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

16 SIERRA NEVADA FOREST PROTECTION )  
17 CAMPAIGN, *et al.*, )

18 Plaintiffs, )

19 v. )

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

22 Federal Defendants, )

23 and )

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

25 Defendant-Intervenors, )

26 and )

27 ///

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

**FEDERAL DEFENDANTS’  
MEMORANDUM IN OPPOSITION TO  
PLAINTIFFS’ MOTION FOR SUMMARY  
JUDGMENT**

1 ///

2 CALIFORNIA SKI INDUSTRY )  
3 ASSOCIATION, )  
4 Defendant-Intervenor, )  
5 and )  
6 QUINCY LIBRARY GROUP, *et al.*, )  
7 Defendant-Intervenors. )  
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**ACRONYMS AND ABBREVIATIONS**

1		
2	APA	Administrative Procedure Act
3	BA/BE	Biological Assessment/Biological Evaluation
4	BBS	Breeding Bird Survey
5	CEQ	Council on Environmental Quality
6	CWHR	California Wildlife Habitat Relationship
7	dbh	Diameter at Breast Height
8	DFPZ	Defensible Fuel Profile Zone
9	EA	Environmental Assessment
10	EIS	Environmental Impact Statement
11	EPA	United States Environmental Protection Agency
12	FEIS	Final Environmental Impact Statement
13	FONSI	Finding of No Significant Impact
14	FWS	United States Fish and Wildlife Service
15	FSEIS	Final Supplemental Environmental Impact Statement
16	GSNM	Giant Sequoia National Monument
17	HFQLG	Herger-Feinstein Quincy Library Group Forest Recovery Act
18	LOP	Limited Operating Period
19	LRMP	Land and Resources Management Plan
20	MIS	Management Indicator Species
21	NEPA	National Environmental Policy Act
22	NF	National Forest
23	NFMA	National Forest Management Act
24	NFS	National Forest System
25	PAC	Protected Activity Center
26	RHCA	Riparian Habitat Conservation Area
27	ROD	Record of Decision
28	SAT	Scientific Analysis Team

1	SCR	Science Consistency Review
2	SOHA	Spotted Owl Habitat Area
3	SEIS	Supplemental Environmental Impact Statement
4	SNFPA	Sierra Nevada Forest Plan Amendment
5	SSFCA	Southern Sierra Fisher Conservation Area

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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

1                                   **PREFACE REGARDING ADMINISTRATIVE RECORD CITATIONS**

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

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

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

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

14           2.       The eight volume SNFPA record also contains material on CDs, which were originally  
15 found at SNFPA 4338-4360. Following the original lodging of these materials, some errors were  
16 discovered in the numbering and organization of the material on some of these CDs. Amended  
17 copies of these CDs were provided to the parties and are also being lodged with the Court. The  
18 material on these amended CDs is referenced by the bates-stamped number at the bottom of the  
19 appropriate page, typically: “SEIS\_aa\_XXXXXX,” where “aa” is the CD volume, and “XXXXXX” is  
20 the page number.

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

25           4.       Also included in the ten-volume administrative record for the Basin Project Decision is a  
26 CD found at BASIN 2917, which contains the forest plan (also known as the land and resources  
27 management plan (“LRMP”)) for the Plumas National Forest. Citations to that document are  
28

1 referenced as “BASIN 2917 (LRMP at x-xx)”, where “x-xx” represents the chapter and page  
2 number of the forest plan.

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

- 5 a. One additional binder is associated with California ex rel. Lockyer v. U.S.  
6 Department of Agriculture, No. CIV-S-05-211 MCE GGH. Any pages  
7 cited in that volume are referenced as “CA xxxx,” where “xxxx” is the  
8 bates-stamped number at the bottom of the page in that record.
- 9 b. Two additional binders are associated with California Forestry Association  
10 v. Bosworth, No. CIV-S-05-905 MCE GGH. Any pages cited in those  
11 volumes are referenced as “CFA xxxx,” where “xxxx” is the bates-  
12 stamped number at the bottom of the page in that record.
- 13 c. One additional binder is associated with Pacific Rivers Council v. U.S.  
14 Forest Service, No. CIV-S-05-953 MCE GGH. Any pages cited in that  
15 volume are referenced as “PRC xxxx,” where “xxxx” is the bates-stamped  
16 number at the bottom of the page in that record.

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

1 **INTRODUCTION**

2 Plaintiffs in this case are a collection of environmental organizations which challenge the  
3 2004 Framework and a forest management project, Basin, under the National Forest Management  
4 Act (“NFMA”), the National Environmental Policy Act of 1969 (“NEPA”), and the  
5 Administrative Procedure Act (“APA”). As an initial matter, Plaintiffs’ NFMA challenges to the  
6 Basin Project should fail because the regulations upon which they are based are no longer in  
7 existence, having been superseded by a new planning rule in January 2005. Even if the old  
8 regulations apply, both the 2004 Framework and the Basin Project address the habitat needs for  
9 the relevant species in light of current science and reasonably conclude that viability would be  
10 maintained. Long-term habitat is projected to increase under the 2004 Framework for the owl,  
11 fisher, and marten. Also, short-term effects from the Basin Project would not be significant,  
12 given that the project avoids owl protected activity centers (“PACs”) and would undertake little  
13 harvest within a designated network for fisher and marten.

14 Plaintiffs’ argument that the Forest Service was required to obtain population data for  
15 management indicator species (“MIS”) and “species-at-risk” is also without merit. There is no  
16 duty under NFMA to obtain such data prior to approving a forest plan amendment, and the  
17 category of species-at-risk is one that is not found either in the 1982 regulations or in the current  
18 rule. The Forest Service complied with any responsibility to monitor MIS by analyzing  
19 information on habitat, sometimes in combination with population and survey data, for the 15  
20 species identified in the Plumas forest plan. Plaintiffs’ allegations that the Forest Service must  
21 comply with duties for other MIS analyzed in the 2004 Framework and its predecessor, the 2001  
22 Framework, is based upon the misperception that the Frameworks somehow expanded the list of  
23 MIS in individual forest plans. That is not the case. Consequently, the Forest Service was not  
24 required to monitor MIS not identified in the Plumas forest plan prior to approving the Basin  
25 Project.

26 The 2004 Framework and the Basin Project also comply with NEPA. The final  
27 supplemental environmental impact statement (“SEIS”) for the 2004 Framework adequately  
28 discusses scientific uncertainty and opposing scientific viewpoints. The SEIS fully analyzed the



1 effects (including short-term effects and cumulative effects) of changed management direction  
2 upon old forest species, including the owl, fisher, and marten. The SEIS considered a reasonable  
3 range of alternatives, including nine alternatives that addressed five key problem areas, and the  
4 need for improvement upon the 2001 Framework. Moreover, the alternatives carried forward  
5 from the 2001 EIS were adequately analyzed, especially in light of the analysis already prepared  
6 in the 2001 EIS and considering the NEPA regulations that encourage reduction of unnecessary  
7 paperwork. See, e.g., 40 C.F.R. §§ 1500.4, 1502.1.<sup>1/</sup>

8 The environmental assessment (“EA”) for the Basin Project complies with NEPA.  
9 Plaintiffs claim that the Forest Service violated NEPA by not circulating a draft EA for public  
10 comment, and allege that the Forest Service failed to take a “hard-look” at the cumulative impacts  
11 of the Basin Project with other logging projects. NEPA does not require circulation of a draft EA  
12 for public comment, however, and the Agency otherwise satisfied NEPA’s public involvement  
13 requirements. Furthermore, the Forest Service’s analysis of cumulative effects in the Basin  
14 Project EA was reasonable. Therefore, Plaintiffs’ claims pertaining to the Basin Project should  
15 be rejected.

## 16 ARGUMENT<sup>2/</sup>

### 17 **I. THE 2004 SEIS COMPLIES WITH THE REQUIREMENTS OF NFMA FOR 18 PROVIDING FOR SPECIES DIVERSITY AND DOES NOT VIOLATE THE APA**

19 Plaintiffs argue that the Forest Service has violated NFMA and the APA for failure to  
20 maintain species diversity. See Pls.’ Mem. at 22-28. Plaintiffs further aver that the 2004

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21  
22 <sup>1/</sup> The regulations implementing NEPA, 40 C.F.R. pt. 1500, were promulgated by the Council on  
23 Environmental Quality (“CEQ”) and are “entitled to substantial deference.” Andrus v. Sierra  
Club, 442 U.S. 347, 358 (1979).

24 <sup>2/</sup> A number of claims in Plaintiffs’ amended complaint are not argued at all in their summary  
25 judgment brief. See Pls.’ Am. Compl. ¶¶ 98-101 (Third Claim); ¶¶ 120-26 (Seventh Claim); ¶¶  
26 127-31 (Eighth Claim); ¶¶ 137-139 (Tenth Claim); ¶¶ 140-143 (Eleventh Claim). Because  
27 Plaintiffs have abandoned those claims by not raising them in their brief, the Court should grant  
28 summary judgment in favor of Federal Defendants on those claims. See Ohio Valley  
Environmental 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 Foundation 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).

1 Framework violates NFMA and the APA for failure to monitor and inventory MIS species. Id.  
2 These claims fail for multiple reasons as detailed below.

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

5 Following the Supreme Court case, Landgraf v. USI Film Products, 511 U.S. 244 (1994),  
6 this Court should apply the current 2005 forest planning regulations instead of the superceded  
7 1982 planning regulations, because application of the new regulations would not impair any  
8 vested rights, increase the liability for past conduct or impose new duties on Federal Defendants.  
9 See Southwest Center for Biological Diversity v. USDA, 314 F.3d 1060, 1062 (9th Cir. 2002)  
10 (determining that a new statute should apply because the plaintiff had not taken any action in  
11 reliance on the prior law that qualified under Landgraf); see also St. Cyr, 533 U.S. at 321 (“A  
12 statute has retroactive effect when it takes away or impairs vested rights acquired under existing  
13 laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to  
14 transactions or considerations already past . . . .”) (citation and internal quotation marks omitted).  
15 Applied here, the new regulations would not impair the rights of a party, because Plaintiffs do not  
16 possess any on-the-ground permits entitling them to occupy the Plumas National Forest, or any  
17 other valid existing rights. See generally Pls.’ Mem. Plaintiffs’ mere “expectation of success in  
18 its litigation [is not] the kind of settled expectation protected by Landgraf’s presumption against  
19 retroactivity.” Southwest Ctr., 314 F.3d at 1062 n.1. Additionally, the 2005 Regulations do not  
20 increase the Agency’s liability for past conduct or impose new duties regarding MIS. With the  
21 exception of Section 219.14(f), MIS are not included in the new rule at all. See 70 Fed. Reg.  
22 1,023-01 at 1048 (“The concept of MIS . . . is not in the final rule, except for transition provisions  
23 at § 219.14”). Thus, neither the second nor third factors in Landgraf prevent the court from  
24 applying the new regulations here. INS v. St. Cyr, 533 U.S. at 321; Southwest Ctr., 314 F.3d at  
25 1062 n.1. Thus, under Landgraf, the 2005 regulations are applicable to the Basin Project.<sup>3/</sup>

26 <sup>3/</sup> See Federal Defendants’ Memorandum in Support of Cross-Motion for Summary Judgment at  
27 13-14 (referenced hereafter as “Federal Defendants’ Summary Judgment Brief”) for additional  
28 discussion of this issue. Relevant factual and legal background is found in Defendants’  
Memorandum in Support of Cross-Motion for Summary Judgment and is incorporated here by  
reference. Furthermore, references to arguments presented in Federal Defendants’ Summary  
Judgment Brief are hereby incorporated by reference into this memorandum.

