS

Because the 2004 Framework only requires collection of population information according to the priorities established by the adaptive management program and in accordance with the species' vulnerability, the Basin Project complied with the Forest Plan by relying upon habitat analysis, species surveys and in some cases, population data. The Ninth Circuit, when faced with the issue of determining "what type of population viability analysis the Service must perform in order to comply with [36 C.F.R. §] 219.19," has expressly rejected the "argument that the Service must assess population viability in terms of actual population size, population trends, or the population

[24]/ For old forest habitat and species, monitoring would be focused upon the owl and the fisher. SNFPA 3144-3148. Ongoing demographic studies for the owl were analyzed in the SEIS, and fisher monitoring data was collected during field seasons for fiscal years 2002 and 2003. SNFPA 3151-3152, 3156.

[25]/ The SEIS, of course, provides the flexibility to change priorities over time, but currently the priorities listed in the SEIS are the only ones required to be implemented. SNFPA 3143 (noting that there is "general agreement that these questions [in Chapter 2 of the SEIS] capture the essence of the highest priority monitoring and research needs").

dynamics of other species." Inland Empire, 88 F.3d at 759, 761 n.8. The court noted that while such analyses are encouraged, they "are not required." Id. at 761 n.8.

The court has likewise allowed the Forest Service to rely upon habitat data to meet monitoring requirements in a forest plan. In Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998), plaintiffs argued that the Forest Service violated NFMA by failing to monitor MIS population trends. Id. at 1153. The court also held that it was not arbitrary or capricious for the Forest Service to use habitat as the method for fulfilling the requirement for population monitoring found in a forest plan. Id. at 1154; see also Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998) (NFMA's objectives of maintaining habitat for MIS "can be accomplished by either monitoring population trends or by evaluating suitable habitat.").

With that background, the Ninth Circuit again visited the issue in Idaho Sporting Congress v. Rittenhouse, 305 F.3d 957 (9th Cir. 2002). The court did not invalidate the habitat approach; it found "that under the facts of this case, the Forest Service's use of habitat as a proxy for population monitoring of the [MIS] was arbitrary and capricious." Rittenhouse, 305 F.3d at 972-973. The court based its decision on the fact that "the Monitoring Report shows that the Forest Service's methodology does not reasonably ensure viable populations of the species at issue." Id. at 972. Specifically, the court found that "the Forest Service's methodology for dedicating old growth is so inaccurate that it turns out there is not old growth at all in [the designated area]." Id. Thus, the court did not invalidate the habitat approach approved in Inland Empire, it merely concluded based upon the facts before it that the Forest Service had done a poor job of data gathering and analysis.

The approach here, unlike Rittenhouse, has not been shown to be unsound. The Basin EA considered effects upon the habitat of all fifteen MIS identified in the Plumas LRMP. See BASIN 3525, 3701-3703. Plaintiffs have not alleged that the habitat analysis is not representative of the actual conditions on the national forests. Moreover, the Basin Project must be viewed in light of the consideration of actual population data for some species in the 2004 SEIS. Given that the 2004 Framework is estimated to result in long-term increases in habitat for many species, it cannot be said that the Basin Project's reliance on the 2004 Framework violated NFMA. See Native Ecosystems Council v. Forest Serv., 428 F. 3d 1233 (9th Cir. 2005) ("NEC-Jimtown") ("The long-term benefit

of preventing stand-replacing fires, which completely destroy goshawk habitat, is preferable over any short-term benefit the goshawks might receive from retaining the dense forest structure in the project area").

First, the Basin Project did not have to conduct in-depth monitoring for all species to satisfy its responsibilities under the forest plan. To begin, the fisher is not an MIS in the Plumas plan. See BASIN 2917 (LRMP at 3-40). Despite this, the Forest Service still conducted an adequate analysis for the species. Fishers "do not appear to inhabit" the Pilot Project area and therefore will not inhabit the Basin Project area. BASIN 3313; BASIN 3663. While there have been "*[n]umerous* survey efforts" to detect the fisher in the Pilot Project area, such efforts have "failed to find . . . this species on Forest Service lands in the area between Mount Shasta and Yosemite National Park." SNFPA 986 (HFQLG FEIS at 3-109) (emphasis added); SNFPA 957 (E-52) (fishers are "absent north of Yosemite National Park"); cf. SNFPA 3156 (noting that two years of monitoring have indicated that fishers are "well distributed on the Sequoia and Sierra National Forests"). Because there is no evidence that the fisher inhabits the Basin Project area, the absence of additional population information does not render the Basin Project decision arbitrary or capricious. See Colorado Envtl. Coalition v. Dombeck, 185 F.3d 1162 (10th Cir. 1999) (population inventory requirement not applicable where the Agency "logically did not select the rare and elusive lynx as a [MIS]" and there was no evidence of species population in the affected area); Inland Empire, 88 F.3d at 763 n.12 (no duty to count individual members of the "smaller, more reclusive species"); cf. BASIN 2917 (LRMP at 3-40) (noting that some species were eliminated from consideration as MIS because "their distribution in the PNF is very limited or unknown").[26]/

For several other species (golden eagle, mule deer, and hairy woodpecker), the Agency adequately analyzed potential effects to these species and their habitat in the Basin EA and BA/BE

[26]/ For another species, Canada goose, viability was determined not to be a concern because the project would not impact any of its wetland habitat, and indirect disturbance would be minimal since project activity would not occur in riparian habitat conservation areas, with the limited exception of some conifer harvesting in aspen stands, where Scientific Analysis Team ("SAT") guidelines would be followed. BASIN 3597, 3702. Such an approach was reasonable under NFMA. See Inland Empire, 88 F.3d at 761-62 (failure to conduct more intensive analysis for two trout species was "understandable, as neither species would be affected by the timber sales").

