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12
13 UNITED STATES DISTRICT COURT
14 FOR THE EASTERN DISTRICT OF CALIFORNIA
15 SACRAMENTO DIVISION

16 PEOPLE OF THE STATE OF CALIFORNIA,)
17 ex rel. BILL LOCKYER, Attorney General,)
18 Plaintiff,) No. CIV-S-05-0211 MCE/GGH
19 v.)
20 UNITED STATES DEPARTMENT OF)
AGRICULTURE, *et al.*,)
21 Federal Defendants,) **FEDERAL DEFENDANTS’**
22 and) **MEMORANDUM IN OPPOSITION**
23 TULOLUMNE COUNTY ALLIANCE FOR) **TO PLAINTIFF’S MOTION FOR**
24 RESOURCES & ENVIRONMENT, *et al.*,) **SUMMARY JUDGMENT**
25 Defendant- Intervenors,)
26 and)
27 ///)
28 ///

1 CALIFORNIA SKI INDUSTRY)
ASSOCIATION,)
2)
3 Defendant- Intervenor,)
and)
4 QUINCY LIBRARY GROUP, *et al.*,)
5)
6 Defendant- Intervenors,)
and)
7 CALIFORNIA CATTLEMEN’S)
ASSOCIATION,)
8)
9 Defendant- Intervenor.)

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26
27
28

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITY iii

ACRONYMS AND ABBREVIATIONS vi

PREFACE REGARDING ADMINISTRATIVE RECORD
CITATION vii

INTRODUCTION 1

ARGUMENT 2

I. THE DECISION IN THE 2004 FRAMEWORK TO
AMEND EXISTING STANDARDS AND GUIDELINES IS
SUPPORTED BY A REASONED ANALYSIS THAT
SATISFIES THE APA 2

A. The Decision in the 2004 Framework to Amend
Standards and Guidelines Affecting the Owl is Adequately
Supported by the Record 3

1. The 2004 Framework Acknowledges the United States
Fish and Wildlife Service Determination Not to List the
Owl But Does Not Rely Upon It As Justification for
Amending the 2001 Framework 3

2. The Meta-Analysis and Recent Owl Reproduction
Data Provide Adequate Context
for the 2004 Framework But Are Not the Driving
Factors Behind the Amendment 4

3. The 2004 Framework’s Balance Between
Increased Fuel Reduction Activity and Long-Term
Protections for the Owl and Is Adequately
Supported by the Record 6

B. The Decision in the 2004 Framework to Amend
Standards and Guidelines for Grazing is Adequately
Supported by the Desire to Provide Incentives to Permittees for
Conservation through Site-Specific Management Plans 8

C. The Conclusion that Expected Outcomes Under the
2004 Framework Would Better Achieve the Goals
of the National Fire Plan Is Adequately
Supported by the Record 11

D. The Conclusion that the 2004 Framework Would
More Effectively Achieve Goals for Reducing
Hazardous Fuels is Adequately
Supported by the Record 13

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

E. The Conclusion that The 2004 Framework Would Result in More Cost-Efficient Treatments Is Adequately Supported by the Record 14

F. The Decision in the 2004 Framework to Implement Fully the HFQLG Pilot Project is Adequately Supported by the Record 15

II. THE 2004 FRAMEWORK COMPLIES WITH NEPA 17

A. The 2004 SEIS Considered a Broad, Legally Sufficient Range of Alternatives 17

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

2. Alternatives F2-F8 Were Properly Within the 2004 SEIS’s Range of Alternatives 18

3. Alternatives F2-F8 Were Adequately Analyzed 19

4. The Forest Service Was Not Required to Analyze Additional Alternatives 21

B. The Forest Service Adequately Responded to Opposing Scientific Viewpoints 23

C. The SEIS Took a Hard Look at Potential Effects from the 2004 Framework 26

1. The SEIS Took A Hard Look at Potential Effects from Timber Harvest 26

2. The SEIS Took A Hard Look at Effects to Old Forest Species, Including the Spotted Owl 28

3. The SEIS Adequately Analyzed Effects from Changes in Grazing Management 30

4. The SEIS Took a Hard Look at Additional Impacts from Full Implementation of the HFQLG Pilot Project 32

5. The SEIS Adequately Disclosed the Limitations of Future Projections in Forest Vegetation 33

D. Adaptive Management was Reasonably Included in the 2004 Framework 34

CONCLUSION 35

TABLE OF AUTHORITY

CASES

California v. Block, 690 F.2d 753 (9th Cir. 1982) 22, 23

Churchill County v. Norton, 276 F. 3d 1060 (9th Cir. 2001) 34

City of Angoon v. Hodel, 803 F.2d 1016 (9th Cir. 1986) 21, 22

City of Carmel-by-the-Sea, 123 F.3d 1142 (9th Cir. 1997) 18, 19, 22

City of Tenakee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990) 22

Comm. for Nuclear Responsibility Inc. v. Seaborg,
463 F.2d 783 (D.C. Cir. 1971) 23

Custer County Action Ass'n v. Garvey,
256 F.3d 1024 (10th Cir. 2001) 25, 26

Dep't of Transp. v. Pub. Citizen,
541 U.S. 752 (U.S. 2004) 21

Earth Island Inst. v. Forest Serv., 351 F.3d 1291 (9th Cir. 2003) 23

Friends of Endangered Species, Inc. v. Jantzen,
760 F.2d 976 (9th Cir. 1985) 35

Greenpeace Action v. Franklin, 14 F.3d 1324 (9th Cir. 1992) 5

Headwaters v. BLM, 914 F2d 1174 (9th Cir. 1990) 22

Idaho Conservation League v. Mumma,
956 F.2d 1508 (9th Cir. 1992) 27, 31

Inland Empire Pub. Lands Council v. Schultz,
992 F.2d 977 (9th Cir. 1993) 33-35

Inland Empire Public Lands Council v. Forest Serv.,
88 F.3d 754 (9th Cir. 1996) 20

Jicarilla Apache Tribe v. Morton, 471 F.2d 1275 (9th Cir. 1973) 5

Lands Council v. Powell, 395 F.3d 1019 (9th Cir. 2005) 33

Lands Council v. Vaught, 198 F. Supp. 2d 1211 (E.D. Wash. 2002) 33

League of Wilderness Defenders v. Forest Serv., 3
83 F. Supp.2d 1276 (D. Or. 2005) 20

Metcalf v. Daley, 214 F.3d 1135 (9th Cir. 2000) 27

Morongo Band of Mission Indians v. FAA,
161 F.3d 569 (9th Cir. 1998) 21

1	<u>Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,</u> 463 U.S. 29 (1983)	1, 16
2		
3	<u>Muckleshoot Indian Tribe v. Forest Serv.,</u> 177 F.3d 800 (9th Cir. 1999)	22
4	<u>Native Ecosystems Council v. Forest Serv.,</u> 428 F. 3d 1233 (9th Cir. 2005)	3, 30, 31
5		
6	<u>Nat'l Cable & Telecommunications Ass'n v. Brand X Internet,</u> 125 S.Ct. 2688 (U.S. 2005)	10, 16
7	<u>Nat'l Wildlife Fed'n v. Burford,</u> 871 F.2d 849 (9th Cir. 1989)	17
8	<u>Nevada Land Action Ass'n v. Forest Serv.,</u> 8 F.3d 713 (9th Cir. 1993)	28, 29, 34
9		
10	<u>Northwest Motorcycle Ass'n v. Dep't of Agric.,</u> 18 F.3d 1468 (9th Cir. 1994)	3, 9, 10, 13, 14, 15
11	<u>Ohio Forestry Ass'n, Inc. v. Sierra Club,</u> 523 U.S. 726 (1998)	26
12	<u>Perkins v. Bergland,</u> 608 F.2d 803 (9th Cir. 1979)	9-12
13	<u>Resources Ltd. v. Robertson,</u> 35 F.3d 1300 (9th Cir. 1993)	27
14	<u>Salmon River Concerned Citizens v. Robertson,</u> 32 F.3d 1346 (9th Cir. 1994)	27-29, 34
15		
16	<u>Seattle Audubon Soc'y v. Lyons,</u> 871 F. Supp. 1291, 1321 (W.D. Wash. 1994), <u>aff'd sub nom.</u> <u>Seattle Audubon Soc'y v. Mosely ,</u> 80 F.3d 1401 (9th Cir. 1996)	5, 23
17		
18	<u>Seattle Audubon Soc'y v. Mosely,</u> 798 F. Supp. 1473 (W.D. Wash. 1992)	29, 30
19		
20	<u>Sierra Club v. Clark,</u> 774 F.2d 1406 (9th Cir. 1985)	19
21	<u>Sierra Pacific Industries v. Lyng,</u> 866 F.2d 1099 (9th Cir. 1989)	17
22	<u>State of Alaska v. Andrus,</u> 580 F.2d 465 (D.C. Cir. 1978), <u>vacated in part sub nom. Western Oil and Gas Ass'n. v. Alaska,</u> 439 U.S. 922 (1978)	5
23		
24	<u>Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council,</u> 435 U.S. 519 (D.C. Cir. 1978)	21, 22
25		
26	<u>Village of False Pass v. Clark,</u> 733 F.2d 605 (9th Cir. 1984)	33
27	<u>Western Oil and Gas Ass'n. v. Alaska,</u> 439 U.S. 922 (1978)	5
28	<u>Westlands Water Dist.v. Dep't of the Interior,</u> 376 F.3d 853 (9th Cir. 2004)	17, 22, 23

1 **STATUTES**

2 Herger-Feinstein Quincy Library Group Forest Recovery Act,
3 Pub. L. No. 105-277, 112 Stat. 2681-231
4 (codified as 16 U.S.C. § 2104 note) 1
5 16 U.S.C. § 1604(e)(1) 28
6 16 USCA § 2104 16, 32

7 **REGULATIONS**

8 36 C.F.R. § 219.14(b)(3) (2000) 28
9 40 C.F.R. § 1502.14(a) 19
10 40 C.F.R. § 1502.14(e) 27
11 40 C.F.R. § 1502.20 33
12 40 C.F.R. §§ 1500.4 19, 32, 33
13 68 Fed. Reg. 7580, 7604 (Feb. 14, 2003) 3
14 70 Fed. Reg. 35607 (June 21, 2005) 3
15
16
17
18
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ACRONYMS AND ABBREVIATIONS

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APA	Administrative Procedure Act
BA/BE	Biological Assessment/Biological Evaluation
dbh	Diameter at Breast Height
DFPZ	Defensible Fuel Profile Zone
EIS	Environmental Impact Statement
EPA	United States Environmental Protection Agency
ESA	Endangered Species Act
FONSI	Finding of No Significant Impact
FWS	United States Fish and Wildlife Service
HFQLG	Herger-Feinstein Quincy Library Group Forest Recovery Act
HRCA	Home Range Core Area
MRR	Management Review and Recommendations
NEPA	National Environmental Policy Act of 1969
NFS	National Forest System
NWFP	Northwest Forest Plan
OFEA	Old Forest Emphasis Area
PAC	Protected Activity Center
ROD	Record of Decision
SAT	Scientific Analysis Team
SCR	Science Consistency Review
SEIS	Supplemental Environmental Impact Statement
SNFPA	Sierra Nevada Forest Plan Amendment
WFWG	Willow Flycatcher Working Group

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 5. 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 In this case, the California Attorney General (“Plaintiff”) argues that the 2004 Sierra
3 Nevada forest plan amendment (“SNFPA”), commonly known as the 2004 Framework, violates
4 the Administrative Procedure Act (“APA”) and the National Environmental Policy Act of 1969
5 (“NEPA”). As a threshold matter, Plaintiff has failed to demonstrate standing. While Plaintiff
6 claims to bring this action to remedy damages to the state’s natural resources, it has not submitted
7 any evidence from any of the numerous state agencies with responsibility for managing the state’s
8 natural resources.

