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10
11 IN THE UNITED STATES DISTRICT COURT
12
13 FOR THE EASTERN DISTRICT OF CALIFORNIA
14
15 SACRAMENTO DIVISION

16 SIERRA NEVADA FOREST PROTECTION)
17 CAMPAIGN, *et al.*,) No. CIV-S-05-0205 MCE/GGH
18)
19 Plaintiffs,) Related Cases: CIV-S-05-0211 MCE/GGH
20) CIV-S-05-0905 MCE/GGH
21 v.) CIV-S-05-0953 MCE/GGH
22)
23 MARK REY, in his official capacity as Under)
24 Secretary of Agriculture, *et al.*,) MEMORANDUM OF INTERVENORS
25) QUINCY LIBRARY GROUP AND
26 Defendants,) PLUMAS COUNTY IN SUPPORT OF
27) DEFENDANTS' MOTION FOR
28 and) SUMMARY JUDGMENT AND IN
29) OPPOSITION TO SIERRA NEVADA
30 TUOLUMNE COUNTY ALLIANCE FOR) FOREST PROTECTION CAMPAIGN'S
31 RESOURCES & ENVIRONMENT, *et al.*,) MOTION FOR SUMMARY JUDGMENT
32)
33 Defendant-Intervenors,)
34 and)
35) Date: March 20, 2006
36 CALIFORNIA SKI INDUSTRY) Time: 9:00 a.m.
37 ASSOCIATION,) Courtroom: 3, 15th Floor
38) Hon. Morrison C. England, Jr.
39 Defendant-Intervenor,)
40 and)
41)
42 QUINCY LIBRARY GROUP, *et al.*,)
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44 Defendant-Intervenors)
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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

I. BACKGROUND..... 1

II. ARGUMENT..... 3

A. The Campaign Fails to State a Claim Upon Which This Court Grant Relief.... 3

 1. The Campaign’s Facial Challenge That the 2004 Framework Violates the 1982 National Forest Management Act Regulations Is Moot..... 4

 2. If The 2004 Framework Were Governed By The 1982 Planning Rules and CFR 36 Sec. 219.19, The Framework Would Be In Compliance..... 5

 3. Even If the 1982 Planning Rules Applied to 2004 Framework, the Forest Service Reasonably Concluded that the MIS Monitoring Requirements of 36 CFR Section 219.19 Do Not Apply to the Basin Project..... 6

B. The Forest Service’s Determination That The 2004 Framework Will Maintain Viable Populations Of California Spotted Owls, Pacific Fishers, And American Martens Is Squarely In Line With The Overwhelming Evidence In The Record..... 7

 1. The Forest Service May Rely on Habitat Analysis to Satisfy Its Monitoring Requirements..... 7

 2. The Forest Service Complied with Monitoring Requirements When It Adopted the Basin Project..... 8

 3. The Record Demonstrates that the 2004 Framework’s Standards and Guidelines Are Adequate to Maintain Owl, Fisher, and Marten Viability... 8

 4. Implementation of the Basin Project Is Not a Threat to Owl, Fisher, and Marten Viability..... 9

C. The Forest Service Met the Requirements Under the National Environmental Policy Act When It Adopted Both the 2004 Framework and the Basin Project..... 11

 1. The Forest Service Provided for Pre-Decisional Public Comment on the Basin Project, in Accord with the Spirit and Intent of NEPA..... 11

 2. The Forest Service Took a Hard Look at the Cumulative Impact that the Basin Project, Together with Other Logging Projects, Will Have on Old

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

Forest Species..... 13

3. The Final Supplemental Environmental Impact Statement Includes a Full and Fair Discussion of Impacts to Old Forest Species..... 14

4. The FSEIS Discloses Responsible Opposing Scientific Viewpoints Regarding Impacts to Old Forest Species and Adequately Considered the Short-Term and Cumulative Impacts of Logging under the 2004 Framework on Old Forest Species..... 16

5. The Forest Service Is Not required to Re-Examine Every Alternative to the 2004 Framework in Its Final Supplemental Environmental Impact Statement, Nor Was It Required to Re-Examine Alternatives Previously Found to Be Unfeasible..... 17

D. Any Remedy Should Not Include Enjoining Implementation of the 2004 Framework or the QLG Pilot Project..... 18

III. CONCLUSION..... 19

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 AUTHORITIES

Cases

Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531 (1987)	19
Blue Mts. Biodiversity Project v. Pence, 22 F. Supp.2d 1136 (D. Or. 1998)	6
Bowen v. Kitzer, 485 U.S. 386, 108 S.Ct. 1200, 99 L.Ed.2d 402 (1998)	5
Carmel-by-the-Sea v. DOT, 123 F.3d 1142 (9th Cir. 1997)	16
Center for Biological Diversity v. U.S. Forest Service, 349 F.3d 1157 (9th Cir.2003)	11
Churchill County v. Norton, 276 F.3d 1060 (9th Cir.2001).....	13
County of Los Angeles v. Shalala, 192 F.3d 1005 (D.C. Cir. 2003).....	18
Cronin v. U.S. Dept. of Agric., 919 F.2d 439 (7th Cir. 1990).....	12
Dep’t of Transp. v. Pub. Citizen, 124 S. Ct. 2204 (2004)	13, 14
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Krichbaum v. U.S. Forest Serv., 991 F. Supp. 501 (1998).....	19
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1	Methow Forest Watch v. U.S. Forest Service, No. 04-114-KI, 2005 WL 119590 (D. Or. Jan.	
2	20, 2005)	15
3	National Parks & Conservation Ass'n v. United States Dept. of Transp., 222 F.3d 677 (9th	
4	Cir.2000)	11
5	Neighbors of Cuddy Mountain v. U.S. Forest Service, 137 F.3d 1372 (9th Cir.1998).....	8, 14
6	Neighbors of Cuddy Mt. v. Alexander, 303 F.3d 1059 (9th Cir.2002)	11, 14
7	Newton County Wildlife Ass'n v. Rogers, 143 F.3d 803 (8th Cir. 1998).....	13
8	Selkirk Conservation Alliance v. Forsgren, 336 F.3d 944 (9th Cir. 2003)	13
9	Sierra Club v. Eubanks, 335 F.Supp.2d 1070 (E.D.Cal.,2004)	11, 17
10	Sierra Club v. Glickman, 67 F.3d 90 (5th Cir.1995).....	5, 6
11	Sierra Club v. Robertson, 784 F. Supp. 593(W.D. Ark. 1991)	19
12	Wards Cove Packing Corp. v. National Marine Fisheries Service, 307 F.3d 1214 (9th Cir.2002)	
13	5
14	Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982).....	18
15	Statutes	
16	16 U.S.C. § 1604	4
17	5 U.S.C. § 706	5, 18
18		
19	Rules	
20	Fed.R.Civ.P. 56	3
21	Regulations	
22	36 C.F.R. § 219.19.....	6
23	36 C.F.R. 219.19.....	3, 4, 5, 6
24	40 C.F.R. § 1500.1.....	11
25	40 C.F.R. pt. 1500	1
26		
27	Constitutional Provisions	
28	U.S. Const. art. III, § 2.....	5