and found them to be minimal.[27]/ See BASIN 3596-98, 3701, 3702; see also BASIN 3703 (concluding for gray squirrel that removal of oak habitat would be offset by retaining larger oaks, which would grow more rapidly after treatment). Additionally, the reliance on project-level habitat analysis for those three species was sound in light of two factors. First, habitat assessments in the HFQLG FEIS had already indicated that implementation of the Pilot Project would actually increase the habitat for those species. See SNFPA 986 (HFQLG FEIS at 3-98, 3-99 (indicating 9%, 10% , and 7% increases in habitat within Pilot Project area from group selection for golden eagle, deer, and hairy woodpecker, respectively).[28]/

Additionally, for two of the species (deer and hairy woodpecker), actual population data had already been considered in the SEIS for the 2004 Framework. Those data came from the California Department of Fish and Game (for deer) and breeding bird survey ("BBS") routes (for hairy woodpecker, pileated woodpecker, and other birds). See SNFPA 3241; see also SNFPA SEIS_05_006588 to 006643 (assessment of mule and black-tailed deer habitats and populations); SEIS_05_006159 to 006285 (analysis of BBS data). These data, combined with the information about habitat associations from the scientific literature, are sufficient to satisfy any duties to monitor population trends of these species. See, e.g., Earth Island, Fed. Defs.' Ex. A at 11-12 (plaintiffs had not demonstrated probability of success on claim that BBS data failed to satisfy NFMA monitoring duties); Forest Conservation Council v. Jacobs, 374 F. Supp. 2d 1187, 1207 (N.D. Ga. 2005) (allowing use of BBS data to satisfy duties regarding MIS).

Nor was the Basin Project approved in the absence of adequate information on the owl or marten. For the owl, the Forest Service has actual population data from five demographic studies conducted over the past 7-12 years, which were analyzed in the 2004 SEIS. See SNFPA 3152, 3214-3215. In addition, survey data were collected for owls as part of the Plumas-Lassen Administrative Study. See BASIN 4577-4593. These data were collected for the 2004 breeding season and contain information for 50 confirmed owl sites within the study area on the Plumas NF. The data was "thoroughly reviewed with rigorous standards for protocol compliance and data quality." BASIN

[27]/ The Basin EA incorporates the BA/BE by reference. See BASIN 3691.

[28]/ The Basin EA is tiered to the HFQLG EIS. See BASIN 3683, 3700.

4577. Survey data were also collected for northern goshawk, specifically within the Basin project area. These data were collected according to an "intensive protocol" that detected seven active nests based upon systematic surveying, incidental observations, and follow-up stand searches. See BASIN 4174, 4179-87.

For marten, the Forest Service relied upon adequate information about habitat to satisfy any monitoring obligations. Information from the scientific literature describes that species as occurring generally in higher elevation (>6500'), mature and old-growth forests, utilizing large snags and large downed woody material for protection from predators, sources of prey, access to spaces below snow, and protective environments. See SNFPA 957 (E-55) (citing Buskirik and Powell 1994, Ruggiero et al. 1994, and Spencer et al. 1983). The marten also selects habitats for foraging that are close to meadows and riparian areas. Id. at E-56.

The Basin Project adequately relies upon habitat to satisfy any monitoring duties. A 17,000-acre habitat network has been established on the Plumas for forest carnivores like the marten, and the Basin Project would only conduct group selection on about 0.1% (for individual selection) and 2.4% (for group selection). BASIN 3699. No den sights have been confirmed in the analysis area. Id. Surveys would be conducted prior to operations, and if a den is discovered, the agency would develop a plan of action and determine whether to delay or interrupt operations. Id. Riparian Habitat Conservation Areas ("RHCAs"), potentially used by the marten for breeding and travel, would not be entered. BASIN 3566. Forested habitats affected by the project are relatively small (3.6% of the project area), as most of the habitat used by forest carnivores like marten is included in owl and goshawk PACs, where timber harvest and new road construction would not occur. Given these factors, the reliance upon habitat analysis for marten was reasonable.

Other observance records for various species (pileated woodpecker, Swainson's thrush, northern goshawk) were also considered. See BASIN 4576. The observances were made during surveys for willow flycatcher, and the data recorded included locational information and dates of observances. Id. A number of other incidental observances were also recorded during the goshawk surveys, including for spotted owl and numerous recordings of pileated woodpecker. BASIN 4185-86. In sum, because the analysis of MIS viability for the Basin Project was supported by sound

habitat models as well as actual population and survey data in some instances, the Basin decision satisfied NFMA.

Finally, there is not any duty to monitor "species-at-risk" prior to approving the Basin Project. See Pls.' Am. Compl. ¶ 97. The category of "species-at-risk" is neither created by NFMA nor the 1982 regulations. Rather, it was a concept created in the 2000 planning regulations, which were never fully implemented. See 67 Fed. Reg. 35431 (May 20, 2002) (extending deadline for mandatory compliance with the 2000 regulations until new regulations are promulgated). The 2000 regulations abandoned the concept of MIS and replaced it with two other management categories, focal species and species-at-risk. See 65 Fed. Reg. 67568, 67546 (Nov. 9, 2000); see also SNFPA 957 (E-16) (noting that in the 2000 planning regulations, "MIS are replaced by focal species (i.e., indicators) and species-at-risk for assessment and monitoring"). The 2000 regulations, however, have been repealed, and the revised planning regulation does not include either MIS or the other two management categories. 70 Fed. Reg. 1023, 1048 (Jan. 5, 2005) (final rule does not retain MIS or focal species, and it "changed the terms used" for the category of species-at-risk); 70 Fed. Reg. 1022 (Jan. 5, 2005) (repealing 2000 regulations). Because there is no duty either under the 1982 regulations or the current 2005 regulations to consider population information for species-at-risk, Federal Defendants are entitled to summary judgment on Plaintiffs' second claim.