9 Even if Plaintiff could demonstrate standing, the administrative record shows that
10 Plaintiff’s claims lack merit. First, Plaintiff’s claim under the APA that the Forest Service did
11 not provide a reasoned basis for changing prior management direction is unsupported. The
12 caselaw makes clear that a change in policy is a “perfectly reasonable basis for an executive
13 agency's reappraisal of the costs and benefits of its programs and regulations.” Motor Vehicle
14 Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J.,
15 concurring in part and dissenting in part). The agency’s rationale is supported by its detailed
16 management review and recommendations (“MRR”), which found that the 2001 Framework
17 relied upon a flawed analysis of effects to owls, would not achieve consistency with the National
18 Fire Plan, and did not fully implement the pilot project required by the Herger-Feinstein Quincy
19 Library Group Forest Recovery Act, Pub. L. No. 105-277, 112 Stat. 2681-231 (codified as 16
20 U.S.C. § 2104 note) (“HFQLG Act”).

21 The 2004 Framework also complies with NEPA. The final supplemental environmental
22 impact statement (“SEIS”) for the 2004 Framework considered a reasonable range of alternatives.
23 The nine alternatives considered in detail meet the purpose and need of addressing five problem
24 areas raised by the 2001 Framework, as well as several areas where the Chief of the Forest
25 Service and the management review team found room for improvement upon the existing
26 direction. Moreover, the alternatives carried forward from the 2001 Environmental Impact
27 Statement (“EIS”) were adequately analyzed.

1 considered in the SEIS, the 2004 Framework is actually driven by a more fundamental exercise of the
2 agency's discretion to strike a different multiple use balance which, while still protective of owls,
3 places a greater emphasis on more effective reduction of hazardous fuels so as to decrease the risk
4 of stand-replacing wildfire. See SNFPA 2995, 3626. As such, adequate reasoning under the APA
5 has been provided in this case, and Plaintiff's arguments must be rejected. See Native Ecosystems
6 Council v. Forest Serv., 428 F. 3d 1233 (9th Cir. 2005) ("NEC-Jimtown") ("The long-term benefit
7 of preventing stand-replacing fires, which completely destroy goshawk habitat, is preferable over any
8 short-term benefit the goshawks might receive from retaining the dense forest structure in the project
9 area Consequently, we uphold the agency action under the APA's arbitrary and capricious
10 standard."); Northwest Motorcycle Ass'n v. Dep't of Agric., 18 F.3d 1468, 1479 (9th Cir. 1994)
11 (Forest Service's "desire to provide a proper balance of trail opportunities between motorized and
12 non-motorized users and to reduce 'user conflict'" was reasoned basis for closure to off-road
13 vehicles).

14 **1. The 2004 Framework Acknowledges the United States Fish and**
15 **Wildlife Service Determination Not to List the Owl But Does Not**
16 **Rely Upon It As Justification for Amending the 2001 Framework**

17 In arguing that the 2004 Framework does not satisfy the APA, Plaintiff points to the February
18 2003 finding by the United States Fish and Wildlife Service ("FWS") that listing the owl under the
19 ESA was not warranted. Plaintiff argues that because the FWS finding assumed that the 2001
20 Framework would provide management direction for National Forest System ("NFS") land in the
21 Sierra, the Forest Service cannot rely upon the FWS finding to support the 2004 Framework. See
22 Pl.'s Mem. at 26-27. Plaintiff's argument is a red herring; the 2004 SEIS fully acknowledged that
23 the FWS finding on owls "assumed that management of the national forests in the Sierra Nevada was
24 based on the [2001] SNFPA." SNFPA 3074; see SNFPA 3218 ("The finding acknowledged that the
25 [2001] SNFPA ROD [Record of Decision ("ROD")] . . . established the current management
26 direction being implemented on National Forest lands across the Sierra Nevada and considered the
27 ramifications of this management in making its finding."). The FWS also recognized that the 2001
28 Framework was being reviewed by the Forest Service, which "may result in changes in the
anticipated impacts of the SNFPA." See 68 Fed. Reg. 7580, 7604 (Feb. 14, 2003); SNFPA 3218.

1 Recently, FWS determined that a petition by environmental groups and other information
2 available to FWS presented substantial information that listing of the owl may be warranted. See 70
3 Fed. Reg. 35607 (June 21, 2005). In court pleadings in a separate action, FWS has stated that it
4 expects to make its 12-month finding on whether listing for the owl is warranted by March 2006.
5 SNFPA 3218. Should the owl be listed, the Forest Service would comply with any duties for the owl
6 imposed by the ESA with respect to the 2004 Framework. See SNFPA 3010. Because the 2004
7 Framework acknowledges that the FWS finding assumes the 2001 Framework is in effect and does
8 not rely upon the finding to justify the amendment, the Forest Service’s conclusions are not
9 undermined, and Plaintiff’s argument should be rejected.^{2/}

10 **2. The Meta-Analysis and Recent Owl Reproduction Data Provide**
11 **Adequate Context for the 2004 Framework But Are Not the**
12 **Driving Factors Behind the Amendment**

13 Next, Plaintiff argues that the recent analysis of owl population data and 2002 owl
14 reproduction data do not support amending the management direction for the owl. Pl.’s Mem. at 27-
15 28. Plaintiff’s argument must be rejected. The first item identified by Plaintiff is a “meta-analysis”
16 undertaken by 16 scientists using data gathered from five owl demographic studies to assess
17 population status and trends. SNFPA 3213.^{3/} The meta-analysis used a new approach to estimate
18 the rate of change of owl populations. Id. at 3213. The results showed that the rate of owl population
19 decline may not be as great as originally predicted in the 2001 EIS. SNFPA 3214.

20 The Forest Service did not rely upon the meta-analysis to justify “substantially ramping up
21 timber harvesting in owl habitat,” as Plaintiff argues. Pl.’s Mem. at 27. The meta-analysis was one
22 of numerous pieces of new information that were considered in the SEIS. See SNFPA 3213-3218
23 (listing other new information and analyses for owls, including recent wildfires in protected activity

24 ^{2/} While the recent 90-day finding found that the revisions to the 2001 Framework were one of
25 several changes that may affect owl status and distribution, FWS also found that the petitioners
26 had “not presented substantial new scientific information” on many of the threats to owls and
their habitat (e.g., effects from past logging, livestock grazing, urban development, and
recreation) that had been addressed in the prior 12-month finding. 70 Fed. Reg. at 35613.

27 ^{3/} 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 centers (“PACs”) and drought-related mortality); SNFPA 3608 (new information on owl
2 demographics “did not drive the development of new management direction but was used to inform
3 the decision-maker of the effects of implementing the new proposal”). The Team acknowledged that
4 “[b]ecause of the considerable uncertainty” about the knowledge of owl demographics, it “does not
5 believe or suggest that this new information will eliminate concern for the status and trend in owl
6 population[s].” SNFPA 1950; see also SNFPA 3214 (acknowledging uncertainty about population
7 trends); SNFPA 3607, 3608 (same); SNFPA 3340. Rather, the Team acknowledged that all available
8 science indicates that owl habitat “must be carefully managed.” SNFPA 1950.

9 Accordingly, the 2001 Framework assumed that “there is *no* available information suggesting
10 a *stable* or increasing population.” SNFPA 00266 (emphasis added). Given the observation in the
11 meta-analysis of at least one potentially stable population, it was reasonable for the Forest Service
12 to consider the meta-analysis as supporting a different management strategy than the 2001 ROD. See
13 SNFPA 1949 (noting that the meta-analysis “shows evidence of one apparently stable population,”
14 and that other populations do not show statistically significant difference from stable populations).

15 As for the 2002 reproductive data, the SEIS acknowledges the point that Plaintiff makes,
16 namely that “reproductive success from individual years cannot be used to indicate overall population
17 trends as it is widely recognized that the species has periodic breeding pulses.” SNFPA 3214.
18 Again, however, this is simply another piece of new information that is acknowledged by the SEIS
19 that provides context for the overall analysis of environmental effects.

20 In the context of the owl, it was sufficient for the Forest Service to admit the uncertain
21 scientific knowledge and to provide the most current science available. See State of Alaska v.
22 Andrus, 580 F.2d 465, 473-74 (D.C. Cir. 1978) vacated in part sub nom. Western Oil and Gas Ass'n.
23 v. Alaska, 439 U.S. 922 (1978) (“Predictions . . . can never be perfect”, “the Secretary was not
24 required, as a matter of law, to await the results of the ongoing studies . . .”); Jicarilla Apache Tribe
25 v. Morton, 471 F.2d 1275, 1280-1281 (9th Cir. 1973) (no “requirement that complete information . . .
26 must be obtained before action may be taken”). Plaintiff’s argument demanding that any changes
27 in management must await further studies simply does not establish a violation of law and should
28 therefore be rejected. See id.; Seattle Audubon Soc’y v. Lyons, 871 F. Supp. 1291, 1321 (W.D.

1 Wash. 1994) (government will not be held to a “degree of certainty that is ultimately illusory”)
2 (quoting Greenpeace Action v. Franklin, 14 F.3d 1324, 1336 (9th Cir. 1992)).

3 **3. The 2004 Framework’s Balance Between Increased Fuel**
4 **Reduction Activity and Long-Term Protections for the Owl and**
5 **Is Adequately Supported by the Record**

6 Plaintiff also argues that the 2001 Framework already recognized the potential loss of habitat
7 to wildland fire, that there is no new information that wildfire poses undue risks to the owl, and that
8 the 2004 Framework would result in short-term effects to the owl without a reasoned basis. Pl.’s
9 Mem. at 28-29. Plaintiff is incorrect. As the record demonstrates the 2004 Framework better
10 addresses the goals of moving the landscape toward a natural fire regime and, in the long run, would
11 result in more effective fuels treatments on the landscape. See SNFPA 3287, 3288 (Table 4.2.4a,
12 Figure 4.2.4b).

13 The Sierra Nevada faces a situation today where nearly 8 million of the 11.5 million acres of
14 NFS lands are in vegetation condition classes that pose moderate to high risks from wildland fire.
15 See SNFPA 2998.^{4/} Because the 2004 Framework would employ treatments that would move more
16 of these acres out of those condition classes than under the 2001 Framework, there is ample support
17 for the decision in the record, and Plaintiff’s APA claim must be rejected.

18 Plaintiff argues that the SEIS does not quantify or characterize the risk to old forest habitat
19 in the short term. The SEIS, however, contains this analysis. At year 20, the SEIS compares
20 cumulative effects and quantifies remaining suitable habitat (CWHR classes 4M, 4D, 5M, 5D, and
21 6), nesting habitat (classes 5M, 5D, and 6), and the number of PAC and home range core areas
22 (“HRCA”) acres that would be treated. SNFPA 3348 (Table 4.3.2.3k). The differences between the
23 two Frameworks in this respect are less than one percent: A total of 4.67 million acres of suitable
24 habitat would remain at year 20 under the 2001 Framework, and 4.63 million acres would remain
25 under the 2004 Framework. Id. Similarly, 2.52 million acres and 2.51 million acres of suitable

26 ^{4/} These lands are within Classes 2 and 3, which represent, respectively: areas where fire
27 regimes have been so altered from their historic range of fire return interval that they are at
28 “moderate risk of losing key ecosystem components” due to wildland fire; and areas which are at
“greatest risk of ecological collapse” because it has been so long since fire operated as a process
in the ecosystem. Id.

1 nesting habitat would remain under the 2001 and 2004 Frameworks, respectively. Id. Overall, both
2 would see an increase of over 500,000 acres of suitable owl habitat by year 20. Id.

3 Impacts occurring prior to year 20 were also considered. See SNFPA 3327 (displaying
4 projected acreage of CWHR 5M, 5D, and 6 vegetation from 1994 forward); SNFPA 3350. For that
5 time period, the SEIS acknowledged that there is some risk of negatively affecting the owl because
6 of the “uncertainty associated with the effects of using mechanical treatment in PACs (potentially
7 affects 5% of all PACs).” SNFPA 3350; 3992-3993. The SEIS assumed, however, that because of
8 the sensitivity of the habitat areas and the uncertainty that mechanical treatments impose, line officers
9 will proceed with “extreme caution” in proposing vegetation management within PACs and “will
10 attempt to avoid such treatments wherever possible.” Id. The impacts of future individual projects
11 would also be analyzed, as appropriate under NEPA, in site-specific documents. See SNFPA 3010.