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2
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ACRONYMS AND ABBREVIATIONS

APA	Administrative Procedure Act
BA/BE	Biological Assessment/Biological Evaluation
CEQ	Council on Environmental Quality
CWHR	California Wildlife Habitat Relationship
dbh	Diameter at Breast Height
DFPZ	Defensible Fuel Profile Zone
EA	Environmental Assessment
EIS	Environmental Impact Statement
FEIS	Final Environmental Impact Statement
FONSI	Finding of No Significant Impact
FWS	United States Fish and Wildlife Service
FSEIS	Final Supplemental Environmental Impact Statement
HFQLG	Herger-Feinstein Quincy Library Group Forest Recovery Act
MIS	Management Indicator Species
NEPA	National Environmental Policy Act
NF	National Forest
NFMA	National Forest Management Act
NFS	National Forest System
PAC	Protected Activity Center
QLG	Quincy Library Group
ROD	Record of Decision
SCR	Science Consistency Review
SEIS	Supplemental Environmental Impact Statement
SNFPA	Sierra Nevada Forest Plan Amendment
SOHA	Spotted Owl Habitat Area

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CITATIONS TO THE ADMINISTRATIVE RECORDS

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

1. Citations to the eight-volume administrative record for the 2004 and 2001 Sierra Nevada Framework are referenced as “SNFPA xxxx,” where “xxxx” is the Bates-stamped number at the bottom of the page in that record.
2. The eight-volume SNFPA record also contains material on CDs, which were originally found at SNFPA 4338-4360. The material on these CDs are referenced by the Bates-stamped number at the bottom of the appropriate page, typically: “SEIS_aa_xxxxxx,” where “aa” is the CD volume, and “xxxxxx” is the page number.
3. Citations to the ten-volume administrative record for the Basin Project, which is challenged in Sierra Nevada Forest Protection Campaign v. Rey, No. CIV-S-05-0205 MCE GGH, are referenced as “BASIN xxxx,” where “xxxx” is the Bates-stamped number at the bottom of the page in that record.
4. The 1997 Sierra Nevada Ecosystem Project Report is located on a compact disk found at SNFPA 1670. It is cited as “SNEP Vol. z, Ch. y at x,” where “z” is the SNEP volume number, “y” is the SNEP chapter number, and “x” is the page number.

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I. BACKGROUND

The Forest Service’s need to move from the 2001 Framework to the 2004 Framework is not a violation of the National Environmental Protection Act (NEPA). 40 C.F.R. pt. 1500. The shift in policy was clearly and succinctly explained in the previously published Sierra Nevada Forest Plan Amendment (SNFPA) Management Review and Recommendations, SNFPA 1918, 1921. The numerous reasons for the change included, in part, affording more effective fuels reduction treatments than allowed under the 2001 Record of Decision (ROD); greater implementation of the Herger-Feinstein Quincy Library Group Forest Recovery Act’s (HFQLG) pilot project; and reducing unintended and unnecessary adverse consequences of the 2001 ROD to local communities, recreational users, grazing permittees. SNFPA 1918-1919. A summary of the Forest Service’s history of forest planning and California spotted owl management in the Sierra Nevada appears at SNFPA 1920-1922.

The background and basic facts for the case against the 2004 Sierra Nevada Forest Plan Amendment are properly summarized by the Federal Defendants’ Mem. at 1. For more extensive and detailed background information, Intervenor Quincy Library Group (QLG) incorporates its arguments made in response to the Lockyer Motion for Summary Judgment found at pp. 1 through 7.

The fundamental premise of the motions filed by the Campaign plaintiffs, Attorney General Lockyer, and Pacific Rivers Council is that the 2004 Sierra Nevada Forest Plan Amendment, or Framework, will lead to imminent environmental collapse. *See* Campaign Mem. in Supp. Summ. J. at 1, 3. However, these bleak characterizations are unsupported by fact or general scientific opinion. There is nothing in the record that reflects any scientific conclusion that Sierra Nevada old-growth forest ecosystems are “collapsing” or have “collapsed.” In fact, the seminal scientific evaluations of the Sierra of the last 13 years conclude exactly the opposite. *See* SNFPA 1035; BASIN 2920; SNEP Vol. 2, Ch. 15 at 439.

The amendment of the 2001 Framework was largely driven by the availability of superior

1 scientific information concerning the status and needs of the California spotted owl. This
2 information only became available *after* the 2001 Framework was adopted. During analysis of
3 the California spotted owl in 1992, the CASPO report used scientific data collected over a
4 relatively short period of time to determine the population viability of the owl. Although the
5 conclusion provided the best available science at the time, the abbreviated analysis produced
6 limited concrete findings:

7 Is the Sierran population [of spotted owls] declining? We cannot be certain. . . .
8 [California spotted owls'] current distribution and abundance, however, do not
9 suggest that they have declined either in their overall distribution in the Sierra
10 Nevada or that they have declined markedly in abundance within any forest
11 type.

12 SNFPA 1028.

13 With the benefit of an additional ten years of study and review, a team of spotted owl
14 researchers and Forest Service scientists completed a report in April 2003 entitled “Population
15 Dynamics of the California Spotted Owl: a Meta-analysis.” SEIS_05_003745 – 003848. This
16 report was used by the U.S. Fish and Wildlife Service (FWS) during its status review of the
17 owl. SNFPA 1896. The new report proved stronger than the CASPO report made in 1992,
18 largely because the duration and depth of the analysis had become sufficient to conclusively
19 confirm whether the spotted owl populations were truly declining. Yet with all the new data
20 available, a population decline was neither evident nor conclusive:

21 We cannot absolutely distinguish between alternative [hypothesis] that the
22 populations were stationary or that the estimates of rate of [population change]
23 were not sufficiently precise to detect declines on 4 of the study areas. This
24 result was analogous to the CASPO results a decade earlier where the power of
25 the test was low.

26 SEIS_05_003748.

27 The report went on to state:

28 We believe the situation calls for several steps needed during an interim period
to preserve for the future significant management options for owls in the Sierra
Nevada. These [should be] aimed primarily at saving the older forest elements
that the owls appear to need for nesting and roosting, and at reducing the
excessive build-up of surface and ladder fuels.

SNFPA 1036.