II. THE 2004 FRAMEWORK COMPLIES WITH NEPA AND THE APA

Plaintiffs' fifth claim alleges that the SEIS for the 2004 Framework violates NEPA because it did not adequately analyze impacts to owl, fisher, or marten. Pls.' Am. Compl. ¶¶ 107-115. Plaintiffs' sixth claim alleges a failure to analyze cumulative impacts to those same species. Id. ¶¶ 116-119. Finally, Plaintiffs' seventh claim alleges that the SEIS failed to analyze a reasonable range of alternatives. Pls.' Am. Compl. ¶¶ 120-126. For the reason set forth below, Federal Defendants are entitled to summary judgment on all these claims.

A. The 2004 SEIS Complied With NEPA by Taking a Hard Look at Direct and Indirect Impacts to Old Forest Species

The 2004 SEIS took a hard look at potential effects, including short-term impacts, on wildlife species such as the owl, fisher, and marten. See SNFPA 3327, 3337 ("With regard to owl population persistence, the short-terms effects of management activities are believed to be most relevant . . . and are highlighted in this effects analysis"), SNFPA 3339-3345. A comparative analysis was conducted on late-seral stage forest in the short-term, including years 0 through 20. SNFPA 3326-3327.[29]/ The SEIS concludes with respect to canopy cover and fragmentation of owl habitat that, "the overall increase of suitable habitat predicted for both Alternative S1 (2001 Framework) and S2 (2004 Framework) by year 20 of treatment, and the overall habitat increase over time (Year 50 and year 130, Table 4.3.2.3e), indicated that treatment prescriptions for both Alternatives S1 and S2 would contribute to increasing amounts of suitable habitat." SNFPA 3344. Recognizing that species like the owl benefit from canopy cover, big trees and stand structure, the decision maintains or increases all of these parameters. SNFPA 2996; SNFPA 3602 (noting that the amount of old forest is projected to increase across the bioregion in the short term, "despite treatments in approximately 14% of old forest emphasis areas); SNFPA 3615-16 (noting that the amount of forest area that average tree greater than 24 inches in dbh is expected to increase due to re-growth and untreated areas).

Evidence that the Forest Service took a hard look at the impacts to the California spotted owl is well-documented in the SEIS. The Forest Service addressed the California spotted owl through a meta-analysis[30]/ (SNFPA 2086-2089), assessment of published research (SNFPA 2638-57), agency meetings (SNFPA 2431-2447), and in evaluation of the Scientific Consistency Review Team's findings (SNFPA 2578-89, 2590-2601). As evidenced by the Forest Service's response to comments by the Scientific Consistency Review team (SNFPA 2578-2589), the Forest Service fine-tuned its analysis and discussion of the California spotted owl in the SEIS. See SNFPA 2590-2601. Specifically, the Forest Service stated that "[m]ore emphases and discussion on short-term effects and associated risk [to the California spotted owl] was added to the SEIS and is considered in the

[29]/ Figure 4.3.2.2a illustrates projected region-wide acreage of late seral habitat (CWHR 5M, 5D, and 6. SNFPA 3327. This habitat is considered "highest quality marten foraging and reproductive habitat," and is also suitable habitat for owl nesting and foraging. SNFPA 3327,3337.

[30]/ The California Spotted Owl Meta-analysis is a "thorough, updated analysis of the demographic data collected on the California spotted owl ver the last ten years. SNFPA 2087.

Adaptive Management process." SNFPA at 2601. Specifically, Chapter 2 of the SEIS discusses application of adaptive management and that discussion was expanded from the discussion in the DEIS. It addresses short-term impacts and associated risks to the California spotted owl in the Forest Service's analysis of: key areas of uncertainty and priority management questions (SNFPA 3134); old forest habitat and species, uncertainties and management questions (SNFPA 3144-46); ongoing monitoring and research relevant to the adaptive management program, owl demographic studies (SNFPA 3151-3152), and, California spotted owl response module (SNFPA 3155-3156). Furthermore, the United States Fish and Wildlife Service ("FWS") concluded from the meta-analysis, conducted by both FWS and the Forest Service, "there was no clear statistical evidence to show that the [California spotted] owl was decreasing across its range." SNFPA at 3995. Based on 2004 SEIS and the biological evaluation (SNFPA 2658-2664), the Forest Service openly concluded that for the California spotted owl "the determination was that the 2004 SNFPA decision "may affect individuals, but not likely to trend toward Federal listing." SNFPA at 3946.

Here, what is clear is that the Forest Service took a "hard look" at the available data and opposing opinions and provided a reasoned discussion of the effects on the California spotted owl. Lyons, 871 F. Supp at 1321 (the agency having engaged in numerous studies and analyses on the owl satisfied NEPA's requirement to take a "hard look" at available data.); see also Village of False Pass v. Clark 733 F.2d 605, 614 (9th Cir. 1984) (quoting Sierra Club v. Sigler, 695 F.2d at 963) ("[T]he unavailability of information, . . . should not be permitted to halt all government action . . . . This is particularly true when information may become available at a later time and can still be used to influence the agency's decision.").