12 Nor is Plaintiff correct in asserting that there is no new information relevant to the effects of
13 fire upon the owl. The SEIS incorporated data from an additional fire season and provides an
14 updated analysis that estimates losses to PACs on NFS land, finding that about 7% have burned
15 between 1993 and 2003. SNFPA 3215. Between 1998 and 2002, the annual rate of loss of owl
16 PACs to wildland fire appears to have increased to an average annual loss of about 5.0 owl PACs.
17 SNFPA 3992.^{5/} This new data and analysis were appropriately considered by the SEIS.

18 Plaintiff’s argument that the fuels management under the 2004 Framework “is of no clear
19 benefit to the owl” is solidly refuted by the SEIS. Pl.’s Mem. at 29. Under the 2004 Framework,
20 about 63,000 acres per year would be burned by wildland fire in year 50--a 22% reduction compared
21 to the 2001 Framework. See SNFPA 3347. Wildland fire causes “[l]oss and degradation of habitat,
22 creation of habitat gaps, and lengthy time periods for habitat reestablishment.” Id. Immediate
23 effects to owl habitat have been documented for several large, recent wildfires. SNFPA 3215.
24 Because of the observed recent loss of PACs and observed effects to habitat, the SEIS reasonably
25 concluded that owl “habitat would benefit” from the decreased risk of stand-replacing fire under the

27 ^{5/} An errata was issued by the Forest Service to correct reporting and analysis errors contained in
28 Table 3.2.2.2b of the SEIS such as including only PAC’s with 25% loss or greater, and only
where there was less than 50% PAC acre are identified as non-suitable. SNFPA 3992.

1 2004 Framework. SNFPA 3349; see SNFPA 3287, 3288 (showing reductions in wildland fire under
2 2004 Framework); SNFPA 3348 (a“potential subsequent decreased loss of spotted owl habitat to
3 wildfire is expected”under 2004 Framework).

4 Finally, Plaintiff’s assertion that the Forest Service has “abandoned the goal of returning fire
5 to the Sierra Nevada ecosystem” is wrong. Pl.’s Mem. at 29. In the 2004 Framework, prescribed fire
6 is still used as a follow-up to mechanical treatment. See SNFPA 3084, 3170 (Table 2.5.3a, showing
7 42,020 acres of prescribed burn treatments annually). Additionally, the 2001 Framework was overly
8 optimistic about the effectiveness of using prescribed fire on a landscape that contains tremendous
9 levels of hazardous fuels. See SNFPA 2998 (noting that the “directive of using fire itself to thin the
10 forest is too risky to attempt [in] many cases”); SNFPA 3084 (noting that “limitations . . . due to high
11 existing fuel loadings may hamper some prescribed burn projects” under the 2001 Framework). The
12 whole point of reducing hazardous fuels, which is central to the 2004 Framework, is to return the
13 landscape to a situation that better resembles historic conditions, where fire return intervals were
14 shorter and fire intensity was less. See SNFPA 3505 (“Over time the goal of the treatments shifts
15 toward restoring fire regimes and condition class across the landscape.”).^{6/} Because there is adequate
16 support for the determination that the 2004 Framework would better accomplish this, Plaintiff’s
17 arguments must be rejected.

18 **B. The Decision in the 2004 Framework to Amend Standards and**
19 **Guidelines for Grazing is Adequately Supported by the Desire to Provide**
20 **Incentives to Permittees for Conservation through Site-Specific**
21 **Management Plans**

21 Plaintiff argues that any new information about meadow ecosystems does not support the
22 decision to change the standards and guidelines on grazing. Pl.’s Mem. at 30. Plaintiff’s argument
23 is wrong, as it was only after initiating surveys following the 2001 ROD that the full extent of
24 impacts to grazing permittees became clear. SNFPA 3392. Once it was determined that many
25 allotments would result in non-use, the agency decided--not to eliminate protections for riparian

26 ^{6/} See also SNFPA 3586 (“The use of fire as a follow-up and maintenance fuels treatment is
27 intended to provide for re-introducing fire in treated areas.”); SNFPA 3601 (SEIS attempts to
28 create conditions “where prescribed burning can be used to reintroduce low intensity fire into
portions of landscapes.”); SNFPA 3651 (“Once fire resilient conditions were reached, treatments
would focus on maintenance,” primarily through prescribed fire and thinning).

1 species--but to improve the ability to develop site-specific plans tailored to address conservation at
2 a local level while still allowing grazing. Because the change is a reasonable exercise of agency's
3 discretion to emphasize different resource uses than those in the 2001 ROD, Plaintiff's argument
4 must fail. See Northwest Motorcycle, 18 F.3d at 1479 (“Even if the closure of the North Entiat [to
5 off-road vehicle use] was viewed as a policy change, it was, as discussed *supra*, based on a rational
6 and principled reason: to minimize ‘user conflicts’ in the North Entiat.”); Perkins v. Bergland, 608
7 F.2d 803, 806 (9th Cir. 1979) (the mandate to manage for multiple uses “‘breathe(s) discretion at
8 every pore.’”) (citation omitted)).

9 First, the 2004 Framework does not eliminate protections for riparian species. Indeed, it
10 retains numerous components of the 2001 ROD that are important for protecting riparian and aquatic
11 habitat. SNFPA 3000 (2004 ROD retains “Critical Aquatic Refuges, the Riparian Conservation
12 Areas, and the goals of the Aquatic Management Strategy [“AMS”]”). The 2004 ROD also builds
13 upon two years of field surveys for the Yosemite toad and willow flycatcher, as well as a
14 conservation assessment for the flycatcher, by requiring an interagency conservation strategy for the
15 flycatcher that will incorporate input from the state of California and FWS. Id.

16 Second, detailed information about impacts to the grazing permittees from the flycatcher
17 standards in the 2001 Framework was only available following the signing of the 2001 ROD, once
18 surveys were initiated. Id.; see also SNFPA 3392 (“Much of the field survey work has since been
19 done and this new information provides a better foundation from which to evaluate effects.”). The
20 Review Team collected information from the surveys and found that at least two allotments would
21 go to non-use based on a restriction to late-season grazing at *unoccupied* sites. SEIS_01_000063 to
22 64. The Team also found that the 2001 ROD actually provided a disincentive for grazing permittees
23 to facilitate species recovery.^{7/}

25 ^{7/} For example, at the Perrazzo Meadow complex on the Tahoe the Forest Service worked with
26 the permittee to “develop allotment plans to protect areas where willow flycatchers are nesting.”
27 SEIS_01_000065. Perazzo Meadows reportedly has one of the two highest concentrations of
28 flycatcher territories in the Sierra. Id. Under the 2001 ROD, however, this successful partnership
between the Forest Service and the permittee would be “reduced to a meadow closure and a non-
use situation.” Id.

1 Comparatively, the 2004 ROD still incorporates surveys and protections of occupied sites,
2 but it also makes adjustments to encourage conservation partnerships. In particular, grazing may be
3 allowed at occupied sites where the Agency has developed a site-specific management strategy.
4 SNFPA 3048. The strategy focuses on “protecting the nest site and associated habitat during the
5 breeding season and the long-term sustainability of suitable habitat at breeding sites.” *Id.* This is in
6 accordance with the Review Team’s observation that impacts from grazing (such as fly-catcher nest
7 bumping) could be addressed by working with permittees to adjust the timing, location, and intensity
8 of grazing to keep livestock out of willows during the bird’s breeding period. SEIS_01_000067.

9 For the toad, the 2004 Framework excludes grazing from occupied habitat except where an
10 interdisciplinary team has developed a site-specific plan to successfully manage stock around those
11 areas. SNFPA 3001. Although the restrictions do not apply to packstock or saddle stock, those
12 animals are in low concentration in the affected areas and have disparate needs; thus, the direction
13 is more “appropriately developed as part of individual forest plan direction.” *Id.* Additionally,
14 should the toad become listed under the ESA, site-specific plans could also be used to incorporate
15 measures required to comply with that statute.

16 Plaintiff’s argument that the “only benefit” of the 2004 ROD on grazing is to lower the
17 number of permittees who are “highly affected” from 12 to 9 is an oversimplification. Pl.’s Mem.
18 at 32 (quoting SNFPA 3177). By employing an alternative means for balancing grazing uses and
19 protection for willow flycatcher and the toad, the 2004 ROD results in a variety of lessened impacts
20 to permittees, including: 56 allotments with known but unoccupied flycatcher sites would no longer
21 be limited to late-season grazing; 15 allotments with known occupied willow flycatcher sites would
22 have a late season grazing opportunity after August 15, rather than total exclusion under the 2001
23 ROD; and 14 of the allotments showing low, medium, or high impacts under the 2001 ROD would
24 not be impacted at all under the 2004 ROD. SNFPA 3393-94. In sum, the record provides adequate
25 support for the decision to strike a different multiple use balance for grazing under the 2004 ROD.
26 See Nat’l Cable & Telecommunications Ass’n v. Brand X Internet, 125 S.Ct. 2688, 2700 (U.S.
27 2005); see Northwest Motorcycle, 18 F.3d at 1479-1480; Perkins, 608 F.2d at 806.

1 **C. The Conclusion that Expected Outcomes Under the 2004 Framework Would**
2 **Better Achieve the Goals of the National Fire Plan Is Adequately Supported by**
3 **the Record**

4 Plaintiff also argues that the adoption of the 2004 Framework is not supported by the record
5 because there is allegedly “no evidence” that the 2001 Framework was inconsistent with the National
6 Fire Plan (“Fire Plan”). Pl.’s Mem. at 32-33. Plaintiff’s argument must fail, because it neglects the
7 Review Team’s findings that the expected outcomes under the 2001 ROD were “not consistent with
8 the ‘Goals and Implementation Outcomes’” found in the recently developed implementation
9 component of the Fire Plan. SNFPA 1959 (emphasis omitted).

10 Although the Review Team found that the priorities and goals of the 2001 Framework were
11 consistent with the Fire Plan, the expected outcomes were found to be “not consistent” with the goals
12 and outcomes of the Fire Plan’s implementation plan for its 10-year comprehensive strategy. *Id.*
13 (emphasis omitted); see also SNFPA 3662-3663.^{8/} The first goal, improving fire prevention and
14 suppression, is measured by the number of high severity acres burned by unplanned, unwanted
15 wildland fire. SNFPA 1959, 3197-98. The Review Team undertook an analysis of the Middle Fork
16 Cosumnes landscape on the Eldorado NF that provided “evidence that the current [2001] direction
17 will perform poorly under this measure . . .” SNFPA 1959. Specifically, the analysis indicated that
18 on the Eldorado NF, the number of acres per decade burned by wildland fire is projected to increase
19 to over 30,000 within 30 years under the 2001 ROD. SNFPA 1960. The Team therefore concluded
20 this was “clear evidence” that the direction in the 2001 ROD would perform poorly under the first
21 goal. SNFPA 1959-60.

22 The second goal, reducing hazardous fuels, is measured by the number of acres treated and
23 the number of acres treated per million dollars gross investment in targeted areas. SNFPA 1960,
24 3198. The Team found that although the 2001 ROD would allow fuels to be treated economically

27 ^{8/} The Fire Plan includes a 10-year comprehensive strategy, which was developed by the
28 Secretaries and western state governors after the 2001 Framework, in August 2001. SNFPA
3197. In May 2002 the Secretaries and governors developed an implementation plan for the 10
year comprehensive strategy. *Id.*; see also SNFPA 3197-99.

1 within the defense zone of the wildland urban intermix (“WUI”),^{2/} higher cost treatments would
2 occur outside that zone. SNFPA 1960. Because treatments under the 2001 ROD would result in
3 fewer acres treated per million dollars invested, the Team determined there was “significant
4 opportunity to better harmonize the SNFPA strategy . . .” with the second goal. Id.