1 QLG believes that the 1992 CASPO report and the 2003 Meta-analysis have reached
2 exactly the same conclusion: that the spotted owl has the distribution and abundance to be a
3 viable species in the Sierra Nevada, and reports of its decline are indeterminate. This is the
4 same conclusion that the FWS described in its finding on the 2003 owl status review (FR Vol.
5 68. No. 31. 2-14-03):

6 In total, the findings reported [in the draft meta-analysis] are not conclusive with
7 respect to the population status of the California spotted owl. There is no
8 definitive evidence that the population is decreasing across its range, and various
9 analytical results of the individual study areas are not wholly supportive of
10 conclusions regarding declines in any given study area. Low levels of declines
11 may be occurring in some study areas, but if so, they are not clearly evident
12 using existing analytical techniques.

13 SNFPA 1899.

14 To date, no conclusive scientific evidence supports a finding that the California spotted
15 owl population is declining, nor can it be shown that a decline is directly or indirectly related to
16 logging practices in the Sierra Nevada's national forests.

17 **II. ARGUMENT**

18 **A. THE CAMPAIGN FAILS TO STATE A CLAIM UPON WHICH THIS COURT CAN GRANT RELIEF.**

19 Summary judgment is appropriate when there is no genuine issue as to material facts and
20 the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. Most of the
21 Campaign Br. (at 21-39, 44-47) argues that the Framework and the Basin Project violate the
22 wildlife viability and/or wildlife monitoring portions of the 1982 rules, and that the National
23 Environmental Policy Act (NEPA) documents failed to provide § 219.19-related information.
24 Case law governing the applicability of superceded regulations to judicial review of agency
25 decisions should direct this Court to apply current Forest Service planning regulations when
26 reviewing the adequacy of the 2004 Framework and Basin project decisions. Under the new
27 regulations, Plaintiffs have no legal violation to complain of with regard to species viability
28 issues. Plaintiffs' claims would, however, be unsubstantiated even under the 1982 regulations.

INTE On January 5, 2005, the Forest Service promulgated new regulations that replaced

1 requirements formerly set out in 36 C.F.R. Part 219 with regulations set out in 70 Fed.Reg.
2 1023. The now-deleted 36 C.F.R. 219.19 (1999) previously required that a forest plan: (1)
3 maintain sufficient habitat for “viable populations of [each] existing native...vertebrate
4 species”; and (2) describe a program in which “[p]opulation trends of the management
5 indicator species [“MIS”] will be monitored.” The 2005 regulations repealed all provisions
6 under the 1982 regulations, including those which the plaintiffs claim required the Forest
7 Service to collect quantitative population data on MIS. The Campaign Br. (at 21-39, 44-47)
8 argues that the Framework and the Basin Project violate the wildlife viability and/or monitoring
9 portions of this rule, and that the NEPA documents failed to provide § 219.19-related data.

10 The National Forest Management Act (NFMA) requires the Forest Service to provide for
11 diverse plant and animal populations. 16 U.S.C. § 1604(g)(3)(B). Under the now-obsolete
12 1982 regulations, the Forest Service was required to identify and select management indicator
13 species as a method of managing habitat, using the data collected from the indicator species to
14 preserve viable species populations. 36 C.F.R. § 219.19(a)(6)(1982). It is important to note
15 how “viability” was described in the regulation: “For planning purposes, a viable population
16 shall be regarded as one which has the estimated numbers and distribution of reproductive
17 individuals to insure its continued existence is well distributed in the planning area.” The new
18 2005 regulations at 36 C.F.R. § 219.14(f) provide the following regarding MIS:

19 For Units with plans developed, amended, or revised using the provisions of the
20 planning rule in effect prior to November 2, 2000, the Responsible Official may
21 comply with any obligations relating to management indicator species by
22 considering data and analysis relating to habitat unless the plan specifically
23 requires population monitoring or population surveys for the species. Site-
24 specific monitoring or surveying of a proposed project or activity area is not
25 required, but may be conducted at the discretion of the Responsible Official.

26 While the Campaign spends much of its time arguing that the Forest Service is in violation
27 of § 219.19, it fails to note that those regulations are now wholly obsolete.

28 **1. The Campaign’s Facial Challenge That the 2004 Framework
Violates the 1982 National Forest Management Act Regulations Is Moot.**

Article III of the Constitution limits the judicial power to “actual, ongoing cases or
INTERVENOR QLG’S MEM. IN OPP. TO PLS.’ MOT. FOR SUMM. J. – CIV. S-05-0205-MCE/GGH

1 controversies.” *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 108
2 L.Ed.2d 400 (1990) (citations omitted); *see* U.S. Const. art. III, § 2. For the Federal court to
3 properly hear a controversy and render a decision, the “case- or- controversy requirement
4 [must] subsist through all stages of federal judicial proceedings, [both] trial and appellate.”
5 *Lewis*, 494 U.S. at 477. Whether an actual controversy exists for purposes of Article III is
6 determined when the court acts, and *not* when the action is commenced. *Bowen v. Kitzer*, 485
7 U.S. 386, 387, 108 S.Ct. 1200, 99 L.Ed.2d 402 (1998) (per curiam) (emphasis added). When a
8 law is no longer in effect, cases challenging that law and requesting prospective equitable relief
9 typically become moot. *See Burke*, 479 U.S. at 363; *Diffenderfer v. Central Baptist Church*,
10 404 U.S. 412, 414, 92 S.Ct. 574, 30 L.Ed.2d 567 (1972) (per curiam).

11 **2. If The 2004 Framework Were Governed By The 1982 Planning**
12 **Rules and CFR 36 Sec. 219.19, The Framework Would Be In Compliance.**

13 Judicial review of agency decisions under both NEPA and NFMA is governed by the APA,
14 under which agency actions may only be overturned where the actions are found to be
15 “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5
16 U.S.C. § 706(2)(A); *see Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th
17 Cir.1998) (applying arbitrary and capricious standard to NEPA and NFMA claims). “An
18 agency's interpretation of regulations it is charged with administering is entitled to a high
19 degree of deference and will be upheld as long as it is not plainly erroneous or inconsistent with
20 the regulation.” *Wards Cove Packing Corp. v. National Marine Fisheries Service*, 307 F.3d
21 1214, 1218 (9th Cir.2002). As the court is not considering the issue *de novo*, it cannot substitute
22 its own opinion for that of the agency. *Sierra Club v. Glickman*, 67 F.3d 90, 96 (5th Cir.1995).

23 The Campaign’s chief argument is that, under the 1982 rules, the Forest Service cannot
24 satisfy their obligations relating to Management Indicator Species (MIS) by considering habitat
25 data, even though the 1982 regulations point to consideration of habitat as an approach to
26 managing for viable populations: “In order to insure that viable populations will be maintained,
27 habitat must be provided to support, at least, a minimum number of reproductive individuals
28 and that habitat must be well distributed so that those individuals can interact with others in the

1 planning area.” 36 C.F.R. § 219.19 (1982).