Similarly, the Forest Service adequately analyzed short-term impacts to the fisher as summarized in the section entitled "Habitat Conditions in the Short-Term and Long-Term." SNFPA 3314. The Forest Service determined that short-term impacts on snag levels, down wood debris, and fisher prey would not be significantly different between Alterative S1 and Alternative S2. SNFPA 3318-3319. In analyzing the short-term effects from reduced canopy closure, the Forest Service found that the proposed thinning of the canopy "should not limit connectivity between stands of

higher canopy cover, denning-quality habitat, because proposed treatment would only affect approximately 25-30% of the forested area." SNFPA 3317.

The Forest Service adequately analyzed short-term impacts to the marten finding that the short term impacts on large live trees, snags, down woody debris and meadow and riparian habitats would not be significantly different under the 2004 Framework as compared to the 2001 Framework. SNFPA 3323-3330. The proposed action under both Frameworks will impact canopy cover, and thereby reduce habitat quality for the marten; however, adequate levels of ground cover and downed logs would remain to provide suitable marten habitat. SNFPA 3325. Quality of the marten habitat is projected to increase under both Frameworks, with greater short-term increases projected for the 2001 Framework and greater long-term increase proejcted for the 2004 Framework. SNFPA 3326. As the SEIS explains, this is due to the differences in standards and guidelines that will impact late seral stage forest areas. Id. Those particular areas provided the highest quality marten foraging and reproductive habitat. Id. However, because suitable habitats for the marten are currently either broadly distributed or highly abundant because of the relatively minimal impact either Framework will have on the marten, both the 2001 and 2004 Frameworks are expected to result in a broad distribution of marten. SNFPA 3330. As the record demonstrates, the Forest Service took the requisite hard-look at the short-term effects to the fisher and marten. Simply because Plaintiffs may disagree with the Forest Service's assessment of the impacts does not allow the court to "substitute its judgement for that of the agency as to the environmental consequences of its actions." Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976). The SEIS's analysis of effects to other wildlife species is adequate under NEPA, and the Forest Service is entitled to summary judgment on Plaintiffs' fifth claim.

B. The 2004 SEIS Complied with NEPA By Taking a Hard Look at Cumulative Impacts to Old Forest Species.

Plaintiffs allege that the Forest Service failed to analyze the cumulative impacts to old forest species of logging under the 2004 Framework together with logging under the GSNM Management Plan. Pls.' Am. Compl. ¶¶ 116-119. However, in light of the properly determined scope of its

cumulative effects analysis on old forest species, the 2004 SEIS satisfies NEPA, and should be upheld.

Although an EIS must disclose cumulative impacts, 40 C.F.R. § 1508.25(c)(3), courts grant considerable deference to an agency's determination of the proper scope of a NEPA analysis, including the scope of its cumulative effects review. Kleppe, 427 U.S. at 414; NEC-Gallatin, 304 F.3d 886, 893-894 (9th Cir. 2002); Neighbors, 303 F.3d at 1071. Given the 2004 Framework is a programmatic-level action, the Forest Service properly determined the scope of its cumulative effects analysis.

As the Forest Service explains in the SEIS, the scope of its cumulative effects analysis to old forest species, such as the fisher, focuses on the risk of wildfires and the preservation of habitat. SNFPA 3323. The SEIS states that the "largest events affecting viability of the fisher population in the southern Sierra appear to be large stand replacing wildfires." SNFPA 3320. Therefore, in analyzing the cumulative effects of two other projects - Kings River Demonstration Project and Giant Sequoia National Monument (GSNM) in combination with the 2004 Framework, the Forest Service reasonably tailored its cumulative effects analysis to the issue of wildfires. SNFPA 3321-3322. The SEIS discusses the cumulative effects of treatment designs of the GSNM Management Plan to reduce risk of stand replacing fires. SNFPA 3322 (*i.e.* "hardwood density in conifer stand may increase due to the opened stand conditions after prescribed burning and/or thinning;" and, "the amount and/or vigor of young trees less than 30 years old will increase as existing patches are thinned out while being protected from excessive mortality from fire"). Cumulative effects of the green tree harvest is also projected, including the GSNM, with the use of models. SNFPA 3389. See also SNFPA 3472 (discussing the modeling assumptions for acres of treatment applicable to the GSNM).

Cumulative effects on fisher habitat and population are addressed, noting the benefits and costs as reflected by the statement that "although some denning habitat may be degraded, the degraded patches would be a smaller inclusion within a larger matrix of untreated habitat would likely retain habitat elements suitable for numerous denning and resting sites across a landscape or territory." SNFPA 3323.

Cumulative effects on the California spotted owl address the owl's habitat and population in light of the 2004 Framework's proposed action is also discussed in the SEIS. SNFPA 3348-3350. The cumulative effect analysis evaluates changes to suitable habitat, impacts of wildfire, and acres treated. Id. Projected cumulative changes in suitable habitat for the owl (CWHR classes 4M, 4D, 5M 5D, and 6) within and outside of the HFQLG pilot project area, were analyzed over a period of 130 years. SNFPA 3339, 3348. From the implementation of the 2004 Framework, the SEIS concludes that abundance and distribution of suitable habitat for the owl is expected to increase above current conditions. Id. Focused monitoring and forest-level and regional-level review is to be conducted to ensure that cumulative effects are analyzed for site-specific project planning. SNFPA 2185.

Here the Forest Service has properly determined the scope of its cumulative effects analysis, meriting the courts deference. Kleppe, 427 U.S. at 414; NEC-Gallatin, 304 F.3d 886, 893-894 (9th Cir. 2002); Neighbors, 303 F.3d at 1071. And, as the record demonstrate, the Forest Service took a "hard look" at the available information, meeting the requirements of NEPA. See Lyons, 871 F. Supp. at 1321; see also Village of False Pass, 733 F.2d at 614. In sum, there is no doubt that the Forest Service reasonably considered cumulative impacts on old forest species.