5 The third goal, restoring fire-adapted ecosystems, is measured by the number of acres moved
6 to a better condition class (both total acreage moved and percent moved of total acres treated).
7 SNFPA 1960, 3198. As already explained *supra* at Section I.A.3, over seven million of the 11.5
8 million acres in the Sierra are in condition classes that are at ecological risk due to their high
9 vulnerability to catastrophic fire. See SNFPA 1960, 2998. The Team found goal three to be an area
10 in which the 2001 Framework was in “significant conflict with the National Fire Plan.” Id. The
11 2001 ROD itself admits that it would “increase homogenous vegetation structure across the
12 landscape over time” and “would increase the potential for catastrophic effects when wildfire”
13 occurs. Id. (quoting SNFPA 0252). The 2001 ROD was not designed to move forests toward their
14 historic ecological condition, but rather was developed with the goal of “minimally modifying fire
15 behavior while avoiding short-term adverse effects” to owl habitat. SNFPA 1961. Consequently,
16 the 2001 ROD was determined to “preclude embarking on meaningful restoration of historic fire
17 regimes” for the next few decades, leading the Team to conclude that the situation was “not
18 compatible” with goal three. Id.

19 Finally, goal four, promoting community assistance, is measured by the percentage of acres
20 which are mechanically treated and from which forest products are recovered and used. SNFPA
21 1961, 3199. The Team found that the 2001 ROD “performs poorly” under this measure. SNFPA
22 1961. A predictable supply of forest products sufficient to sustain the local, community-based timber
23 infrastructure was not a goal of the 2001 ROD. Id. By contrast, the 2004 Framework offers over 3.5
24 times more annual revenue from wood by-products on average in the first and second decades.
25 SNFPA 3294 (\$80 million/year and \$33 million/year in first and second decades, respectively, under

26
27 ^{2/} This land use area is the buffer in closest proximity to communities and generally extends
28 about a 1.3 miles from such areas. See SNFPA 3030. The focus of treatment within the quarter
mile closest to communities, the defense zone, is to reduce fire spread and intensity sufficiently
for fire-fighters to successfully protect human life and property. Id.

1 S2 , versus \$23 million and \$9 million under S1). This is supported by the Review Team’s
2 conclusion that changing the 2001 ROD to allow more flexibility to design fuel reduction projects
3 that provide useful wood products would “improve consistency” with the Fire Plan. In sum, the
4 inconsistencies and poor performance of the expected outcomes of the 2001 Framework as compared
5 to the Fire Plan reasonably support the adoption of the 2004 Framework, and Plaintiff’s argument
6 to the contrary should be rejected. See Northwest Motorcycle, 18 F.3d at 1479-1480.

7 **D. The Conclusion that the 2004 Framework Would More Effectively Achieve**
8 **Goals for Reducing Hazardous Fuels is Adequately Supported by the Record**

9 Plaintiff also argues that the 2004 Framework is not supported by sufficient evidence that it
10 would result in more effective fuels treatment than the 2001 Framework. See Pl.’s Mem. at 33. On
11 the contrary, the 2001 EIS itself acknowledged that modified Alternative 8, the chosen alternative,
12 includes “stand level structural requirements that could preclude full implementation of the fuels
13 strategy.” SNFPA 3101 (quoting 2001 EIS vol. 1 Summary at 29). The 2001 ROD even
14 acknowledged that it would “increase the potential for catastrophic effects when wildfire” occurs.
15 SNFPA 0252. Because there is adequate support in the record for the conclusion that 2004
16 Framework would better address fire and fuels, Plaintiff’s argument should be rejected.

17 As explained in Federal Defendants’ Summary Judgment Brief, the Review Team evaluated
18 the direction for fuels in the 2001 Framework and found three areas for improvement. See Fed.
19 Defs.’ Summ. J. Br. at 13-15; SNFPA 3100-3101. First, the 2004 Framework provides more
20 flexibility to strategically locate treatments across the landscape. SNFPA 3290, 3291; see also
21 SNFPA 2995. Because the 2004 Framework does not restrict the location of mechanical treatments
22 as much as the 2001 ROD, fire behavior will be more effectively modified. See SNFPA 3290, 3291
23 (comparing rate of spread, flame length, scorch height, and projected mortality). Second, the 2004
24 Framework results in the removal of more hazardous fuels, making mechanical treatment more
25 effective. See SNFPA 3290 (noting that the effectiveness of mechanical treatments under the 2001
26 ROD was “greatly compromise[d]” by the fact that 30% of the acreage is limited to removing trees
27 <6" in diameter at breast height (“dbh”). Third, the 2004 Framework provides for more cost-
28 efficient treatments. See SNFPA 3292-3295. For example, the increased cost-efficiency from the

1 2004 Framework is demonstrated by the fact that the revenue-to-cost ratio for the first decade is over
2 two and a half times greater under the 2004 Framework (1.38) than under the 2001 Framework
3 (1.38). SNFPA 3293-94. These three factors demonstrate that the 2004 Framework is supported by
4 a reasoned basis. See Northwest Motorcycle, 18 F.3d at 1479.

5 Plaintiff's assertion that the 2001 Framework would not substantially interfere with necessary
6 fuels treatments "in the near term" or in the WUI, is a tacit admission that the prior direction might
7 indeed pose such problems in the long term and in other land use areas. Pl.'s Mem. at 33. Indeed,
8 after a decade of implementation, fewer acres would experience stand-replacing wildfires on annual
9 average under the 2004 Framework than under the 2001 Framework.^{10/} See SNFPA 3287, 3288.

10 By the seventh decade (when full effects might be observed), the 2004 Framework would result in
11 6,000 fewer acres of such fires, compared to the 2001 Framework. SNFPA 3288 (Table 4.2.4a).

12 In sum, there is adequate support in the record for the conclusion that the 2004 Framework
13 would more effectively reduce fuels on the landscape, and this change in mixture of resource uses
14 is well within the agency's statutory discretion. See Northwest Motorcycle, 18 F.3d at 1479.

15 **E. The Conclusion that The 2004 Framework Would Result in More Cost-Efficient**
16 **Treatments Is Adequately Supported by the Record**

17 Next, Plaintiff argues that there is insufficient evidence to support the conclusion that the
18 2001 Framework could not have been sufficiently funded. Pl.'s Mem. at 35. This argument,
19 however, misconceives the economic justifications identified by the 2004 Framework. First, one of
20 the economic goals of the 2004 Framework is to provide greater economic opportunities for local
21 communities that historically have depended on forest-based industry.

22 Second, the decision to adopt the 2004 Framework was not based on the fact that the
23 treatments in the 2001 Framework could not be adequately funded. The economic justification that
24 Plaintiff's argument fails to grasp is that the treatments are more *cost-efficient*. Under the 2001
25 Framework, the minimal intensity and acreage of treatments simply would not achieve the goals of
26 modifying fire behavior to the point where fuels treatment objectives would be met. See SNFPA
27 1946. Following the first decade of implementation, acres destroyed by stand replacing wildfire

28 ^{10/} A stand-replacing fire is one where most or all vegetation is killed. SNFPA 3287.

1 would be greater under the 2001 Framework. See SNFPA 3287, 3288 (displaying greater acreage
2 lost to stand-replacing fire). Although the monetary costs of implementing the 2001 Framework
3 would be lower, the accompanying risk of wildlife habitat loss would be greater. See SNFPA 3347-
4 3348 (S2 would result in “less wildfire acres by the fifth decade . . . thus a potential subsequent
5 decreased loss of spotted owl habitat due to wildfire is expected”); SNFPA 3581 (habitat projections
6 for owl “benefit from reductions in wildfire acres burned and severity of effects by the fifth decade”).

7 Third, the Forest Service is not, as Plaintiff implies, abandoning appropriated dollars and
8 relying solely upon timber harvest revenues to fund treatments. See SNFPA 3100 (increasing the
9 economic value of wood byproducts would improve the ability to “treat the desired acreage of
10 hazardous fuels *with available appropriated dollars*”) (emphasis added); SNFPA 3583, 3584 (2004
11 Framework would allow treatments to “generate revenues through commercial forest products to
12 increase the number of acres that can be treated with the available appropriated funds”); SNFPA
13 3652 (proceeds from harvest of some larger trees would be used to treat *additional acres*) (emphasis
14 added); Id. Rather, it is making use of the commercial value of wood by-products in order to more
15 efficiently and effectively reduce fuels on the landscape, which results in non-commercial benefits
16 by avoiding loss of wildlife habitat to stand replacing fires--something not possible under the 2001
17 Framework. See SNFPA 2005 (noting that under the 2001 Framework, “using timber sale contracts
18 as a tool to leverage appropriated funds and achieve higher levels of accomplishment will not be
19 possible”); SNFPA 3654 (field professionals expressed concerns over the “inability to create
20 effective and cost-efficient fuels treatments”) (citing SNFPA 1923). The economic justification for
21 the 2004 Framework is therefore reasonably supported by the record and satisfies the APA.

22 **F. The Decision in the 2004 Framework to Implement Fully the HFQLG Pilot**
23 **Project is Adequately Supported by the Record**

24 Finally, Plaintiff argues that the 2001 Framework made a “purposeful decision” that the
25 HFQLG Project could not be fully implemented without risking owl viability, and that there is “no
26 evidence” that this approach was in error. Pl.’s Mem. at 36. First, the argument that the Forest
27 Service is prohibited from emphasizing resource uses that are part of the HFQLG Project simply
28 because it previously chose to emphasize a different balance of uses is contrary to the caselaw. See

1 Brand X, 125 S.Ct. at 2700; State Farm, 463 U.S. at 59. Additionally, the Agency provided a
2 reasonable explanation of the decision to change the 2001 Framework and fully implement the
3 mandatory Pilot Project, thereby satisfying the APA. See id.

4 The HFQLG Act consists of mandatory legislative direction that the Forest Service establish
5 a pilot project that includes Defensible Fuel Profile Zone (“DFPZ”) construction and group selection.
6 16 USCA § 2104 note, sec. 401(d). The Review Team found that the 2001 ROD “severely
7 limit[ed]” implementation of the Pilot Project, as it did not allow the full extent of group selection
8 envisioned by HFQLG Act. SNFPA 1967 (2001 ROD would “preclude[] many of the resource
9 management activities that Congress desired be tested,” under the Pilot Project); see SNFPA 1970
10 (2001 ROD allowed only “15,400 acres of group selection,” less than 36% of what Pilot Project
11 contemplated). The Team concluded that new direction could more thoroughly test group selection
12 and better fulfill the goals of the HFQLG Act. Id.; see also SNFPA 3002.

13 In addition, as discussed *supra* at Section I.A.2, the Review Team re-evaluated the owl
14 analysis upon which the 2001 ROD relied and found that it had been unnecessarily conservative.
15 SNFPA 1968 (analysis unnecessarily “took a worst case approach to estimating effects”); SNFPA
16 3338-39. The Team found that even though the prior analysis had assumed that the Pilot Project
17 would render 100 percent of habitat unsuitable, observed effects of prior treatments had been far less.
18 Id.; see also SNFPA 3608-09. Other factors also were found to indicate that a new analysis was
19 warranted. See SNFPA 3339.

20 Additionally, the Team found that the community stability goals of the HFQLG Act were not
21 being met. See SNFPA 1967, 1968 (a “key component” of the Pilot Project is to “provide socio-
22 economic benefit through timber and biomass production, and therefore enhance community stability
23 in the project area.”); SNFPA 1969, 1970 (the “community stability, and socio-economic aspects of
24 the Pilot Project are not being implemented”); SNFPA 3001. The 2004 Framework responded by
25 adopting direction that would allow additional sawtimber production from the Pilot Project area,
26 thereby better providing community stability. See SNFPA 3386, 3697 (“Alternative S2 is designed
27 to better meet[] the goals envisioned by the Pilot Project and will contribute toward producing socio-
28 economic benefits of enhancing community stability in the pilot project area.”).

1 By revisiting the unnecessary assumptions in the Biological Assessment/Biological
2 Evaluation (“BA/BE”) and better providing for community stability, the Forest Service decided upon
3 a different resource balance that would address both the needs of wildlife and the duty under the
4 HFQLG Act to fully implement the Pilot Project. See SNFPA 3338-39, 3608-09. Plaintiff’s
5 arguments therefore lack merit and should be rejected. See Sierra Pacific Industries v. Lyng, 866
6 F.2d 1099, 1106-07 (9th Cir. 1989) (Secretary of Agriculture had adequate basis for requiring timber
7 harvest schedules to be revised as a condition of a buy-out under federal statute); Nat’l Wildlife
8 Fed’n v. Burford, 871 F.2d 849, 856-57 (9th Cir. 1989) (Interior Department’s shift of bidding
9 procedures for coal leases was not arbitrary and capricious).