2 Administrative records in this case disclose that each time the Forest Service, FWS, or an
3 expert panel assessed the issue, it was concluded that California spotted owls and their habitats
4 are still widely distributed throughout their range. SNFPA 3350; SNFPA 1900 (FWS findings
5 in 2003 owl status review); SNFPA 2433 and 2439 (owl scientists’ meeting with Regional
6 Forester); SNFPA 1028 (CASPO Report in 1992). Neither the administrative record nor the
7 Campaign’s briefs contain any evidence that gaps have opened up in recent years in the
8 distribution of owls or their habitat, such that individuals cannot interact with others. Thus any
9 viability requirements that exist, even under the 1982 rules, are met by the 2004 Framework.

10 **3. Even If the 1982 Planning Rules Applied to 2004 Framework, the**
11 **Forest Service Reasonably Concluded that the MIS Monitoring**
12 **Requirements of 36 CFR Section 219.19 Do Not Apply to the Basin Project.**

13 The purpose of Section 219.19 is twofold: to guide the habitat that forest plans must set
14 aside for each vertebrate species, and to require that forest plans include wildlife monitoring
15 plans. The Forest Service reasonably reads 36 C.F.R. § 219.19 as meaning that §219.19 applies
16 only when a forest plan is being prepared. It is not plainly erroneous or inconsistent with the
17 regulation for the Forest Service to determine that §219.19 does not apply at the level of the
18 Basin Project, as wildlife monitoring is not a prerequisite to each project. *E.g., Forest*
19 *Conservation Council v. Jacobs*, 374 F. Supp.2d 1187, 1203 (N.D. Ga. 2005); *Blue Mts.*
20 *Biodiversity Project v. Pence*, 22 F. Supp.2d 1136, 1145 (D. Or. 1998). Similarly, the Forest
21 Service’s interpretation is reasonable that §219.19 allows the use of habitat suitability
22 monitoring in lieu of counting secretive, elusive wildlife over a wide geographic area. *See*
23 *Inland Empire Public Lands Council v. Glickman*, 88 F.3d 754, 759-63 (9th Cir. 1996);
24 *Chattooga Conservancy v. Jacobs*, 373 F. Supp.2d 1353, 1375-80 (2005).

25 The Environmental Assessment (EA) prepared for the Basin Project reported the results of
26 habitat trends analyses for the MIS expected to occur in the project area, BASIN 3700-3703,
27 BASIN 3594. Expected project changes in vegetation and California Wildlife Habitat
28 Relationships (“CWHR”) classifications were based on aerial photographs taken in 2000 and
INTERVENOR QLG’S MEM. IN OPP. TO PLS.’ MOT. FOR SUMM. J. – CIV. S-05-0205-MCE/GGH

1 were analyzed by Forest Service biologists to evaluate potential effects to MIS and other
2 species of interest. BASIN 3602. Furthermore, the Basin Project Decision Notice identified the
3 potential effects of the Basin Project on MIS as Issue #7 in the Environmental Assessment.
4 BASIN 3647. The decision-maker found that “[m]inor short-term effects to habitats of
5 particular species or species groups are expected to occur. None of these impacts will be
6 substantial.” BASIN 3647. The Forest Service did analyze and disclose expected trends in
7 wildlife habitats.

8 **B. The Forest Service’s Determination That The 2004 Framework Will**
9 **Maintain Viable Populations Of California Spotted Owls, Pacific Fishers,**
10 **And American Martens Is Squarely In Line With The Overwhelming**
11 **Evidence In The Record.**

12 An agency's choice of a particular analytical method is generally entitled to judicial
13 deference if it employs a reasonable methodology and discloses the inherent limitations of the
14 methodology. *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377, 109 S.Ct.1851,
15 104 L.Ed.2d 377 (1989). The methodologies used in the 2004 Framework process to evaluate
16 viability of owls, fishers, and martens included both general habitat type assessments and also
17 consultations with spotted owl and furbearer researchers and other related experts. These were
18 the same approaches used in the 2001 Framework, and involved essentially the same people.
19 Significant improvements in the Meta-analysis models, as well as greater scientific debate
20 surrounding the Hunsaker papers and the 2001 Framework’s cutting prescriptions, helped
21 clarify the expert’s recommendations and led to superior decision-making on the part of the
22 Regional Forester. SNFPA 1949-1952.

23 **1. The Forest Service May Rely on Habitat Analysis to Satisfy Its**
24 **Monitoring Requirements.**

25 Several Ninth Circuit decisions have upheld analysis on MIS populations by analyzing the
26 amount of habitat affected rather than through population counts. *See Inland Empire*, 88 F.3d at
27 759, 763; *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1154 (9th Cir.1998) (Forest
28 Service's decision to address regulatory requirement by evaluation of habitat not arbitrary or

1 capricious); *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372,
2 1380 (9th Cir.1998) (regulatory requirement can be satisfied by evaluating suitable habitat).
3 QLG adopts and incorporates the Federal Defendants’ argument at Mem. at 17.

4 **2. The Forest Service Complied with Monitoring Requirements When It**
5 **Adopted the Basin Project.**

6 QLG adopts Federal Defendants’ argument at Mem. at 15, and adds the following
7 information. In association with the Plumas-Lassen Administrative Study and other activities
8 over the last ten years, the Basin BA-BE reports that approximately half of the Plumas National
9 Forest has been surveyed according to agency protocols for forest carnivores, and that protocol-
10 level surveys of the Basin Project area in the winter of 2003-2004 found no sign of their
11 presence. BASIN 3553-3554. Forest Service PSW researchers have been monitoring spotted
12 owl populations in the Basin Project and other administrative study areas annually since 2002.
13 BASIN 3551. The results of those and other pre-project owl surveys are disclosed in the BA-
14 BE at BASIN 3551-3552. The record shows that despite decades of timber harvest and other
15 habitat modifications, the Basin Project analysis area was found to have 21 occupied owl
16 territories during the 2002-2004 surveys. BASIN 3552. Prior to the Basin decision, two new
17 owl PACs were designated and six others were “reconfigured” to better protect resident pairs of
18 owls. BASIN 3552. If the Campaign is truly seeking environmental disclosure and adaptive
19 management that protects spotted owls and other resource values, the Basin Project
20 accomplishes their goal, and the Basin Project EA has fulfilled NEPA’s requirements.