C. The 2004 FSEIS Considered a Broad, Legally Sufficient Range of Alternatives

1. The SEIS's Range of Alternatives Meets the SEIS's Purpose and Need

The range of alternatives under NEPA is determined by the purpose and need. See, e.g., Westlands Water Dist.v. Dep't of the Interior, 376 F.3d 853, 865-66 (9th Cir. 2004). Here, the needs and goals underlying the 2001 EIS are the foundation for the 2004 SEIS.[31]/ Both the 2001 and 2004 decisions were fundamentally concerned with creating a workable strategy to address five problem areas: old forest ecosystems; aquatic, riparian and meadow ecosystems; fire and fuels management; noxious weeds; and lower westside hardwood ecosystems. SNFPA 3583. At their core, the 2001 and

[31]/ See SNFPA 2993 (2004 ROD "retains the overall goals of the SNFPA 2001 ROD," including overall strategy for addressing the fire situation "in combination with key components of the conservation strategy for old forest dependent species"); SNFPA 3097, 3098 (purpose of proposed action is "to adjust existing management direction to better achieve the goals of SNFPA"); SNFPA 3577 (SEIS was "initiated to incorporate new information and adjust the management direction in the existing SNFPA ROD to better achieve the goals of the SNFPA.").

2004 EISs shared a common purpose and need. See id. (the "purpose of the [2001] SNFPA FEIS *and the* [2004] SEIS" is to address the five problem areas) (emphasis added).

Because the 2004 SEIS sought to address the same purposes as the 2001 EIS, it was appropriate to reexamine alternatives from 2001 (represented in the SEIS as F2-F8). The Agency also generated a new alternative (S2) based on new information, experience from implementing the 2001 ROD, and extensive review of management options. These alternatives covered a wide range of management strategies--some emphasizing more passive management (F2, F5, F8), and others taking a more active approach (F4, F6, F7). See SNFPA 3170 (Table 2.5.3a). Together, the nine alternatives analyzed in detail responded to the SEIS's purpose of addressing the five problem areas and remedying them more effectively than the 2001 Framework. Because the range of alternatives met the purpose and need, it therefore complied with NEPA.

2. Alternatives F2-F8 Were Adequately Analyzed

Plaintiffs' allegation that alternatives F2-F8 were not given sufficient treatment in the SEIS is without merit. See Pls.' Am. Compl. ¶ 123. While alternatives F2-F8 were not discussed in the SEIS in the exact manner as alternatives S1 and S2, the record shows that alternatives F2-F8 were "rigorously explore[d] and objectively evaluate[d]" as required by NEPA. 40 C.F.R. § 1502.14(a). Plaintiffs' allegation that only two alternatives were considered in detail is simply incorrect. Pls.' Am. Compl. ¶ 122; see SNFPA 3078, 3115, 3160-62, 957 (2001 EIS, 83-164, 185-202); 3166-78. While the SEIS did not always analyze F2-F8 in the same manner as S1 and S2, this is because F2-F8 had already been analyzed extensively in the 2001 EIS. Rather than repeat that analysis, the SEIS simply cited the 2001 EIS and included new analysis of F2-F8 where necessary.[32]/ Such an approach is adequate and indeed encouraged by NEPA. See 40 C.F.R. §§ 1500.4, 1502.21 (encouraging incorporation by reference); Sierra Club v. Clark, 774 F.2d 1406, 1411 (9th Cir. 1985) ("By specifically referring to prior BLM studies and supporting materials, the FEIS fulfilled its informational purpose.").

[32]/ See SNFPA 3577 (SEIS "relies very heavily upon the analysis presented in the FEIS and incorporates that information rather than repeating it."); SNFPA 3115, 3255 (information presented for F2-F8 "addresses aspects of environmental consequences that have changed based on new information identified during the SNFPA review process"); see also SNFPA 3082-94, 3166-78 (analyzing F2-F8 alongside S1 and S2).

Plaintiffs also allege that including Alternatives F2-F8 was improper because the 2001 EIS's analysis of those alternatives was based on different methodologies than the 2004 SEIS analysis for Alternatives S1 and S2. Pls.' Am. Compl. ¶ 123. This argument is flawed in several respects. First, while the modeling used in the 2001 and 2004 EISs differed in some minor ways, the core modeling and analytical systems for the two EISs were the same. See SNFPA 3461 ("Essentially the same modeling and analysis systems used in the FEIS were used for the SEIS"); see also SNFPA 3577 ("new information has resulted in some minor adjustments to assumptions . . ."). Because the minor differences between the models were adequately disclosed, there is no support for the argument that they violated NEPA. See, e.g., Inland Empire, 88 F.3d at 758 ("NEPA's goal is satisfied once this information [on significant environmental impacts] is properly disclosed."); League of Wilderness Defenders v. Forest Serv., 383 F. Supp.2d 1276, 1282 (D. Or. 2005) (disclosure of assumptions of scientific methodology was adequate to withstand request for preliminary injunction). Plaintiffs' allegations about the analysis of Alternatives F2-F8 are therefore unfounded.

3. The Forest Service Was Not Required to Analyze Additional Alternatives

Plaintiffs also allege that various other alternatives were suggested and should have been considered in the 2004 SEIS. Pls.' Am. Compl. ¶ 125. Plaintiffs' argument fails for two reasons.[33]/ First, the Forest Service considered a sufficient range of alternatives, even though it did not consider every possible course of action. Second, the SEIS reasonably eliminated the other alternatives from detailed consideration.