10 **II. THE 2004 FRAMEWORK COMPLIES WITH NEPA**

11 **A. The 2004 SEIS Considered a Broad, Legally Sufficient Range of Alternatives**

12 **1. The SEIS’s Range of Alternatives Meets the SEIS’s Purpose and** 13 **Need**

14 The range of alternatives under NEPA is determined by the purpose and need. See, e.g.,
15 Westlands Water Dist.v. Dep’t of the Interior, 376 F.3d 853, 865-66 (9th Cir. 2004). In this case,
16 the needs and goals underlying the 2001 EIS are the foundation for the 2004 SEIS.^{11/} Both the 2001
17 and 2004 decisions were fundamentally concerned with creating a workable strategy to address five
18 problem areas: “old forest ecosystems and their associate species; aquatic, riparian and meadow
19 ecosystems; fire and fuels management; noxious weeds; and lower westside hardwood ecosystems.”
20 SNFPA 3583. At their core, the 2001 and 2004 EISs shared a common purpose and need. See id.
21 (the “purpose of the [2001] SNFPA FEIS and the [2004] SEIS” is to address the five problem areas)
22 (emphasis added).

23 Because the 2004 SEIS sought to address the same purposes as the 2001 EIS, it was
24 appropriate to reexamine the various non-selected alternatives from 2001 (represented in the SEIS

25
26 ^{11/} See SNFPA 2993 (2004 ROD “retains the overall goals of the SNFPA 2001 ROD,” including
27 overall strategy for addressing the fire situation “in combination with key components of the
28 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 as F2-F8). The Agency also generated a new alternative (S2) based on new information, experience
2 from implementing the 2001 ROD, and extensive review of management options. These alternatives
3 covered a wide range of management strategies--some emphasizing more passive management (F2,
4 F5, F8), and others taking a more active approach (F4, F6, F7). See SNFPA 3170 (Table 2.5.3a).
5 Together, the nine alternatives analyzed in detail responded to the 2004 SEIS's purpose of addressing
6 the five problem areas and remedying them more effectively than the 2001 Framework. Because the
7 range of alternatives met the purpose and need, it therefore complied with NEPA.

8 **2. Alternatives F2-F8 Were Properly Within the 2004 SEIS's Range**
9 **of Alternatives**

10 Plaintiff argues that including alternatives F2-F8 in the 2004 SEIS's range of alternatives was
11 inappropriate because F2-F8 were based on a different purpose and need. Pl.'s Mem. at 19-20. This
12 is incorrect for several reasons. First, the Forest Service's incorporation of alternatives F2-F8 must
13 be viewed in their proper context--the 2004 EIS being a *supplement* to an existing EIS. As noted
14 above, in preparing the SEIS, the Forest Service did not intend to start at square one in considering
15 management options for the Sierra. SNFPA 3577 ("For the SEIS, the purpose was not to reconsider
16 broad changes in overall program direction."); see also SNFPA 4012-14; Pl.'s Mem. at 20 ("the
17 Forest Service is not starting over again, reconsidering every option . . ."). Rather, the goal was to
18 take the 2001 Framework and see if it could be applied along with new information to create a more
19 workable solution. See, e.g., SNFPA 3098 ("The purpose of the proposed action is to adjust existing
20 management direction to better achieve the goals of SNFPA."); see also SNFPA 2993, 3097, 3577.
21 Given that the purpose of the SEIS was to adjust the 2001 Framework rather than start from scratch,
22 it was reasonable for the SEIS to include the original EIS alternatives in its range of alternatives.

23 Second, the fact that alternatives F2-F8 would not achieve certain elements of the purpose
24 and need as well as Alternative S2 does not render the inclusion of F2-F8 arbitrary or capricious.
25 The Ninth Circuit has made clear that an EIS's range of alternatives complies with NEPA even if
26 several of the alternatives would not fully meet an important element of the purpose and need. See
27 City of Carmel-by-the-Sea, 123 F.3d 1142, 59 (9th Cir. 1997). (Only two of the ten alternatives
28 considered in detail met the project's need. Despite this, the court held that the range of alternatives

1 “span[ned] the spectrum of ‘reasonable’ alternatives and satisfied the requirements of the National
2 Environmental Policy Act.”). The same holds true here. Alternatives F2-F8 cover a broad range
3 of solutions to solving the key problem areas in the Sierra, and were reasonably included for the
4 benefit of the decisionmaker and the public. See id.

5 **3. Alternatives F2-F8 Were Adequately Analyzed**

6 Plaintiff’s argument that alternatives F2-F8 were not given sufficient treatment in the SEIS
7 is without merit. See Pl.’s Mem. at 19-20, 21-22. While alternatives F2-F8 were not discussed in
8 the SEIS in the exact manner as alternatives S1 and S2, the record shows that alternatives F2-F8 were
9 “rigorously explore[d] and objectively evaluate[d]” as required by NEPA. 40 C.F.R. § 1502.14(a).

10 Plaintiff’s argument that only two alternatives were considered in detail is simply incorrect.
11 See, e.g., SNFPA 3078, 3115, 3160-62, 957 (2001 EIS, 83-164, 185-202); 3166-78. While the SEIS
12 did not always analyze F2-F8 in the same manner as S1 and S2, this is because F2-F8 had already
13 been analyzed extensively in the 2001 EIS. Rather than repeat that analysis, the SEIS simply cited
14 the 2001 EIS and included new analysis of F2-F8 where necessary.^{12/} Such an approach is adequate
15 and indeed encouraged by NEPA. Because Alternatives F2-F8 were explored in detail in the 2001
16 EIS and relevant portions of that analysis were incorporated into the SEIS, NEPA was satisfied. See
17 40 C.F.R. §§ 1500.4, 1502.21 (encouraging incorporation by reference); Sierra Club v. Clark, 774
18 F.2d 1406, 1411 (9th Cir. 1985) (“By specifically referring to prior BLM studies and supporting
19 materials, the FEIS fulfilled its informational purpose.”) (citation omitted).

20 Plaintiff also argues that including Alternatives F2-F8 was improper because the 2001 EIS’s
21 analysis of those alternatives was based on different methodologies than the 2004 SEIS analysis for
22 Alternatives S1 and S2. Pl. Mem at 20-22. This argument is flawed in several respects. First, while
23 the modeling used in the 2001 and 2004 EISs differed in some minor ways, the core modeling and
24 analytical systems for the two EISs were the same. See SNFPA 3461 (“Essentially the same modeling
25

26 ^{12/} See SNFPA 3577 (SEIS “relies very heavily upon the analysis presented in the FEIS and
27 incorporates that information rather than repeating it.”); SNFPA 3115, 3255 (information
28 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).

1 and analysis systems used in the FEIS were used for the SEIS”); see also SNFPA 3577 (“new
2 information has resulted in some minor adjustments to assumptions . . .”). Because the minor
3 differences between the models were adequately disclosed, there is no support for the argument that
4 they violated NEPA. See, e.g., Inland Empire Public Lands Council v. Forest Serv., 88 F.3d 754, 758
5 (9th Cir. 1996) (“NEPA’s goal is satisfied once this information [on significant environmental
6 impacts] is properly disclosed.”); League of Wilderness Defenders v. Forest Serv., 383 F. Supp.2d
7 1276, 1282 (D. Or. 2005) (disclosure of assumptions of scientific methodology was adequate to
8 withstand request for preliminary injunction).

9 Additionally, the Forest Service did not simply rest on the analysis done for F2-F8 in the 2001
10 EIS. Instead, the Forest Service prepared new analysis of Alternatives F2-F8 in the 2004 SEIS to
11 account for the new information that provided the basis for the modified assumptions and modeling
12 in the SEIS. See SNFPA 3255, 3398-3403 (new analysis of F2-F8). Therefore, to the extent new
13 analysis was required for F2-F8 to compare those alternatives to S1 and S2, that analysis is in the
14 2004 SEIS. See, e.g., SNFPA 3082-94, 3166-78 (analyzing F2-F8).

15 In advancing its argument that the 2001 and 2004 modeling techniques differed significantly,
16 Plaintiff points to several examples where the modeling output in the 2001 EIS for Modified
17 Alternative 8 differed from the modeling output in the 2004 SEIS for Alternative S1. Pl.’s Mem. at
18 20-21. Plaintiff argues that since Modified Alternative 8 and Alternative S1 are the same alternative,
19 the differences in modeling outputs proves that the 2001 and 2004 EISs are not analytically
20 compatible. This argument suffers from a fundamental flaw: Modified Alternative 8 and Alternative
21 S1 are *different* alternatives. While S1 is closely related to Modified Alternative 8, Modified
22 Alternative 8 was changed in the 2001 ROD, so that it differed from the Modified Alternative 8 that
23 was analyzed in the 2001 EIS. S1 reflects Modified Alternative 8 *as changed in the 2001 ROD*, not
24 as analyzed and modeled in the 2001 EIS. See SNFPA 3578-3579 (“The analysis of Alternative S1
25 in the Draft SEIS was designed to be consistent with management direction for Modified Alternative
26 8 *as implemented through the SNFPA ROD*. The ROD included constraints that were not analyzed
27 for Modified Alternative 8 in the FEIS . . .”) (emphasis added). Given that Modified Alternative
28

1 8 and S1 are different alternatives, it is not at all surprising that modeling their implementation
2 resulted in different outputs. Plaintiff's examples therefore do not support its arguments.

3 Given that the analytical methods of the two EISs did not substantially differ and that the
4 2004 SEIS provided new analysis of Alternatives F2-F8 when necessary, Plaintiff complaints about
5 the analysis of Alternatives F2-F8 are unfounded.

6 **4. The Forest Service Was Not Required to Analyze Additional** 7 **Alternatives**

8 Plaintiff contends that various additional alternatives should have been considered in the 2004
9 SEIS. Pl.'s Mem. at 22-23. Plaintiff's argument fails for three reasons. First, Plaintiff has forfeited
10 any challenge to the range of alternatives because it failed to provide a sufficiently detailed proposed
11 alternative during the public comment period. Second, even if Plaintiff had presented an adequately
12 detailed proposed alternative, the SEIS was adequate because it considered a sufficient range of
13 alternatives, even though it did not consider every possible course of action. Third, the SEIS
14 reasonably eliminated the other alternatives from detailed consideration.

15 As a threshold matter, Plaintiff has forfeited this argument because it failed to propose a
16 detailed alternative during the public comment period. See Dep't of Transp. v. Pub. Citizen, 541
17 U.S. 752, 764-65 (U.S. 2004) (plaintiffs forfeited any objection to the range of alternatives where
18 they failed to propose alternatives during the NEPA process). While Plaintiff did submit comments
19 on the draft SEIS, Plaintiff only mentioned alternative courses of action in the most oblique and
20 vague terms. See SNFPA 3772 (“[The DEIS] does not consider, for example, addressing the issue
21 [of local flexibility] through adaptive management; through a specific process for obtaining relief
22 from particular Standards and Guidelines on a project basis, or through a pilot project for a section
23 of the Sierras.”). Because Plaintiff did not propose an alternative in detail, it may not raise its
24 argument here. See Vermont Yankee Nuclear Power Corp. v. Natural Res. Def., 435 U.S. 519, 553-
25 54 (D.C. Cir. 1978); Morongo Band of Mission Indians v. FAA, 161 F.3d 569, 576-77 (9th Cir.
26 1998); City of Angoon v. Hodel, 803 F.2d 1016, 1022 (9th Cir. 1986) (upholding decision not to
27 analyze a suggested alternative where plaintiff had not “offered a specific, detailed counterproposal”
28 during NEPA process)

1 Even if Plaintiff's comments provided a basis to challenge the range of alternatives, that
2 challenge must fail because, as explained *supra* at Section II.A.1, the range of alternatives in the
3 SEIS was adequate because it met the purpose and need. See SNFPA 3578 (discussing how range
4 of alternatives satisfied NEPA). Plaintiff's argument that the SEIS did not analyze in detail all
5 possible alternatives is beside the point. See Pl.'s Mem. at 20. While the Agency could have
6 analyzed other alternatives, NEPA does not require such makework. See Vermont Yankee, 435 U.S.
7 at 551 ("Time and resources are simply too limited to hold that an impact statement fails because the
8 agency failed to ferret out every possible alternative"); Westlands, 376 F.3d at 871 (EIS need not
9 consider "every conceivable permutation").^{13/} In this case, the Forest Service considered a broad
10 range of alternatives that responded to public input, addressed significant issues, and met the purpose
11 and need. By doing so, the 16 alternatives fostered informed decision-making and public
12 participation, thereby satisfying NEPA.^{14/} See id. at 872; California v. Block, 690 F.2d 753, 767 (9th
13 Cir. 1982).