21 **3. The Record Demonstrates that the 2004 Framework’s Standards and**
22 **Guidelines Are Adequate to Maintain Owl, Fisher, and Marten**
23 **Viability.**

24 Of the wildlife species named here, only the California spotted owl is known to exist as a
25 resident population throughout the Sierra Nevada. Trapping and other factors virtually
26 eliminated fisher populations in the central and northern Sierra Nevada decades ago.
27 Therefore, any logging done as a result of the QLG project or the 2004 Framework outside of
28 the Southern Sierra Fisher Conservation Area will have no effect on these species.

1 **4. Implementation of The Basin Project is Not a Threat to Owl, Fisher,**
2 **and Marten Viability.**

3 The 1999 HFQLG Environmental Impact Statement (EIS) owl analysis cited repeatedly by
4 plaintiffs contained assumptions of owl decline that have since proved incorrect. SNFPA 1949.
5 The Forest Service’s Management Review and Recommendations, and the FWS’s finding that
6 the owl was “unwarranted for listing,” each recount how the mistakes in the 1999 BA/BE for
7 the HFQLG and in the 2001 Framework ROD occurred. SNFPA 1948-1952 (MRR); SNFPA
8 1900 (FWS listing determination found that “certain of [the 2001 Framework’s] conclusions as
9 to the possible population implications were not valid.”). The Regional Forester in the 2004
10 ROD used the correct information, reassessed the 2001 ROD in light of the correct information,
11 considered the District Rangers’ assessments of their ability to implement the 2001 ROD
12 standards and guidelines, prepared a SEIS, and changed Forest Service policy. Among the
13 changes was to allow full implementation of the HFQLG pilot program. SNFPA 3001.

14 The Basin project’s BA/BE analyzed the amounts of various wildlife habitats currently
15 available, compared those with the amounts projected if the Basin project were implemented,
16 and concluded that 72 percent of the acres in the Basin planning area will be good owl, fisher,
17 and marten habitat. BASIN 3539 and 3553 (owl PACs, SOHA, and additional nesting and
18 foraging habitat total 37,833 acres in the 52,570-acre analysis area); BASIN 3695 (projected
19 changes in CWHR habitat types).

20 The 2003 Meta-analysis of all existing demographic data found that the owl is, within a
21 95% confidence level, a stable population, and not declining as was previously believed.
22 BASIN 3720. Moreover, the latest research indicates that: (1) owls utilize a wider variety of
23 habitats for foraging (habitats where the canopy coverage is 40% or greater) than previously
24 thought; (2) owls are being protected on private timberlands pursuant to State laws; (3) owls
25 are not suffering from any demonstrable population declines; and (4) owls are suffering habitat
26 loss from wildfires. SNFPA 3099, 3213-18 (2004 SEIS at 27, 141-46). These factors led the
27 FWS to conclude there is sufficient suitable habitat (“4,628,100 acres”) for viable populations
28 of owls in the Sierra Nevada to persist in the future, so the owl did not warrant listing under the

1 Endangered Species Act (“ESA”). 68 Fed. Reg. 7580, 7586, 7601, 7607 (Feb. 14, 2003).

2 The Basin BA/BE discussed both population and habitat data concerning four “forest
3 carnivores,” including fisher and marten, and noted that of the four species, only the marten
4 have been sighted at locations in the Plumas National Forest. BASIN 3553. The BA/BE further
5 notes that several thousand acres of potential carnivore habitat, “approximately 50% of the
6 forest,” has been systematically surveyed according to established protocols in the last 10
7 years, but to date “there have been no fisher, Sierra Nevada red fox, or wolverine observations
8 associated with these surveys.” BASIN 3554. Nevertheless, the Forest Service analyzed both
9 the overall habitat and also the Forest Carnivore Network’s potential habitat changes before
10 concluding that the Basin Project would not have a potentially significant effect upon fisher,
11 marten, or other furbearers. BASIN 3575 and 3576.

12 The combination of the 2004 Framework, Plumas National Forest Plan, and HFQLG Act in
13 the northern Sierra provides significant habitat protection for owls, fisher, and marten in both
14 the QLG Pilot area and the Basin Project area. The HFQLG Act bans logging and new roads
15 on all Forest Service road-less areas, as well as in owl PACs and SOHAs, in the Pilot Project
16 area for the duration of the Pilot. SNFPA 1078. The 2004 Framework ROD prohibits the
17 harvest of trees bigger than 30 in diameter at breast height. SNFPA 2997. The Plumas NF
18 designated a Forest Carnivore Network in 1995 that consists of old-forest blocks connected by
19 riparian corridors; this network provides for linkages across the landscape for fisher, marten,
20 and other forest carnivores. BASIN 3553. The Basin Project lies between two large road-less
21 areas, including the Wild and Scenic Middle Fork Feather River. BASIN 3553. The Basin
22 BA/BE analyzed the project’s effects upon the carnivore habitat network in the context of all
23 the foregoing management direction, and reasonably concluded that the few acres to be affected
24 represented insignificant potential impacts. BASIN 3575.

25 The HQLG Act is more protective of owls than either the 2001 or 2004 Frameworks
26 because it completely prohibits logging in spotted owl Protected Activity Centers (PACs).
27 BASIN 1077. California spotted owls are believed to be widely distributed across the Sierra
28 and seem to fill the available habitat. SNFPA 3332 (SEIS Ch.4 at 262). Owls are widely

1 distributed in the Basin Project area and throughout the Plumas NF. BASIN 1168; 3694. Based
2 on these facts, the Forest Supervisor reasonably concluded that owl viability and forest
3 carnivore habitat protection could be achieved while also carrying out the HFQLG Act. BASIN
4 3644-3645. The Plumas Forest Supervisor has adequately explained his reasons for
5 implementing the Basin Project and has met his NEPA and APA obligations.

6 **C. The Forest Service Met The Requirements Under The National**
7 **Environmental Policy Act When It Adopted Both The 2004 Framework**
8 **And The Basin Project.**

9 NEPA remains “our basic national charter for protection of the environment.” 40 C.F.R. §
10 1500.1. There are two express objectives underlying the statute: “(1) to ensure that the agency
11 will have detailed information on significant environmental impacts when it makes decisions;
12 and (2) to guarantee that this information will be available to a larger audience.” *Neighbors of*
13 *Cuddy Mt. v. Alexander*, 303 F.3d 1059, 1063 (9th Cir.2002). In accordance with those
14 objectives, once an EIS has been completed, a court’s review of the EIS under NEPA is
15 “extremely limited.” *National Parks & Conservation Ass’n v. United States Dept. of Transp.*,
16 222 F.3d 677, 680 (9th Cir.2000). “NEPA does not mandate that an EIS be based on a
17 particular scientific methodology, nor does it require a reviewing court to weigh conflicting
18 scientific data.” *Sierra Club v. Eubanks*, 335 F.Supp.2d 1070, 1076 (E.D.Cal.,2004) (*citing*
19 *Friends of Endangered Species, Inc. v. Jantzen*, 760 F.2d 976, 986 (9th Cir.1985). Because it
20 does not “contain substantive environmental standards and guidelines,” the Act does not
21 mandate “that agencies achieve particular substantive environmental results.” *Center for*
22 *Biological Diversity v. U.S. Forest Service*, 349 F.3d 1157, 1166 (9th Cir.2003).