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

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

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

7           Plaintiffs first argue that the 2004 Framework and the Basin Project would not maintain  
8           viability of the owl, fisher, and marten. Pls.’ Mem. at 22-28. Specifically, Plaintiffs assert that  
9           the standards and guidelines in the 2004 Framework are insufficient, Pls.’ Mem. at 22, and the  
10          adaptive management strategy of the 2004 Framework is inadequate to maintain owl, fisher and  
11          marten viability. Pls.’ Mem. at 26. Plaintiffs further claim that those species’ viability is  
12          threatened by the implementation of the pilot project required by the Herger-Feinstein Quincy  
13          Library Group Forest Recovery Act (“HFQLG Act”).<sup>4/</sup> Pls.’ Mem. at 25. However, as discussed  
14          in Federal Defendants’ Summary Judgment Brief at 16, the Forest Service has substantial  
15          discretion to balance the multiple surface uses of resources on its lands, even when maintaining  
16          viability. See 16 U.S.C. § 529 (directing Secretary of Agriculture to administer the NFS for  
17          multiple uses and sustained yield); Perkins v. Bergland, 608 F.2d 803, 806 (C.A. Ariz. 1979);  
18          Sierra Club v. Espy, 38 F.3d 792, 795 (5th Cir. 1994) (principles of multiple-use sustained-yield  
19          are “incorporated into the statutory and regulatory scheme of NFMA”); Citizens for Envntl.  
20          Quality v. United States, 731 F. Supp. 970, 976 (D. Colo. 1989). Specific to wildlife, NFMA  
21          gives the Forest Service substantial discretion to balance the need to maintain species viability  
22          with other multiple use objectives in a forest plan. See Seattle Audubon Soc’y v. Moseley, 80  
23          F.3d 1401, 1404-05 (9th Cir. 1996) (upholding regional plan amendment in part because of the

24          <sup>4/</sup> The HFQLG Act requires the Forest Service to conduct a pilot project on about 1.5 million  
25          acres on the Plumas, Lassen, and Tahoe National Forests to “demonstrate the effectiveness” of  
26          several resource management techniques. HFQLG Act, Pub. L. No. 105-277, § 401(b), 112 Stat.  
27          2681-231 (1998) (codified as 16 U.S.C. § 2104 note); see also SNFPA 986(HFQLG FEIS at 2-3)  
28          (pilot project area encompasses about 1.53 million acres); SNFPA 3131. The techniques include  
        the construction of fuelbreaks called defensible fuel profile zones (“DFPZs”), and two uneven-  
        aged methods of timber harvest: group selection and harvest by selection of individual trees.  
        See id. § 401(d). Group selection involves harvest of small patches (0.25 to 2 acres) for the  
        purposes of regenerating uneven-aged stands and promoting the growth of shade-intolerant trees.  
        SNFPA 3276, 3329, 3339; see also in Sierra Nevada Forest Prot. Campaign v. Forest Serv., No.  
        Civ. S-04-2023-MCE/GGH, 2005 WL 1366507, \*15 (E.D. Cal. May 26, 2005) (explaining  
        purposes of group selection under the HFQLG Act).

1 “inherent flexibility of the NFMA”). Here the 2004 Framework, which is an amendment to forest  
2 plans, balances the need to maintain viability of wildlife with other multiple uses in accordance  
3 with NFMA and Ninth Circuit precedent. Plaintiffs have not demonstrated that such a balance  
4 is an abuse of discretion or otherwise not in accordance with the law, and therefore, Plaintiffs’  
5 claims regarding viability must be dismissed.

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

8 Plaintiffs focus on the concerns raised by scientists of the 2004 Framework to support  
9 their argument. Pls.’ Mem. at 22-26. Specifically, Plaintiffs point to criticisms by scientists that  
10 because the 2004 Framework would allow timber harvest to occur at increased diameter limits  
11 (20-30" diameter breast height (“dbh”)), and would decrease canopy coverage as compared to the  
12 2001 Framework, there would be effects upon the owl. Pls.’ Mem. at 23. However, the Forest  
13 Service adequately addressed these concerns, and in doing so determined that the viability of the  
14 owl would be maintained.

15 First, as to diameter limits, the SEIS concluded that despite the fact that harvest would be  
16 allowed for 20-30" dbh trees, owl viability would be adequately protected by other standards and  
17 guidelines, which would ensure that large live trees ( $\geq 30$ " dbh) would be retained, that enough  
18 smaller size trees would be retained so as to allow recruitment for future large trees, and that old  
19 forest vegetation would re-grow in the long-term. See SNFPA 3316, 3338, 3340. The Forest  
20 Service also determined that while large trees are important to owls, the diameter limit in the  
21 2001 ROD was not a biologically-based criteria for viability.<sup>5/</sup> This led the Forest Service to  
22 recommend a more flexible standard that blended the needs of owls with other objectives such as  
23 effective vegetation management. See SNFPA 1953-54, 0264. The 2004 Framework thus  
24 addressed diameter limits and reasonably determined that owl viability would be maintained,  
25

26 <sup>5/</sup> See SNFPA 1953-54 (owl scientists “were not aware of any research indicating that 12-inch  
27 trees were specifically needed as an essential component of owl habitat.”); SNFPA 1953  
28 (concluding that after consulting with owl scientists that a 12-inch diameter limit, which the 2001  
ROD imposed for most mechanical treatments in old forest areas, “had not been based on owl  
biology.”).

1 consistent with other multiple uses. See SNFPA 3011 (finding that viability would be  
2 maintained); See *Moseley*, 80 F.3d at 1404-05.

3         Second, the Forest Service adequately considered the concerns regarding possible  
4 excessive removal of canopy cover as argued by Plaintiffs. Pls.’ Mem. at 23. The 2004  
5 Framework, does not support excessive removal, but does allow for additional removal of canopy  
6 cover. This change is due the Review Team finding of an important flaw in the 2001  
7 Framework’s assumptions about canopy cover, which relied upon a study known as *Hunsaker et*  
8 *al.* (2002).<sup>6/</sup> SNFPA 1950. The Team noted that the *Hunsaker et al.* study provided an inaccurate  
9 figure to rely upon for the purposes of identifying owl habitat sufficient to support owl  
10 populations. SNFPA 1951. (concluding that “the assessment of owl home range condition in the  
11 2001 FEIS was not consistent with the research findings upon which it was based and may not be  
12 representative of the current status of owl habitat.”).

13         Third, the SEIS acknowledges that there is “conflicting science about the effects of  
14 canopy cover reductions from fuels treatments on the California spotted owl.” SNFPA 3340. As  
15 the Forest Service explained, one study has found that concerns about proposed fuel treatments  
16 having a negative effect on spotted owls (either short term or long term) through reductions in  
17 canopy cover at the landscape scale are “not supported by their analysis or other published  
18 information.” *Id.* The SEIS also considered a recent “meta-analysis” undertaken by 16 scientists  
19 using data gathered from five owl demographic studies to assess population status and trends.  
20 SNFPA 3213.<sup>7/</sup> The SEIS acknowledges, however, that other scientific viewpoints contend that  
21 fuels treatments would have negative effects. *Id.* The thorough review of the current science on  
22

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23 <sup>6/</sup> That study reported sites that had consistently produced owl young had a median proportion of  
24 60 percent of their analysis area (1000-acre circles around the nest) in 50 percent canopy cover or  
25 greater. SNFPA 1950. The result was “interpreted in the FEIS as a habitat threshold for owl  
26 home ranges, below which pairs could not sustain themselves.” *Id.* A statement to that effect is  
found in the original owl viability analysis, which reports that owl home ranges with less than  
60% of their area in moderate to high density canopy cover would have habitat that “may be  
insufficient to support a self-sustaining population of owls” *Id.*; see SNFPA 0431.

27 <sup>7/</sup> A “meta-analysis” is an analytic tool to evaluate population status and trend over time.  
28 SNFPA 3213. Its power lies in the “ability to combine information from several studies to  
achieve greater sample size” and perhaps investigate sources of variation and potential  
correlations otherwise unavailable from a single study. SEIS\_05\_003751.

1 the owl surely satisfies NFMA. See Inland Empire Public Lands Council v. United States Forest  
2 Service, 88 F.3d 762 (9th Cir. 1996) (an “analysis that uses all the scientific data currently  
3 available is a sound one”). In sum, the SEIS addressed the criticisms levied by Plaintiffs and  
4 reasonably concluded that owl viability would be maintained. See Nevada Land Action Ass’n v.  
5 United States Forest Service, 8 F.3d 713, 717 (9th Cir. 1993) (an “agency’s interpretation of its  
6 own regulations controls unless it is plainly erroneous or inconsistent with the regulation[s]”)  
7 (internal citations and quotations omitted).

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

10 Plaintiffs further assert, like the owl, that the standards and guidelines of the 2004  
11 Framework are inadequate to maintain fisher viability. Pls.’ Mem. at 24. However, as the SEIS  
12 demonstrates the 2004 Framework specifically addresses long-term viability for the fisher--as  
13 with the owl--by reducing size and intensity of stand-replacing fires, which was “identified as a  
14 major concern” in the Science Consistency Review (“SCR”).<sup>8/</sup> SNFPA 3314; SNFPA 2997.  
15 Additionally, the ROD imposes special standards for the Southern Sierra Fisher Conservation  
16 Area (“SSFCA”), which is the only known occupied habitat in the planning area. SNFPA 3313;  
17 see SNFPA 3052 (requiring design measures to protect important habitat structures, e.g., large  
18 snags and oaks, patches of dense large trees, large trees with cavities); see also id. at 2997  
19 (concluding that “[o]ld forest habitat fragmentation will be minimized”). Outside the SSFCA,  
20 the greatest concern is the “risk of further fragmentation due to large stand replacing fire.”  
21 SNFPA 3314. Because the 2004 Framework reduces the risk of catastrophic wildfire, it will  
22 “avoid the creation of additional gaps and barriers to fisher movement and so become an  
23 important component of maintaining viability of fisher populations in the Sierra Nevada.” Id.

24  
25 <sup>8/</sup> The SCR Team consisted of eleven scientists convened by the Pacific Southwest Research  
26 Station in Davis, California, and included experts in fire and fuels management, forest ecology,  
27 and species viability. SNFPA 3503. The SCR Team reviewed the draft SEIS according to a  
28 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.

1 Thus, the 2004 ROD’s conclusion that fisher viability would be maintained was not arbitrary or  
2 capricious. See SNFPA 3011.

3 Moreover, because fishers “do not appear to inhabit” the HFQLG Pilot Project area, it  
4 would be speculative to say whether treatments within that area would increase fragmentation and  
5 create barriers to fisher movement. SNFPA 3313; see also SNFPA 986 (HFQLG FEIS at 3-109)  
6 (numerous survey efforts “failed to find . . . this species on Forest Service lands in the area  
7 between Mount Shasta and Yosemite National Park”). The SEIS speculates that even if fisher  
8 were reintroduced to the Pilot Project area, it would still take several years before habitats would  
9 become occupied. Id. Even then, the proposed DFPZs--linear features up to 1/4 mile wide--  
10 would still retain sufficient habitat elements within the range of those used by fisher for foraging  
11 and dispersal and “not likely [ ] create large barriers to further expansion and connectivity for  
12 fisher.” SNFPA 3313; see also id. at 3316 (noting that fisher can use stands of 25-40% canopy  
13 cover in some instances, and may have home ranges with 32-67% of habitat with less than 50%  
14 canopy cover). In sum, fisher viability was adequately addressed and reasonably determined to  
15 be maintained consistent with other multiple uses, including the objectives of the HFQLG Pilot  
16 Project. See Inland Empire, 88 F.3d at 760 (Forest Service’s interpretation of its own regulations  
17 on how to maintain viability receives deference); BASIN 3582.