14 Finally, other alternatives were considered and reasonably eliminated from detailed
15 consideration. In addition to the nine alternatives considered in detail, the Forest Service considered
16 another seven alternatives, including several of the alternatives mentioned by Plaintiff. see SNFPA
17 3163-65. The Forest Service eliminated those alternatives from detailed consideration under 40
18 C.F.R. § 1502.14(a), because they were inconsistent with the purpose and need. See SNFPA 3009
19 ("Alternatives were eliminated [from detailed study] because they did not respond to the purpose and
20 need for action, new information, and/or implementation concerns."); SNFPA 3163, 4014; see also
21 SNFPA 3163-65, 3583-84 (explaining why each of the seven alternatives was eliminated). While
22

23 ^{13/} See also Carmel-by-the-Sea, 123 F.3d at 1155 ("[An EIS] need not consider an infinite range
24 of alternatives"); Headwaters v. BLM, 914 F.2d 1174, 1181 (9th Cir. 1990) (analysis of
alternatives may be sufficient, "even if it does not consider every available alternative.")

25 ^{14/} In support of the position that the Forest Service should have considered other alternatives,
26 Plaintiff cites to Muckleshoot Indian Tribe v. Forest Serv., 177 F.3d 800 (9th Cir. 1999), and City
of Tenakee Springs v. Clough, 915 F.2d 1308 (9th Cir. 1990). Pl.'s Mem. at 19. However, both
27 of those cases involved the "egregious omission" of a reasonable alternative. See Muckleshoot,
28 177 F.3d at 813 (finding that "the Forest Service failed to consider an alternative that was more
consistent with its basic policy objectives than the alternatives that were the subject of final
consideration."). Plaintiff has identified no such egregious omission here.

1 Plaintiff may have preferred that the Forest Service analyze all sixteen alternatives in detail, an
2 agency is not required to consider alternatives that are “inconsistent with its basic policy objectives.”
3 Seattle Audubon Soc’y v. Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996); see Westlands, 376 F.3d at
4 871-72 (requiring analysis of such alternatives “would turn NEPA on its head”) (citing Kootenai
5 Tribe v. Veneman, 313 F.3d 1094, 1122 (9th Cir. 2002)). Because the alternatives eliminated from
6 detailed consideration were inconsistent with SEIS’s goals or were similar to existing alternatives,
7 the treatment of those alternatives was reasonable.^{15/} See id. at 871-72. Plaintiff’s challenges should
8 therefore be rejected.

9 **B. The Forest Service Adequately Responded to Opposing Scientific**
10 **Viewpoints**

11 “[A]n agency is entitled to wide discretion in assessing the scientific evidence, so long as it
12 takes a hard look at the issues and responds to reasonable opposing viewpoints.” Earth Island Inst.
13 v. Forest Serv., 351 F.3d 1291, 1301 (9th Cir. 2003) (citing 40 C.F.R. § 1502.9(a)-(b)). The Forest
14 Service need not “set forth at full length, the views with which it disagrees. Block, 690 F.2d at 773
15 (citing Comm. for Nuclear Responsibility Inc. v. Seaborg, 463 F.2d 783, 787 (D.C. Cir. 1971)).
16 “Moreover, an agency is under no obligation to conduct new studies in response to issues raised in
17 the comments, nor is it duty-bound to resolve conflicts raised by opposing viewpoints.” Id. (Citation
18 omitted); Earth Island, 351 F.3d at 1301 (NEPA was satisfied where an EIS “drew upon the existing
19 literature when estimating the size and potential damage of various levels of future fuel loads” and

20 ^{15/} For Example, as an alternative Plaintiff argues that the Forest Service should have considered
21 making small changes to the 2001 ROD rather than proposing a new management plan. See Pl.’s
22 Mem. at 22-23, 34-35. The SEIS rejected this type of alternative, because a piecemeal approach
23 to adjusting the 2001 Framework

24 would not address the fundamental problems of the prescriptive nature of the
25 existing management direction (economic inefficiencies, complications with
26 implementation, questionable effectiveness of fuels treatments, and inability to
27 treat enough acreage with available funds to effectively modify fire behavior or be
28 responsive to the goals of the National Fire Plan). Moreover, the suggested
29 alternative would not provide local managers with the flexibility needed to choose
30 from an array of tools and techniques to better address site-specific conditions.

31 SNFPA 3164. See also SNFPA 3584 (finding that minor changes would not address economic
32 inefficiencies of treatments, complications with implementation, questionable effectiveness of
33 fuels treatments, and consistency with National Fire Plan); SNFPA 3650 (noting a “myriad of
34 reasons” to consider changes, including implementation problems and high costs).

1 responded directly to comments). The SEIS includes a separate volume containing copies of
2 substantive public comment letters, as well as over 130 pages of responses to issues raised by the
3 comments, organized by topic. See generally SNFPA 3568-3702. The SEIS also contains a concise
4 summary of the Science Consistency Review (“SCR”), a supplement to the SCR, and the Agency’s
5 response to issues in those reports. SNFPA 3503-3524; see SNFPA 3256 (“Issues of scientific
6 controversy, conflicting scientific information, uncertainty and significant data gaps are summarized
7 in Appendix E, [SCR] and in SEIS Volume 2, Response to Comments.”).

8 Additionally, areas of scientific controversy and uncertainty were discussed throughout the
9 SEIS.^{16/} The SEIS responded to the substance of other agencies’ comments.^{17/} For example, the
10 comments by FWS made recommendations, one of which was that treatments should “take into
11 account avoiding suitable owl habitat in HRCA and [old forest emphasis areas (“OFEAs”)],” and that
12 mechanical treatments in such areas should be “constrained by the Desired Future Conditions” for
13 the land use areas they intersect. SNFPA 3922. The SEIS responds to this by noting that treatments
14 in HRCAs and OFEAs “would be designed to move sites toward desired conditions,” and that a set
15 of desired conditions, management intents, and vegetation and fuels objectives would provide
16 direction for project development.^{18/} SNFPA 3653 (#9.2.9); see also SNFPA 3615 (treatments “are

17
18 ^{16/} See, e.g., SNFPA 3218 (“Controversy exists about relying on habitat on private timberlands to
19 maintain spotted owl viability, due to varying management objectives of private timberland
20 owners and the lack regulatory direction for them to manage their timberland”); SNFPA 3258
21 (disclosing finding by FWS that “[s]ubstantial scientific uncertainty remains regarding the effects
22 of fuel treatments in [owl] PACs . . . and foraging areas”); SNFPA 3278 (disclosing uncertainty
23 regarding debris inputs to streams after fires); SNFPA 3283 (discussing controversy regarding
24 aquatic effects of postfire salvage); SNFPA 3286 (“Significant uncertainty surrounds projections
25 of future wildfire acreage and percentages burned at high severity.”); SNFPA 3296-3297
26 (uncertainty regarding fuels strategy); SNFPA 3305 (same regarding yellow-legged frog); SNFPA
27 3312-3313, 3315 (same regarding long-term projections for fisher habitat, vegetation treatments
28 in habitat, stand-replacing fire), SNFPA 3335 (uncertainty regarding effects of mechanical
treatments on owl habitat), SNFPA 3339 (same).

24 ^{17/} The comments by the United States Environmental Protection Agency focus on effects to
25 water quality and aquatic effects from roads--topics nowhere else argued in Plaintiff’s papers.
26 See SNFPA 3907. Nevertheless, the Forest Service adequately addressed such topics in the SEIS.
See, e.g., SNFPA 3593-94, 3629-32, 3648.

27 ^{18/} Other recommendations by FWS were addressed in a similar manner. See SNFPA 3927;
28 3618-19. Compare SNFPA 3927 (recommending adaptive management studies to accompany
site- specific plans) with SNFPA 3619 (SEIS “adds an adaptive management strategy of livestock
grazing effects on Yosemite toads,” and effects of implementing the studies “will be evaluated

1 to be designed to avoid the highest quality habitat . . . wherever possible”). Such a response is all
2 that NEPA requires. See Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1038 (10th Cir.
3 2001) (“[NEPA] requires agencies preparing environmental impact statements to consider and
4 respond to the comments of other agencies, not to agree with them”).

5 The SEIS also disclosed and responded to other opposing science on the owl. See, e.g.,
6 SNFPA 3340 (“There is conflicting science about the effects of canopy cover reductions from fuels
7 treatments on the California spotted owl.”). As for comments disputing the assertion that PACs are
8 being “lost” at a high rate, Pl.’s Mem. at 40, the Agency deleted a statement from the draft SEIS that
9 “old forest is burning up faster than it can be replaced,” and admitted the observation was overstated.
10 SNFPA 3609. Also, a comparison of Dr. Verner’s letter with Volume 2 of the SEIS reveals that
11 many of the public concerns to which the SEIS responded came directly from Dr. Verner’s letter.^{19/}

12 Finally, Plaintiff’s argument that the SEIS did not address comments from the Willow
13 Flycatcher Working Group (“WFWG”) or the Agency’s Watershed, Fish, Wildlife, Air, and Rare
14 Plants Group (“Wildlife Group”) staff is incorrect. Pl.’s Mem. at 40. The WFWG made three main
15 recommendations: complete a conservation strategy within 6-9 months; implement a monitoring
16 plan and demographic study; and remove cattle from occupied meadows year-round.
17 SEIS_02_001969 to SEIS_02_001970. The Agency adopted a variation of the first recommendation.
18 See SNFPA 3620 (“a conservation strategy for the willow flycatcher would be completed by May
19 2005”). The second recommendation--a demographic study--had already been addressed in an
20 _____
21 site-specifically as the study plans are developed”).

22 ^{19/} Compare SNFPA 4357, #SN-1032 at 2 (draft SEIS (“DSEIS”) would not provide “retention
23 of patches of suitable nesting habitat for owls that are at least 1 acre in size in habitat polygons
24 that otherwise are not recognized as suitable for nesting by the owls”) with SNFPA 3612
25 (responding to comment that SEIS “should retain one acre patches of suitable nesting habitat in
26 areas otherwise not recognized as suitable for spotted owl nesting”); compare SNFPA 4357,
27 #SN-1032 at 3 (“The Framework sets stricter limits than does the DSEIS on treatments that could
28 occur in ‘Areas of Concern’”) with SNFPA 3607-08 (“The Framework sets stricter limits
than does the DSEIS on treatments that could occur in ‘Areas of Concern’”); compare
SNFPA 4357, #SN-1032 at 7 (“It seems to me that concern for the extent of wildfire damage in
the Sierra Nevada is exaggerated”) and id. at 8 (opening up canopy in SPLATs would “encourage
the establishment of a substantial ground cover”) with SNFPA 3675 (responding to same);
compare SNFPA 4357, #SN-1032 at 9 (comments on heavy thins, group selections, and SPLATs)
with SNFPA 3614-15 (responding to same).

1 existing conservation assessment. Id.; see also SNFPA 3359 (agency “will continue to direct study
2 of the demographics of the willow flycatcher”); SNFPA 3978 (showing prioritization of
3 demographic study). Lastly, effects of year-round grazing were fully analyzed in the SEIS. See
4 SNFPA 3359, 3360.