23 **1. The Forest Service Provided for Pre-Decisional Public Comment on**
24 **the Basin Project, in Accord with the Spirit and Intent of NEPA.**

25 The Campaign (at 42-47) attacks the Basin Project EA. The Basin Project is part of the
26 QLG Pilot Project, which was addressed in both a 1999 Quincy EIS and as part of the 2004
27 Framework assessed in the 2004 SEIS. The Campaign does not assert the Basin Project
28 requires another EIS. After the impacts of the regional program had been addressed in an EIS,
INTERVENOR QLG’S MEM. IN OPP. TO PLS.’ MOT. FOR SUMM. J. – CIV. S-05-0205-MCE/GGH

1 a project implementing that program and consistent with the EIS “can be carried out without
2 the agency’s having to issue a new” EIS. *Cronin v. U.S. Dept. of Agric.*, 919 F.2d 439, 447
3 (7th Cir. 1990); *see Headwaters, Inc. v. BLM, Medford Dist.*, 914 F.2d 1174, 1178-79 (9th Cir.
4 1990).

5
6 The distinguishing features between an EIS and EA in the implementing NEPA rules
7 include: (1) a draft EIS is circulated for public comment before being prepared in final, after
8 which is a 30-day waiting period before the action can be taken (see 40 C.F.R. 1502.9, 1502.19,
9 1503.1-1503.4); while (2) there is no duty to prepare a draft EA on less environmentally-
10 significant actions, the agency need only provide public notice of the EA's availability, and the
11 action on the project subject to an EA is not subject to any waiting period. *See* 40 C.F.R.
12 1500.4(q) and 1500.5(l) (expedite EAs), 1501.4(b) (involve the public on EAs "to the extent
13 practicable"), 1506.6(b)(1) (the only universal duty to the public on an EA is "[i]n all cases the
14 agency shall mail notice" of an EA to those who have requested it), 1506.10 (no waiting period
15 between an EA and commencing an action); 46 Fed. Reg. at 18037 (March 1, 1981) (CEQ
16 advice that "public involvement" in EAs can consist of "giv[ing] the public notice" of the
17 "availability" of the EA, and that the entire EA process "should take no more than 3 months").

18 Public comment opportunities for the Basin Project were conducted pursuant to the rules
19 and regulations in effect at the time. The Forest Service notified the public by mail in
20 December 2003 (BASIN 3044; 3651), and also mailed a detailed Proposed Action description
21 and solicited public comment in March 2004. BASIN 3134-3148. Plaintiffs had numerous
22 communications with the Basin interdisciplinary team throughout the spring and summer,
23 including submitting a 2003 spotted owl dissertation on August 23, 2004. BASIN 3180-3196;
24 3238; 3258; 3274-3294; 3493-3519. The Campaign signaled to the Forest Service early on in
25 the Basin process that it intended to challenge the project. Multiple interactions between the
26 Campaign and the Forest Service indicated no change in the Campaign’s position. Therefore,
27 the QLG does not believe the Campaign’s interests were harmed from a failure to review the
28 draft Environmental Assessment (EA). The Campaign’s attempts to impose EIS-like duties on
INTERVENOR QLG’S MEM. IN OPP. TO PLS.’ MOT. FOR SUMM. J. – CIV. S-05-0205-MCE/GGH

1 an EA should fail. The NEPA rules designed EAs to reduce government costs, paperwork, and
2 delay. 40 C.F.R. 1500.4(q), 1500.5(l). An EA is a “concise public document” which provides
3 “brief discussions of...impacts of the proposed action and alternatives.” 40 C.F.R. 1508.9.
4 Thus, EAs are intended to be “rough-cut” and “low-budget” and to not include an EIS’s level
5 of detail. *Indiana Forest*, 325 F.3d at 856. An “EA cannot be both concise and brief and
6 provide detailed answers for every question.” *Newton County Wildlife Ass’n v. Rogers*, 143
7 F.3d 803, 809 (8th Cir. 1998). QLG further adopts the argument on this issue at Fed. Defs.’
8 Mem. at 30-32.

9 **2. The Forest Service Took a Hard Look at the Cumulative Impact that**
10 **the Basin Project, Together with Other Logging Projects, Will Have**
11 **on Old Forest Species.**

12 An agency is required to take a hard look at cumulative impacts regardless of whether an
13 EIS or EA is involved. *See Churchill County v. Norton*, 276 F.3d 1060, 1081 (9th Cir.2001);
14 *Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1076 (9th Cir.2002). NEPA
15 “imposes procedural requirements designed to force agencies to take a 'hard look' at [the]
16 environmental consequences" of their actions. *Earth Island Institute v. U.S. Forest Service*, 351
17 F.3d 1291, 1300 (9th Cir.2003). The Forest Service satisfied all of these requirements under
18 NEPA. The agency correctly defined the geographic area where effects were to occur and
19 correctly evaluated them. Defining the area in which to take the hard look is “a task assigned
20 to the special competency of the appropriate agencies.” *Kleppe v. Sierra Club*, 427 U.S. 390,
21 414 (1976); *see Selkirk Conservation Alliance v. Forsgren*, 336 F.3d 944, 959-60 (9th Cir.
22 2003). Such decisions are given judicial deference. *Id.*

23 In the Basin EA, the Forest Service’s analysis of cumulative effects from past actions
24 satisfies NEPA because it meets the standard recently set forth by the Supreme Court in *Dep’t*
25 *of Transp. v. Pub. Citizen*, 124 S. Ct. 2204 (2004). In that case, the Court held that an agency is
26 only required to analyze the “incremental impact” of its proposed action “in the context” of
27 other past, present, and reasonably foreseeable future actions by private and other public actors.
28 *Id.* The cumulative impact regulation does not require an agency to analyze the “incremental”
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INTERIOR QLG MEM. IN SUPP. TO PLS. MOT. FOR SUMM. J. CIV. S. 05-0205-MUC-GH

1 caused by the agency's proposed action. *Id.* at 2216-17. Considerable deference is afforded to
2 agencies in determining the scope of review of cumulative impacts. *Neighbors of Cuddy*
3 *Mountain v. Alexander*, 303 F.3d 1059, 1071 (2002). The Basin EA satisfies this requirement
4 with an environmental baseline of vegetation classes which were determined to reflect the
5 effects of past harvest in the larger analysis area. BASIN 3695. Therefore, it has satisfied
6 NEPA in analyzing past actions.