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

21 Plaintiffs also argue that the 2004 Framework would not maintain viability for the marten.  
22 Pls.’ Mem. at 24. As with the owl and fisher, the Forest Service reasonably concluded that  
23 viability of marten would be maintained. The Forest Service analyzed forest vegetation  
24 projections and, based upon habitat associations for the species, concluded that the quantity of  
25 habitat is projected to “increase modestly” under both the 2001 and 2004 Frameworks, with  
26 greater short-term increases projected under the 2001 Framework, and greater long-term increases  
27 under the 2004 Framework. SNFPA 3326. The Forest Service determined that effects to marten  
28 habitat may be less than anticipated because they “occupy habitats at higher elevation than the

1 majority of proposed treatments.” SNFPA 3325.<sup>9/</sup> Although treatments under both the 2001 and  
2 2004 Frameworks may reduce habitat quality for marten, the resulting habitats would still be  
3 within the range of conditions of suitable habitat, so long as adequate ground cover and down  
4 logs remain onsite. Id.

5 The SEIS further assesses the viability for the marten specifically within the HFQLG pilot  
6 project area and reasonably concludes it would be maintained. The size of group selection units  
7 is “within the size range of openings used by marten, if suitable shrub and down log cover is  
8 available.” SNFPA 3329. Additionally, a network of high quality habitat for forest carnivores,  
9 such as the fisher, has been delineated, which “provide[s] connectivity to marten populations to  
10 the north and south of the [HFQLG]” area. Id. Additionally, Scientific Analysis Team (“SAT”)  
11 guidelines would be followed under the terms of the HFQLG Act. See 16 USCA § 2104 note,  
12 Sec. 401(c)(2)(a); SNFPA 3329. These guidelines establish treatment buffers around riparian  
13 areas, which are of “high importance to marten and are often used as corridors.” Id. Finally, each  
14 proposed project area is surveyed for forest carnivores (including marten) using standard  
15 protocols. Id.; see also SNFPA 3329 (HFQLG FEIS at 2-8) (for threatened, endangered, and  
16 sensitive species, the Forest Service would continue to survey “areas of suitable habitat, to  
17 protocols based on the best available science, to determine information relevant to  
18 implementation of site-specific resource management activities”). Given these and other factors,  
19 including the limited life of the Pilot Project, the SEIS reasonably concludes that the 2004  
20 Framework would maintain marten viability. Inland Empire, 88 F.3d at 762.<sup>10/</sup>

23 <sup>9/</sup> Some studies have “shown that marten will use harvested areas,” and while they “typically  
24 avoid” habitats having less than 30% canopy cover, at least one study has identified marten  
25 ranges having an “average of 20% canopy closure.” Id.

26 <sup>10/</sup> Plaintiffs have submitted to the Court a report of the Joint Science Fire Team dated August 1,  
27 2005. Pls.’ Decl. of Gregory C. Loarie, Ex. C. Because this was not available prior to the date  
28 the 2004 Framework was approved, the Agency cannot be faulted for not having considered it.  
See U.S. Dep’t of Transp. v. Pub. Citizen, 541 U.S. 752, 764 (2004) (party which did not identify  
with particularity its objections during the administrative process “forfeited” those objections);  
ONRC v. Lowe, 109 F.3d 521 (9th Cir. 1997) (report that post-dated forest plan, amendment,  
and administrative appeals would not be considered).



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

3                                   Plaintiffs argue that the Basin Project similarly fails to maintain viability of the owl,  
4                                   fisher, and marten. Pls.’ Mem. at 22-26. However, as the record demonstrates, the Forest  
5                                   Service reasonably concluded that viability for owl, fisher, and marten would be maintained by  
6                                   the Basin Project. For all three species, the Forest Service relied upon the fact that forested  
7                                   habitats affected by the project would be relatively small (only 3.6% of the project area). BASIN  
8                                   3698, 3699. Timber harvesting and road construction would not occur in owl PACs or spotted  
9                                   owl habitat areas (“SOHAs”), which constitute 7,244 acres (totaling 19% of the project area).<sup>11/</sup>  
10                                   BASIN 3698. Nor would harvest or new road construction occur in goshawk PACs, which along  
11                                   with owl PACs encompass most of the habitat used by forest carnivores such as fisher and  
12                                   marten. BASIN 3699. As such, loss, degradation and fragmentation of suitable habitat would be  
13                                   minimal, and therefore contrary to Plaintiffs assertions, implementation of the Basin Project does  
14                                   not pose a viability threat to the owl, fisher or marten.

15                                   In addition, surveys are to be conducted for owl, fisher, and marten prior to project  
16                                   implementation. SNFPA 3698, 3698-99. If any new owl territories or fisher or marten dens are  
17                                   located, the Forest Service would develop a plan that could include applying limited operating  
18                                   periods (“LOPs”),<sup>12/</sup> changing prescriptions, or excluding project activity from the harvest units.  
19                                   Id. Additionally, the Agency would determine whether activity should be delayed to prevent  
20                                   harm to the species. Id. Given these facts, the Forest Service reasonably concluded that the  
21                                   Basin Project, which is undertaken within the HFQLG pilot project, would not threaten the  
22                                   viability of the owl, fisher or marten.

23                                   Outside of owl and goshawk PACs, only 4.1% of suitable owl nesting habitat and 3.2% of  
24                                   suitable foraging habitat would be altered by timber harvest. BASIN 3698. Timber harvest

25                                   

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<sup>11/</sup> Owl PACs are circular areas around each known or suspected nest stand that encompass the  
26                                   “best available 300 acres of habitat in as compact a unit as possible.” SNFPA 3027. SOHAs are  
27                                   areas delineated in forest plans for the “purpose of providing nesting and foraging habitat for  
28                                   spotted owls.” SNFPA 986 (HFQLG FEIS at Glossary-12.)

<sup>12/</sup> 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 BASIN 3537.

1 would occur within even smaller percentages of the forest carnivore network,<sup>13/</sup> a habitat system  
2 for fisher and marten. See BASIN 3699 (only 0.1% of the 17,034 acre network is proposed for  
3 individual tree selection, and 2.4% for group selection). Additionally, some old forest structural  
4 elements would be retained in treated areas, including oaks > 21" dbh, conifers >30" dbh, and  
5 four snags per acre >15" dbh. BASIN 3698, 3699. LOPs would be imposed for project units  
6 within 1/4 mile of active owl nest sites.

7 In referencing SEIS Table 4.3.2.3g, Plaintiffs claim that the owl habitat in the HFQLG  
8 pilot project will suffer a net decrease. Pls.' Mem. at 25. This claim merits clarification of the  
9 information conveyed by Table 4.3.2.3g of the SEIS. The table projects cumulative changes in  
10 suitable owl habitat (expressed through the California Wildlife Habitat Relationship, or "CWHR"  
11 classification system) measured in acres over the course of 130 years, and compares the resulting  
12 suitable habitat of the 2001 Framework and the 2004 Framework. BASIN 1324. Contrary to  
13 Plaintiffs' contentions, the information in the table reflects a substantial overall increase in  
14 suitable habitat for the California spotted owl in the Sierra Nevada. Id; see also SNFPA 3340 ("  
15 ... over time there is an increase in acres of CWHR class 5M, 5D, and 6 due to the retention of  
16 30-inch dbh and larger trees, as well as release and growth of treated CWHR size class 4  
17 stands.").

18 Furthermore, the Basin Project should be viewed against the larger context of the  
19 programmatic analyses conducted by the 2004 SEIS, 2001 EIS, and the 1999 HFQLG FEIS. As  
20 explained *supra* at 5, 9-10, the 2004 SEIS thoroughly analyzed the effects upon viability for old  
21 forest species and reasonably concluded that its standards and guidelines would maintain viability  
22 consistent with multiple use objectives. The Basin EA expressly tiers to the 2004 SEIS, and the  
23 project was determined to be fully consistent with the 2004 Framework. See BASIN 3645, 3663,  
24 3683. The project therefore may properly rely upon the analysis in the 2001 SEIS and would also  
25 maintain viability by following the 2004 Framework standards and guidelines. See 40 C.F.R. §  
26

27 \_\_\_\_\_  
28 <sup>13/</sup> The network, 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.  
BASIN 3553.

1 1502.20); see also Portland Audubon Soc’y v. Lujan, 884 F.2d 1233, 1239 (9th Cir. 1989) (upholding  
2 EAs tiering to programmatic EIS).

3 In sum, given that the small percentage of suitable habitat that would be affected by the Basin  
4 project, as well as the projection that adequate habitat would exist in the long-term under the 2004  
5 Framework, the Agency did not act arbitrarily or capriciously in determining that either decision  
6 would maintain species viability consistent with other multiple use objectives, and thereby satisfy  
7 NFMA. See Native Ecosystems Council v. Forest Serv., 428 F.3d 1233, 1251 (9<sup>th</sup> Cir. 2005) (“NEC-  
8 Jimtown”) (“The long-term benefit of preventing stand-replacing fires, which completely destroy  
9 goshawk habitat, is preferable over any short-term benefit the goshawks might receive from retaining  
10 the dense forest structure in the project area . . . . Consequently, we uphold the agency action under  
11 the APA's arbitrary and capricious standard.”); see also Inland Empire, 88 F.3d at 762 n.10 (“We also  
12 doubt that the flammulated owl will be greatly affected by the timber sales,” where owls only  
13 required 20 acres for territory, and sales would still leave 35 acres in the smallest of three potential  
14 territories). Plaintiffs’ arguments on these points should therefore be rejected.

15 **C. Even if the 1982 Regulations Apply, Plaintiffs’ Claims that the Forest Service**  
16 **Failed to Comply with its Monitoring Duties are Without Merit**

17 Plaintiffs argue that the 2004 Framework and the Basin Project are invalid because they were  
18 adopted in the alleged absence of sufficient information about MIS and species at risk. Pls.’ Memo  
19 at 28. This argument fails for the reasons discussed below.

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

21 Plaintiffs argue that the 2004 Framework is invalid because it was allegedly adopted in the  
22 absence of sufficient information about MIS and species at risk. Pls.’ Mem. at 28-29. This argument  
23 is simply wrong, as there is no duty under NFMA or its implementing regulations to collect  
24 quantitative population monitoring data prior to the promulgation of a forest plan amendment.  
25 Plaintiffs rely upon a regulatory provision that describes what should be contained in each of the  
26 alternatives that is evaluated in a forest plan process, and which is intended to meet the goals of  
27 section 219.19(a). Section 219.19(a) states:  
28

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

7 36 C.F.R. § 219.19(a) (2000) (emphasis added). Nowhere does section 219.19(a) state that  
8 population monitoring must be conducted prior to approving the forest plan alternative, only that  
9 population trends “will be monitored and relationships to habitat changes determined.” 36 C.F.R.  
10 § 219.19(a)(6) (2000) (emphasis added). The population monitoring contemplated by subparagraph  
11 (a)(6) is designed to meet the goal of maintaining and improving habitat consistent with achieving  
12 other multiple use objectives of the alternative. See, e.g., Moseley, 80 F.3d at 1404-05.

13 The 2004 Framework attempts to balance the uncertain short-term effects upon wildlife with  
14 other resource objectives, including the use of commercial timber sales to treat hazardous fuels across  
15 the landscape so as to reduce the likelihood of catastrophic wildfire, and therefore to increase wildlife  
16 habitat in the long-term. Nothing in NFMA requires population monitoring to occur prior to the  
17 adoption of a forest plan amendment. To comply with section 219.16(a)(6) and undertake  
18 monitoring once a plan amendment has been adopted, the 2004 Framework includes an adaptive  
19 management study that is specifically designed to study population trends and habitat changes. See  
20 SNFPA 3154-3158.