5 In addition to responding to the WFWG’s concerns, the SEIS also responded to internal
6 comments from the Wildlife Group staff. Pl.’s Mem. at 39. For example, the SEIS acknowledged
7 the uncertainty related to short-term effects upon the owl, toad, and flycatcher, and discussed in detail
8 the proposed studies that would attempt to address the gaps in scientific knowledge. See SNFPA
9 3144-46, 3149-50. In response to concerns about long-term modeling, the SEIS included additional
10 disclosure of the assumptions and limitations of the model, as explained in Section II.C.5 *infra*. See
11 SNFPA 3461-3480. In sum, the SEIS responded to opposing viewpoints sufficient to satisfy NEPA.

12 **C. The SEIS Took a Hard Look at Potential Effects from the 2004**
13 **Framework**

14 **1. The SEIS Took A Hard Look at Potential Effects from Timber**
15 **Harvest**

16 Plaintiff’s argument that the 2004 SEIS “failed to analyze” potential impacts from increased
17 timber harvest is simply wrong. Pl.’Mem. at 41. The potential effects from increased timber harvest
18 are considered throughout the analyses for individual resources.^{20/} Plaintiff’s argument ignores the
19 fact that a forest plan amendment like the 2004 Framework does not *authorize* any actual timber
20 harvest; rather, it establishes the standards and guidelines under which future projects that authorize
21 harvest would occur. See Ohio Forestry Ass’n, Inc. v. Sierra Club, 523 U.S. 726 (1998); SNFPA
22 3014 (amended plans “do not provide final authorization for any activity”). Future site-specific
23 authorization of actual timber harvest would have to comply with NEPA, where effects would be
24 analyzed in more detail according to site-specific factors. See SNFPA 3010, 3690, 4019. Thus, as
25 explained in more detail in Federal Defendants’ cross motion, the scope of detail is considerably less

26 ^{20/} See, e.g., SNFPA 3271, 3272-3275 (forest vegetation); SNFPA 3280-3284 (aquatic
27 resources); SNFPA 3289-3291, 3296-3297 (fire and fuels); SNFPA 3298 (noxious weeds);
28 SNFPA 3316-3322 (fisher); SNFPA 3324-3325, 3329 (marten); SNFPA 3333, 3335, 3342, 3347
(owls); SNFPA 3353, 3354 (goshawks); SNFPA 3363, 3365 (great gray owls), and other
resources.

1 for evaluating the effects from that future harvest in a programmatic EIS like the 2004 Framework.
2 Fed. Defs.’ Summ. J. Mem. at 21; see Salmon River Concerned Citizens v. Robertson, 32 F.3d 1346
3 (9th Cir. 1994); Resources Ltd. v. Robertson, 35 F.3d 1300, 1305-1306 (9th Cir. 1993); Idaho
4 Conservation League v. Mumma, 956 F.2d 1508, 1511-12 (9th Cir. 1992).

5 For some resources, effects of timber harvest simply are too site-specific to be meaningfully
6 analyzed at the regional scale of the 2004 Framework. For example, effects on the delivery of coarse
7 woody debris (“CWD”) to streams--which is important for stabilizing stream channels and providing
8 cover for fish--“is difficult at the bioregional scale due to extreme variability in the condition of
9 [riparian conservation areas] and the relative importance of CWD in maintaining stream channel
10 structure and function.” SNFPA 3282. Consequently, these effects will be evaluated in landscape
11 and project-level analyses using watershed and site-specific parameters such as “stream width, tree
12 heights, distances from streams, slope steepness,” and other factors. Id. Assessment of localized
13 effects is similarly problematic for stream temperature “due to highly variable conditions.” Id.

14 For hydrological effects from timber harvest, the SEIS estimated that while the increased
15 level of activity under the 2004 Framework would result in “moderately higher” risk of increased
16 runoff, overall annual increases would be relatively small (e.g., 0.5% annually in the HFQLG Pilot
17 Project area, with the greatest seasonal increase occurring at 0.7%). SNFPA 3281. As with effects
18 to other resources, hydrologic effects would be further evaluated and potentially mitigated on an
19 appropriate scale in future landscape and project analyses. See id. The fact that the effects were too
20 variable or site-specific to lend themselves to more detailed analysis at the bioregional scale,
21 however, does not mean that the Framework violated NEPA. Salmon River, 32 F.3d at 1357 (9th
22 Cir. 1994) (“when an impact statement [programmatic] is prepared, site-specific impacts need not
23 be fully evaluated until a ‘critical decision’ has been made to act on site development”) (Citation
24 omitted).

25 Plaintiff’s argument that the analysis of effects from timber harvest is defective because the
26 2004 Framework was “predetermined” is without merit. Pl.’s Mem. at 42. NEPA presumes that
27 agencies will have a preferred action, so it only requires that impacts be evaluated objectively and
28 in good faith. See 40 C.F.R. § 1502.14(e) (requiring identification of agency’s preferred alternative);

1 Metcalfe v. Daley, 214 F.3d 1135, 1142 (9th Cir. 2000) (“NEPA assumes as inevitable an institutional
2 bias within an agency proposing a project . . .”). This was done for the 2004 Framework. Plaintiff’s
3 only “evidence” to support its argument is a chart comparing projected harvest to current timber
4 “inventory,” terminology which Plaintiff alleges shows that impacts to other resources were
5 trivialized. Pl.’s Mem. at 42. This chart appears in a discussion of commercial harvest, where it is
6 not uncommon to refer to potential harvestable volume as timber “inventory.” SNFPA 3390.^{21/}
7 Timber is among the multiple uses for which Congress has directed forest plans to provide, and the
8 former National Forest Management Act regulations also employ such a term. See 16 U.S.C. §
9 1604(e)(1); 36 C.F.R. § 219.14(b)(3) (2000) (discussing management of existing “timber inventory”).
10 The mention of “inventory” in an analysis of commercial timber harvest simply does not show that
11 the analysis lacked objectivity or violated NEPA.

12 **2. The SEIS Took A Hard Look at Effects to Old Forest Species,**
13 **Including the Spotted Owl**

14 Plaintiff’s argument that the analysis of the owl and other old forest species is defective
15 should be rejected. Pl.’s Mem. at 43. The SEIS took a hard look by acknowledging uncertainty
16 associated with short-term effects upon old forest species, struck a reasoned balance that is projected
17 to result in more suitable habitat in the long-term than under the 2001 Framework, and proposed to
18 monitor short-term effects on the owl through an adaptive management study and consideration in
19 future site-specific analyses. See SNFPA 3338 (“By year 50, Alternative S2 would result in over
20 176,000 more acres [of suitable owl habitat] than S1”), 3154 (noting ongoing studies of short-term
21 effects to owls from mechanical treatments). Plaintiff’s arguments therefore should be rejected.

22 Plaintiff’s argument that the SEIS only disclosed the results of modeling 20 years into the
23 future because it “showed the newly selected alternative in a favorable light” is wrong. Pl.’s Mem.
24 at 44. First, modeling results prior to year 20 *were* disclosed. See SNFPA 3287, 3288, 3327.
25 Moreover, reliance upon modeling was a sound methodology deserving deference. See Salmon
26 River, 32 F.3d at 1359 (courts should not resolve disagreements among scientists as to methodology);

27
28 ^{21/} The chart is an updated version of similar data that was presented in the draft SEIS in tabular
format, rather than in a chart. See SEIS_06_000244 (showing inventory, growth, harvest).

1 Nevada Land Action Ass’n v. Forest Serv., 8 F.3d 713, 718 (9th Cir. 1993) (“NLA”). “Essentially
2 the same modeling and analysis systems used in the [2001] FEIS were used for the [2004] SEIS.”
3 SNFPA 3461. Indeed, long-term projections are “fundamental to forestry science.” SNFPA 3337.
4 The models for the SEIS are “state-of-the-art,” updated versions of those used in the Northwest Forest
5 Plan (“NWFP”) and “every national forest plan in the Region.” Id. (models are “based on thousands
6 of measured trees, are grounded in forestry science and are uniquely developed to cover the major
7 forested areas around the country”). The SEIS also fully disclosed the models’ assumptions. See
8 SNFPA 3461-3480. Plaintiff cannot show that long-term modeling is an unreasonable methodology.
9 See Salmon River, 32 F.3d at 1359; NLA, 8 F.3d at 718 (approving use of models in forest planning).

10 Plaintiff argues that the Forest Service cannot rely upon long-term habitat increases to justify
11 short-term impacts, citing Seattle Audubon Soc’y v. Mosely, 798 F. Supp. 1473 (W.D. Wash. 1992).
12 Pl.’s Mem. at 44. That case, however, is distinguishable in two respects. First, the forest plan
13 amendment challenged in Mosely involved the *northern* spotted owl, which unlike the *California*
14 spotted owl, was already listed under the ESA as threatened. Id. at 1475. In addition, the plan
15 amendment in Moseley predicted a “net decrease of approximately 468,000 acres of spotted owl
16 nesting, roosting, and foraging habitat over the next fifty years.” Id. at 1478. By contrast, here it is
17 projected that habitat would *increase* over the same time period. See SNFPA 3338 (both alternatives
18 would result in “increased cumulative acreage” of habitat in years 20, 50, and 130, with Alternative
19 S2 showing a greater increase than Alternative S1 over time); SNFPA 3615-3616 (amount of forested
20 area with average trees >24" dbh “continues to increase” in both alternatives). The decision in
21 Mosely therefore does not support Plaintiff’s argument.

22 Plaintiff’s argument that there is “no evidence” to support the conclusion that reductions in
23 wildland fire would lead to a net increase in suitable owl habitat, also should be rejected. Pl.’s Mem.
24 at 45. Plaintiff relies upon a statement in the SEIS that it is “unknown” how much the burning of
25 PACs between 1998 and 2002 has diminished suitable owl habitat. See Pl.’s Mem. at 29 (citing
26 SNFPA 3215), 45. Plaintiff takes that statement out of context. The passage explains that changes
27 in owl habitat resulting from wildland fires have not been estimated and “cannot be fully measured
28 immediately following wildfire, because direct and indirect tree mortality may not become evident

1 for several years.” SNFPA 3215. The SEIS observes, however, that immediate effects to owl habitat
2 *have* been documented for several large wildfires (Buck, Storrie, Manter, McNally, Star, and Gap)
3 between 1998 and 2002. *Id.* Although the magnitude of the full effects to owl habitat will not be
4 understood for many years, most of these fires “did lead to total or partial loss of PACs,” based upon
5 the extent of mortality of mature conifers immediately following the fire. *Id.*

6 As discussed *supra* Section I.A.3, between 1998-2002 the annual rate of loss of owl PACs
7 due to wildfire appears to have increased. SNFPA 3349. Under the 2004 Framework, not only
8 would there be fewer acres burned by wildfire, but “a reduction in the fraction of wildfire acreage
9 (forested) that is lethally burned” is also projected. SNFPA 3287-88. By contrast, under the 2001
10 Framework, wildfire acreage is “projected to remain about the same as current levels.” SNFPA 3349.
11 Given that most of the recent fires led to total or partial loss of PACs, the SEIS’s conclusion that
12 habitat would benefit from reducing stand-replacing wildfire 50 years into the future was reasonable.
13 *Id.*; see Native Ecosystems Council v. Forest Serv., 428 F 3d. 1233, 1248 (9th Cir. 2005). In sum,
14 Plaintiff’s arguments should be rejected.

15 3. The SEIS Adequately Analyzed Effects from Changes in Grazing 16 Management

17 The Court should also reject Plaintiff’s argument that the SEIS failed to analyze adequately
18 the potential effects from changes to management direction regarding grazing. The SEIS contains
19 a candid discussion of the effects from grazing that would likely result under both the 2001
20 Framework and the 2004 Framework, and should therefore be upheld under NEPA. *See, e.g.*, SNFPA
21 3356-3362 (effects upon flycatchers); SNFPA 3371-3375 (effects upon toads).