7 **3. The Final Supplemental Environmental Impact Statement Includes a** 8 **Full and Fair Discussion of Impacts to Old Forest Species.**

9 The 2004 Framework SEIS takes a hard look at potential impacts to the spotted owl and
10 reasonably concludes they would not be significant for four reasons. First, there will be only
11 minor project activity in any PACs and none in the HFQLG area where most of the logging is
12 scheduled to take place. SNFPA 2997; 3121-3122; 3336. Second, the vast majority of existing
13 foraging habitat and nesting habitat would be retained within the Sierra Nevada over the first
14 20 years, and that owl habitat would be increased by the 2004 Framework thereafter. SNFPA
15 3332 (80% of HRCA acreage and 86% of OFEAs are not projected to be treated). Third,
16 retention of the great majority of necessary old growth components (30 in dbh and larger trees,
17 snags, dead and down material, 40 per cent and above canopy cover) that are recognized as
18 important to the spotted owl and other old-forest-dependent species are carried over by both the
19 HFQLG and the 2004 Framework. SNFPA 2995; 2997; 3341. Fourth, a thinning program to
20 reduce high-risk areas for catastrophic wildfire will reduce old growth habitat lost by fire in the
21 future. SNFPA 2995; 3083; 3266; 3336. This led the Forest Service to conclude that owl
22 occupancy would not be reduced by the logging allowed by the 2004 Framework. SNFPA
23 2997.

24 This detailed analysis provided a reasonable basis for the agency to conclude that potential
25 effects to owls would not be significant. *See Friends of Endangered Species, Inc. v. Jantzen*,
26 760 F.2d 976, 986 (9th Cir. 1985) (“Our task [in reviewing NEPA claims] is simply to ensure
27 that the procedure followed by the [agency] resulted in a reasoned analysis of the evidence
28 before it, and that the [agency] made the evidence available to all concerned.”); *Methow Forest*
29 *Wilderness Council v. U.S. Forest Service*, No. 04-104-10R, 2005 WL 959602 (M.D. Wa. Jan. 20, 2005)

1 The Campaign misrepresents the Sierra Nevada Ecosystem Project (SNEP) findings
2 regarding the condition of old-growth forests through the use of highly selective quotes that are
3 over-simplified and often out of context. Plaintiffs’ Br. at 2 quotes a summary chapter of the
4 SNEP Report as authority for the argument that “150 years of intensive logging” has single-
5 handedly led to the collapse of most of the Sierra Nevada’s old-growth forests, and is
6 responsible for current wildfire threats to remaining old-growth forests. Plaintiff’s Br. 2, lines
7 16-20. By cherry picking the record, the Campaign attempts to persuade the court that the
8 SNEP report champions a logging responsibility theory, and that no meaningful credence is
9 given to the theory that fire suppression has made a significant contribution to the decline in the
10 quality of old-growth forests. Despite this representation in the Campaign brief, the SNEP
11 report does discuss the contributions of fire suppression to existing problems of forest health,
12 stating that: “Modern fire suppression has led to the invasion of shade-tolerant trees into
13 existing older stands, producing greater vertical and horizontal continuity in canopies and
14 largely excluding shrubs and herbs.” SNEP Vol. 1, Ch. 6 at 95. The “dense in-growth” of
15 ecologically similar species referenced in the Campaigns argument is plainly not the result of
16 logging alone, but the product of numerous factors, including systemic fire suppression. *Id.*

17 The Campaign also ignores the SNEP scientists’ statements that “Selective timber harvest –
18 the dominant approach in the Sierra Nevada – has helped maintain much of [the LS/OG]
19 structural complexity,” and that “[r]estoration of LS/OG structures and functions in the matrix
20 is also very important and can be achieved by developing and applying silvicultural
21 prescriptions which restore and maintain key LS/OG structures, such as large-diameter trees
22 and the snags and logs derived from them.” SNEP Vol. II, Ch. 21 at 627, 630. Finally, while
23 the Campaign points to the SNEP scientists’ recommendations to designate and manage “Areas
24 of Late-Successional Emphasis” (ALSEs), they omit the scientists’ vision of active forest
25 management within ALSEs, and further omit the SNEP scientists’ advice that “[s]imple
26 diameter-limit guidelines are not adequate to achieve long-term objectives” associated with
27 maintaining late-successional forest functions and structures. SNEP Vol. II, Ch. 21 at 653, 655.

28 When the FWS conducted a status review of the owl in 2003, it recognized that
INTERVENOR QLG’S MEM. IN OPP. TO PLS.’ MOT. FOR SUMM. J. – CIV. S-05-0205-MCE/GGH

1 “descriptions of suitable habitat derived from habitat use studies often also include smaller size
2 classes, and thus, include a greater proportion of the landscape than that included in the above
3 estimates of older forest extent.” SNFPA 1890. The FWS noted that the 2001 SNFPA FEIS
4 “estimated the amount of suitable habitat for California spotted owls on national forest lands in
5 the Sierra Nevada to be 1.7 million ha (4.3 million ac). ... This constitutes about 59 percent of
6 the forested lands on the Sierra Nevada national forests.” SNFPA 1890.

7 This case isn't about reducing the amount of old-growth forest, however. Rather, the
8 changes in management direction between the 2001 and 2004 Frameworks lie in addressing the
9 densities of younger, smaller trees and the extent of openings to be desired and allowed in
10 mature forests. Under both Frameworks, as under the prior CASPO interim guidelines, both
11 large old trees and old-growth, late-successional forest stands are to be managed for old-growth
12 characteristics. On the other hand, absent the proactive management prescribed by the 2004
13 Framework, the threat of stand-destroying, catastrophic wildfires, property damage, and loss of
14 human and other lives are real and growing dangers in Sierra Nevada forests. SNFPA 2993.

15 **4. The FSEIS Discloses Responsible Opposing Scientific Viewpoints**
16 **Regarding Impacts to Old Forest Species And Adequately Considered**
17 **the Short-Term and Cumulative Impacts of Logging under the 2004**
18 **Framework on Old Forest Species.**

19 The SEIS adequately discusses short-term risks to species preferring older forests and
20 opposing viewpoints at SNFPA 3112-13, 3139, 3143-60, 3214-18, 3258, 3265, 3278, 3283,
21 3286, 3296-97, 3312-16, 3329-30, 3335-40, 3342, 3344-46, 3350, 3508-09, 3512, 3515-23,
22 3581, 3586, 3606-09, 3644, 3649-50. Since opposing viewpoints and uncertainties were
23 disclosed, NEPA's "rule of reason" has been satisfied. The existence of agency critiques or
24 alternative methodologies for analyzing issues does not render an EIS "arbitrary." *Edwardsen v.*
25 *U.S. Dept. of Interior*, 268 F.3d 781, 786 (9th Cir. 2001); *Carmel-by-the-Sea v. DOT*, 123 F.3d
26 1142, 1151-52 (9th Cir. 1997).