21 Consequently, the absence of additional monitoring, as Plaintiffs would like to have, does not  
22 render the adoption of the 2004 Framework arbitrary and capricious under the APA. See NEC-  
23 Jimtown, 2005 WL 2931893 at \* 16.

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

26 **a. Plaintiffs’ Challenges Based Upon MIS Not Identified in the**  
27 **Plumas Forest Plan are not Ripe**

28 Plaintiffs bring challenges of failure to monitor MIS and species-at-risk that are listed in  
Appendix E of the 2001 Framework EIS. Pls.’ Mem. at 29. 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

1 MIS species for any particular project, the Court must first look to the original Plumas forest plan.  
2 The Plumas Forest Plan lists fifteen species and species groups as MIS: bald eagle, golden eagle,  
3 goshawk, peregrine falcon, prairie falcon, spotted owl, Canada goose, woodpecker group, deer group,  
4 gray squirrel, marten, trout group, largemouth bass, sensitive plant group, and willow-alder  
5 community. BASIN 2917 (LRMP at 3-40).

6 Plaintiffs' argument that the Basin Project must address population inventory data for all the  
7 species listed in Appendix E of the 2001 Framework is based upon a mistaken premise that the 2001  
8 Framework expanded the list of MIS for the Plumas NF. In actuality, none of the subsequent forest  
9 plan amendments--the HFQLG ROD, the 2001 Framework, or the 2004 Framework--expanded the  
10 list of MIS species found in the original Plumas Forest Plan. First, while the HFQLG ROD amended  
11 the wildlife management direction, it did not add any new MIS. See BASIN 1410-11 (describing  
12 changes in management direction for wildlife).

13 Second, the 2001 Framework did not expand the list of MIS identified by the Plumas forest  
14 plan. See Pls.' Mem. at 31. The 2001 EIS analyzed the effects upon MIS for all eleven national  
15 forests on a region wide scale. However, nothing in the 2001 Framework indicates that just because  
16 it analyzed data or included monitoring on a region wide scale, that it was also expanding the list of  
17 MIS for each particular national forest.

18 The 2004 Framework also does not expand upon the list of MIS in the original forest plans.  
19 As the SEIS explained, the "MIS are identified in the Land and Resource Management Plans of *each*  
20 *national forest . . .*" SNFPA 3238. As with the 2001 Framework, the SEIS for the 2004 Framework  
21 analyzed effects to MIS by compiling the lists from each forest. See id. ("In order to evaluate the  
22 effects of the proposed alternatives on MIS, the MIS list from each affected forest was reviewed to  
23 develop the list of species to be addressed."). This was done in order to conduct a consistent analysis  
24 across the entire bioregion. See id. (describing how the "current lists of MIS in individual forest  
25 plans vary from forest to forest" in terms of habitat representation and other factors across the Sierra).  
26 As with the 2001 Framework, the 2004 Framework did not purport to expand the list of MIS for each  
27 of those individual forest plans. See SEIS \_05\_001973 to 002146 (forest plan lists). Thus, the Basin  
28 Project has no duty to obtain or consider population monitoring data for the MIS that are not found

1 in the Plumas forest plan. See Forest Guardians v. U.S. F.S., 329 F.3d 1089, 1098 (9th Cir. 2003)  
2 (courts must defer to the Forest Service’s reasonable interpretation of its own forest plan ); Native  
3 Ecosystems Council v. Dombeck, 304 F.3d 886, 900 (9th Cir. 2002) (deferring to Forest Service’s  
4 “particular expertise in interpreting its own Forest Plan” ).

5 Because any duty to have population inventory data only extends to those MIS in the Plumas  
6 forest plan, Plaintiffs’ challenge to the 2004 Framework on the basis of species not found in the  
7 individual plan is not ripe. Supreme Court and Ninth Circuit case law makes clear that in order for  
8 a challenge to a forest plan to be ripe, there must be some causal dependency of an actual on-the-  
9 ground project upon the forest plan standard actually being challenged. Ohio Forestry Ass’n v.  
10 Sierra Club, 523 U.S. 726 (1998); Neighbors of Cuddy Mountain v. Alexander, 303 F.3d 1059,  
11 1067(9th Cir. 2002) (“[N]ot all forest-wide practices [such as monitoring] may be challenged on the  
12 coattails of a site specific action; there must be a relationship between the lawfulness of the site-  
13 specific action and the practice challenged.”).

14 Here, the challenges to the Basin Project must fail, as there is no duty for the Basin Project  
15 to obtain monitoring information for the species not identified in the Plumas forest plan. Similarly,  
16 the challenges to the 2004 Framework must also fail, as the species not identified in the Plumas forest  
17 plan do not “play[] a causal role” in the Basin Project. Ohio Forestry, 523 U.S. at 734 (“Any such  
18 later challenge might also include a challenge to the lawfulness of the present Plan if (but only if) the  
19 present Plan then matters, i.e., *if the Plan plays a causal role* with respect to the future,  
20 then-imminent, harm from logging.”).

21 **b. The Basin Project and the 2004 Framework Satisfy Any**  
22 **Requirements for Population Inventory Information for the**  
23 **Species Identified in the Plumas Forest Plan**

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

27 Plaintiffs argue that the 2004 Framework has adopted annual monitoring requirements for  
28 numerous species that are listed in Appendix E to the 2001 Framework. Pls.’ Memo. at 29-30.  
In support of their contention, Plaintiffs heavily rely upon Sierra Club v. Eubanks, 335 F. Supp. 2d  
1070 (E.D. Cal. 2004). See Pls.’ Mem. at 29. Indeed, in Eubanks, the Court, in deciding a motion

1 for a preliminary injunction, found that the 2001 Framework required population monitoring for MIS.  
2 Eubanks, 335 F. Supp. 2d at 1081. Recently, however, this Court again considered the population  
3 monitoring plan of the 2001 Framework, as it was adopted by the 2004 Framework. Earth Island Inst.  
4 v. U.S. Forest Serv., No. Civ. S 05-1608 MCE PAN (E.D. Cal. Aug. 25, 2005) (attached as Fed.  
5 Defs.’ Ex. A). The Court found that the level of monitoring contemplated for the species listed in  
6 Appendix E varied according to the vulnerability of the species. Id. at 11. As this Court recognized  
7 in Earth Island, the Framework provides the Forest Service with flexibility for meeting the  
8 monitoring plan according to the species that have been identified as priorities. Id.

9 In addition, Plaintiffs’ argument misconstrues the requirements of the 2004 Framework. The  
10 2001 Framework included monitoring plans for species associated with old forests and other  
11 ecosystems. See SNFPA 957 (2001 FEIS Vol. 4, Appx. E-47 to E-106). The 2004 Framework  
12 adopted the monitoring plan, but it also changed the priorities for what monitoring would occur. See  
13 SNFPA 3060 (directing the reader to “Chapter 2 of the Final SEIS for the focus of and priorities for  
14 monitoring . . .”). The SEIS recognized that while Appendix E provided a comprehensive *strategy*  
15 for conducting monitoring to address scientific uncertainties, “[n]ot everything can be addressed at  
16 once.” SNFPA 3143. The FEIS identified priorities; it did not establish any specific monitoring  
17 plan. Id.; see also SNFPA 3140 (SEIS identified priority questions that “represent the issues deemed  
18 most pressing at this time . . .”); SNFPA 3145-48 (priorities for old forest ecosystem monitoring  
19 included owl and fisher). As for other monitoring issues not deemed to be priorities, the SEIS  
20 acknowledges that they may be addressed at a future date. See SNFPA 3145 (“Certainly, many other  
21 issues will deserve investigation at some future date but the following discussion identifies those  
22 issues that require immediate attention.”). The establishment of priorities identifying the desire to  
23 collect population trend data or the expectation to do so, is not an enforceable requirement. See  
24 Norton v. S. Utah Wilderness Alliance, 542 U.S. 55,72 (2004) (“We therefore hold that the Henry  
25 Mountain’s [land use] plan’s statements to the effect that the BLM will conduct ‘use supervision and  
26 monitoring’ in designated areas - like the other ‘will do’ projections of agency action set forth in land  
27 use plans - are not a legally binding commitment enforceable under [5 U.S.C.] §706(1).”).

1                                   **(2) The Basin Project’s Reliance Upon Habitat Analysis Is a**  
2                                   **Sound Methodology That Satisfies the Monitoring**  
3                                   **Requirements**

4           Plaintiffs’ argument that the Forest Service may not rely upon habitat to satisfy any duties  
5 regarding population monitoring is a misguided view of the case law. Pls.’ Memo. at 33. The Ninth  
6 Circuit, when faced with the issue of determining “what type of population viability analysis the  
7 Service must perform in order to comply with [36 C.F.R. §] 219.19,” expressly rejected the  
8 “argument that the Service must assess population viability in terms of actual population size,  
9 population trends, or the population dynamics of other species.” Inland Empire, 88 F.3d at 759, 761  
10 n.8. While such analyses are encouraged, they “*are not required*.” Id. at 761 n.8 (emphasis added).  
11 In Idaho Sporting Congress v. Thomas, 137 F.3d 1146 (9th Cir. 1998), plaintiffs argued, as they do  
12 here, that the Forest Service violated NFMA by failing to monitor MIS population trends. Id. at  
13 1153. The court held that it was not arbitrary or capricious for the Forest Service to use habitat as  
14 the method for fulfilling the regulatory requirement for population monitoring. Id. at 1154; see also  
15 Neighbors of Cuddy Mountain v. U.S. Forest Serv., 137 F.3d 1372, 1380 (9th Cir. 1998) (NFMA’s  
16 objectives of maintaining habitat for MIS “can be accomplished by either monitoring population  
17 trends or by evaluating suitable habitat”).

18           Plaintiffs’ reference to Idaho Sporting Congress, Inc. v. Rittenhouse, 305 F.3d 957 (9th Cir.  
19 2002) does not support their argument. In that case, the court did not invalidate the habitat  
20 approach; it found “that under the facts of this case, the Forest Service’s use of habitat as a proxy for  
21 population monitoring of the [MIS] was arbitrary and capricious.” Rittenhouse, 305 F.3d at 972-973.  
22 Specifically, the court found that “the Forest Service’s methodology for dedicating old growth is so  
23 inaccurate that it turns out there is not old growth at all in [the designated area].” Id. Thus, the court  
24 did not invalidate the habitat approach approved in Inland Empire; it merely concluded based upon  
25 the facts before it that the Forest Service had done a poor job of data gathering and analysis.

26           Furthermore, Plaintiffs have not demonstrated that the habitat approach used for any one  
27 species here is arbitrary, and, in fact, the Basin EA considered effects upon the habitat of all fifteen  
28 MIS identified in the Plumas Forest Plan. See BASIN 3700-3703, 3525. The approach the Forest  
Service used for each species is sound, reasoned and complies with NFMA. For example, the fisher



1 is not an MIS in the Plumas plan, and in-depth monitoring of the fisher is not required in the Basin  
2 Project EA. See BASIN 2917 (LRMP at 3-40). Fishers “do not appear to inhabit” the Pilot Project  
3 area. SNFPA 4025.<sup>14/</sup> Because there is no evidence that the fisher inhabits the Basin Project area,  
4 the absence of additional population information does not render the Basin Project decision arbitrary  
5 or capricious. See Colorado Env'tl. Coalition v. Dombeck, 185 F.3d 1162, 1170 (10th Cir. 1999)  
6 (population inventory requirement not applicable where the Agency “logically did not select the rare  
7 and elusive lynx as a [MIS]” and there was no evidence of species population in the affected area);  
8 Inland Empire, 88 F.3d at 763 n.12 (no duty to count individual members of the “smaller, more  
9 reclusive species”).