22 For the flycatcher, the SEIS analyzed effects that could result from the main difference
23 between S1 and S2, namely the option of managers at occupied sites either to restrict grazing to late-
24 season, or to allow grazing year-round under a site-specific management plan. *See* SNFPA 3359.
25 As the SEIS explained, only about 10% of nesting attempts occur after August 15, the date for late-
26 season grazing. *Id.* In some of these years, late nesting occurs due to unusually wet weather. *Id.*
27 When that happens, the date when livestock are allowed onto allotments would likely be delayed,
28 thereby “moderating the risk” of nest disturbance. *Id.* Additionally, standards for willow use and

1 direction to stop livestock from browsing on willows “should also minimize this risk and result in
2 little difference between alternatives.” Id. Finally, the site-specific management plan is required to
3 protect habitat during the breeding season and to maintain long-term habitat suitability. Id.^{22/}

4 As for the toad, the SEIS provides a candid assessment of the potential effects to the species,
5 noting that under both S1 and S2, due to the difficulty of herding and fencing livestock in high
6 elevation meadows, grazing and movement will take place in some portion of toad breeding and
7 rearing areas if livestock are allowed in adjacent areas. SNFPA 3372. The SEIS noted that “[l]ittle
8 information exists about the effects of land management activities on the Yosemite toad.” SNFPA
9 3371; see also id. 3159 (in which the 2004 Framework directs further study of grazing practices on
10 habitat important for the Yosemite toad). The SEIS therefore bases its analyses upon general
11 ecological relationships and principles.

12 Potential direct effects to the toad were candidly disclosed. Effects would include “trampling
13 of some egg masses and tadpoles in shallow portions of ponds,” although most eggs will have
14 hatched, and effects would primarily be upon tadpoles by the time livestock reach the high meadows.
15 Id. The SEIS also disclosed that metamorphs are more vulnerable due to their slow movement, and
16 that the risk is highest from July through October. SNFPA 3372- 3373. Indirect effects were also
17 fully disclosed and include: modification of breeding and rearing pool structural features from
18 livestock hooves; reduction of cover from trampling and matting of vegetation; and potentially
19 delayed metamorphosis and smaller metamorphs as a result of contamination of pools by livestock.
20 Id. Finally, cumulative impacts and effects to toad populations were disclosed. SNFPA 3374-3375.

21 In sum, the SEIS took a hard look at effects from grazing, and Plaintiff’s argument to the
22 contrary should be rejected. See Mumma, 956 F.2d at 519 (9th Cir. 1992) (“Once satisfied that a
23 proposing agency has taken a ‘hard look’ at a decision’s environmental consequences, the review is
24 at an end.”) (quoting Block, 690 F.2d at 761).

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28 ^{22/} As explained *supra* at Section II.B., the final SEIS adequately addressed the WFWG’s
comments.

1 **4. The SEIS Took a Hard Look at Additional Impacts from Full**
2 **Implementation of the HFQLG Pilot Project**

3 The SEIS satisfies NEPA by taking a hard look at effects from full implementation of the
4 HFQLG Pilot Project. See Pl.’s Mem. at 46. The Forest Service is required by statute to conduct
5 the Pilot Project. See 16 U.S.C. § 2104 note, sec. 401(b). The Forest Service already prepared a
6 programmatic EIS in August 1999 specifically for the Pilot Project, as well as a supplemental
7 programmatic EIS which was published in July 2003 in response to a court order. SNFPA 986. The
8 SEIS represents *yet another* programmatic EIS that addresses standards and guidelines for the Pilot
9 Project.

10 The SEIS contains adequate discussion of the effects of full implementation of the Pilot
11 Project.^{23/} Plaintiff’s argument that the agency has not fully evaluated the “potential impacts that
12 implementation of this large-scale project will have” is simply wrong. Pl.’s Mem. at 46. The prior
13 Pilot Project EIS covers much of the ground that Plaintiff would like to see re-analyzed in the SEIS.
14 See SNFPA 3609 (“The environmental effects of the Pilot Project were originally evaluated and
15 analyzed in the HFQLG FEIS”); SNFPA 3361 (“The effects of implementing the [Scientific Analysis
16 Team (“SAT”)] guidelines have been analyzed and discussed in the HFQLG FEIS and biological
17 evaluation, and the effects of implementing the SAT guidelines in lieu of the AMS have been
18 evaluated and discussed in the SNFPA FEIS and biological evaluation”). NEPA is not an exercise
19 in generating paperwork but in producing meaningful analysis. See 40 C.F.R. §§ 1500.4, 1500.1(c),
20 1502.1. It was therefore reasonable for the SEIS to include an analysis only of new standards and
21 guidelines, and not a full-blown re-evaluation of the Pilot Project as Plaintiff prefers.

22 Moreover, the SEIS did draw reasoned conclusions about impacts from the Pilot Project. For
23 example, the analysis for willow flycatcher noted that treatments would be consistent with SAT
24 guidelines that apply to the Pilot Project, and that such guidelines would likely have similar effects

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26 ^{23/} See, e.g., SNFPA 3131-34 (description of management direction); 3177 (effects to roads);
27 3267-3268 (old forest connectivity); 3268-3269 (old forest desired conditions); 3270-3271 (forest
28 density/composition); 3275, 3276 (reforestation/regeneration); 3280, 3281, 3282 (aquatic
ecosystems); 3289, 3290, 3291, 3292, 3294, 3295 (fire and fuels); 3307 (red-legged frog); 3338-
39, 3342; SNFPA 3361(willow flycatcher); SNFPA 3364 (great gray owl); SNFPA 3373
(Yosemite toad “does not occur within the HFQLG Pilot Project Area”).

1 on riparian areas where flycatchers occur, as would the Framework’s aquatic management strategy.
2 SNFPA 3361. The SEIS also recommended initiating a conservation strategy and monitoring to
3 “identify needs and opportunities for meadow management to improve habitat conditions that would
4 benefit willow flycatchers,” and thereby reduce uncertainty about effects of management. *Id.*

5 Finally, as explained *supra* at Section I.F., the SEIS adequately reconciles its prior conclusion
6 in the Pilot Project BA/BE that full implementation might threaten owl viability. *See* SNFPA 3338-
7 39, 3608-09; *see also* SNFPA 1968. As the agency has explained, the prior owl viability analysis was
8 reviewed and found to have taken unnecessarily a “worst case approach to estimating effects” on the
9 owl, while the actual implementation has more modest impacts. SNFPA 1968; *see* SNFPA 3338,
10 3609; *see also* SNFPA 3339 (vegetation growth outside DFPZs not explicitly considered in prior
11 analysis, nor was the fact that treatments were prohibited in PACs and Spotted Owl Habitat Areas).

12 In sum, much of the analysis that Plaintiff requests has already been covered by the prior two
13 programmatic EISs specifically prepared for the Pilot Project and was not required to be repeated.
14 *See* SNFPA 3633, SNFPA 4012; *see also* 40 C.F.R. § 1502.20 (encouraging agencies to tier analysis
15 to “eliminate repetitive discussions of the same issues,” in subsequent EISs); *Village of False Pass*
16 *v. Clark*, 733 F.2d 605, 615 (9th Cir. 1984) (approving of tiering). The SEIS reasonably addressed
17 the impacts related to the changes in direction for the Pilot Project and thereby satisfied NEPA.

18 **5. The SEIS Adequately Disclosed the Limitations of Future**
19 **Projections in Forest Vegetation**

20 Plaintiff’s argument that the 2004 SEIS failed to disclose the “magnitude of uncertainty”
21 surrounding its vegetation modeling should also be rejected. Pl.’s Mem. at 47-48. Under NEPA, an
22 agency must disclose the methodology upon which it relies, including the shortcomings of its analytic
23 models. *See Lands Council v. Powell*, 395 F.3d 1019, 1032 (9th Cir. 2005). The agency’s
24 description of methodology “should set forth only those methodology shortcomings that are relevant
25 in light of the environmental impacts the methodology is used to analyze.” *Lands Council v. Vaught*,
26 198 F. Supp. 2d 1211, 1238 (E.D. Wash. 2002). The Court must “defer to agency expertise on
27 questions of methodology unless the agency has completely failed to address” an essential factor.
28 *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993).

1 As explained *supra* at Section II.C.2, the SEIS used state-of-the-art models that have been
2 applied and refined for many years, including their use in the 2001 Framework, NWFP, and every
3 forest plan in the Region. SNFPA 3337, 3461. The SEIS fully disclosed assumptions behind the
4 models and candidly acknowledged that the models are better predictors of relative differences than
5 absolute results. See SNFPA 3461-3480, 3649-50; see also SNFPA 3337 (noting that the analysis
6 “does inform the decision-maker about the relative performance of the different management options
7 under a given set of assumptions”); SNFPA 3461 (acknowledging that the models were not intended
8 to provide precise information, “but rather to provide indication of direction of change, estimates of
9 the magnitude of change, and time frames surrounding such change.”). The SEIS thus adequately
10 disclosed the models’ limitations. Schultz, 992 F.2d at 981.

11 Neither the 2001 nor the 2004 Frameworks are long-term strategies, and the current direction
12 will likely be revised before these long-term projections bear out. See SNFPA 3615 (“It is expected
13 that as this new information [from adaptive management] becomes available, the current direction
14 will be modified”). Nonetheless, the models have recognized utility in forestry science, and nothing
15 requires an absolute quantification of their uncertainty. See, e.g., Salmon River, 32 F.3d at 1359-60
16 (NEPA does not require an agency to “quantify every risk”). Plaintiff’s argument should therefore
17 be rejected. See Churchill County v. Norton, 276 F. 3d 1060, 1081-82 (9th Cir. 2001) (agency was
18 “nevertheless able to make an informed decision” after recognizing limitations of conceptual model);
19 NLA, 8 F.3d at 718 (approving use of professional projections and estimates in forest planning).

20 **D. Adaptive Management was Reasonably Included in the 2004 Framework**

21 Plaintiff is incorrect in suggesting that the Forest Service has applied adaptive management
22 as a “fix [to] the substantial defects in the 2004 SEIS” (Pl’s Memo. 48). Plaintiff further
23 mischaracterizes the Forest Service’s intended use of adaptive management as a means to “check any
24 unanticipated adverse impacts.” Pl.’s Mem. at 49. The use of adaptive management is adequately
25 explained in the SEIS, and the Forest Service reasonably has applied it to the 2004 Framework.

26 As the Forest Service explains, adaptive management is a scientific “approach to [move]
27 forward when decisions must be made in an environment of uncertainty.” SNFPA 3136. Its
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1 “policies and decisions are not viewed as final solutions but as hypotheses and opportunities for
2 continued learning.” SNFPA 3137. The monitoring and research initiatives of adaptive management
3 provide data that can be reviewed and used to inform subsequent management decisions. SNFPA
4 3141. As the record demonstrates, the 2004 Framework will apply adaptive management to reduce
5 uncertainty in future decisions, not as a “fix.” Furthermore, contrary to Plaintiff’s position here, the
6 State’s own Resources Agency openly supports the use of adaptive management in the 2004
7 Framework. See Ex. A. In a memorandum of understanding with the Forest Service, the California
8 Resources Agency acknowledged that adaptive management can improve forest management while
9 at the same time can address the State’s interests in its natural resources. See Ex. A at 2.

10 Plaintiff also incorrectly asserts there is no discussion on the funding for monitoring and
11 surveying. Pl.’s Mem. at 49. A detailed discussion on funding for the adaptive management
12 monitoring and surveying is present in the record, and lists high priority studies such as the California
13 spotted owl canopy reduction study. SNFPA 3983-86. Finally, there is no undue optimism as to
14 the application of adaptive management. See Pl. Memo. at 49. The Forest Service candidly
15 explained that it is not a simple approach. As stated in the ROD:

16 I want to set *realistic expectations* about this decision and commitments that
17 I am making for an adaptive management and monitoring program. It is a
18 system that can help us learn, it provides us the opportunity to interact with
19 stakeholders to share and interpret data, and it can lead to creative solutions
20 that fit ecosystem processes within the context of law and cost-effective
21 management.

22 SNFPA 3002 (emphasis added). However, recognizing the limits of a scientific methodology does
23 not invalidate its use. Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir.
24 1985) (NEPA does not require a court to decide whether an environmental document “is based on
25 the best scientific methodology available . . .”). Here, Plaintiff’s claims have no merit, and the Forest
26 Service’s adaptive management should be afforded deference. Schultz, 992 F.2d at 981 (“We will
27 not second-guess methodological choices made by an agency in its area of expertise.”).

28 CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff’s motion for summary judgment.

Respectfully submitted this 16th day of December 2005.

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