First, as explained *supra* at 40-41, the range of alternatives in the SEIS was adequate because it met the purpose and need. See SNFPA 3578 (discussing how range of alternatives satisfied NEPA). Plaintiffs' allegation that the SEIS did not analyze in detail all possible alternatives is beside

[33]/ As a threshold matter, Plaintiffs have forfeited this argument because they failed to propose a detailed alternative during the public comment period. See Pub. Citizen, 541 U.S. at 764-65 (plaintiffs forfeited any objection to the range of alternatives where they failed to propose alternatives during the NEPA process). While Plaintiffs did submit comments on the draft SEIS, none of those comments provided a detailed proposal for an alternative that Plaintiffs wished to be considered. See SNFPA 380-496. Because Plaintiffs did not propose an alternative in detail, they may not raise their argument here. See Vermont Yankee, 435 U.S. at 553-54; Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 576-77 (9th Cir. 1998); City of Angoon v. Hodel, 803 F.2d 1016, 1022 (9th Cir. 1986) (upholding decision not to analyze a suggested alternative where plaintiff had not "offered a specific, detailed counterproposal" during NEPA process)

the point. See Pls.' Am. Compl. ¶ 125. While the Agency could have analyzed other alternatives, NEPA does not require such makework. See Vermont Yankee, 435 U.S. at 551; Westlands, 376 F.3d at 871.[34]/ In this case, the Forest Service considered a broad range of alternatives that responded to public input, addressed significant issues, and met the purpose and need. By doing so, the 16 alternatives fostered informed decision-making and public participation, thereby satisfying NEPA. See Westlands, 376 F.3d at 872; California v. Block, 690 F.2d 753, 767 (9th Cir. 1982).

In addition to the nine alternatives considered in detail, the Forest Service considered another seven alternatives, including some mentioned in Plaintiffs' amended Complaint. Pls.' Am. Compl. ¶ 125; see SNFPA 3163-65. However, the Forest Service eliminated those alternatives from detailed consideration under 40 C.F.R.§ 1502.14(a), because they were inconsistent with the purpose and need. See SNFPA 3009 ("Alternatives were eliminated [from detailed study] because they did not respond to the purpose and need for action, new information, and/or implementation concerns."); SNFPA 3163, 4014; see also SNFPA 3163-3165, 3583-3584 (explaining why each of the seven alternatives was eliminated).

While Plaintiff may have preferred that the Forest Service analyze all sixteen alternatives in detail, an agency is not required to consider alternatives that are "inconsistent with its basic policy objectives." Moseley, 80 F.3d at 1404; see Westlands, 376 F.3d at 871-72 (requiring analysis of such alternatives "would turn NEPA on its head") (citing Kootenai Tribe, 313 F.3d at 1122). Because the alternatives eliminated from detailed consideration were inconsistent with SEIS's goals or were similar to existing alternatives, the treatment of those alternatives was reasonable. See Westlands, 376 F.3d at 871-72. Plaintiffs' challenges to the alternatives considered should therefore be rejected.

[34]/ See also Carmel-by-the-Sea, 123 F.3d at 1155 ("[An EIS] need not consider an infinite range of alternatives ...."); Headwaters v. BLM, 914 F2d 1174, 1181 (9th Cir. 1990) (analysis of alternatives may be sufficient, "even if it does not consider every available alternative.")

III. THE BASIN PROJECT COMPLIES WITH NEPA

Plaintiffs also allege in their ninth and twelfth claims,[35]/ respectively, that the Basin Project violates NEPA because: (1) the Forest Service failed to take a "hard-look" at the cumulative impacts of the Basin Project with other logging projects; and (2) the Forest Service did not circulate a draft EA for public comment. Pls.' Am. Compl. ¶¶ 135, 144-147. However, Plaintiffs' arguments must be rejected.

A. The Basin Project EA Adequately Considered Cumulative Impacts.

Plaintiffs' ninth claim alleges that the Forest Service violated NEPA for failure to take a hard look at the cumulative impacts that the Basin Project, along with other logging projects, will have on old forest species. Pls.' Am. Compl. ¶ 135. The Basin EA, however, relied upon an adequate cumulative effects analysis, including consideration of past and ongoing projects. The BA/BE identified numerous other projects within the analysis area, described the silvicultural systems used (generally thinning or salvage prescriptions), the number of acres treated or otherwise affected, and effects that likely will result. See BASIN 3563-65. Effects from these past projects were discussed:

> The combined effects of *past timber harvest* and fire exclusion have changed the tree species composition and structure of the forest. The most important effect is the loss of large trees and snags, which decrease habitat values for pallid bats, goshawks, forest carnivores, great gray owls, and spotted owls as well as cavity dependent species.

SNFPA 3564 (emphasis added); see also BASIN 3685, 3717, 3719 (discussing past harvest).

In addition, the Basin EA's cumulative effects analysis must be considered against the backdrop of the cumulative effects analyses already prepared in three programmatic EISs. Under NEPA, agencies may address cumulative impacts in the EA or by "tier[ing] to an EIS" that discusses cumulative impacts. NEC-Gallatin, 304 F.3d at 895-96; 40 C.F.R. § 1502.20 (encouraging tiering to "eliminate repetitive discussions of the same issues"); see Portland Audubor Soc., 884 F.2d at 1239; see also Headwaters, 914 F.2d at 1178.

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[35]/ Other than their claim that the Basin EA failed to adequately consider cumulative effects, Plaintiffs themselves have not moved for summary judgment on the remainder of their ninth claim. Nor have Plaintiffs moved for summary judgment on their tenth or eleventh claims. Because those allegations are deemed abandoned, Federal Defendants do not address them here. See *supra* at 12 n.9.