10 For marten, Forest Service has relied on habitat analyses from the scientific literature that  
11 describes that species as occurring generally in higher elevation (> 6500'), mature and old-growth  
12 forests, utilizing large snags and large downed woody material for protection from predators, sources  
13 of prey, access to spaces below snow, and protective environments. See SNFPA 957 (2001 FEIS at  
14 E-55, 56) (citing Buskirik and Powell 1994, Ruggiero et al. 1994, and Spencer et al. 1983). The  
15 marten also selects habitats for foraging that are close to meadows and riparian areas. Id. at E-56.  
16 Such an approach was reasonable under NFMA. See Inland Empire, 88 F.3d at 761-62 (failure to  
17 conduct more intensive analysis for two trout species was “understandable, as neither species would  
18 be affected by the timber sales”).

19 For several other species (golden eagle, mule deer, and hairy woodpecker), the Forest Service  
20 adequately analyzed potential effects to these species and their habitat in the Basin EA and biological  
21 assessment/biological evaluation (“BA/BE”) and found them to be minimal.<sup>15/</sup> See BASIN 3701,  
22 3702, 3596-98. Additionally, habitat assessments in the HFQLG FEIS had already indicated that  
23 implementation of the Pilot Project would actually increase the habitat for those species. See

24 \_\_\_\_\_  
25 <sup>14/</sup> While there have been “[n]umerous survey efforts” to detect the fisher in the Pilot Project  
26 area, such efforts have “failed to find . . . this species on Forest Service lands in the area between  
27 Mount Shasta and Yosemite National Park.” SNFPA 986 (HFQLG FEIS at 3-109) (emphasis  
28 added); SNFPA 957 (2001 EIS at E-52) (fishers are “absent north of Yosemite National Park”);  
cf. BASIN 2917 (LRMP at 3-40) (noting that some species were eliminated from consideration as  
MIS because “their distribution in the [Plumas National Forest] is very limited or unknown”).

<sup>15/</sup> The Basin EA incorporates the BA/BE by reference. See BASIN 3691.

1 SNFPA 986 (HFQLG FEIS at 3-98, 3-99) (indicating 9%, 10% , and 7% increases in habitat within  
2 the Pilot Project area from group selection for golden eagle, deer, and hairy woodpecker,  
3 respectively).<sup>16/</sup>

4 Survey data were also collected for owls as part of the Plumas-Lassen Administrative Study.  
5 See BASIN 4577-4593.<sup>17/</sup> The data was “thoroughly reviewed with rigorous standards for protocol  
6 compliance and data quality.” BASIN 4577. Survey data were also collected for northern goshawk  
7 within the Basin project area. These data were collected according to an “intensive protocol” that  
8 detected seven active nests based upon systematic surveying, incidental observations, and follow-  
9 up stand searches. See BASIN 4174, 4179-87. In addition to survey data, other observance records  
10 for the willow flycatcher, pileated woodpecker, Swainson’s thrush, northern goshawk, and other  
11 species were also considered. See BASIN 4576, 4185-86.

12 As a whole, the data considered for all of the above-mentioned species, combined with the  
13 information about habitat associations from the scientific literature, are sufficient to satisfy any duties  
14 to monitor population trends. See, e.g., Earth Island Inst., Fed. Defs.’ Ex. A at 11-12 (plaintiffs had  
15 not demonstrated probability of success on claim that breeding bird survey data failed to satisfy  
16 NFMA monitoring duties); Forest Conservation Council v. Jacobs, 374 F. Supp. 2d 1187, 1207 (N.D.  
17 Ga. 2005). Given that the 2004 Framework is estimated to result in long-term increases in habitat  
18 for many species, it cannot be said that the Basin Project’s reliance on the 2004 Framework violated  
19 NFMA. See NEC-Jimtown, 428 F.3d 1233 at 1251.

20 Finally, there is not any duty to monitor “species-at-risk” prior to approving the Basin Project.  
21 See Pls.’ Mem. at 32. The category of “species-at-risk” is created neither by NFMA nor the 1982  
22 regulations. Rather, it was a concept created in the 2000 planning regulations, which were never

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23 <sup>16/</sup> The Basin EA is tiered to the HFQLG EIS. See BASIN 3683, 3700.

24 <sup>17/</sup> The Basin Project must be viewed in light of the consideration of actual population data for  
25 some of the species in the 2004 FSEIS. For example, for two of the species (deer and hairy  
26 woodpecker), actual population data had already been considered in the SEIS for the 2004  
27 Framework. Those data came from the California Department of Fish and Game (for deer) and  
28 breeding bird survey (“BBS”) routes (for hairy woodpecker, pileated woodpecker, and other  
birds). See SNFPA 3242; see also SEIS 05\_006588 to 006643 (assessment of mule and black-  
tailed deer habitats and populations); SEIS\_05\_006159 to 006285 (analysis of breeding bird  
survey data).

1 fully implemented. See 67 Fed. Reg. 35431 (May 20, 2002) (extending deadline for mandatory  
2 compliance with the 2000 regulations until new regulations were promulgated). The 2000 regulations  
3 abandoned the concept of MIS and replaced it with two other management categories, focal species  
4 and species-at-risk. See 65 Fed. Reg. 67568, 67546 (Nov. 9, 2000); see also SNFPA 957 (FEIS Vol.  
5 4 at Appx. E-16) (noting that in the 2000 planning regulations, “MIS are replaced by focal species  
6 (i.e., indicators) and species-at-risk for assessment and monitoring”). The 2000 regulations, however,  
7 have been repealed, and the revised planning regulation does not include either MIS or the other two  
8 management categories. 70 Fed. Reg. 1023, 1048 (Jan. 5, 2005) (final rule does not retain MIS or  
9 focal species, and it “changed the terms used” for the category of species-at-risk); Id. at  
10 1048(repealing 2000 regulations). Because there is no duty either under the 1982 regulations or the  
11 current 2005 regulations to consider population information for species-at-risk, Plaintiffs’ arguments  
12 for those species fail as well.

## 13 **II. THE 2004 FRAMEWORK COMPLIES WITH NEPA**

14 Plaintiffs argue that the SEIS for the 2004 Framework violates NEPA because it allegedly  
15 did not address opposing scientific viewpoints, short-term impacts of logging or cumulative impacts  
16 of logging, from the Giant Sequoia National Monument (“GSNM”) Management Plan. Pls.’ Mem.  
17 at 34. As explained below, the 2004 SEIS adequately discusses scientific uncertainty and opposing  
18 scientific views. The SEIS also took a “hard-look” at short-term impacts of logging on wildlife  
19 species, and the cumulative effects analysis of the GSNM Plan was reasonable. Finally, the 2004  
20 SEIS analyzed a reasonable range of alternatives. Plaintiffs’ arguments must be rejected.

### 21 **A. The SEIS Adequately Considered Opposing Scientific Viewpoints.**

22 Plaintiffs’ argument that the Forest Service violated NEPA for failure to analyze opposing  
23 scientific viewpoints in the SEIS is without merit. The Forest Service disclosed and responded to  
24 scientific controversy and uncertainty regarding the 2004 Framework in the SEIS, in the response to  
25 public comments, in the SCR, and in the ROD. Pls.’ Mem. at 35.

26 The existence of uncertainty and scientific controversy does not prevent the Forest Service  
27 from choosing a certain course of action. Indeed, as courts have recognized, “disagreement among  
28 the experts is inevitable when the issues are at the ‘very frontiers of scientific knowledge,’ and such

1 disagreement does not preclude [courts] from finding that the [government's] decisions are  
2 adequately supported by evidence in the record.” *Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130,  
3 1160 (D.C. Cir.), cert. denied, *St. Joe Minerals v. EPA*, 449 U.S. 1042 (1980); see also *California*  
4 *v. Watt*, 712 F.2d 584, 602 (D.C. Cir. 1983) (Secretary, in predicting future oil prices, was “free to  
5 use his expertise to accept the one percent growth rate which the study [he relied upon stated] was  
6 within the realm of possibility,” although that study predicted a 3% rate was most likely).

7 The 2004 Framework adequately addressed opposing scientific views. First, scientific  
8 uncertainty regarding the owl, fisher, and marten are discussed throughout the SEIS. See SNFPA  
9 3143-3148; 3212 (uncertainty about marten distribution); see also SNFPA 3145 (acknowledging the  
10 “relatively little information” about key habitat elements for fisher). The SEIS also recognized  
11 scientific controversy regarding these species. See SNFPA 3340 (“There is conflicting science about  
12 the effects of canopy cover reductions from fuels treatments on the California spotted owl.”); SNFPA  
13 3144. As evidence of the candor with which conflicting science was disclosed, the SEIS cites to  
14 articles that fuels treatments may have negative effects on owls. See SNFPA 3340 (citing Lee &  
15 Irwin (in review, 2003)); SNFPA 3342 (citing Blakesley & Noon, 1999 for the notion that certain  
16 activities “would increase uncertainties associated with successful dispersal and mate finding”).  
17 Indeed, scientific uncertainty is disclosed throughout the SEIS with specific literature references.<sup>18/</sup>

18 In addition to disclosing opposing science through citations in the SEIS, the Forest Service  
19 also addressed scientific controversy in the response to public comments. See SNFPA 3600-3623.

20 For instance, the Forest Service responded to comments that the “SEIS does not provide adequate  
21 protection of spotted owl and goshawk nests” and “[d]ue to scientific uncertainty in population  
22 trends, the SEIS should exercise caution in spotted owl management efforts.” SNFPA 3606.

23 Scientific uncertainty was also addressed in the SCR, including analysis of whether: (1)  
24 applicable and available scientific information had been considered; (2) scientific information was  
25 interpreted reasonably and accurately; (3) uncertainties associated with the scientific information  
26

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27 <sup>18/</sup> See, e.g., SNFPA 3313, SNFPA 3314, SNFPA 3316 (including literature citations for fisher);  
28 SNFPA 3337 (citing Self and Kerns, 2001, Kucera, 2000, Spencer 1981, SNFPA 3325,) for the  
marten); SNFPA 3337, 3340, 3342 (citations for the owl).

1 were acknowledged; and (4) risks and uncertainties were identified and documented. SNFPA 3504,  
2 3256; see also SNFPA 2356, 3503-24 (explaining how SEIS was improved based upon SCR).

3 In addition to disclosing scientific uncertainty through the SEIS, response to comments, and  
4 SCR, the Forest Service also acknowledged such uncertainty in the 2004 Record of Decision  
5 (“ROD”) for the 2004 Framework. SNFPA 3002 (explaining that SCR was used to improve the  
6 SEIS and “acknowledge scientific uncertainty and differing points of view”). Regarding the fisher,  
7 the ROD states that an important change between the draft and final SEIS is to reinstate the desired  
8 conditions for the Southern Sierra Fischer Conservation Area. See SNFPA 2997-2998 (“ . . .  
9 [B]ecause there is some uncertainty about the habitat need of the fisher . . . I am recommending the  
10 continuation of existing status and change monitoring and the competition of a number of research  
11 studies currently under way”). The ROD, therefore, shows the decisionmaker’s awareness of the  
12 scientific controversy related to the decision.