27 The administrative record in this case demonstrates that the Regional Forester held
28 meetings with the owl scientists relied upon by the Plaintiffs to listen to their concerns about
the owl. SNFPA 2432. In 2003 Regional Forest Blackwell attended a meeting with owl

1 in regard to distribution and density of owls in the Sierra Nevada (SNFPA 2433) and that the
2 owl's status and viability was the same as it had been 10 years before with no decline;
3 Blackwell also heard from scientist Alan Franklin that the owl population "will never exhibit
4 large increases because it is [already] at carrying capacity." SNFPA 2439.

5 The Regional Forester also heard scientist Jerry Verner and Forest Supervisor Steve
6 Eubanks discuss scientist Verner's question about the adequacy of the 2001 Framework: "Why
7 wasn't the 2001 Framework tried and why didn't it work," to which Supervisor Eubanks pointed
8 out that the Sierra Nevada line officers believed that "we were never going to be able to
9 implement the 2001 alternative (S1)" SNFPA 2442. In addition, scientist Kevin McKelvey
10 pointed out to the other owl scientists the important forest species issue that "we are never
11 going to grow another ponderosa pine in 50% canopy cover and that all we will get is white fir
12 and incense cedar" and that "under the [CASPO interim guidelines] we could [better] design
13 openings/patch cuts in small diameter stands to regenerate pine." SNFPA 2443.

14 Scientist Jennifer Blakesley, one of Plaintiffs' experts, recognized in the meeting with the
15 Regional Forester that the Forest Service "needs to test the effectiveness of fuel treatments.
16 The beauty of having experimental designs across the [Sierra Nevada National] forests is that
17 somewhere in here you'll have a wildfire and get to test the effectiveness of fuel treatments."
18 SNFPA 2435. Blakesley also recommended to the Regional Forester that the Forest Service
19 "need[ed] to monitor effects on fire of treatments" and recommended to the Regional Forester,
20 "let's get moving—pick something and try it and monitor it." SNFPA 2442.

21 Contrary to Plaintiffs' allegations that the Regional Forester ignored the owl scientists in
22 his decision to change the 2001 Framework, he listened to them all, evaluated their
23 information, balanced it with other important policy of the Forest Service, and made a knowing
24 choice. His consideration and reason is documented in the 2004 Framework ROD. Nothing
25 else is required of him by NEPA and the APA.

26 **5. The Forest Service Is Not Required to Re-Examine Every Alternative**
27 **to the 2004 Framework in its Final Supplemental Environmental**
28 **Impact Statement, Nor Was It Required to Re-examine Alternatives**
Previously Found to Be Unfeasible.

1 at 27-29.

2 **D. ANY REMEDY SHOULD NOT INCLUDE ENJOINING**
3 **IMPLEMENTATION OF THE 2004 FRAMEWORK OR THE QLG**
4 **PILOT PROJECT.**

5 The Campaign (at 47-48) seeks to have this Court accomplish the Campaign's political
6 goals of enjoining the 2004 Framework adopted by the Executive Branch and the Forest
7 Service, and reinstating the 2001 Framework. QLG believes that the appropriate remedy for
8 any curable legal error is declaratory relief, accompanied by a remand that preserves the
9 Executive Branch's discretion. Reasons for that position follow: (1) Most of the Campaign's
10 claims concern curable procedural errors (e.g., inadequate explanations, inadequate NEPA
11 disclosure, inadequate wildlife monitoring). The 2004 Framework should not be enjoined for
12 such curable procedural defaults under decisions such as *County of Los Angeles v. Shalala*, 192
13 F.3d 1005, 1023 (D.C. Cir. 2003); (2) some of the Campaign's claims against the 2004
14 Framework apply equally to the 2001 Framework. For example, if the Court finds persuasive
15 the Campaign's claim of inadequate wildlife monitoring (*see* Campaign Br. at 28-34), that
16 violation of law equally condemns the 2001 Framework (as the 2004 Framework largely
17 adopted the 2001 Framework's provisions on monitoring of wildlife). Where there are defects
18 common to both the 2001 and 2004 Frameworks, there is no rational basis for setting aside the
19 2004 Framework and reinstating the 2001 Framework; (3) if there has been a failure to
20 adequately monitor wildlife, the curative remedy is to direct the completion of the required
21 level of wildlife monitoring. The APA specifies the "relief for a failure to act in § 706(1): 'the
22 reviewing court shall...compel agency action unlawfully withheld or unreasonably delayed.'" *SUWA*,
23 124 S. Ct. at 2378; and, (4) a prerequisite to obtaining extraordinary injunctive relief is
24 plaintiffs must show that their desired injunction is necessary to avoid irreparable injury.
25 *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312-14 (1982). The Ninth Circuit's earlier
26 approach of "presuming" that all environmental injuries are irreparable was reversed as being
27 "contrary to traditional equitable principles" in *Amoco Prod. Co. v. Village of Gambell*, 480
28 U.S. 531, 544-45 (1987). The "Supreme Court has held that insufficient evaluation of
environmental impact under NEPA does not create a presumption of irreparable injury." *Earth*

1 *Island Institute*, 351 F.3d at 1299.

2 Instead, Plaintiffs bear the burden of demonstrating that some environmental injury of
3 “long duration” is “sufficiently likely” to satisfy the “irreparable” injury prerequisite. *Earth*
4 *Island*, 351 F.3d at 1299. The harvesting of some trees (e.g., under the Basin Project) is, by
5 itself, “not irreparable” since, though some “trees will be cut; new trees will grow in their
6 place.” *Sierra Club v. Robertson*, 784 F. Supp. 593, 601 (W.D. Ark. 1991). Since plaintiffs are
7 not “legally entitled to demand ‘unmanaged wildlife,’” the fact that the challenged actions
8 would actively manage some lands does not show irreparable injury. *Greater Yellowstone*
9 *Coalition v. Babbitt*, 952 F. Supp. 1435, 1445 (D. Mont. 1996). The “proper inquiry is whether
10 the area and the forest *as a whole* would be harmed by the Forest Service’s overall management
11 plan.” *Krichbaum v. U.S. Forest Serv.*, 991 F. Supp. 501, 507 (1998).

12 **III. CONCLUSION**

13 For the reasons discussed above, Intervenor QLG respectfully requests that the court
14 dismiss Plaintiff’s Motion for Summary Judgment.

15
16 Respectfully submitted on January 6, 2006

s/ Michael B. Jackson

17 Michael B. Jackson

18 for Intervenor

19 Quincy Library Group