The cumulative effects from other potential present and future HFQLG pilot project actions have already been analyzed extensively in the 2004 SEIS, 2001 FEIS, and the 1999 HFQLG pilot project FEIS. As such the EA reasonably tiered to prior analyses. For example, analysis of suitable habitat for the California spotted owl, and potential impacts to that habitat can be found in multiple NEPA documents. Table 4.3.2.3g in the 2004 SEIS displays projected cumulative changes in CWHR types, and is referenced and relied upon again in the Basin EA. BASIN 3720, SNFPA 3330-3350. That analysis of cumulative changes in CWHR types rendered a finding that suitable foraging habitat for the California spotted owl would diminish in early decades but would later be offset. BASIN 3720; SNFPA 3339. Because the owl is within the 95% confidence limits of a stable population (SNFPA 3340), the Forest Service reasonably concluded in the Basin EA that cumulative habitat changes would not result in a loss of owl viability. BASIN 3720. Furthermore, timber harvesting and road construction is not to occur in owl PACs within the project area. BASIN 3698.

For the owl, fisher and marten, the Basin EA reasonably concluded that cumulative impacts would be low. This is due to the fact that the forested habitats affected by the project would be relatively small (3.6% of the project area). BASIN 3698, 3699. There were no known den sites or confirmed sighting of forest carnivores in the analysis area. BASIN 3575. Effects due to skidding are expected not to occur or be minimal because the tree and group selections are outside the riparian habitats ("RHCA's"). Id. Timber harvesting and new roads construction is not to occur in goshawk PACs or California spotted owl PACs which together comprise most of the habitat used by the fisher and martin. BASIN 3699. This analysis, based upon the limited geographic range of the Basin Project, builds upon the broader analysis of direct, indirect and cumulative effects to both the marten and fisher in the 2004 Framework. SNFPA 3312-3330. The 2004 Framework SEIS address the cumulative effects of the NcNally Fire which burned approximately 155,000 acres in 2002 on the Sequoia and Inyo National Forests. SNFPA 3321. This fire resulted in the stand-replacing burning of 17,000 acres of suitable and presumed occupied habitat for the fisher. Id. The impact is that fisher movement in this area is now limited because of the fragmentation in habitat created by the fire. Id.

Given the analysis that had already been conducted at a programmatic level, the EA did not have to re-analyze the cumulative effects across the entire Pilot Project Area, or the Sierra, as

Plaintiffs allege. See 40 C.F.R.§ 1502.20. Instead, for cumulative effects to species like the owl, the EA took the reasonable approach of tiering to those prior analyses and focusing only upon the cumulative effects discussion that was relevant to the particular project. See, e.g., BASIN 3570-3571 (discussing analysis from HFQLG FEIS); BASIN 3720 (discussing analysis from 2004 SEIS); BASIN 3528 (same). As such, the cumulative effects analysis for the Basin Project satisfied NEPA. See PAS, 884 F.2d at 1239; see also Headwaters, 914 F.2d at 1178 (supplemental EIS not required when effects of original action adequately covered by a regionwide EIS).

Finally, the cumulative effects analysis in the EA satisfies NEPA because it complies with CEQ's recent *Guidance on the Consideration of Past Action in Cumulative Effects Analysis*. Ex. B. The CEQ Guidance states that "[a]gencies are not required to list or analyze the effects of individual past actions unless such information is necessary to describe the cumulative effects of all past actions combined," and that "[a]gencies retain substantial discretion as to the extent of such inquiry and appropriate level of explanation." Id. at 1-2 (citing to Marsh v. ONRC, 490 U.S. 360, 376-77 (1989)). An adequate analysis focuses "on the current aggregate effects of past actions without delving into the historical details of individual past actions." Id. at 2. Furthermore, the CEQ Guidance affirms that agencies may limit the scope of their cumulative effects analysis "based on practical considerations." Id. (citing Kleppe, 427 U.S. at 414). CEQ was created by NEPA and is the agency responsible for promulgating NEPA's implementing regulations. 42. U.S.C. § 4344; Jones v. Gordon, 792 F.2d 821, 827 (9th Cir. 1986). Given this fact, the CEQ Guidance is entitled to deference unless "plainly erroneous or inconsistent with the regulation." See Auer v. Robbins, 519 U.S. 452 (1997) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)). Here the Forest Service's analysis of past cumulative complies with this guidance.

In sum, the cumulative effects analysis in Basin satisfied NEPA because it is tiered to the extensive analyses in three prior programmatic EISs, and because the project EA relies upon an adequate analysis of other factors specific to the project. See, e.g., BASIN 3530 (explaining that determination of effects at the project level will likely concur with that in the plan level analysis if certain criteria are met); BASIN 3563-3564 (discussing effects of past timber harvest within the

Basin area); see PAS, 884 F.2d at 1239; Headwaters, 914 F.2d at 1178. Federal Defendants are therefore entitled to summary judgment on Plaintiffs' ninth claim.