13 Plaintiffs wrongly rely upon a post-decisional report on fisher, to support their challenges to  
14 the SEIS. Pls.’ Mem. at 38. Citation to that document provides no support for Plaintiffs’ claims,  
15 because they were not presented to the Agency prior to January 2004, the time of the 2004 decision.  
16 With several limited exceptions, none of which Plaintiffs have invoked, such post-decisional  
17 information cannot be considered in evaluating whether an agency acted arbitrarily based on the  
18 information before the agency at the time of its decision. *Southwest Ctr for Biological Diversity v.*  
19 *U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996).<sup>19/</sup> For this reason alone, Plaintiffs’ challenges  
20 to the adequacy by which the SEIS evaluated scientific controversy fail.

21 In sum, the Forest Service adequately considered and addressed contradictory opinions in the  
22 SEIS, through its acknowledgment of scientific controversy and uncertainty (including references  
23 to the literature) in the SEIS, SCR, and ROD. Because the SEIS adequately disclosed and addressed  
24 the scientific viewpoints, the Forest Service’s decision deserves deference, and Plaintiffs’ arguments  
25 must be rejected. See *California v. Block*, 690 F.2d 753, 773 (9th Cir. 1982) (an agency “is under  
26 no obligation to conduct new studies in response to issues raised in the comments, nor is it duty-

27 <sup>19/</sup> Plaintiffs citation to *Nat’l Audubon Soc’y v. U.S. Forest Serv.*, 46 F.3d 1437, 1447-48 (9th  
28 Cir. 1993) is inapposite, because it did not find that a NEPA document can be successfully  
attacked based on post-decisional information. Pls.’ Mem. at 38 n.9.

1 bound to resolve conflicts raised by opposing viewpoints”); see also *Earth Island Inst. v. U.S. Forest*  
2 *Serv.*, 351 F.3d 1291, 1301 (9th Cir. 2003) (“[An] agency is entitled to wide discretion in assessing  
3 the scientific evidence, so long as it takes a hard look at the issues and responds to reasonable  
4 opposing viewpoints.”).

5 **B. The SEIS Took a Hard Look at Short-term Impacts to Wildlife Species**

6 The Forest Service took a hard look at potential effects, including short-term impacts, on  
7 wildlife species such as the owl, fisher, and marten. Contrary to Plaintiffs’ contentions (Pls.’ Mem.  
8 at 37), the SEIS addresses short term impacts. See SNFPA 3327, 3337 (“With regard to owl  
9 population persistence, the short-term effects of management activities are believed to be most  
10 relevant . . . and are highlighted in this effects analysis.”), 3339-3345. A comparative analysis was  
11 conducted on late-seral stage forest in the short-term, including years 0 through 20. SNFPA 3326-  
12 3327.<sup>20/</sup> The SEIS concludes with respect to canopy cover and fragmentation of owl habitat that “the  
13 overall increase of suitable habitat predicted for both Alternative S1 and S2 by year 20 of treatment,  
14 and the overall habitat increase over time (Year 50 and year 130, Table 4.3.2.3e), indicated that  
15 treatment prescriptions for both Alternatives S1 and S2 would contribute to increasing amounts of  
16 suitable habitat.” SNFPA 3344. Recognizing that species like the owl benefit from canopy cover,  
17 big trees and stand structure, the decision maintains or increases all of these parameters. SNFPA  
18 2996; SNFPA 3602 (noting that amount of old forest is projected to increase across the bioregion in  
19 the short term, “despite treatments in approximately 14% of old forest emphasis areas.”); SNFPA  
20 3615-3616 (noting that trees less than 24 inches in dbh are expected to increase due to re-growth and  
21 untreated areas).

22 Evidence that the Forest Service took a hard look at the impacts to the California spotted owl  
23 is well-documented in the record. As evidenced by the Forest Service’s response to comments by  
24 the SRC team (SNFPA 2578-2589), the Forest Service fine-tuned its analysis and discussion of the  
25 California spotted owl in the SEIS. See SNFPA 2590-2601. Specifically, the Forest Service stated  
26 that “[m]ore emphases and discussion on short-term effects and associated risk [to the California

27 <sup>20/</sup> Figure 4.3.2.2a shows projected region-wide acreage of late seral habitat (CWHR 5M, 5D, 6).  
28 SNFPA 3327. This habitat is considered “highest quality marten foraging and reproductive  
habitat,” and is also suitable habitat for owl nesting and foraging. SNFPA 3326, 3337.

1 spotted owl] was added to the SEIS and is considered in the Adaptive Management process.”  
2 SNFPA at 2601.<sup>21/</sup> Furthermore, the United States Fish and Wildlife Service (“FWS”) concluded  
3 from an analysis conducted by both FWS and the Forest Service that “there was no clear statistical  
4 evidence to show that the [California spotted] owl was decreasing across its range.” SNFPA 3995.  
5 Based on 2004 SEIS and the biological evaluation (SNFPA 2658-2664), the Forest Service openly  
6 concluded that for the California spotted owl the determination was that the 2004 SNFPA decision  
7 “may affect individuals, but not likely to trend toward Federal listing.” SNFPA at 3946. It is clear  
8 that the Forest Service took a “hard look” at the available data and opposing opinions and provided  
9 a reasoned discussion of the effects on the California spotted owl.<sup>22/</sup>

10 Similarly, the Forest Service adequately analyzed short-term impacts to the fisher as  
11 summarized in the section entitled “Habitat Conditions in the Short-Term and Long-Term.” SNFPA  
12 3314. The Forest Service determined that short-term impacts on snag levels, down wood debris, and  
13 fisher prey would not be significantly different between Alternative S1 and Alternative S2. SNFPA  
14 3318-3319. In analyzing the short-term effects from reduced canopy closure, the Forest Service  
15 found that the proposed thinning of the canopy “should not limit connectivity between stands of  
16 higher canopy cover, denning-quality habitat, because proposed treatment would only affect  
17 approximately 25-30% of the forested area.” SNFPA 3317. As the record demonstrates, the Forest  
18 Service took the requisite “hard look” at the short-term effects to the fisher.

19 The simple fact that because Plaintiffs may disagree with the Forest Service’s assessment of  
20 the impacts does not allow the court to “substitute its judgement for that of the agency as to the  
21 environmental consequences of its actions.” Kleppe v. Sierra Club, 427 U.S. 390, 410 n.21 (1976).  
22 The SEIS’ analysis of effects to other wildlife species is adequate under NEPA.

23 <sup>21/</sup> Chapter 2 of the SEIS discusses application of adaptive management, was expanded from the  
24 discussion in the DEIS, and addresses short-term impacts and associated risks to the California  
spotted owl. SNFPA 3134, 3144-46, 3151-52, 3155-56.

25 <sup>22/</sup> Seattle Audubon Soc’y v. Lyons, 871 F.Supp 1291, 1321 (W.D. Wash., 1994) (The agency  
26 having engaged in numerous studies and analyses on the owl satisfied NEPA’s requirement to  
27 take a “hard look” at available data.); see also Village of False Pass v. Clark 733 F.2d 605, 614  
28 (C.A. Alaska 1984) (quoting Sierra Club v. Sigler, 695 F.2d 957, 963 (5<sup>th</sup> Cir. 1983) "the  
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.").

1           **C.     The Forest Service Complied with NEPA and Analyzed the Cumulative Impacts**  
2           **of the 2004 Framework With the GSNM Management Plan.**

3           Plaintiffs allege that the Forest Service failed to analyze the cumulative impacts of old forest  
4 species, particularly the fisher, of logging under the 2004 Framework and logging under the GSNM  
5 management plan. Pls.’ Mem. at 39. For the reasons set forth in Federal Defendants’ Summary  
6 Judgment Brief, and summarized here, this claim must fail.

7           First, courts grant considerable deference to an agency’s determination of the proper scope  
8 of a NEPA analysis, including the scope of its cumulative effects review. Kleppe, 427 U.S. at 414;  
9 Native Ecosystems Council v. Dombeck, 304 F.3d at 893-894; Neighbors, 303 F.3d at 1071. In this  
10 case, the Forest Service reasonably tailored its cumulative effects analysis of the GSNM  
11 management plan and the 2004 Framework to issues relating to wildfires. SNFPA 3321-3322. The  
12 SEIS discusses the cumulative effects of treatment designs of the GSNM Management Plan to  
13 reduce risk of stand replacing fires. SNFPA 3322 (*i.e.* “hardwood density in conifer stand may  
14 increase due to the opened stand conditions after prescribed burning and/or thinning;” and “the  
15 amount and/or vigor of young trees less than 30 years old will increase as existing patches are thinned  
16 out while being protected from excessive mortality from fire”). Cumulative effects of the green tree  
17 harvest is also projected, including the GSNM, with the use of models. SNFPA 3389. See also  
18 SNFPA 3472 (discussing the modeling assumptions for acres of treatment applicable to the GSNM).

19           Plaintiffs further claim that the SEIS does not contain a “quantified or detailed assessment”  
20 of the impacts of the cumulative impacts of logging from implementation the GSNM management  
21 plan. Pls.’ Mem. at 40. However, NEPA does not require what Plaintiffs are requesting. Plaintiffs  
22 cite to Klamath-Siskiyou Wildlands Ctr. v. BLM, 387 F.3d 989 (9<sup>th</sup> Cir. 2004), which concerns  
23 NEPA documentation of a site-specific timber sale. This case law is inapposite. Because the 2004  
24 Framework is a management plan absent site-specific project proposals, the Forest Service is not  
25 required to quantify or detail the environmental impacts of on-the-ground logging projects yet to be  
26 proposed. Ohio Forestry, 523 U.S. at 729-33. In addition, NEPA does not require an agency to  
27 “quantify every risk.” Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346, 1359-60 (9<sup>th</sup>  
28 Cir. 1994).



1 Finally, the Forest Service also reasonably limited its analysis to the information accessible  
2 at the time it conducted the 2004 Framework SEIS. The GSNM Plan was not selected until  
3 December 2003, after the 2004 Framework SEIS was written. See SNFPA 3322 (“The final  
4 environmental impact statement for the GSNM Management Plan will be available in 2003.”).  
5 Nevertheless, the Agency reasonably considered what could be considered in evaluating cumulative  
6 impacts of the 2004 Framework with the GSNM Management Plan. Specifically, the SEIS states that  
7 for the purposes of estimating cumulative effects, “future management of the GSNM was modeled  
8 using a modification of Alternative 6 of the draft GSNM FEIS, ...” SNFPA 3323. Here, the Forest  
9 Service took a “hard look” at the available information, meeting the requirements of NEPA. See  
10 Lyons, 871 F.Supp. at 1321; see also Village of False Pass, 733 F.2d at 614 (quoting Sigler, 695 F.2d  
11 at 963). Here, there is no doubt that the Forest Service reasonably considered cumulative impacts.

#### 12 **D. The SEIS Considered a Broad, Legally Sufficient Range of Alternatives**

13 Plaintiffs further allege that the 2004 SEIS fails to evaluate a “full range of alternatives, and  
14 those alternatives that are described do not receive comparable treatment.” Pls.’ Mem. at 40.  
15 However, a review of the SEIS makes clear that the range of alternatives satisfied NEPA.

##### 16 **1. The SEIS’s Range of Alternatives Meets the SEIS’s Purpose and** 17 **Need**

18 The range of alternatives under NEPA is determined by the purpose and need. See, e.g.,  
19 Westlands Water Dist.v. U.S. Dep’t of the Interior, 376 F.3d 853, 865-66 (9th Cir. 2004). Here, the  
20 needs and goals underlying the 2001 EIS are the foundation for the 2004 SEIS.<sup>23/</sup> As a result, the  
21 2004 Framework reexamined alternatives from 2001 (represented in the SEIS as F2-F8). SNFPA  
22 3583.

23 The Forest Service also generated a new alternative (S2) based on new information,  
24 experience from implementing the 2001 ROD, and extensive review of management options. These

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25  
26 <sup>23/</sup> See SNFPA 2993 (2004 ROD “retains the overall goals of the SNFPA 2001 ROD,”  
27 including overall strategy for addressing the fire situation “in combination with key components  
28 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.”).

1 alternatives covered a wide range of management strategies--some emphasizing more passive  
2 management (F2, F5, F8), and others taking a more active approach (F4, F6, F7). See SNFPA 3170  
3 (Table 2.5.3a). Together, the nine alternatives analyzed in detail responded to the SEIS's purpose  
4 of addressing the five problem areas and remedying them more effectively than the 2001 Framework.  
5 Because the range of alternatives met the purpose and need, it therefore complied with NEPA.

6 **2. Alternatives F2-F8 Were Properly Within the 2004 SEIS's Range of**  
7 **Alternatives and Were Adequately Analyzed**

8 Plaintiffs argue that the Forest Service's inclusion of alternatives F2-F8 in the 2004 SEIS's  
9 range of alternatives was inappropriate because F2-F8 were based on a different purpose and need.  
10 Pls.' Mem. at 41-42. This is incorrect for two reasons. First, the inclusion of alternatives F2-F8 must  
11 be viewed in the proper context--the SEIS being a *supplement* to an existing EIS. Given that the  
12 SEIS's purpose was to revise the 2001 Framework rather than begin anew, it was reasonable for the  
13 SEIS to analyze the original alternatives from 2001. SNFPA 3098, 2993, 3097, 3577, 4012-14.

14 Second, the fact that alternatives F2-F8 would not achieve certain aspects of the purpose and  
15 need as well as S2 does not make it arbitrary or capricious to have considered F2-F8. An EIS's range  
16 of alternatives complies with NEPA even if some of the alternatives would not fully meet the purpose  
17 and need. See Carmel-by-the-Sea v. U.S. Dept. Of Trans., 123 F.3d 1142, 1159 (9th Cir. 1997)  
18 (upholding range of alternatives even though only two of ten considered in detail met the project's  
19 need). Because F2-F8 cover a broad range of solutions to the five problem areas, they were  
20 reasonably included under NEPA. See id.

21 Plaintiffs' argument that even if alternatives F2-F8 were within the range of reasonable  
22 alternatives, they were not given sufficient treatment in the SEIS, is without merit. See Pls.' Mem.  
23 at 41. While alternatives F2-F8 were not discussed in the SEIS in the exact manner as alternatives  
24 S1 and S2, the record shows that alternatives F2-F8 were "rigorously explore[d] and objectively  
25 evaluate[d]" as required by NEPA. 40 C.F.R. § 1502.14(a). Plaintiffs' argument that only two  
26 alternatives were considered in detail is incorrect. Pls.' Mem. at 40-41; see SNFPA 3078, 3115,  
27 3160-62, 957 (2001 EIS, 83-164, 185-202); 3166-78. Alternatives F2-F8 had already been analyzed  
28 extensively in the 2001 EIS. Rather than repeat that analysis, the SEIS cited the 2001 EIS and

1 included new analysis of F2-F8 where necessary.<sup>24/</sup> Such an approach is adequate and indeed  
2 encouraged by NEPA. See 40 C.F.R. §§ 1500.4, 1502.21 (encouraging incorporation by reference);  
3 Sierra Club v. Clark, 774 F.2d 1406, 1411 (9th Cir. 1985) (“By specifically referring to prior BLM  
4 studies and supporting materials, the FEIS fulfilled its informational purpose.”).

5 Plaintiffs also argue that including Alternatives F2-F8 was improper because the 2001 EIS’s  
6 analysis of those alternatives was based on different assumptions and different models than the 2004  
7 SEIS analysis for Alternatives S1 and S2. Pls.’ Mem. at 41. This argument is flawed for two  
8 reasons. First, while the modeling used in the 2001 and 2004 EISs differed in some minor ways, the  
9 core modeling and analytical systems for the two EISs were the same. See SNFPA 3461  
10 (“Essentially the same modeling and analysis systems used in the FEIS were used for the SEIS”); see  
11 also SNFPA 3577 (“new information has resulted in some minor adjustments to assumptions . . .”).  
12 Because the minor differences between the models were adequately disclosed, there is no support for  
13 the argument that they violated NEPA.<sup>25/</sup> Second, the Forest Service prepared new analysis of  
14 Alternatives F2-F8 in the 2004 SEIS to account for the new information that provided the basis for  
15 the modified assumptions and modeling in the SEIS. See SNFPA 3255; SNFPA 3398-3403 (new  
16 analysis of F2-F8). Therefore, to the extent new analysis was required for F2-F8 to compare those  
17 alternatives to S1 and S2, that analysis is in the SEIS. See, e.g., SNFPA 3082-94, 3166-78 (analyzing  
18 F2-F8).

19 Given that the analytical methods of the two EISs did not substantially differ and that the  
20 2004 SEIS provided new analysis of Alternatives F2-F8 when necessary, Plaintiffs’ complaints about  
21 the analysis of Alternatives F2-F8 are unfounded.

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22  
23 <sup>24/</sup> See SNFPA 3577 (SEIS “relies very heavily upon the analysis presented in the FEIS and  
24 incorporates that information rather than repeating it.”); SNFPA 3115, 3255 (information  
25 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).

26 <sup>25/</sup> As an example of the alleged differences between the 2001 and 2004 methodologies,  
27 Plaintiffs cite the two EISs’ assumptions about the efficacy of harvesting trees < 6" dbh to reduce  
28 fire risk. Pls.’ Mem. at 41. However, the referenced pages do not support the propositions for  
which they are cited, and read together they do not indicate that the methodologies for the two  
EISs are radically different. See SNFPA 957 (2001 FEIS Vol. 4, Appx. B, pp. 44, 63); SNFPA  
3471.

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

2           Plaintiffs contend that various other alternatives should have been considered in the 2004  
3 SEIS. Pls.’ Mem. at 42. Plaintiffs’ argument fails for a number of reasons, including forfeiture of  
4 this argument, as fully discussed in Federal Defendants’ Summary Judgment Brief at 41-42.

5           Plaintiffs’ argument also fails because, in fact, the Forest Service considered a broad range  
6 of alternatives that responded to public input, addressed significant issues, and met the purpose and  
7 need – 16 in all. SNFPA 3006, 3009.<sup>26/</sup> The alternatives considered foster informed decision-  
8 making and public participation, thereby satisfying NEPA. See Westlands, 376 F.3d at 872; Block,  
9 690 F.2d at 767.

10           In addition, while Plaintiff may have preferred that the Forest Service analyze all sixteen  
11 alternatives in greater detail, an agency is not required to consider alternatives that are “inconsistent  
12 with its basic policy objectives.” Moseley, 80 F.3d at 1404; see Westlands, 376 F.3d at 871-72  
13 (requiring analysis of such alternatives “would turn NEPA on its head”) (citing Kootenai Tribe of  
14 Idaho v. Veneman, 313 F.3d 1094, 1122 (9th Cir. 2002)). Because the alternatives eliminated from  
15 detailed consideration were inconsistent with SEIS’s goals or were similar to existing alternatives,  
16 the treatment of those alternatives was reasonable. Vermont Yankee Nuclear Power Corp. v. Natural  
17 Res. Def. Council, 435 U.S. 519, 551(1978) (“Time and resources are simply too limited to hold that  
18 an impact statement fails because the agency failed to ferret out every possible alternative . . . .”);  
19 Westlands, 376 F.3d at 871 (EIS need not consider “every conceivable permutation”).<sup>27/</sup>

20  
21  
22 \_\_\_\_\_  
23 <sup>26/</sup> In addition to the nine alternatives considered in detail, the Forest Service considered another  
24 seven alternatives, including several mentioned in Plaintiffs’ brief. Pls.’ Mem. at 42; see SNFPA  
25 3163-65. The Forest Service eliminated those alternatives from detailed consideration under 40  
26 C.F.R. § 1502.14(a), because they were inconsistent with the purpose and need. See SNFPA 3009  
27 (“Alternatives were eliminated [from detailed study] because they did not respond to the purpose  
28 and need for action, new information, and/or implementation concerns.”); SNFPA 3163, 4014;  
see also SNFPA 3163-65, 3583-84 (explaining why each of the seven alternatives was  
eliminated).

<sup>27/</sup> See also Carmel-by-the-Sea, 123 F.3d at 1155 (“[An EIS] need not consider an infinite range  
of alternatives ....”); Headwaters v. Bureau of Land Management, 914 F2d 1174, 1181 (9th Cir.  
1990) (an agency’s consideration of alternatives may be sufficient, “even if it does not consider  
every available alternative”).

1 **III. THE BASIN PROJECT COMPLIES WITH NEPA**

2 Plaintiffs argue that the Basin Project violates NEPA because: (1) the Forest Service did not  
3 circulate a draft EA for public comment, and (2) the Forest Service failed to take a “hard-look” at  
4 the cumulative impacts of the Basin Project with other logging projects. Pls.’ Mem. at 42. However,  
5 as demonstrated below and explained in greater detail in Federal Defendants’ Summary Judgment  
6 Brief at 45, NEPA does not require circulation of a draft EA. Irrespective of that fact, the Forest  
7 Service satisfied NEPA’s public involvement requirements, and the cumulative effects analysis in  
8 the Basin EA was reasonable.

9 **A. NEPA Does Not Require Public Circulation of a Draft EA**

10 Contrary to Plaintiffs’ argument, Pls.’ Mem. at 43, NEPA does not require circulation of a  
11 draft Environmental Assessment (“EA”) prior to an agency decision. Neither the regulations nor the  
12 case law cited by Plaintiffs mandate such a requirement. As explained in Federal Defendants’  
13 Summary Judgment Brief at 45, and incorporated herein, the plain language of the regulations  
14 implementing NEPA does not require the circulation of a draft EA. See 40 C.F.R. § 1501.4(b); 40  
15 C.F.R. § 1506.6.<sup>28/</sup> Plaintiffs’ view that a draft EA had to be circulated is not supported by the  
16 regulations.

17 Furthermore, numerous courts of appeals, including this District Court, have made clear that  
18 there is no requirement in NEPA to circulate a draft EA for public comment. See Sierra Nevada  
19 Forest Prot. Campaign v. Weingardt, 376 F. Supp. 984 (E.D. Cal. 2005).<sup>29/</sup> In Weingardt, the court  
20

21 <sup>28/</sup> Plaintiffs also cite to 40 C.F.R. § 1500.1(b), which describes the purpose of NEPA's  
22 procedures. Pls.’ Mem. at 43. Like any purpose statement, Section 1500.1(b) is based on  
23 hortatory language, and therefore cannot support a mandatory duty to allow public comment on a  
24 draft EA. See Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 22-24 (1981)  
(provisions that merely state goals or other hortatory purposes are not legally binding on federal  
agencies).

25 <sup>29/</sup> 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 finding of  
26 no significant impact (“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,  
27 306 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  
28 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

1 stated that in “contrast to an EIS, the CEQ regulations *do not expressly require that a draft EA be*  
2 *circulated to the public for comment* before the agency adopts it as its final decision.” *Id.* at 991  
3 (emphasis added). Because neither the plain language of the regulations nor the case law requires  
4 circulation of a draft EA, Plaintiffs’ argument should be rejected. *See Vt. Yankee*, 435 U.S. at 549  
5 (court may not “impose upon [an] agency its own best notion of which procedures are ‘best’ or most  
6 likely to further some vague, undefined public good”); *Wilderness Soc’y v. Tyrrel*, 918 F.2d 813, 818  
7 (9th Cir. 1990).