B. The Forest Service Satisfied NEPA's Public Involvement Requirements for the Basin Project

1. NEPA Does Not Require Public Circulation of a Draft EA

Plaintiffs' twelfth claim alleges that the Forest Service violated NEPA because it did not publicly circulate a draft EA for public comment or otherwise involve the public in preparing and considering the EA. Pls.' Am. Compl. ¶¶ 144-147. However, numerous courts of appeals, as well this District Court, have made clear that there is no requirement in NEPA to circulate a draft EA for public comment. See Sierra Nevada Forest Prot. Campaign v. Weingardt, 376 F. Supp. 2d. 984 (E.D. Cal. 2005).[36]/

The courts have made this determination on a reasonable reading of NEPA's implementing regulations. Section 1501.4(b) states: "[t]he agency shall involve environmental agencies, applicants, and the public, *to the extent practicable*, in preparing assessments required by 1508.9(a)(1)." (emphasis added). The phrase "to the extent practicable" affords considerable discretion to the Agency and can hardly be construed as a mandatory requirement to circulate a draft EA. Nor can the requirement to circulate a draft EA be coerced from the highly discretionary language in 40 C.F.R. § 1506.6, which provides that "[a]gencies shall . . .[a] make diligent efforts to involve the public in preparing and implementing their NEPA procedures . . . [p]rovide public notice of . . . the availability of environmental documents so as to inform those persons … who may be interested or affected, [and] solicit appropriate information from the public." Plaintiffs' view that a draft EA had to be circulated is not supported by the regulations.

[36]/ See also Alliance To Protect Nantucket Sound, Inc. v. U.S. Dept. of Army, 398 F.3d 105, 114-15 (1st Cir. 2005) (agency did not violate NEPA by failing to circulate draft EA or FONSI for public comment); Greater Yellowstone Coalition v. Flowers, 359 F.3d 1257, 1279 (10th Cir. 2004) (not making available the EA and other project documents before issuance of an agency decision was not arbitrary); Pogliani v. U.S. Army Corps of Eng'rs, 306 F.3d 1235, 1238-39 (2nd Cir. 2002) (finding plaintiffs unlikely to succeed on their claim that the Corps "erred by failing to release its draft EA and FONSI for public comment prior to their issuance"); Fund For Animals, Inc. v. Rice, 85 F.3d 535, 549 (11th Cir. 1996) ("there is no legal requirement that an Environmental Assessment be circulated publicly and, in fact, they rarely are"); Como-Falcon Mty. Coalition v. Dep't of Labor, 609 F.2d 342, 345 (8th Cir. 1979) (there is no statutory requirement that an agency provide opportunity for public comment of a particular kind, and "we are unwilling by judicial decision to legislate such a requirement into the Act [NEPA].").

As recognized by numerous other circuit courts, recently this District Court correctly concluded that there is no requirement to circulate an EA. Weingardt, 376 F. Supp. 2d 991. The court stated that in "contrast to an EIS, the CEQ regulations *do not expressly require that a draft EA be circulated to the public for comment* before the agency adopts it as its final decision." Id. at 991 (emphasis added). The Court's conclusion in Weingardt is also consistent with the findings of other circuits. See *supra* at 50 n.31. Because neither the plain language of the regulations nor the caselaw requires circulation of a draft EA, Plaintiffs' argument should be rejected. See Vermont Yankee, 435 U.S. at 549 (court may not "impose upon [an] agency its own best notion of which procedures are 'best' or most likely to further some vague, undefined public good"); Wilderness Soc'y v. Tyrrel, 918 F.2d 813, 818 (9th Cir. 1990) (court is "not free to impose [its] own notions of procedural propriety upon the Forest Service").

2. The Forest Service Provided For Public Involvement to the Extent Practicable For the Basin Project.

The Forest Service complied with NEPA's public involvement requirements. As the administrative record demonstrates, the Forest Service made "diligent efforts to involve the public" under 40 C.F.R. § 1506.6, and involved the public "to the extent practicable" under 40 C.F.R. § 1501.4(b). The Forest Service provided a comment period, noted and responded to public comments, and conferred with federal and state agencies. See BASIN 3044, 3132, 3134-48, 3155, 3211, 3240-57.

Following its own internal guidance at FSH 1909.15, Sec. 10.3, the Forest Service gave public notice of the Basin Project on December 19, 2003, and provided the opportunity to submit comments. BASIN 3044. The comment period for the Basin Project began with the mailing of the project description and posting of the legal notice on March 2, 2004. BASIN 3132, 3155, 3746. The project description detailed the proposed action, its purpose and need, and design and mitigation measures, in addition to including maps of the project area. Id. 3134-3148. The Forest Service received comments which it reviewed and responded to, including comments from Plaintiffs submitted on several occasions. BASIN 3211, 3240-3257; see also 3180-3196, 3274-94, 3493-3519. Additionally, the Forest Service provided two notices of public meeting to be held on planned

projects in the vicinity including the Basin Project on June 15, 2004. BASIN 3213, 3230. On June 16, 2004 the Forest Service held a morning and afternoon public meeting which Plaintiffs did not attend. See Decl. of Cindy Roberts ¶ 4 (attached as Fed. Defs.' Ex. C). At the public meetings a map of the Basin Project was available for public viewing and Forest Service employees were available to answer specific questions relating to the Basin Project. Id. At the request of a representative of Plaintiffs, Mr. Craig Thomas, a meeting was held between Mr. Thomas and a Forest Service employee discussing the Basin Project and Mr. Thomas' concerns regarding the Basin Project. Id. at ¶¶ 3, 5. Finally, the Forest Service responded to requests by providing the EA, DN/FONSI, and BA/BE. BASIN 3764-3765, 3763- 3766, 3657-3757.

The Weingardt court recognized that public involvement and distribution of information can take many forms. Weingardt, 376 F. Supp. 2d. at 991 ("Depending on the circumstances, the agency could provide adequate information through public meetings or by a reasonably thorough scoping notice."). As explained above, the Forest Service, using various methods to involve the public, provided sufficient information and involved the public "to the extent practicable." Such an approach satisfies NEPA, and Federal Defendants should be granted summary judgment on Plaintiffs' twelfth claim.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Federal Defendants.

Respectfully submitted this 16th day of December 2005.

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