8 **B. The Forest Service Provided For Public Involvement to the Extent Practicable**  
9 **For the Basin Project.**

10 The Forest Service complied with NEPA’s public involvement requirements. As the  
11 administrative record demonstrates, the Forest Service made “diligent efforts to involve the public”  
12 under 40 C.F.R. § 1506.6, and involved the public “to the extent practicable” under 40 C.F.R. §  
13 1501.4(b). The Forest Service provided a comment period, noted and responded to public  
14 comments, and conferred with federal and state agencies. *See* BASIN 0344, 3132, 3134-48, 3155;  
15 BASIN 3211, 3240-3257.

16 Following its own internal guidance at FSH 1909.15, Sec. 10.3, the Forest Service gave  
17 public notice of the Basin Project on December 19, 2003, and provided the opportunity to submit  
18 comments. BASIN 3044. The comment period for the Basin Project began with the mailing of the  
19 project description and posting of the legal notice on March 3, 2004. BASIN 3132, 3134-3148, 3155.  
20 The project description detailed the proposed action, its purpose and need, and design and mitigation  
21 measures, in addition to including maps of the project area. BASIN 3134-3148. The Forest Service  
22 received comments which it reviewed and responded to, including comments from Plaintiffs  
23 submitted on several occasions. BASIN 3211, 3240-3257; *see also* 3180-3196, 3274-94, 3493-3519.  
24 Additionally, the Forest Service provided two notices of public meeting to be held on planned  
25 projects in the vicinity including the Basin Project on June 15, 2004. BASIN 3213, 3230.

26  
27 \_\_\_\_\_  
28 are”); *Como-Falcon Cmty. 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].”).

1 On June 16, 2004 the Forest Service held a morning and afternoon public meeting which  
2 Plaintiffs did not attend. See Decl. of Cindy Roberts ¶ 4 (attached as Fed. Defs.’ Ex. C).<sup>30/</sup> At the  
3 public meetings a map of the Basin Project was available and Forest Service employees were present  
4 to answer specific questions relating to the Basin Project. Id. Although, Plaintiffs did not attend the  
5 public meetings, the Forest Service met with a representative of Plaintiffs, Mr. Craig Thomas, to  
6 discuss the Basin Project and Mr. Thomas’ concerns regarding the Basin Project. Id. at ¶¶ 3, 5.  
7 Finally, the Forest Service responded to requests by providing the EA, decision notice, FONSI, and  
8 BA/BE. BASIN 3764-65, 3763-66, 3657-3757.

9 Despite these opportunities for the public to be involved in the Basin Project, Plaintiffs argue  
10 that the Forest Service’s actions are insufficient under Weingardt, 376 F. Supp. 2d at 991, because  
11 the documents distributed for public comment were not the equivalent to a draft EA. Pls.’ Mem. at  
12 44. However, as explained above, NEPA does not require circulation of a draft EA. NEPA requires  
13 public involvement “to the extent practicable.” 40 C.F.R. § 1501.4. This regulatory language that  
14 seemingly sets the standard for public involvement must be read not to render an absurd result.<sup>31/</sup>  
15 However, the Weingardt court’s reading of the regulatory language, “to extent practicable,” to require  
16 that the Forest Service offer what amounts to a draft EA renders an absurd result and contravenes the  
17 requirement that courts not impose additional procedures on agencies unless required by statute or  
18 regulation. Vt. Yankee, 435 U.S. at 549; Tyrrel, 918 F.2d at 818.

19 Moreover, even the Weingardt court recognized that public involvement and distribution of  
20 information can take many forms. Weingardt, 376 F. Supp. at 991 (“Depending on the  
21 circumstances, the agency could provide adequate information through public meetings or by a  
22 reasonably thorough scoping notice.”). As explained above, the Forest Service, using various

23 <sup>30/</sup> Documents provided by the agency after the date of the decision are properly included in the  
24 record if they do not provide a new rationale for the decision, but merely explain the contents of  
25 the record. See Kunaknana v. Clark 742 F.2d 1145, 1149 (9th Cir. 1984); ASARCO, Inc. v.  
26 EPA, 616 F.2d 1153, 1159 (9th Cir. 1980) (if necessary, court may obtain further explanation  
27 from agency); Bunker Hill v. EPA, 572 F.2d 1286, 1292 (9th Cir. 1977) (allowing  
28 supplementation of the record because “the augmenting materials were merely explanatory of the  
original record”).

<sup>31/</sup> Santamaria-Ames v. INS, 104 F.3d 1127, 1130 (9th Cir. 1996) citing Reno v. National Trasp.  
Safety Board, 45 F.3d 12375, 1379 (9th Cir. 1995) (The plain meaning of language in a  
regulation governs unless that meaning would lead to absurd results.).

1 methods to involve the public, provided sufficient information and involved the public “to the extent  
2 practicable.” Such an approach satisfies NEPA, and Plaintiffs’ argument should be rejected.

3 **C. The Basin Project EA Adequately Considered Cumulative Impacts**

4 Plaintiffs further allege that the Forest Service violated NEPA for failure to take a hard look  
5 at the cumulative impacts of the Basin Project with other logging projects on the old forest species.  
6 Pls.’ Mem. at 44. For the reasons discussed below, this claim fails.

7 First, Plaintiffs incorrectly assert that the Forest Service failed to analyze the impact of past  
8 timber harvests, and incorrectly ground their assertion on Lands Council v. Powell, 395 F.3d 1019,  
9 1027 (9th Cir. 2005). See Pls.’ Mem. at 46. In reading Lands Council, Plaintiffs have  
10 mischaracterized the prominence to the word “past” in the definition of “cumulative impact.” 40  
11 C.F.R. § 1508.7. As the Supreme Court recently found in applying that definition, emphasis must  
12 be on the “‘incremental impact’ of the [agency’s current actions] themselves” – the cumulative  
13 impact rule does not require detailed consideration of the incremental impacts of prior actions. Pub.  
14 Citizen, 541 U.S. at 769-770.

15 As the record demonstrates, the BA/BE identified numerous other projects within the  
16 analysis area, described the silvicultural systems used (generally thinning or salvage prescriptions),  
17 the number of acres treated or otherwise affected, and effects that will likely result. See BASIN  
18 3563-3565. The BA/BE states in no uncertain terms:

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

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

23 Contrary to Plaintiffs’ allegations, the cumulative effects from other potential present and  
24 future HFQLG pilot project actions were analyzed through the 2004 Framework SEIS and the 1999  
25 HFQLG pilot project FEIS and incorporated into the Basin EA by tiering. BASIN 3720. Agencies  
26 may address cumulative impacts in the EA or by “tier[ing] to an EIS” that discusses cumulative  
27 impacts. Native Ecosystems, 304 F.3d at 895-96; 40 C.F.R. § 1502.20; see Portland Audubon Soc’y  
28 (“PAS”) v. Lujan, 884 F.2d 1233, 1239 (9th Cir. 1989); see also Headwaters, 914 F.2d at 1178.



1 Cumulative effects were analyzed for individual species and at the watershed level. For  
2 example, Table 4.3.2.3g in the SEIS displays projected cumulative changes in CWHR types that may  
3 impact the California spotted owl. BASIN 3720, SNFPA 3330-3350. The analysis determined that  
4 suitable foraging habitat for the California spotted owl would diminish in early decades, but would  
5 later be offset. BASIN 3720; SNFPA 3339. However, because the owl is within the 95% confidence  
6 limits of a stable population, SNFPA 3340, the 2004 Framework SEIS and BA/BE reasonably  
7 concluded cumulative habitat changes would not result in a loss of viability to the California spotted  
8 owl. BASIN 3720.

9 Moreover, for cumulative effects to species like the owl, the EA could lawfully refer the  
10 reader to the more detailed discussion in the SEIS. See id. As such, the Basin EA satisfied NEPA  
11 by tiering to the SEIS. See PAS, 884 F.2d at 1239; see also Headwaters, 914 F.2d at 1178 (SEIS not  
12 required when effects of original action adequately covered by a region-wide EIS).

13 The Basin EA also explained that the cumulative impacts on forest carnivores' suitable  
14 habitat (including marten and fisher habitat) are expected to be low since direct effects are not  
15 expected and indirect effects are to be low.<sup>32/</sup> BASIN 3576, 3699, 3721. Additionally, contrary to  
16 Plaintiffs' assertion, Pls.' Mem. at 46, the Forest Service did conduct a watershed-level analysis of  
17 cumulative impacts of Basin and other projects on riparian species. See BASIN 3563-70, 3575-76,  
18 3718, 3719, 3721.

19 Finally, as explained in Federal Defendants' Summary Judgment Brief at 44-45, the  
20 cumulative effects analysis in the EA complies with CEQ's recent *Guidance on the Consideration*  
21 *of Past Action in Cumulative Effects Analysis*. Ex. B ("CEQ Guidance") (attached as Fed. Defs.' Ex.  
22 B). The CEQ Guidance states that "[a]gencies are not required to list or analyze the effects of  
23 individual past actions unless such information is necessary to describe the cumulative effects of all  
24 past actions combined," and that "[a]gencies retain substantial discretion as to the extent of such

25 <sup>32/</sup> For example, as to direct effects, there were no known den sites or a confirmed sighting of  
26 forest carnivores in the analysis area. BASIN 3575. Direct effects due to skidding are not  
27 expected to occur or would be minimal because the tree and group selections are outside the  
28 riparian habitats (referencing the riparian habitat conservation areas, or "RHCAs") and because  
the skid trails would cross streambeds at a point where it is dry. Id. In consideration of indirect  
effects, changes in canopy cover which can alter temperature in denning areas was deemed to be  
low due to the small size of GS. Id.

1 inquiry and appropriate level of explanation.” Id. at 2 (citing to Marsh v. ONRC, 490 U.S. 360, 376-  
2 77 (1989)). Given this fact, the CEQ Guidance is entitled to deference unless “plainly erroneous or  
3 inconsistent with the regulation.”<sup>33/</sup> Here the Forest Service’s analysis of past cumulative effects for  
4 the Basin Project complies with this guidance. Therefore, Plaintiffs’ allegations regarding the Basin  
5 Project are without merit and should be rejected.

6 **IV. FURTHER PROCEEDINGS SHOULD BE ALLOWED BEFORE DETERMINING**  
7 **A PROPER REMEDY**

8 Plaintiffs’ arguments about what remedy the Court should enter if it finds a violation of law  
9 are premature. Pls.’ Mem. at 47-49. The issue of remedy requires an inquiry into competing  
10 equitable considerations that are not readily resolved through summary judgment. See Amoco  
11 Production Co. v. Village of Gambell, 480 U.S. 531, 542 (1987); Northwestern Ecosystem Alliance  
12 v. Rey, 380 F.Supp.2d 1175, 1197 (W.D. Wash. 2005). If the Court finds a violation of law in this  
13 case, further proceedings are necessary so that Federal Defendants may present evidence “that  
14 ‘unusual circumstances’ weigh against the injunction sought, and to present evidence to assist the  
15 court in fashioning the appropriate scope of whatever injunctive relief is granted.” Forest  
16 Conservation Council v. U.S. Forest Service, 66 F.3d 1489, 1496 (9th Cir.1995); see also  
17 Northwestern Ecosystem, 380 F.Supp.2d at 1197 (allowing further proceedings on remedy).

18 **CONCLUSION**

19 For the foregoing reasons, the Court should deny Plaintiffs’ motion for summary judgment.

20 Respectfully submitted this 16th day of December 2005.

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<sup>33/</sup> See Auer v. Robbins, 519 U.S. 452, 461 (1997) (citing Robertson v. Methow Valley Citizens Council, 490 U.S. 332, 359 (1989)).

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